Rutgers Law School (Newark)
Faculty Papers

Year 2000 *Paper* 5

The Public Justification Approach to Statutory Interpretation

Bernard W. Bell*

*Rutgers School of Law-Newark, bbell@kinoy.rutgers.edu

The Public Justification Approach to Statutory Interpretation

Bernard W. Bell

Abstract

Legislative history seems inextricably intertwined with the concept of legislative intentexamining legislative history makes sense only if one wishes to determine legislative intent. The contestants on both sides of the current battle over using legislative history may agree on little, but they seem to agree on this point. Legislative history's devotees argue that determining legislative intent is the goal of statutory interpretation, and the legitimacy of referring to legislative history seems to follow without much argument. That is, legislative history merely serves as a tool to find illusive legislative intent, but, in itself, lacks significance. Those who attack legislative history also view it as inexorably coupled with the concept of legislative intent. Thus, they argue against the use of legislative history by attempting to show that "legislative intent" does not provide a proper basis for interpreting statutes. Alternatively, they argue that "legislative history" provides poor evidence of "legislative intent," and thus holds scant value because it is useful only as evidence of intent. In this paper, I show that one can accept the arguments that legislative intent is chimerical and that legislative history provides a poor tool for discovering any legislative intent that exists, and yet continue to believe that some legislative history retains an important place in the interpretive enterprise.

The Public Justification Approach to Statutory Interpretation

by Bernard W. Bell
Rutgers Law School (Newark)
for the Columbia Law School Legal Theory Workshop (October 16, 2000)

Legislative history seems inextricably intertwined with the concept of legislative intent-examining legislative history makes sense only if one wishes to determine legislative intent. The contestants on both sides of the current battle over using legislative history may agree on little, but they seem to agree on this point. Legislative history's devotees argue that determining legislative intent is the goal of statutory interpretation, and the legitimacy of referring to legislative history seems to follow without much argument. That is, legislative history merely serves as a tool to find illusive legislative intent, but, in itself, lacks significance. Those who attack legislative history also view it as inexorably coupled with the concept of legislative intent. Thus, they argue against the use of legislative history by attempting to show that "legislative intent" does not provide a proper basis for interpreting statutes. Alternatively, they argue that "legislative history" provides poor evidence of "legislative intent," and thus holds scant value because it is useful only as evidence of intent. In this paper, I show that one can accept the arguments that legislative intent is chimerical and that legislative history provides a poor tool for discovering any legislative intent that exists, and yet continue to believe that some legislative history retains an important place in the interpretive enterprise.

The reigning methodology of statutory construction involves the search for legislative intent. As the Supreme Court has proclaimed, the touchstone of interpretation is finding legislative intent. Courts initially relied not only on the text of the statute but also on a very limited range of legislatively-produced documents, primarily committee reports and statements of the floor manager of the relevant legislation, to discern legislative intent. Courts justified that approach by relying upon a "delegation-assent" argument — Congress delegates the task of formulating legislation to committees and when it votes on the statute it votes on whether to approve the work of the committee, including the committee's interpretation of the statute.

Two problems emerged. First, judicial practice outstripped this justification for using legislative history, and courts began to use almost anything they could find to discover legislative intent. Second, textualists challenged the concept of legislative intent. They argued that only the vote on a statute by the legislative body had legal significance and that such a vote expressed approval of only the statutory text, not any committee's intent. Intentionalist scholars have not produced a terribly convincing response to this challenge. For example, they have not provided a basis for viewing legislators as voting on anything other than the text of the statute. This paper supplies the missing argument, while distinguishing the types of legislative history that courts should consider from those they should not. Members of Congress should be viewed as having an obligation to vote on both the text of the statute and institutional explanations of those statutes. This duty derives from the concomitant duties of legislatures to explain statutes and avoid misleading the public.

New textualism, intentionalism, and my approach rest upon contrasting premises.[1] The new textualist approach rests on three premises. First, the legislature's vote on a statute is the only significant event in the legislative process. This reflects the view that the legislative process merely provides a forum for the expression of preferences. It also reflects a failure to consider Congress as an institution that is greater than its individual members. Second, the vote on a statute is a vote only on the text of the statute. Third, rarely will members of the legislature share the same subjective intent with respect to a statute. The new textualist methodology is objective[2] — it requires a determination of the meaning that a reasonable person would accord to text, and the only legally relevant text is the statute.

According to the Intentionalist Approach, at least as described by its critics, the vote on a statute is the only event of legal significance in the legislative process. Thus intentionalism, like new textualism, seems to regard the legislative process as nothing more than a mechanism for aggregating preferences. However, contrary to new textualists, intentionalists view the vote for a statute as the enactment of the subjective intent of a majority of legislators or some select smaller group of legislators (either members of the relevant standing committee, the drafters of the legislation, the typical legislator who helped form the victorious majority, i.e., the typical majority voter, or the legislators whose votes were necessary for the bill's passage but were most ambivalent, i.e., swing voters). Also contrary to new textualists, intentionalists believe that the members of the victorious majority will often share a subjective intent. Their methodology is subjective — at base they attempt to discern the subjective intent of some person or group.

The delegation-assent approach seeks to expand the number of legally-significant events beyond floor actions by according committee decisions significance. Advocates of such an approach regard committees as agents whose actions are then approved by their principal — the legislature. However, their failure to provide a convincing basis for finding such assent undermines their approach.

The approach proposed in this Paper focuses on institutional obligations and institutional actions: the responsibility of Congress as an institution to explain statutes as well as enact them, and the actions Congress takes to explain those statutes in the form of committee reports and floor manager statements. As a result, this approach views the vote on a statute as a vote on the text plus certain documents comprising the "public justification" of the statute. In addition, because members have a duty to consider the public justification of a statute when they vote, the lack of a joint subjective intent becomes unimportant because members can be viewed as constructively assenting

---

[1] All three approaches assume that courts should act as agents of the legislature and, accordingly, effectuate its will. Under other approaches, the courts, as "readers" of statutes, may legitimately create meaning. See, e.g., T. Alexander Aleinikoff, Updating Statutory Interpretation, 87 Mich. L. Rev. 20, 20-21 (1988); William N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321, 325-29 (1990).

[2] I use the words "objective" and "subjective" to distinguish approaches that accord legal significance to an actor's conduct from those that accord such significance to the actor's intentions. *See* Kent Greenawalt, Law and Objectivity 109-11 (1992).

to the text of the statute and the accompanying institutional explanatory materials. Thus, the approach is objective, like new textualism, focusing on the reasonable interpretation of text rather than subjective intentions of legislators. However, the approach in this Paper expands the text that must be recognized as relevant to interpretation to include institutional explanations as well as statutory text.[3]

After setting forth my public justification approach, I will address one final new textualist argument — that judicial reliance on legislative history has a detrimental effect on the legislative process itself. New textualists argue that reliance on legislative history encourages legislatures to enact unduly vague statutes and unduly enhances the power of legislative minorities, congressional staff, and lobbyists. I will suggest that these instrumentalist concerns are not persuasive if one rejects new textualists' intrinsic arguments for their approach. Not only is it inappropriate for courts to rely solely on instrumental reasons to justify their interpretive approach, but the new textualist position in particular embodies an unwarranted lack of respect for Congress' assessment of the legislative process.

I. The Duty to Explain

A. The Basis of the Duty

We view legislative history as having value only as evidence of the subjective intent of legislators. However, statements can be accorded significance apart from their value as evidence of the speaker's subjective intent. Promises illustrate this point. A person making a promise creates an obligation for himself, regardless of whether he intends to keep the promise at the moment of utterance. The recipient of the promise can justifiably rely upon it without determining whether the promise actually reflected the subjective intent of the promisor. As Kent Greenawalt notes, "[t]he individual who promises creates social obligations for himself and confers social claims on others;" such obligations are created and claims conferred whether or not the promisor intended to act as promised.[4] Legislative history should be recognized as possessing significance apart from its value as evidence of legislators' subjective intent, much like promises have independent significance. In other words, legislative explanations should have some legal effect whether or not they actually reflect any legislator's state of mind.

A legislature's explanation of a statute itself merits recognition as an act of legal significance. Such an approach toward legislative history rests on the twin premises that legislatures have an obligation to justify statutes they enact and that at a minimum legislatures should not mislead the public.

---

[3] Some scholars advocate this approach. Jeremy Waldron, Legislators' Intentions and Unintentional Legislation, in Law and Interpretation 355-56 (Andrei Marmor ed., 1995) (under this theory legislative history becomes like text-it matters not why the person voted for it (even if they were mistaken), the words bind them).

[4] See Kent Greenawalt, Speech, Crime, and the Uses of Language 63-65 (1989).

The Obligation to Explain. Congress's obligation to explain, the first of the twin premises, rests on two propositions. First, Congress's obligation to explain derives from the respect that government owes its citizens. In democracies, citizens are sovereign, and legislatures merely act on the behalf of citizens. Accordingly, legislatures owe the public a justification for actions taken in their name. Ordinarily, actors have no obligation to explain their actions to those who are not the source of their authority. For example, military commanders need not explain their commands to subordinates, because they do not derive their authority from those subordinates.[5] Yet, because legislatures derive their authority from the people they govern, the proper analogy is to those relationships, such as the principle-agent relationship, in which explanations are owed.[6] Indeed, knowledge of the rationale for an agent's action is essential to maintaining control over the agent. Thus, knowledge of legislative rationales is critical to the citizenry's ability to control its government.[7]

Some First Amendment theorists have grounded the protection of free speech in the sovereignty of the people and the consequent need to ensure that "the people" can learn about government activities. Such arguments support a duty of explanation. Alexander Meiklejohn was one of the most systematic exponents of the theory that free speech is an integral part of popular sovereignty. Meiklejohn argued that American government is controlled by "the people" and that to intelligently control the government, the electorate, not merely government officials, must have access to all important information and debate. However Meiklejohn, who focused on government suppression of private citizens' speech, envisioned only a modest affirmative role for government with respect to speech. The government could act as moderator, controlling the "time, place, and manner" of speech so that the public debate did not devolve into a cacophony of meaninglessness.[8] Meiklejohn also advocated government efforts to encourage public debate by both providing citizens a general education, so that they can take part in governing, and establishing fora in which the citizenry can discuss public issues.[9]

---

[5] Alexander Meiklejohn provided an example from a more political context: in a country controlled by an occupying power, such as post-World War II Germany and Japan, the citizens are not entitled to an explanation of the occupying powers' dictates. Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 85 (1948).

[6] For example, shareholders have the right to demand explanations from corporate officers for decisions those officers make in managing the corporation. It would be anomalous if Congress owed citizens less of a duty to explain than a corporation owes to its shareholders.

[7] Moreover, a government that refuses to disclose information to the public treats citizens as outsiders. Joseph Vining, The Authoritative and the Authoritarian 43 (1986)("disclosure, absence of deception, almost defines what it means to be inside rather than outside an entity");Woodrow Wilson, The New Freedom 85 (William E. Leuchtenburg ed., 1961) (1913)("until you drive all those things into the open, you are not connected with your government; you are not represented; you are not participants in your government").

[8] Meiklejohn, supra note 5, at 24-27.

[9] See id. at 19-20.

Cass Sunstein makes a similar argument when he relates the First Amendment to the needs of citizens as governing sovereigns.[10] In his view, the First Amendment requires the government to do more than refrain from interfering with communication between private parties regarding matters of government; it imposes an affirmative obligation on the government to publicize its activities.[11] Similarly, Justice Stevens and others have argued that the public has a right to discover the manner in which the government operates public institutions, such as prisons. Therefore, government officials should not have absolute discretion to prevent the public and media from entering such institutions to observe their operation.[12] Justice Stevens and others derive this right of access from the citizenry's role in self-governance.

These theories, like my argument that legislatures have a duty of explanation, are grounded in citizens' status as sovereigns and their right to learn about their government's activities. In other words, these theories incorporate a view of the importance of information about government in a democracy. A subtle difference remains between those theories and mine. Meiklejohn's, Sunstein's, and Stevens's arguments focus upon government either divulging information that already exists or allowing others to observe government operations or proceedings that will actually occur, they do not require the affirmative development of explanations (or the production of anything that would not otherwise exist).

Thus, the people could have a right of access to all legislative proceedings and all of the facts that served as a basis for legislative deliberation, without a legislature providing any coherent rationale setting forth its collective explanation for its action. However, drawing such a line makes little sense — the populace is no less entitled to know the rationale for decisions than the facts underlying governmental actions or the statements made by representatives during legislative deliberations. Indeed, there may be no sharp distinction between rules and their justifications — the latter are really intertwined with the former.[13]

---

[10] Cass R. Sunstein, Democracy and the Problem of Free Speech, xvii, 18-22, 34-35, 37 (1993).

[11] See id. at 105-07. Ultimately, Sunstein contends that the rejection of the view that the First Amendment limits a government's ability to withhold information is justified by the limited institutional capacity of the courts. See id., at 106-07.

[12] Houchins v. KQED, Inc., 438 U.S. 1, 31-32, 35-38 (1978) ("Without some protection for the acquisition of information about the operation of public institutions . . . by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance."); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 586-87 (1980) (Brennan, J., concurring).

[13] Moreover, there may be little practical difference between the right to information, the right of access to proceedings, and the right to an explanation of government policy. To the extent that there are institutional reasons for action, and government policy is not merely a coincidental confluence of separate interests, the reasons motivating legislators become similar to a fact that exists, rather than an affirmative obligation to formulate an explanation that would not otherwise have been developed.

In addition, providing explanations to citizens affected by governmental actions is essential to according them respect as autonomous human beings. Professor Laurence Tribe has observed that:

> both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a person, rather than a thing, is at least to be consulted about what is done with one.[14]

Similarly, Mortimer and Stanford Kadish argue that "the principle that people must justify undertaking an action when others are affected . . . flows from an underlying commitment that other people are entitled to be treated as autonomous and free beings rather than manipulable things — a commitment that has informed . . . the entire Western liberal tradition."[15] Many have made similar arguments.[16]

Indeed, in some situations, the respect due those affected by a decision may provide a more cogent justification for a duty to explain than the concept of popular sovereignty. Because courts, and to a lesser extent administrative agencies, are subject to only indirect popular control, a popular sovereignty argument for a duty to explain seems somewhat strained in those contexts. The argument for an explanation based on respect, however, fully applies to courts and agencies, regardless of the attenuated nature of popular control.

The Obligation Not To Mislead. A second argument for the political significance of institutional explanations of statutes can be derived from the premise that government should not mislead the governed, at least in a democracy. Even if governments should legitimately keep secrets in limited circumstances, the circumstances justifying government efforts to mislead the general public are surely even more limited. An open refusal to divulge information is surely a less serious affront to the public than the intentional propagation of falsehoods. In other words, lying exhibits an even greater disrespect for the status of citizens as sovereigns (and as autonomous beings entitled to respect) than does refusing to supply an explanation at all.

---

[14] Laurence H. Tribe, American Constitutional Law § 10-7, at 503 (2d ed. 1988); see Laurence H. Tribe, Structural Due Process, 10 Harv. C.R.-C.L. L. Rev. 269, 302 (1975).

[15] Mortimer R. Kadish & Sanford H. Kadish, Discretion to Disobey 12- 13 (1973).

[16] See, e.g., Greenawalt, supra note 4, at 154 ("The litigants in legal cases, especially losing ones, have an important stake in reasoned justification. So also do the participants in other branches of government and the community at large."); Hans A. Linde, Due Process in Lawmaking, 55 Neb. L. Rev. 197, 206 (1976) ("The sense of obligation to justify an exercise of power is essential in a democracy."); Frederick Schauer, Giving Reasons, 47 Stan. L. Rev. 633, 658 (1995) ("[G]iving reasons is still a way of showing respect for the subject."). The view that respect for citizens imposes upon government in general, and legislatures in particular, a duty to explain commands has a long history. Plato can be read to suggest such a point in discussing the importance of preambles. See Plato, The Laws 178-88 (Trevor J. Saunders trans., 1970).

Moreover, governmental deception can produce "falsified consent."[17] Democracy is legitimate only if citizens vote or otherwise consent based on their true preferences, rather than those manufactured by government manipulation of information. Of course, citizens themselves do not vote on most legislative proposals and exercise only indirect control over government — they vote on representatives only periodically. Thus, citizens, in their capacity as sovereigns, do not ordinarily directly rely on rationales provided by government. However, citizens are expected to influence legislatures between elections by communicating with government officials. If citizens do not know the reasons for governmental actions, they cannot effectively lobby government. Moreover, the true explanations of legislative decisions may affect people's attitudes toward the structure of the governmental process in general. For instance, the populace's perception of the reasons that generally motivate a majority of legislators to act might shape their attitudes with respect to the desirability of altering the campaign finance system or the rules governing lobbying. In short, where a government has reasons for taking certain actions, that government has an obligation to avoid misleading the public by misstating the rationale for its action.

Accordingly, the courts should not condone a legislative practice of acting for one reason, but publicly proclaiming another. When private reasons differ from public ones, the public reasons should receive more respect precisely because they are public. The act of proclaiming reasons should be considered a public act that has significance beyond what it reveals about the secret motivations of legislators. If government offers official justifications that vary from the real reasons for government action, the official statements should be privileged over the actual purposes because of their superior democratic pedigree.

Thus, if a legislature enacts a statute to protect a particular industry, but publicly presents it as a consumer-protection statute, such deception should not be honored in the course of interpreting the statute. If courts are to effectuate any purposes, they should effectuate the publicly-offered purposes, not the private ones, even if the private rationale served as more of a motivating factor for legislators. For example, to take a slightly modified version of the facts underlying *Williamson v. Lee Optical Co.*,[18] suppose a legislature enacts a statute prohibiting optometrists from writing prescriptions for eyeglasses. The legislature may publicly justify the statute, in the legislative history, as a public health measure, even if most legislators really wished to shield ophthalmologists from competition. Disregarding the publicly-stated purpose and acting on the basis of the secret reasons motivating the legislature furthers this legislative deceit. The court would not condone such deceit if, instead, it acted on the basis of the publicly-stated justification. Thus, in interpreting that statute,

---

[17] See Mark G. Yudof, When Government Speaks: Politics, Law, and Government Expression in America 15, 145, 152-57 (1983)(coining phrase “falsified consent”); Burt v. Blumenauer, 699 P.2d 168, 175 (Or. 1985) ("[T]he legitimacy of [a] chosen policy rests on the consent, if not the consensus, of the governed; excessive or questionable efforts by government to manufacture consent of the governed call the legitimacy of its action into question."); Sissela Bok, Lying: Moral Choice in Public and Private Life 179, 182 (1978) (stating that lying allows "power bypassing the consent of the governed" and gives government leaders "free reign to manipulate and distort the facts and thus escape accountability to the public").

[18] 348 U.S. 483 (1955).

a court should accord more weight to the public health justification than to the secret anti-competitive justification.

This contrasts with the approach then-Professor (now Judge) Easterbrook recommends. Easterbrook argues that the statutory text more likely captures the essence of the actual secret deal between various groups interested in a piece of legislation. Any public explanation merely provides a facade. Courts should honor the text because the actual secret intentions of the parties to the legislation deserves more respect than their publicly-expressed intentions.[19] Analyzing the *Williamson v. Lee Optical Co.* hypothetical from th Easterbrook perspective, the text of the statute more likely reflects the actual legislative agreement, and thus the text, and not the publicly-stated consumer protection purpose, deserves the focus of judicial attention. If an ambiguity arises, the interpretation of the statute should not turn on the consumer protection rationale. Easterbrook's approach should be rejected because even if institutional explanations are often merely a form of deceit, Easterbrook's approach condones that deceit. While less true to legislators' actual intent, interpretation that exalts public rationales would avoid condoning deceit.[20]

In short, the official explanation of legislative action should have a legal significance of its own, apart from its value as evidence of legislators' collective subjective intent. Whether or not the public explanation is congruent with the legislators' private motivations, that official statement itself is entitled to respect and can provide a basis for resolving difficult interpretive questions.

B. The Nature of the Duty to Explain

A legislative duty to explain finds support in several constitutional principles. The proposition that legislatures must justify their actions follows from the constitutional principle that "the people" are sovereign and the government is their agent. The proposition may also be implicit in the Equal Protection Clause. Arguably, the Clause requires all government entities to justify the distinctions they make between citizens. Indeed, some have argued that the courts should enforce such a principle by requiring explicit justification of statutory classifications.[21] The Due Process Clause, too, may well provide a basis for an explanation requirement, the right to an explanation may

---

[19] Frank H. Easterbrook, Foreword: The Court and the Economic System, 98 Harv. L. Rev. 4, 14-18 (1984).

[20] Public choice theorists may argue that the above argument assumes that statutes have purposes. They view such an assumption as fatal because public choice theory asserts that group decisions lack coherent purposes. My "duty of candor" argument does not assume that public purposes exist. Public pronouncement of purposes justifying legislation that lacks coherent purposes (but rather merely reflects the coincidental confluence of the interests of independent groups), is also misleading. The argument that misleading the public is wrong applies when there are reasons for actions as well as when there are no reasons for actions.

[21] Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court, 86 Harv. L. Rev. 1, 21, 33, 47 (1972); Susan Rose-Ackerman, Rethinking the Progressive Agenda: The Reform of the American Regulatory State 44, 51-52 (1992).

qualify as one of the procedural protections implicit in due process.[22] The right to petition government may support such a requirement-as suggested earlier, citizens may find it difficult to petition effectively if they lack the right to demand an explanation of a statute's justification.[23]

However, the duty I posit need not be viewed as an explicit constitutional mandate. Indeed, the duty should operate differently from constitutional rules. Rather than authorizing invalidation of statutes, it should operate as an underenforced constitutional norm[24] that merely affects the courts' approach to statutory interpretation.

Courts refuse to directly enforce some constitutional principles because of institutional competence concerns, but may encourage observance of those constitutional principles by the manner in which they interpret statutes. For instance, the Court encourages sensitivity to the potential unfairness of retroactive lawmaking by employing certain clear statement rules in interpreting statutes. While Congress possesses broad power to enact retroactive legislation, the Court will not construe a statute to operate retroactively unless Congress clearly so states its intent.[25] Indeed, courts sometimes leave unenforced explicit constitutional provisions, like the Republican Form of Government Clause, because of institutional competence concerns. Yet, judicial nonenforcement does not absolve Congress from its duty to comply with the Republican Form of Government Clause or other unenforced constitutional provisions.

Two institutional competence concerns counsel against judicially-enforcing a reason-giving requirement. First, requiring legislators to state their reasons for enacting statutes may lead to intrusive judicial review of the quality of those reasons. Indeed, precisely such intrusive review developed after Congress required agencies to provide "a concise general statement" of the "basis and purpose" of each regulation promulgated.[26] Enforcement of this Administrative Procedures Act reason-giving requirement for informal rulemaking has led to rigorous review of the substance of agency decisions and imposed a means-ends reasoning approach on agencies.[27] Second, the judiciary

---

[22] However, to date courts have rejected such an argument in both the legislative and the judicial context.

[23] The First Amendment also supports a requirement of explanation, if one takes a structural view of the provision, see text accompanying notes 8-13 supra; however, such a conclusion would seem to conflict with the Supreme Court's view of the First Amendment's scope.

[24] The concept of "underenforced constitutional norms" was popularized by Professor Lawrence Sager. See Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1212 (1978).

[25] See Landgraf v. USI Film Prods., 511 U.S. 244, 285-86 (1994); Daniel E. Troy, Retroactive Legislation 27-28, 32-33, 40-43 (1998).

[26] Administrative Procedure Act, 5 U.S.C. § 553© (1994).

[27] Jerry L. Mashaw & David L. Harfst, Regulation and Legal Culture: The Case of Motor Vehicle Safety, 4 Yale J. on Reg. 257, 262-63, 289-90, 293-94, 308-09 (1987); see John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 662-63 (1996).

can add little to the political process, which itself encourages legislators to proclaim reasons for enacting statutes.[28] However, these institutional competence concerns about judicial enforcement of a reasons-giving requirement do not mean that Congress has any less of a duty to justify statutes.[29]

C. Objections

At least three objections can be raised to my claim that courts should view legislatures as having a duty to explain statutes and interpret statutes in light of that duty. First, imposing such a duty on legislatures equates the legislature with the judiciary, that is, it suggests that legislatures should operate like courts. Because legislatures and courts serve different functions, imposing a court-type duty of explanation upon legislatures is arguably inappropriate. Second, legislatures can provide no explanations for statutes because institutional reasons for statutes almost never exist, i.e., group choice will almost always lack a coherent rationale. Third, even if legislatures have an obligation to explain statutes, such explanations should be set forth in the statutory text itself, not in other documents. Otherwise, legislatures can encroach upon the judicial power. I will address each of these three objections in turn.

1. Turning Legislatures Into Courts

First, courts and legislatures arguably should make decisions on different bases — courts should act on principle and legislatures should act on preferences or expediency. Reason-giving serves to constrain the judicial decisionmaking process so that judges' own individual policy preferences do not dominate their decisionmaking.[30] Legislatures, which should act on the basis of preferences, need no such constraint. Indeed, if legislatures act on preferences, they may be unable to satisfy any duty to explain. As Mark Tushnet observes, reason-giving requirements seek to transform "legislators who are assumed in general to be creatures of will" into beings of reason.[31] Such a concern may be dismissed. We require an element of reasoned decisionmaking even in the legislative process. Judicial decisions construing the Constitution require that statutes reflect the

---

[28] John Hart Ely, for example, argues that legislatures should publicly justify to citizens the legislation they enact, thereby fostering the democratic process. However, he rejects the argument that courts should establish and enforce such a reason-giving requirement because the judiciary will probably not improve upon the pressures the normal political process places upon legislators to provide explanations. John Hart Ely, Democracy and Distrust 125-31 (1980).

[29] The approach to statutory interpretation argued here is strikingly similar to Peter Tiersma's description of some courts' approach to interpreting a principal's silence when advised of actions an agent took in his name. See Peter Tiersma, The Language of Silence, 48 Rutgers L. Rev. 1, 41-42 (1995)("the 'duty to speak' is crucial . . .primarily because [it] is used to interpret the [principal's] silence").

[30] See Michael Dorf, Dicta and Article III, 142 U. Pa. L. Rev. 1997, 2029, 2040 (1994) ("As we have seen, judicial accountability and legitimacy derive from judicial rationality, which in turn will be found in the rationales offered by courts to justify their decisions.").

[31] Mark V. Tushnet, Red, White and Blue: A Critical Analysis of Constitutional Law 213 (1988).

judgment of the legislature, not merely the legislature's unreasoned will or preferences. Statutes must have some rational design.[32] Indeed, the Framers' design of the legislative and executive branches embodies the judgment that legislation should rest on some principled basis — the Framers structured the electoral and legislative processes to induce enactment of rational laws.[33] In short, viewing legislatures as having an obligation to explain statutes does not compromise the legislative function of resolving preferences.

2. Statutes Lack Purposes

A second criticism of the proposed duty of explanation, based on one of public choice theory's teachings, rests upon the theory that group choice often cannot embody any coherent underlying purposes. If group choice is inherently incoherent, then requiring legislatures to provide explanations for statutes will require legislators to mislead the public, because the explanations would falsely assert the existence of a coherent policy. If the legislature merely wishes to establish the rights and obligations stated in the statutory text it enacts, then any explanatory text will invariably state the "legislative purpose" less accurately than the statutory text itself.

The public choice view that statutes lack purposes should be rejected for two reasons: (1) public choice theory assumes that the preferences of individual legislators do not change as a result of their participation in the legislative process, and (2) public choice theorists' factual predictions, namely that cycling will constantly afflict legislatures, have proven wrong.

First, public choice theory assumes that the preferences of representatives, which will determine their votes on legislation, are fully formed and unchangeable before they participate in the legislative process. Thus public choice theory assumes that no aspect of the legislative process— such as hearings, mark-up sessions, floor debates, party caucuses, and informal contacts with other members — will affect any legislator's preferences.

The assumption that preferences are exogenous to the legislative process, i.e., fully formed and unchangeable before the legislative process begins, warrants skepticism. Indeed, many have

---

[32] Thus, the Supreme Court has held that the Due Process Clause of the Constitution requires that every statute have a "rational basis," i.e., some rational relationship to a public purpose. *See, e.g.*, Mathews v. DeCastro, 429 U.S. 181, 185 (1976). The Court has explained that legislation must be an "exercise of judgment," not "a display of arbitrary power." Mathews, 429 U.S. at 185 (citing Helvering v. Davis, 301 U.S. 619, 640 (1936)).

Moreover, when statutes implicate fundamental rights, such as freedom of speech and freedom of religion, or when statutes implicate suspect or semi-suspect classifications, such as race and gender, the courts demand more than mere rationality. In such circumstances, legislatures obviously have an obligation that extends far beyond that implicit in public choice theory; a legislature has an obligation to agree on purposes and consider whether the means they have adopted are more restrictive than necessary to achieve those purposes.

[33] See The Federalist No. 10 (James Madison) (Clinton Rossiter ed., 1961); The Federalist No. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961); Cass R. Sunstein, The Partial Constitution 22, 24 (1993). For instance, they designed the electoral process in such a way that more learned citizens would moderate the passions of the electorate.

argued that participation in the legislative process does affect the preferences of individual legislators, and thus may affect their votes.

Second, the public choice prediction that the phenomenon of cycling majorities will bedevil legislatures has proven erroneous. Cycles do not seem to occur frequently in the legislative process. For instance, Congress rarely cycles through radically different alternatives.[34] Several theorists have identified other reasons for the rarity of cycles.

In particular, preferences may not be arrayed in ways that produce cycles because representatives take into account the preferences of others and make judgments about which options best advance the welfare of the country or, at the very least, the welfare of their own constituents. (This contrasts with public choice theorists' assumption that representatives consider only the subjective preferences of their constituents.) Often then, each representative votes not merely on the basis of his constituents' subjective preferences (formed with only their own individual interests in mind), but on a judgment about the welfare of his constituents (or perhaps even the country as a whole). Theorists have suggested that judgments about welfare tend to produce preferences that are less likely to result in cycles than preferences that reflect subjective desires, i.e., tastes.[35]

In addition, legislators may adjust their voting behavior in order to avoid cycles or prevent undesirable outcomes. A group of legislators may decide to vote for their second-choice policy rather than their first-choice in order to form a majority for the second-choice policy. They may do so because they wish to avoid one of two undesirable results: (1) further cycling, or (2) the group's selection of their third choice (as a result of the order of the voting). In this situation, the legislative outcome is not random; it is not an accidental result that no one designed. The majority vote for the winning policy reflects agreement on policy among the majority of the legislators, not just an agreement on the text of the statute.

For some, the above considerations may not provide a full answer to the public choice critique.[36] Nevertheless, the considerations set forth above do provide a sufficient basis to entertain serious doubts about the public choice critique, and thus allow us to put aside that critique.

---

[34] Of course, this absence of cycling could reflect the exercise of agenda control by the House and Senate leadership.

[35] E.g., Herbert Hovenkamp, Arrow's Theorem: Ordinalism and Republican Government, 75 Iowa L. Rev. 949, 954-62 (1990).

[36] Even legislator preferences that have been influenced by legislative deliberation and which reflect considerations of public welfare (rather than mere constituent desires), may be arrayed in a manner that produces cycles.

3. Any Statement of Purposes Should Be Included in Statutory Text

A critic might argue that even if the legislature has a duty to provide a justification for statutes, that justification must appear in the text of the statute. Certainly, many statutes contain preambles, and those preambles can set forth statutory purposes and interpretive guidance. However, because words are indeterminate and legislatures cannot envision all future situations, legislatures are entitled to provide rationales for statutes to guide courts interpreting those statutes, without making such principles legally binding. Legislatures' lack of prescience means that legally-binding explanations might not aid the courts in deciding a large number of cases, yet compel decisions that the legislature did not desire. In addition, at least the process of approving statutory commentary is subject to a democratic process — legislators and chief executives can assent or dissent on the basis of such commentary. The alternative, unelected interpreters like courts or administrative agencies attempting to intuit legislative policies, is not democratic. The political branches of government cannot overturn such judicial or administrative intuitions unless they can overcome inertia and pass a second statute.

Some argue that allowing legislatures to provide nonstatutory interpretive guidance to courts violates separation of powers principles by allowing legislatures to assume both legislative and judicial powers.[37] But allowing legislatures to provide nonstatutory interpretive guidance when they enact statutes does not create the dangers that the Framers of the Constitution sought to avoid by separating judicial power from legislative and executive powers.

There are two rationales for separating legislative and judicial powers. First, preventing legislators from exercising judicial powers preserves the rule of law, i.e., the impartial administration of the law. Governments must enact general rules that apply to all citizens to ensure equal treatment of all citizens. At the same time, governments must apply general rules to specific individual controversies. General rules should be established by political branches of government accountable to the electorate. However, if these same politically accountable institutions also apply the general principles to particular cases, they may begin to apply the rules arbitrarily in response to political pressure. Thus, the legislature should act in generalities and courts should resolve specific controversies.

Second, legislatures may not exercise judicial power because the rules of conduct should be established before a citizen acts. The resolution of a particular case should not give the rulemaker an opportunity to alter the relevant rules on a basis not disclosed before the person acted. Thus, the separation of judicial and legislative power reflects concerns about retroactivity.

Provision of nonstatutory legislative guidance does not compromise the legitimate distinction between legislative and judicial functions. Typically, the interpretive guidance provided by legislatures in legislative history is broad-based, covering a wide range of cases, and is both

---

[37] See Pierce v. Underwood, 487 U.S. 552, 566 (1988); Office of Legal Pol'y, U.S. Dep't. of Justice, Using and Misusing Legislative History 5, 33-34, 39-40 (1989).

promulgated and made publicly available before a controversial situation arises. Because legislative history generally addresses broad categories of behavior, not the specific circumstances of particular individuals, the provision of legislative guidance, in the form of legislative history, tends not to implicate "rule of law" concerns.. Because legislatures promulgate nonstatutory interpretive guidance before cases are adjudicated under the statute, and make such guidance available to those affected by the statute as well as the public in general, judicial recognition of such nonstatutory legislative guidance presents no retroactivity problem.

In any event, courts need not disregard legislative history to retain adjudicatory power. Even though the judiciary currently accords weight to legislative history, the judiciary continues to apply the law to particular factual controversies. Moreover, legislative history merely provides guidance, the judiciary makes the ultimate decision as to: (1) whether the statutory text contains sufficient ambiguity to justify reliance on legislative history, and (2) whether, even in light of the legislative history, the statutory text can bear the construction that Congress's explanation suggests. Thus, the legislature's provision of interpretive guidance separate from the statutory text does not impermissibly encroach upon the judicial power.

II. New Textualists Versus Intentionalists

The duty to justify statutes now allows us to reexamine new textualism and intentionalism. Ultimately, that reexamination will provide a basis for my public justification approach.

A. New Textualism

Led by Justice Antonin Scalia, a group of judges and scholars, dubbed "the new textualists," have urged the courts to abandon the use of legislative history in interpreting statutes. As noted earlier, textualism rests upon three premises. First, the only significant element of the legislative process is the vote of each legislative chamber on proposals before it (and, of course, the signing or veto of legislation by the chief executive). Second, legislators vote only on the text of the statute, not any accompanying explanatory materials or their own subjective intent. Third, legislative majorities rarely, if ever, share a common subjective intent regarding the statutes they enact. Though the new textualist methodology has been challenged, as leading to stilted interpretations of statutes and increasing the discretion of interpreters relative to lawmakers, these three premises have remained unchallenged.

Nevertheless, the first two premises are problematic. The first premise ignores the institutional nature of Congress. More particularly, it fails to recognize that Congress has an institutional obligation to explain statutes and may act as an institution in ways other than holding votes on legislation. The second premise conflicts with the normative principle that legislatures have an obligation to explain statutes as well as enact them. Moreover, the third premise, while sound, can be turned against the textualist — a majority of legislators will be no more likely to know the precise language of a proposed bill and agree on its meaning than share one subjective intent. However, the manner in which new textualism can avoid such an argument, by positing a duty to

vote on statutes based upon their reasonable meaning, points the way to an alternative approach founded upon legislators' obligation to base their votes upon the explanations of statutes as well as their text.

1. New Textualist Premises

a. *The Only Significant Action in the Legislative Process Is the Vote of Each Chamber on Legislation*

New textualism, as well as public choice theory, assumes that the only significant element of the legislative process is the vote of each legislative chamber on proposals before it. Early public choice scholars viewed legislatures merely as arenas in which individual representatives assembled and registered their preferences. The legislature merely aggregated those preferences. Public choice scholars viewed the legislative process very much like the electoral process — the process by which citizens "gathered" to express their preferences through voting. Accordingly, such theorists did not view legislatures, like Congress, as institutions that existed apart from elected representatives. For example, the early public choice models did not examine legislative committees, legislative leadership structures, or behavioral norms.

This focus on individual representatives rather than the legislature as an institution requires an exclusive focus on voting in legislative chambers. In a democracy, the preferences of all representatives, like the preferences of all voters in elections, must be accorded equal weight; thus, the majority rules. Representatives are equal only when they vote.[38] In the preliminaries to the vote, by contrast, members of a legislature wield very unequal influence. Indeed, under public choice theory, those who frame issues for voting by the legislative chamber, such as drafters and congressional committees, are "dictatorial" agenda-setters that possess the power to manipulate the members of the chamber in ways that defeat democratic choice.[39] Accordingly, according special weight to the views of legislators who crafted the proposal submitted to the chamber would give additional power to agenda-setters, whose control over the legislative agenda already ensures them a degree of power inconsistent with democracy.[40]

The focus on individual legislators, which entails disregarding all activities other than voting in the legislative chamber, is problematic. Institutions matter. Congress is an institution greater than the sum of 535 individual Representatives and Senators who serve in the House and Senate at any

---

[38] Robert A. Dahl, A Preface to Democratic Theory 66 (1956).

[39] See, e.g., Kenneth A. Shepsle, Congress is a "They," Not an "It": Legislative Intent as Oxymoron, 12 Int'l Rev. L. & Econ. 239, 245- 47 (1992); Richard H. Pildes & Elizabeth S. Anderson, Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics, 90 Colum. L. Rev. 2121, 2131-32, 2137-38 (1990).

[40] Though the new textualists have not expressly articulated the above logic, it is implicit in their approach, as reflected in their focus on voting members' reasonable understanding of the statute, not the understanding of the drafter (whether a legislator or a private citizen) or the members of the committee that revised the legislation. See Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989).

one time. In particular, analyzing the House of Representatives as 435 members taking a series of votes that express their own individual preferences, without considering legislative debate, party structure, the committee system, and institutional norms, is flawed and unrealistic. These structures form an integral part of congressional behavior. Moreover, Congress must perform some functions as an institution — institutional responsibilities separate from the responsibilities of individual legislators. Of these institutional functions, two of the most relevant for our purposes are Congress's acquisition of information and refinement of legislative proposals. Congress performs these functions by delegating to committees the task of obtaining the information needed to make informed judgments and formulating coherent proposals, subject to the approval of the entire legislative chamber. Under this view, the work of congressional committees deserves special weight.[41] The duty to justify statutes is another institutional duty, and one that Congress routinely acquits by acting as an institution.

b. *A Vote Is Only a Vote on the Text of the Statute, Not the Explanatory Materials*

New textualists argue that the text of a statute forms the only valid basis of statutory law and that the subjective desires of legislators, even a majority of legislators, do not constitute binding law.[42] If an opinion poll revealed a common desire among a majority of legislators, that desire would not constitute law. Rather, the new textualists note, the Founding Fathers designed the legislative process so that even legislative majorities would encounter difficulty in transforming their subjective intentions into binding statutory law. Desires become legally binding only when memorialized in a statutory text that is approved by both the House and the Senate and then either signed by the President or, if vetoed, approved by two-thirds of the House and the Senate. Legislative history lacks legitimacy because it does not undergo this constitutionally-mandated enactment process.

However, the new textualists' argument assumes that the vote on a statute is a vote only on the statute's text. Committee reports do in a sense undergo the constitutionally-mandated bicameralism and presentment processes. Committee reports can be, and often are, considered by the various legislative actors (i.e., the House, the Senate, and the President), and could become the focus of the various legislative actors' consideration of a proposed statute. Either branch of Congress can refuse to pass a bill based on the explanatory statements in the legislative history. The President can refuse to sign a bill whose text he finds acceptable if he objects to statements in the committee report regarding the statute's meaning. Indeed, many have suggested that legislators are often more likely to focus on the committee report and the bill manager's statements than the text of the statute.

---

[41] See SEC v. Robert Collier & Co., 76 F.2d 939, 941 (2d Cir. 1935); Nicholas S. Zeppos, Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation, 76 Va. L. Rev. 1295, 1344-47 (1990).

[42] See Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators."); Pennsylvania v. Union Gas Co., 491 U.S. 1, 30-31 (1990) (Scalia, J., concurring in part, dissenting in part).

Thus, the new textualists' argument really rests on their view of the meaning of legislative votes. If the vote on a statute merely constitutes the approval of the text of the statute, then only the text has undergone the constitutional process of bicameral approval and presidential consideration. If the vote on the statute constitutes approval of the text and certain documents or statements explicating the statute, then both the text and the expository materials have undergone the constitutional process.

As I will argue below, the existence of an obligation to explain suggests that legislators should view their vote as an expression of assent or dissent to something more than the statutory text. If the legislature has an obligation to explain and provides an official explanation, the legislators have a corresponding duty to vote based on those explanations. Thus, their votes should constitute approval of both the statutory text and institutional explanatory materials, such as committee reports and floor manager statements.

c. *There Will Not Like Be One Subjective Intent Shared by a Majority of Legislators*

New textualists argue that a majority of legislators will rarely share a subjective intent regarding a statute's meaning. They rely on two cogent arguments. First, most legislators give little thought to any particular statute, and certainly do not formulate a position on the numerous specific issues that will confront courts and agencies in applying the statute. Second, many members vote on bills for reasons that have little or no relationship to their view of the bills' merits. (For example, a member might vote for a statute in exchange for a colleague's vote on another measure.) Thus, with respect to virtually any issue that arises under a statute, it is highly unlikely that a majority of the enacting legislative body thought about the issue, voted based on the merits of the bill, and agreed on the resolution of the issue.

However, precisely these same arguments can be made with respect to legislators' consideration of the statutory text. Few, if any, legislators read all of a statute before they vote on it; indeed, often they do not read any of it. Members will more likely rely on descriptions of the bill's provisions, provided in the committee report or by members of their staff, than read the text of the bill and form their own judgments about the text's meaning. In addition, many members may give little thought to the text of the bill because they will vote based on the positions of others- those colleagues or others they use as cues or referents. Moreover, even if members read the text, they would probably understand the terms of the statute differently.

The new textualists do not appear to address these problems in great detail, but their response can be surmised. Legislators' failure to form an understanding of the text (either because they do not read the statute or because they follow others' cues) and their potentially divergent interpretation of words are unimportant because each legislator has a duty to become aware of the text of the statute and ascertain the meaning of that text to a reasonable person. Legislators have a duty to the populace subject to the law, not just their own constituents, to enact determinate and easily understandable statutes. If a legislator wishes a statute to reflect his subjective intent, and the text of the statute, as interpreted by a reasonable person, does not reflect that intent, he must attempt to change the statute

so that the statute conveys his intent to the reasonable reader. No legislator who votes for a statute (even one who casts the decisive vote) could reasonably expect the courts to give the statute the meaning he subjectively ascribes to it if that subjective understanding departs dramatically from the customary meaning of the words used in the statute. Because of the duties outlined above, the new textualists essentially conclusively presume that all of the legislators knew the meaning the reasonable person would attach to the statutory text and voted for or against the statute on that basis.[43] With such a conclusive presumption based on duties arising out of the responsibilities of legislators, legislators' failure to read the statute or recognize the ordinary meaning of the statutory text become failures to acquit their responsibilities rather than a problem that undermines new textualist theory.[44]

This is a cogent response. However, as I will argue below, a similar argument supports the recognition of the parts of legislative history that constitute the legislature's explanation of the statute. In particular, because the public justification of statutes is important, courts should view individual legislators as having a duty to contribute to that public justification and thus presume that they vote on the basis of the text and the public justification.

2. New Textualist Methodology

The new textualist's methodology is simple. Courts should interpret statutes based on the ordinary meaning of the words used in the statute and various rules of grammar and syntax, such as the interpretive canon that a court must interpret a statute so as to give every word some effect. If the ordinary meaning of the words and the syntax and grammatical devices do not yield an interpretation, the court should fit the statute into the corpus of the law. Ordinarily, a court should not refer to legislative history when interpreting a statute.

Stated alternatively, new textualists place no reliance on the enacting legislators' subjective understanding of a statute, but rely only on the objective meaning of the text of the statute, i.e., the understanding of the statute that the reasonable person would adopt. The only relevant text to be construed in this objective manner is the text of the statute-the text of various elements of the legislative history lack relevance because legislative history cannot create legal obligations.

New textualism has undergone a fearsome counterattack. However, this counterattack rarely contests the validity of the three premises underlying new textualism outlined above. Rather, critics

---

[43] United States v. Taylor, 487 U.S. 326, 345 (1988)(Scalia, J., concurring)("The text is so unambiguous on these points that it must be assumed that what the Members of the House and the Senators thought they were voting for, and what the President thought he was approving when he signed the bill, was what the text plainly said, rather than what a few Representatives, or even a Committee Report, said it said.")

[44] See Conroy v. Aniskoff, 507 U.S. 511, 528 (1993) (Scalia, J., concurring) ("The language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it."). Indeed, the new textualists (and the Supreme Court in general) place on Congress the responsibility for becoming aware of certain judicial doctrines, such as judicially-created clear statement rules.

argue that new textualism cannot yield results in difficult cases, regardless of its basis in constitutional or political theory, and unduly increases the power of interpreters relative to lawmakers.[45]

B. Intentionalism

Intentionalism requires the interpreter to construe a statute according to the "intent" of the enacting legislature; the interpreter must determine which interpretations the enacting legislature wanted it to adopt, or would have wanted it to adopt had the relevant issue been brought to the legislature's attention.[46] Ascertaining this "legislative intent" entails not only examining statutory text, but, the statute's "legislative history" as well, because sometimes legislatures, like individuals, use words that do not reflect their intentions. In general, the courts seem to have adopted intentionalism. I will discuss the assumptions underlying intentionalism and the unfortunate methodological consequences intentionalism has produced.

1. Intentionalist Premises

Three premises that underlie intentionalism merit discussion. First, at least as seen by its critics, intentionalism is individualistic and non-institutional; it ignores the role of legislative institutions. Second, intentionalists do not view the vote on a statute as the approval of statutory text; they view such a vote as an enactment of the subjective intent shared by a majority of the legislature. Third, the intentionalist approach implicitly incorporates the belief that a majority of legislators will often share an intent regarding many of the issues that arise (or at least would have had the issues been broached). These assumptions are problematic, and lead to unfortunate methodological consequences.

a. The Only Significant Action in the Legislative Process Is Each Chamber's Vote on Legislation

In the view of its critics, intentionalism, like new textualism, focuses on legislatures as collections of individuals rather than as institutions. Intentionalists aggregate the intentions of individual legislators. In particular, the intentions of a majority of the individual legislators form the foundation of statutory law. The subjective intent that a majority of legislators either shared, or would have shared had a particular issue arisen, constitutes the legislative intent that governs

---

[45] There is yet a third argument for rejecting textualism. Legislative history makes cases somewhat easier to decide. See, e.g., Frederick Schauer, Statutory Construction and the Coordinating Function of Plain Meaning, 1990 Sup. Ct. Rev. 231, 253-56 (1990).

[46] Two intentionalist approaches, simple intentionalism and imaginative reconstruction, should be distinguished. Simple intentionalism requires the interpreter to determine the intent the members of the legislature actually possessed when enacting the statute. Thus, simple intentionalism will aid the interpreter only if the members of the legislature had a particular situation in mind. "Imaginative reconstruction" requires the interpreter to draw conclusions about how the legislature would have voted on issues that never arose during the legislature's consideration of an issue. Judges are to use statutory text, legislative history and any other information to determine how a legislature would have approach an issue and then interpret the statute consistently with that intuition.

interpretation of the statute. Dean Paul Brest asserts that intentionalists not only examine the text of a statute, but also accord each legislator an "intention-vote."[47] By counting these intention-votes, one can determine the legislative intent regarding a particular issue.

A focus on individual legislators rather than the legislature as an institution, in conjunction with the democratic requirement of equality among legislators, would seem to demand that no one legislator's intent be considered more important than that of any other. However, such an approach ignores institutional obligations and institutional actions. Indeed, the more cogent intentionalists build a theory based upon the special institutional position of legislative committees. As an institution, Congress delegates to committees the responsibility of determining legislative policies, subject to the review and consent of the chamber as a whole.[48] Accordingly, the views of the committee and its representative in floor debates, i.e., the floor manager, which are in effect ratified by approval of the committee's recommended statutory text, should receive special weight. However, judicial practices go far beyond the approaches that this delegation-assent theory would endorse. Courts, with the blessing of many scholars, use elements of legislative history that do not merit recognition under a delegation-assent theory.[49] Moreover, delegation-assent theorists rarely offer a theoretical justification for imposing on legislators the obligation to either voice disagreement with committee reports or consider themselves bound by them.[50]

Intentionalism's focus on Congress as merely the sum of individual legislators creates insurmountable methodological problems. Viewing legislatures as institutions avoids those methodological problems.

b. A Vote on the Statute Is a Vote to Make the Subjective Intent of the Majority the Law

In contrast to the new textualists, intentionalists believe that the vote on the statute is a vote to convert the subjective intent of the majority into law. The vote on a statute acts like a toggle switch. If a majority of legislators share an intent, but the legislature does not enact a statutory

---

[47] Paul Brest, The Misconceived Quest for the Original Understanding, 60 B.U. L. Rev. 204, 212-13 (1980).

[48] See SEC v. Robert Collier & Co., 76 F.2d 939, 941 (2d Cir. 1935) (Hand, J.); Gerald C. MacCallum, Jr., Legislative Intent, 75 Yale L.J. 754, 778-81, 783 (1966); Zeppos, supra note 41, at 1345-47.

[49] For instance, courts give weight to: (1) statements of sponsors of legislation (who surely have not been delegated any power), (2) testimony of witnesses at congressional hearings, and even (3) preliminary reports prepared by executive branch officials or private groups before submitting proposed legislation. Surely a delegation-assent theory does not justify such practices.

[50] Delegation-assent theorists might suggest that legislators have an obligation to either respond to or consider themselves bound by the official explanation of a bill because the members know that courts (and agencies) use legislative history. Because every legislator has notice of the judicial use of legislative history and an opportunity to participate in creating that legislative history, each should be bound by his failure to avail himself of the opportunity to set forth his views in the legislative history. However, such an argument is circular: judicial use of legislative history is legitimate because legislators know courts use legislative history.

provision memorializing that shared intent, the shared intent can have no legal effect. If the legislature enacts a statute purporting to memorialize that intent, then that intent becomes binding law, even if the ordinary meaning of the terms chosen to memorialize that intent do not reflect that shared intent. When the interpreter concludes that the statute's "text cannot possibly reflect the actual intent of Congress," because of a typographical error, for instance, legislative intent rather than the text governs.[51] Thus, once the statute passes, intent, not text, is authoritative.[52]

c. There Will Not Likely Be One Subjective Intent Shared by a Majority of Legislators

Intentionalism presumes that a majority of legislators will often share one subjective intent, or would have, had a particular issue arisen. Intentionalist courts could use legislative intent to resolve few cases if they did not believe that legislative majorities often share a purpose. The argument over the importance of "intent" to interpretation would hold little significance if intent existed as seldom as new textualists claim it does.

Intentionalists do not address the claims that few members think intently about bills and that legislators' votes may bear little relation to their views of a statute's merits.[53] To the extent that they address such claims, they rely on the delegation-assent theory described earlier. Indeed, the methodological problems faced by intentionalism result from intentionalists' pursuit of legislative intent despite cogent arguments that a majority will rarely share a common intent.

2. The Intentionalists' Methodology

a. Using Legislative History to Find Intent

Intentionalists need a method for determining legislative intent — either legislators' actual intent or the underlying attitudes that would have led legislators to agree upon a particular answer if a particular issue had arisen. Traditionally, courts have relied upon both the ordinary meaning of the statutory text and "legislative history" to discern legislative intent. Legislative history consisted of a limited set of legislatively-produced documents, primarily, committee reports and floor debates. That approach has evolved. Courts now use anything that can help them discern legislative intent, including, in some jurisdictions, the testimony of legislators. This evolution results from intentionalists' efforts to find legislative intent where none exists.

---

[51] See Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982) (Rehnquist, J.) ("[I]n rare cases the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling.")

[52] Philbrook v. Glodgett, 421 U.S. 707, 713 (1975); Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892).

[53] The intentionalist could argue, in response, that we should honor the wishes of those legislators who possess the greatest expertise and knowledge. See Zuber v. Allen, 396 U.S. 168, 186 (1969); Henry J. Friendly, Benchmarks 216 (1967);. However, such a rationale conflicts with democratic theory. In an election , for example, we do not give greater weight to the votes cast by more knowledgeable citizens.

Describing intentionalist methodology in terms that allow comparison with new textualist methodology, intentionalist methodology's goal is subjective rather than objective. The intentionalist seeks the subjective understanding of the members of the legislative majority rather than the understanding of a reasonable person reading the statutory text.

b. The Problems

Unfortunately, using legislative history to determine the subjective intent of a majority of legislators presents serious challenges. First, the use of legislative history to determine legislative intent conflicts with the democratic principle that all representatives are equal.

The documents that comprise traditional legislative history contain the statements and views of few members of Congress. For any particular bill, most legislators do not participate in committee proceedings and remain silent during floor debate. Thus, using legislative history to discern intent introduces a bias toward the views of representatives who express their views in a certain narrow range of documents. The views of the many legislators who expressed their views either in other public fora (such as in political campaigns) or privately (to other legislators or staff members), or who never expressed them, do not appear in the legislative history. The legislative history also will not reflect the "intent" of members who did not formulate specific views before the vote on the statute.

If the views of all legislators, those who expressed their views in other public fora, those who expressed their views privately, those who did not express their views, and those who did not form views, as well as those who expressed their views in the legislative history, are to be given one intention-vote, the legislative history will surely provide unreliable evidence of the intent of the majority of legislators. Rather, the intent set forth in the legislative history will be biased toward the views of those who expressed their intent.

Second, as noted earlier, a majority of legislators will rarely share any intent.[54]

Third, we do not have and will likely never have sufficient information to determine the subjective intent of legislative majorities. At best, legislative history provides indirect and inaccurate information regarding the views of the two types of legislators that intentionalists should most wish to learn about: (1) the typical majority voter, i.e., the legislators who made up the bulk of the legislative majority; and (2) the swing voters, i.e., the legislators who cast the deciding votes. Worse yet, the legislative that history may not provide any explanation of some legislative compromises.

[54] See page 17 supra.

c. Attempted Solutions

The courts and "intentionalist" scholars have pursued two basic approaches in addressing the inadequacy of traditional legislative history as a tool for determining the subjective intent of legislative majorities. One approach expands the legislative record or, more radically, transforms statutory interpretation from an exercise in interpreting text into a fact- finding exercise. A second approach involves acknowledging the inaccuracy of traditional legislative history but refusing to consider additional information because of countervailing values. The first approach will fail; the second is arbitrary.

The first approach seeks to increase the judiciary's sophistication in discerning legislative intent. Courts have, over time, expanded "the record" of legislative action, considering an increasingly wider range of materials. Initially, courts referred primarily to statements in floor debates and committee reports. While these remain the preferred sources, courts now refer to a wider range of documents, including transcripts of mark-up sessions, testimony at congressional hearings, and documents prepared by non-legislators. Some have recommended further expansion of the legislative record, calling for the publication of documents that currently remained unpublished. More significantly, the California courts accept sworn statements from legislators regarding legislative intent.[55]

This first approach of expanding the legislative record and reformulating statutory interpretation as fact-finding will fail. While it may reduce the bias toward the views of those who spoke as opposed to those who did not, such an approach will surely not eliminate that bias. Nor will it solve the problems caused by legislators' failure to give detailed thought to statutes and their frequent decisions to vote for reasons unrelated to their understanding of a statute. Such an approach does not even solve the lack of information problem. Though courts have expanded the sources recognized as legislative history, they ultimately, like Alice and the Red Queen,[56] running harder and harder yet making no progress toward their goal, seem no closer to discerning actual legislative intent.

A second approach involves acknowledging the inadequacy of legislative history. Even if traditional legislative history does not reflect the subjective intent of the majority, countervailing concerns require courts and agencies to limit their attempts to discern true subjective intent. For instance, a desire to enhance citizens' ability to ascertain the law can justify limiting the inquiry into legislative intent. The more sophisticated the judicial search for subjective legislative intent, the

---

[55] Nicholas Zeppos argues that legislative intent resembles the intent of individuals or organizations, to which courts regularly attach legal consequences. Zeppos, *supra* note 41, at 1344-47. Zeppos argues that the methodology used in determining legislative intent should resemble that used in determining intent in other contexts.

[56] See Lewis Carroll, Through the Looking Glass and What Alice Found There, in The Complete Illustrated Works of Lewis Carroll 103-04 (Edward Guiliano ed., 1982).

more citizens will have to consult numerous documents, some of which may even be unavailable.[57] Concerns about the reliability of the evidence of intent could also justify limiting the inquiry into legislators' subjective intents — unofficial sources of information regarding legislative intent, particularly legislator testimony, may be too unreliable.

Ultimately, this second approach, limiting the inquiry into subjective intent based upon competing values, seems arbitrary. The approach requires the judiciary to view subjective intent as the law, but to adopt a technique that clearly will not uncover that subjective intent. In addition, the approach will invariably require the courts to make questionable distinctions between documents that can be considered and those that cannot. Moreover, the dangers posed by the use of various categories of documents probably varies greatly depending upon the circumstances surrounding the adoption of the particular statute being interpreted.

In short, because intentionalism focuses on legislators as individuals, and thus requires the interpreter to ascertain an intent shared by a majority of legislators, intentionalism faces serious methodological problems. The result has largely been an expansion of the materials courts consider in interpreting statutes. Ultimately, however, the courts have not demonstrated an ability to convincingly identify any actual intent of a majority of legislators. Rather, the conclusions about legislators' intentions tend to reflect judges' policy views more than any credible factual determination of legislators' subjective policy views.

III. The Public Justification Approach

The public justification approach rests upon three premises. First, legislatures are institutions, not merely aggregations of individual legislators. As an institution, the legislature has obligations apart from those of its individual members and can act without a vote of the full membership. Second, the vote on a statute is a vote on both its text and its justification as presented by the institution. Third, even though a majority will not likely share subjective intentions, legislators have an obligation to both understand the ordinary meaning of the statutory text and learn the institutional explanation of the statute. The public justification approach seeks the reasonable meaning of words rather than subjective intentions of those who approved the words. It is an "objective" rather than a "subjective" approach, but expands the text that must be interpreted to include the institutional justifications for statutes as well as their text.

[57] Some argue against judicial use of legislative history precisely because the practice makes ascertaining the law much more difficult and expensive. See United States v. Public Util. Comm'n, 345 U.S. 295, 319-20 (1953) (Jackson, J., concurring); In re Sinclair, 870 F.2d 1340, 1342-43 (7th Cir. 1989).

A. Premises of the Public Justification Approach

1. Congress Has Duties and Can Act as an Institution

Congress is an institution rather than merely a collection of individuals. As an institution, Congress has obligations in addition to the duties of each of its individual members. A duty to provide an institutional explanation of a statute is one such obligation, and that obligation makes some legislative history legally significant. Moreover, Congress can act as an institution in ways that do not involve formal votes of the full membership of the legislative chamber. Thus, other aspects of the legislative process besides floor votes should be afforded legal significance. In particular, committee actions deserve recognition.

a. Institutional Duties

The public choice and intentionalist approaches suggest a focus on individual legislators that ignores the duties of the legislature as an institution. The individual legislator may have obligations, such as the obligation to represent the preferences of his constituents or to oppose unconstitutional legislation, but Congress does not. For instance, we might believe that voters have a duty to vote against a repressive or unconstitutional referendum measure, yet not view "the electorate" as having a collective duty to reject such referenda. Only with difficulty can one view the electorate as an institution with such collective obligations.

Congress should be viewed as an institution with obligations separate from those of individual legislators. For instance, Congress also has a duty to enact comprehensible laws. Congress also has a duty to oversee the operations of the executive branch and to inform the public of executive branch misconduct.[58]

By focusing upon individual legislators, one could conclude that the only obligation to explain statutes is that of each individual legislator to discuss his actions with his constituents. While such explanations might aid the legislator's constituents in deciding whether to re-elect him, they may be useful for little else. If every member of the legislature presents his own reasons for assenting to a legislative proposal, or even if we look at varied statements of many legislators, we still may lack a sense of the legislature's rationale for adopting the statute.[59]

---

[58] The difference between institutional and individual obligations can be illustrated by the early Nineteenth Century controversy regarding whether the Supreme Court should issue opinions seriatim. Thomas Jefferson asserted that the Justices should render opinions seriatim, arguing that each Justice was a representative and had an obligation to offer an explanation for his vote on a case. Chief Justice John Marshall believed that the Court should produce one opinion. In Marshall's view, the Justices had no obligation, as individuals, to justify their votes. Rather, only the Court as an institution had an obligation to explain its decision.

[59] A less severe instance of this problem is the plurality judicial opinion. When Supreme Court Justices focus on individual statements and attempt to gain votes at the expense of clarity, opinions for the Court become unclear. See Joseph Goldstein, The Intelligible Constitution: The Supreme Court's Obligation to Maintain the Constitution as Something We the People Can Understand 35, 40-41 (1992). Goldstein argues that:

A rationale that can fairly be ascribed to the legislature as a collective entity would be far more useful. We will have one relatively coherent rationale rather than numerous varying rationales. Moreover, collective rationales are at least likely to have a continuing influence on further legislative efforts that go beyond the present membership of the legislative body.

b. Institutional Actions

Congress undoubtedly acts as an institution when it enacts statutes. However, Congress can act even when its full membership is not voting on the floor of the relevant legislative chamber. Legislatures often delegate work to committees. For instance, legislative oversight, an institutional function, is conducted by committees rather than by floor vote. More importantly for our purposes, legislatures often establish committees to analyze and develop legislative proposals, including justifications for those proposals, and provide information regarding those proposals to the legislative body. Thus the members of Congress have established a system in which standing committees develop information regarding prospective bills in certain subject areas, craft particular legislation, and then provide a rationale for the committee proposals. Accordingly, Congress, as an institution, produces explanations of statutes even though the text of those explanations arguably never become subject to a formal vote.

However, while some actions taken by small groups of legislators or individual legislators count as institutional actions, others should not. An action should qualify as "institutional" only if it satisfies three criteria. First, the action must be made known to all members of the legislature. Second, the action must be subject to reversal by the full membership. Third, members must view the action as authoritative — something other than the expression of an individual or a group.

In short, legislatures have institutional obligations. Legislatures owe the populace not merely clear statutory commands, but a public justification of those commands. As we shall see, this public justification obligation, and its fulfillment through committee reports or other documents, legitimates legislative history without reliance upon the flawed concept of legislative intent.

2. A Vote on a Statute Is a Vote on the Text and the Explanatory Materials

The concept of public justification offers a novel view of the duties of the individual legislator as well as the duties of the legislature as a whole. Collective actions and responsibilities,

---

> Opinion-writing must become a process of informing for a vote. It must be a process of clarification characterized by candor. It must not be a process of obfuscation characterized by disingenuousness. The votes that [J]ustices get or are denied, should be based on a shared understanding of what an opinion means, not just on the bottom line, not just on the result. To vote otherwise can only lead the [J]ustices, individually and collectively, to forget We the People for whom and to whom they are expounding the Constitution.

Id. at 40-41.

such as those of a legislature, have meaning only if individual members of the collective have duties. Thus, the responsibility of the legislature structures the responsibilities of individual legislators. I will first discuss the impact that the legislature's duty to provide understandable commands has upon individual legislators' responsibilities. I will then discuss the implications that the duty of public justification outlined above has for the responsibilities of individual legislators when they participate in debate and voting.

A legislature can satisfy its duty to provide understandable commands to citizens only if each legislator has a corresponding obligation in casting his vote. That corresponding obligation consists of expressing assent or dissent, in the form of his vote, to the meaning of the proposed statute (i.e., the command) in customary English usage. An example will illustrate the point. Assume a ten member legislative body, in which each of the ten legislators use the term "motor vehicle" to communicate different concepts, none of which relate to the customary meaning of the term "motor vehicle." A statute passed by such a legislature prohibiting “motor vehicles” from entering a park would mean nothing if the legislators' only obligation were voting based on their own subjective use of the term “motor vehicles.” There would be no "meeting of the minds"— each legislator could insist that the courts interpret the language as she understood it because she had no duty to consider the ordinary meaning of the statutory text. The statute could have meaning, regardless of the legislators' differing understandings of the term "motor vehicle," if legislators had a duty to assent or dissent, in the form of their votes, to the statute's customary meaning. Even if no legislator understood the term "motor vehicles" to mean motorized means of transport, the term "motor vehicle," as used in the statute, could be given that meaning. Such an interpretation would be justified because the legislators should have based their vote on the customary meaning of the statutory text, even if they did not. In short, the legislators constructively assented to banning "motorized means of transport," and only such objects, from the park. Such constructive assent makes legislators' actual intent in assenting irrelevant. The legislator who objects to a court honoring the customary meaning of the statutory language rather than that legislator's subjective use of that language can be told that he should have either sought to amend the statute or voted against it. His decision to vote for the statute based on his own subjective belief was irresponsible.

Now the implications of the legislature's duty to provide public justification can be explored. Because under the public justification approach the duty of the legislature is broader, the duties of each individual legislator are correspondingly broader. The legislature has an obligation to provide a public justification. Each legislator has an obligation to participate in the creation of both the statutory text and the public justification. The legislature can provide a public justification only if individual members vote on the basis of that public justification. Thus, once that public justification is promulgated, each legislator has a duty to express assent or dissent, by means of her vote, to both the ordinary meaning of the terms used in the statute and the public justification provided for it. If a legislator votes for a statute while holding a subjective view of the statute's rationale that differs from the public justification offered by the legislature, she is not entitled to have a court honor her subjective view of the statute's rationale any more than she would be entitled to have a court honor her subjective use of the terms in the text of the statute. Rather, the legislator who asserts that her own subjective view of the rationale should govern the statute's interpretation can be told that she

should have expressed her objection to the rationale provided by the legislature. Her duty as a legislator makes her act of voting for the statute without expressing her disagreement with the publicly — offered rationale irresponsible-the statute need not be interpreted under the assumption that legislators act so irresponsibly.

The duty of the legislator to express assent or dissent regarding each statute's public justification now provides the missing element to the argument of the intentionalists who pursue a delegation-assent approach. Under the delegation-assent argument, legislators assent, by voting for a statute, to the explanation of the statute provided by the reporting committee. The argument rests on a kind of constructive assent. A member's vote constitutes assent to the legislative history, whether or not the member actually intended to assent to that legislative history. If the individual legislator has no responsibility for the legislative history, and the legislature has no duty to provide public justification, it is difficult to construe the legislator's vote as constructive assent to anything other than the ordinary meaning of the words of the statute. The member should have felt no obligation to disavow the legislative history.[60]

The public justification concept provides the basis for constructive assent — each legislator has a responsibility to express assent or dissent to both the customary English usage of the words in the statute and the explanation of the statute. Given such a duty, one could say that the legislator should have responded to the public justification provided and that his failure to do so, whether because of agreement, indifference, or inattention, constitutes constructive assent to that explanation.

3. There Will Not Likely Be One Subjective Intent Shared by All Legislators, But So What?

The strength of the new textualist attack on the concept of "legislative intent" rests upon the cogency of the new textualist assertion that a subjective intent shared by a majority of legislators rarely exits. Under the public justification approach, the validity of that new textualist premise can be acknowledged but ignored.

With respect to most statutes, as noted earlier, it is unlikely that a majority of legislators were aware of the text of the statute and shared a common understanding of its language. The new

---

[60] See Tiersma, supra note 29, at 17, 20-22. Silence can assume significance only if one presumes that the silent person is interacting with another. See id. If such an interaction does not exist, the silence of the recipient of a message can either indicate consent or a refusal to engage in conversation. Thus the recipient's silence in response to a statement means nothing if the person who made the statement had no right to expect or demand a response. See id. at 22. In other words, for silence to constitute consent, the silent person must have a duty to engage in the interchange. Because there is no such requirement if the only significant part of the legislative process is voting, silence cannot be viewed as significant. If the development of public justification by means of a committee proposal and full-chamber review is a part of the legislative process in which legislators have an obligation to participate, a legislator's silence can be accorded significance.. Interestingly, while civic republicans assume that governing largely involves engaging in dialogue, see, e.g., Michael A. Fitts, Look Before You Leap: Some Cautionary Notes on Civic Republicanism, 97 Yale L.J. 1651, 1651-52, 1654-55 (1988); Frank Michelman, Law's Republic, 97 Yale L.J. 1493, 1503, 1528 (1988), public choice theorists assume that governing is an individualistic expression of preferences see, e.g., Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction 45 (1991).

textualists could disregard this problem, we presumed, because of their conception of legislators' duties — legislators have a duty to read the words of the statute and understand their customary English usage. Thus, legislators' votes signify their assent to the text in the customary English usage, regardless of whether they had actually read the statute and actually understood the customary English usage of the words employed.

Under the public justification approach, a similar argument can be advanced with respect to the legislative history that comprises the statute's public justification. The absence of a shared subjective intent is unimportant. A public justification is available to each legislator, as is the text of the statute. Just as each legislator has a duty to make herself aware of the statutory text and its meaning in ordinary English usage, under the public justification approach each individual legislator also has a duty to make herself aware of the public justification offered for the statute, and to vote on the basis of that public justification. Accordingly, if the legislator votes for the statute without dissenting from the public justification, she should be viewed as constructively assenting to that public justification. The legislator who fails to familiarize herself with the public justification for a statute, or fails to challenge a public justification that she privately considers inaccurate, has not acquitted her duty as a legislator. Her actual views of the statute's rationale are irrelevant because she failed to meet her obligation to address the statute's public justification.[61]

B. Public Justification Methodology

The public justification approach requires the interpreter to examine both the statute's text and public justification. Commentary outside the public justification should not be considered binding.[62] The text of the statute must be interpreted in light of the public justification provided. Thus, although the public justification should be honored by the court, it should receive less weight than the statutory text.

The court must identify the materials that constitute the statute's public justification. Because this public justification reflects an institutional approach, the materials that comprise the public justification must be attributable to the legislature as an institution. As suggested above, courts should employ three criteria to determine whether particular material is attributable to Congress. First, only material available to all legislators may be considered a part of the public justification. Each legislator has a right to participate in the development of the public justification, so each must have access to that justification. If some members lack such access, the justification is not that of the institution, but of the limited group that has access. Moreover, a member can have no duty to respond to statements regarding a statute if he lacks access to those statements. Reports of congressional committees and statements made on the House and Senate floor satisfy this requirement. Committee

[61] Indeed, this differs little from legislators' duty to learn judicially-created clear statement rules, which courts, with the new textualists' blessings, use in construing statutes.

[62] The court may want to consider such documents in arriving at the most efficacious interpretation of the statute once it determines, after examining the text and public justification, that the statute so ambiguous that it cannot act as the legislature's agent.

reports must be available to all members of Congress, and all members may attend floor proceedings or obtain a copy of the *Congressional Record*. On the other hand, documents not readily available prior to floor vote, such as party caucus documents, transcripts of committee mark-up sessions, transcripts of committee hearings, and public speeches outside Congress, do not merit recognition as part of the public justification. Treating such documents as expressions of Congress, rather than as expressions of individuals or groups, would be inappropriate.

Second, material may become a part of a statute's public justification only if members can respond to the material before casting their votes. Documents that members can amend during floor proceedings would obviously satisfy this requirement. Presumably, however, in most legislatures members can amend only statutory text during floor proceedings. For instance, reports filed by congressional committees are not subject to amendment. However, even an unamendable document should qualify as an institutional document so long as members can disavow the document, in whole or in part, before voting. Though members cannot formally amend a committee report, a legislative majority can disavow committee reports in several ways. Members may certainly express disagreement with the committee report on the floor of the legislature. Ultimately, however, this second requirement excludes little except post-enactment materials, because during debates members of Congress can express disagreement with any document that discusses the statute.

Third, only material considered authoritative by the legislators themselves should gain recognition as a part of a statute's public justification. Material that legislators themselves customarily rely upon as an exposition of statutory meaning (particularly when casting their votes) meets this standard; material that members regard as an expression of the views of one particular legislator or group of legislators do not. Committee reports and floor manager statements have attained such authoritative status. Senators and Representatives rely upon committee reports and floor manager statements as authoritative expositions of statutory meaning. If a member wants an authoritative explanation of a statute, he (or his staff) consults the committee report or questions the floor manager during the debate on the bill. Congress delegates to committees the task of both reporting statutory text, in the form of a bill, and providing an explanation of the bill that members can consult in deciding how to vote. Thus, a committee report is required by the rules of the House and customarily provided in the Senate. Conference reports must be published in the *Congressional Record* and made available to each Senator or Representative before they vote on the corresponding bill. Indeed, members have come to rely on committee reports so heavily that they often do not consult the text of the statute.[63]

Moreover, members of Congress surely realize that courts, members of the public, and agencies find such documents authoritative. On the other hand, statements made at hearings, made outside Congress, or set forth in party caucus documents do not appear to have gained the same respect. They are seen as expressing only the views of individual members, not that of Congress as

---

[63] See, e.g., Henry J. Friendly, Benchmarks 215-16 (1967); Eric Redman, The Dance of Legislation 140 (1973); James J. Brudney, Congressional Commentary on Judicial Interpretations of Statutes, 93 Mich. L. Rev. 1, 28, 53, 57, 58 & n.230, 63 (1994); Farber & Frickey, supra note 60, at 448; Zeppos, supra note 41, at 1311-14.

an institution. This reasoning may appear somewhat circular — the public, administrative agencies, and legislators may have begun to rely on committee reports and floor manager statements because courts began to rely on such materials, and in turn the widespread reliance on such material is now being used to justify continued judicial reliance upon it. However, even assuming that judicial practice produced widespread reliance on such documents, Congress could have expressed disapproval of the trend or even enacted a statute precluding consideration of legislative history. So while the courts may have provided the initial impetus for reliance upon committee reports and floor manager statements, the continued reliance upon such documents may be attributed to, at a minimum, Congress's acquiescence.

Ultimately, the categories of material considered part of the institutional justification of statutes must be limited so that legislators' duty to respond to that justification does not become overwhelming. We should not require members of Congress to review and publicly comment upon numerous documents on pain of being found to have assented to all the statements therein, because acquitting such a duty would deprive members of time needed to engage in other legislative activities. However, if the legislative process is to be a discussion of policy rather than a registration of preferences, legislators should have a duty to review the limited number of documents discussing statutory rationales produced by authorities within the institution.

With respect to the United States Congress, the "public justification" of statutes consists of: (1) committee reports (of both conference and standing committees), (2) statements of a bill's floor manager, and (3) the statement of a sponsor of an amendment, when that amendment has not been the subject of committee consideration. The final category takes into account situations in which the Senate or the House adopts an amendment proposed by a member that changes the bill recommended by the relevant committee.

Thus, members of Congress have a duty to familiarize themselves with the explanations contained in these three types of documents. They also have a duty to object to the explanations with which they disagree. However, requiring every member who disagrees with a statement in the documents comprising the "public justification" to express that disagreement is unnecessary and unwise. If several legislators disavow the offending statement, a member who agrees with them should not need to express his disagreement with the public justification as well. Such a requirement would needlessly extend debate. Thus, if several legislators argue that the statute's rationale is broader, narrower, or simply different than that identified in the public justification, other members need not add their voices in support.[64]

[64] Nevertheless, the statement of one legislator should not lead the court to question the public justification. The statement of one legislator does not suggest substantial disagreement with the public justification. The public justification should be questioned only if several members disavow it, as such a vocal dissent may suggest a significant difference of opinion within the legislative chamber. However, the interpreter should not accept the position stated by those challenging the public justification. Rather, the existence of such a dispute means only that the court will have to resolve textual ambiguities without reliance upon the text of the explanatory materials.

However, such an expression of disagreement will probably provoke a discussion and clearer resolution of the issue. The floor manager may provide a more complete explanation of the statute. That explanation may convincingly demonstrate that the floor manager's initial statement or the committee report provides the best explanation of the statute. Alternatively, the legislative body might consider amending the text of the bill.

In short, a court interpreting a federal statute should interpret the text in light of committee reports, floor manager statements, and sponsor statements, but abandon reliance on apparently relevant aspects of those documents if floor debate reveals a substantial controversy regarding those aspects of the documents. A court should not consider itself bound by other aspects of legislative history (although these other aspects of legislative history may be used as persuasive authority if a court, after examining the text in light of the public justification, concludes that the statute is ambiguous).

This approach is objective, relying on the customary meaning of text. In this respect, it resembles the new textualist approach and differs from the intentionalists' subjective approach. However, under the public justification approach, the relevant text is expanded to include not just the text of the statute, but also the text of certain additional documents. A recognition of the duty of the legislature to explain statutes and of the individual legislators to react to the public justifications justifies this expansion of the relevant text.

IV. Application of the Public Justification Approach

Examination of two ongoing interpretive debates further illustrates the usefulness of the public justification approach. The first debate involves judicial interpretation of unexplained statutory provisions that appear to address controversial issues. The second involves application of general statutory language to situations that the enacting legislature did not contemplate.

A. The Dog That Did Not Bark

Supreme Court Justices have debated whether congressional silence regarding a questionable application of an ambiguous statute justifies limiting the reach of the statute. The text of a statute, read literally, may appear to require a questionable treatment of an issue even though nothing in the applicable legislative history addresses the issue.

An amendment of the Voting Rights Act of 1965 presented the Court with such a situation in *Chisom v. Roemer*.[65] Initially, the statute prohibited any "voting qualification or prerequisite to voting, or standard, practice, or procedure" that resulted in a denial of the right to vote on account of race or color. The Supreme Court construed the provision to mean that plaintiffs must prove

[65] 501 U.S. 380 (1991).

intentional discrimination to establish a Voting Rights Act violation.[66] Congress then amended the Voting Rights Act, adding section 2(b), to allow plaintiffs to establish a Voting Rights Act violation merely by proving the discriminatory effect of a statute, without showing discriminatory intent. Specifically, section 2(b) provided that plaintiffs could establish a violation of the Voting Rights Act by proving that members of a minority group "have less opportunity than other members of the electorate . . . to elect representatives of their choice."

The *Chisom* Court had to determine whether the word "representatives" included candidates for elective judicial offices, and thus whether litigants could rely upon the section 2(b) "effects" test to challenge rules governing judicial elections. Justice Stevens, writing for the majority, argued that the word "representative" encompassed all elected officials, even judges. He offered several reasons for his conclusion, but only one merits discussion here. Justice Stevens argued that Congress would not have distinguished judicial elections from all other elections without noting that intent or without many members of Congress expressing opposition.[67] In particular, before the amendment of the Voting Rights Act, identical standards governed judicial and non-judicial elections; the ambiguous term "representative" should not be viewed as requiring the standards for judicial and non-judicial elections to diverge. In setting forth his reasoning, Justice Stevens referred to a Sir Arthur Conan Doyle story in which Doyle's famous detective, Sherlock Holmes, determined the murderer's identity by noting that the victim's dog did not bark on the night of the murder.[68] In that story, Holmes relied upon the dog's silence to infer that the murderer was someone with whom the dog was familiar. Congress's silence regarding the divergence of the standards for judicial and non-judicial elections, when amending the Voting Rights Act, had significance, just as the silence of the "dog that did not bark" had significance in the Holmes story.

Justice Scalia objected to Justice Stevens's reasoning. First, he argued, Justice Stevens's argument relied on the erroneous proposition that "Congress cannot be credited with having achieved anything of major importance by simply saying it, in ordinary language, in the text of a statute 'without comment' in the legislative history."[69] The word "representative" clearly did not include judges, and Congress did not have to "call its shot," that is, explain the significance of the textual change it was making. To Justice Scalia, the text of the statute clearly provided different standards for non-judicial elections, in which "representatives" are chosen, and judicial elections, in which officials who do not "represent" constituents are chosen. Second, Justice Scalia argued, one cannot assume that everything of significance will be noted in legislative history or spark legislative debate.

In several cases, the Justices have debated the propriety of interpreting statutes based on the absence of an express announcement of an intent to change the law and a lack of controversy over

---

[66] See Chisom, 501 U.S. at 393 (discussing Mobile v. Bolden, 446 U.S. 55 (1980)).

[67] See id. at 396.

[68] See id. at 396 n.23 (noting the incident occurred in *The Silver Blaze*).

[69] Chisom, 501 U.S. at 406 (Scalia, J., dissenting).

a provision.[70] When using this "dog that did not bark" approach, the Court implicitly envisions legislative intent as a fact awaiting discovery. Thus, the Court derives its most prominent analogy for such reasoning from the technique used by detectives in attempting to determine a fact, namely the identity of a murderer. For the Court, legislators' apparent belief that they need not explain a particular statutory change and the absence of controversy about the statute's meaning provide two "clues" to legislators' subjective understanding of the statute. Any inferences from legislative silence rest on certain assumptions about legislative behavior, namely that when the legislature takes significant action it will explain the significance of its actions, or at least individual legislators will contest the controversial action during legislative consideration of the relevant bill. Of course, even assuming that this is invariably true, the Court would nevertheless need to determine whether the issue before it is one that members of Congress believed significant.

Viewing arguments based on Congress's silence as factual is problematic; the Supreme Court rarely cites any facts in support of its conclusion that a particular change would either have been explained in the legislative history or provoked controversy. Clearly, not every change that a statute makes requires explanation or provokes discussion; members of Congress have limited time to debate issues. Thus, to draw inferences from Congress's failure to explain or the lack of legislative controversy, the Court must conclude that the particular change in the law, allegedly made merely by the enactment of certain statutory text, was sufficiently salient to members of Congress that it would have led them to explain their actions or provoked discussion. However, probative evidence of Senators' and Representatives' views of the significance of a particular change rarely exists. Thus, the Court most often merely asserts, without citing any evidence, that if Congress had envisioned a particular interpretation of the statutory language there would have been some indication of such an intent in the legislative history, or at least some debate. It is almost as if Sherlock Holmes had inferred the identity of the murderer from the victim's dog's silence knowing only that ordinarily the dog's master familiarized the dog with important people in his life, surmising that one of the suspects was probably someone the master considered important, and reasoning that therefore the dog knew that particular suspect. This is hardly the sort of inference Holmes was likely to draw, at least without obtaining more specific evidence.

Justice Scalia's challenge to such reasoning is reminiscent of his challenge to the use of legislative history in general. He argues that changing the text of a statute should suffice to change the law. Interpretation based on silence is flawed, argues Justice Scalia, because due process does not require that "legislation . . . be supported by committee reports, floor debates, or even consideration, but only by a vote."[71]

Justice Stevens's and Justice Scalia's opposing positions correspond to the general views of intentionalists and new textualists outlined earlier in this Article. The approach I suggest rests on the

---

[70] Indeed, the Supreme Court's most recent use of this technique, in Department of Commerce v. United States House of Representatives, 119 S. Ct. 765 (1999), produced dissension among the Justices.

[71] Sable Communications v. FCC, 492 U.S. 115, 133 (1989) (Scalia, J., concurring).

principle that legislatures should justify statutes and that courts should interpret unexplained legislative actions cautiously. The Scalia approach is deficient because it does not acknowledge the role of public justification. Even though the Due Process Clause does not create a judicially enforceable requirement that legislatures provide a justification for statutes, legislatures should (and do) explain statutes, and courts should interpret statutes in light of this unenforced legislative obligation. Thus, courts should accord significance to the absence of any assertion that a statute covers a controversial situation when interpreting ambiguous statutory language.

However, the Stevens approach is deficient in characterizing interpretive questions as factual issues involving "legislative intent." The deficiencies of the "legislative intent" concept have been discussed earlier. Instead of attempting to determine whether members of Congress would have viewed a potential application of the statute as sufficiently controversial to warrant vocal opposition or explanation in the legislative history, the Court should determine whether a particular application of the statute is questionable given its own view of the public justification offered for a statute and the corpus of the law. If the proposed application of the statute is questionable[72] and no mention is made of such an application of the statute in the "public justification" (committee reports, statements of floor managers, and statements of sponsors), then the Court may appropriately construe the statute to exclude that situation.

Thus, in *Chisom*, the Court properly considered Congress's failure to suggest that voting rights standards should diverge for judicial and non-judicial elections. However, the Court erred in relying upon some unsupported (and ultimately probably insupportable) inference about legislative intent. The Court should have considered whether the more general purposes of the Voting Rights Act would have been served by such a distinction, and whether other federal voting rights laws distinguished judicial and non-judicial elections. The Court may have concluded, after pursuing such an analysis, that distinguishing judicial and non-judicial elections would not have furthered the elimination of discrimination in voting and that any countervailing principles (such as the principle of preserving local governments' freedom to establish the voting rules) apply no differently in judicial and non-judicial elections. The Court could then have concluded that judicial and non-judicial elections should not be distinguished, based on ambiguous statutory language, unless Congress at least sets forth such a policy in its justification of the statute.

In any event, legislative justification of statutes is important, and courts ordinarily should not conclude that Congress has commanded a significant change in the law without explanation. The requirement of justification supports the requirement that Congress "call its shot" when statutory language is ambiguous.

---

[72] A statute cannot be limited in its effect just to those matters specifically contemplated by the legislature at the time the statute was enacted. The use of general words in the statute suggest that the statute's application should extend beyond the precise situations specifically contemplated and discussed by members of the legislature.

B. *Holy Trinity*: General Words with Unexpected Applications

The approach presented in this Article may also change our view of the interpretive enterprise in situations where a statute uses general words that extend beyond any justification offered for the statute. *Holy Trinity Church v. United States*[73] provides a classic example of this type of problem.

The statute at issue prohibited anyone from assisting or encouraging the immigration of any foreigner who had, before immigrating, entered into a contract to "perform labor or services of any kind."[74] The United States sued Holy Trinity Church, which had hired an English cleric as it rector and pastor. The central issue was whether such employment constituted the "performance of labor or services of any kind" under the immigration statute. As the Court noted, the text of the provision seemed to apply to such employment. However, the Court focused on congressional intent, asserting that it did not "think Congress intended to denounce with penalties a transaction like that" between a church and a rector.[75] The Court explained: "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[76] The Court held that the statutory phrase "labor or services of any kind" meant only manual labor, relying on its general knowledge of the circumstances surrounding the statute's enactment, the problems that prompted Congress to act, and the statute's legislative history, which focused on immigrants who engaged in physical labor. The Court noted that the relevant Senate committee realized that the text of the statute could be read to include even those immigrants who did not engage in manual labor and refused to amend the statute to limit its reach to manual laborers. The Committee had explained that it did not wish to delay the bill's enactment by redrafting it and expressed its confidence that the courts would interpret the bill to bar only manual laborers. The Court also expressed concern about the statute's impact on religious freedom were the statute interpreted literally, and said it did not believe Congress meant to inhibit the practice of religion.[77]

Though no Justice dissented in *Holy Trinity*, Justice Anthony Kennedy criticized the *Holy Trinity* Court's approach in his opinion in *Public Citizen v. United States Department of Justice*.[78] Justice Kennedy argued that legislative materials possess no authority. He also asserted that the judicial practice of "rummag[ing] through" legislative history does not further "democratic

---

[73] 143 U.S. 457 (1892).

[74] Id. at 458.

[75] See id. at 459.

[76] Id. at 459.

[77] See id. at 472.

[78] 491 U.S. 440, 467 (1989) (Kennedy, J., concurring).

exegesis."[79] Finally, analogizing judicial efforts to ascertain legislative intent to a seances,[80] Kennedy argued that determinations of legislative intent are generally so deficient and based on so little evidence that a court's conclusion as to legislative intent likely reflects the views of the judges rather than those of the enacting legislature.

How are we to approach this dispute between those who believe in limiting general words by the legislative history and those who do not? Justice Kennedy offers telling criticisms of the use of legislative history to the extent that it is used to determine the actual subjective intent of a majority of the enacting legislature. The factual basis for a conclusion that most representatives in the Congress that enacted the immigration bill intended the statute to apply only to manual laborers does not seem fully convincing and may reflect the views of the judges more than any serious factual inquiry.[81] Certainly, historians, journalists, archaeologists, or others concerned with history, would find unpersuasive the factual inquiry conducted by the *Holy Trinity* Court.

On the other hand, the new textualist approach, as exemplified by Justice Kennedy's argument in *Public Citizen*, inappropriately discounts the importance of public justification. Because a majority vote on the general text is not the only relevant part of the legislative process, Kennedy's view is too restrictive. The public justification for the statute is an appropriate source to use in determining the scope of the statute. Judges must acknowledge that they are not conducting a factual inquiry into "intent" when attempting to construe a statute. Rather, courts must determine the proper scope of the statute in light of the "public justification" provided for it. The scope of the statute will broaden or contract depending on the public justification. However, given the use of general language in a statute's text, such a statute clearly cannot be interpreted to cover only the specific matters or situations addressed in the public justification. Thus judges will have to acknowledge discretion; they will have to admit that their interpretation is not merely the one they are forced to accept by some "legislative intent," but rather one that is chosen based on the court's interpretation of the text of the statute and the public justification provided.

V. New Textualists' Instrumentalist Challenge to Legislative History

The arguments discussed above have focused on an intrinsic inquiry, namely which approach to statutory interpretation produces the most legitimate interpretation of statutes. Traditionally, debates about statutory interpretation has focused on an intrinsic inquiries. Legal theorists asked the following types of questions: Should courts primarily act as agents of the legislature, seeking to

---

[79] Id. at 473.

[80] See id. at 473 (after noting the Holy Trinity Court's focus on the spirit of the law, Kennedy asserted "[t]he problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice").

[81] See MacCallum, supra note 48, at 778 ("While judges and administrators obviously utilize evidence of the intentions of various individual legislators, they make no serious attempt to discover the actual intentions of the voting majorities. . . .").

effectuate its intent? Should courts view statutory text as the only legitimate source of law? Should courts acknowledge the discretion they possess and proceed accordingly, by giving authoritative weight to neither the statutory text nor their perception of legislative intent? Recently, however, scholars increasingly have viewed interpretive techniques as tools to shape the legislative process — an instrumental approach that seeks to justify particular interpretive techniques by their potential salutary effect on the legislative process.[82]

New textualism is a part of this instrumentalist trend. In addition to new textualists' intrinsic argument that only statutory text should create legal obligations and that legislative history does not provide a legitimate source of legal obligations, new textualists assert four instrumentalist arguments for disregarding legislative history. First, new textualists argue that reliance upon legislative history discourages legislatures from enacting clear, easily-understood statutes.[83] Because legislators can use legislative history to address ambiguities in statutory text, they lack the incentive to eliminate those ambiguities. New textualists explicitly acknowledge their desire to compel more precise congressional drafting.[84]

Second, new textualists have expressed concern about the unreliability of legislative history as an expression of Congress's actual desires, noting that legislative minorities can manipulate legislative history in ways that frustrate the majority will.[85] New textualists posit that members concentrate on the text of statutes and that legislative majorities express their policy preferences in that text. In contrast, legislators never formally vote to approve legislative history, which assumes a lower profile than text. By relying on legislative history, courts give effect to policies that were not formally considered by all legislators and may even not have come to the attention of many legislators. In other words, legislative history provides a vehicle that legislative minorities can use to create law without risking defeat by majority vote in the House or the Senate or veto by the President.

Third, the interpretive use of legislative history increases the power of congressional staff by allowing staff to set policies in documents that legislators never review. Legislative history,

---

[82] Jane S. Schacter, Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation, 108 Harv. L. Rev. 593, 608 (1995); see Bernard W. Bell, Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-Chevron Era?, 13 J.L. & Pol. 105 (1997).

[83] See, e.g., In re Sinclair, 870 F.2d 1340, 1342-43 (7th Cir. 1989) (stating that legislative history is a "crutch" that allows legislatures to enact imprecise statutes).

[84] Office of Legal Policy, U.S. Dep't of Justice, Report to the Attorney General, Using and Misusing Legislative History: A Re-Evaluation of the Status of Legislative History in Statutory Interpretation v (1989); see also id. at 63-64 ("By forcing Congress to pay greater attention to draftsmanship, a commitment to the plain meaning rule results in more carefully drawn legislation.").

[85] See, e.g., Federal Election Comm'n v. Rose, 806 F.2d 1081, 1090 (D.C. Cir. 1986) ("[The D.C. Circuit] has condemned the well-recognized phenomenon of deliberate manipulation of legislative history at the committee level to achieve what likely cannot be won before Congress as a whole.")

particularly committee reports (the most prized legislative history) are often drafted by staff with little involvement by members. Justice Scalia has warned that reliance on committee reports is "converting a system of judicial construction into a system of committee-staff prescription."[86] If legislative history were disregarded, policies could gain authoritative recognition only if set forth in legislation voted on by members of Congress and signed by the President.

Fourth, courts' use of legislative history allows lobbyists to smuggle their policies into the law.[87] Lobbyists attempt to persuade staff members to place language favorable to their positions in committee reports. Because members do not involve themselves in the drafting of committee reports, they do not review these interest group policies. Thus, by recognizing committee reports as authoritative, judges allow interest groups and their lobbyists to secure the "enactment" of policies that could not garner a majority if openly debated.

Those who believe that legislative history has an important function in the interpretation of statutes, either because they take an intentionalist approach of seeking to find legislative intent or because, like me, they value certain aspects of legislative history independent of any attempt to determine legislative intent, should reject the new textualists' instrumentalist arguments, even if on balance they find them persuasive. Adopting a new textualist approach for purely instrumentalist reasons would denigrate majority rule, conflict with the courts' primary role of dispute resolution, and exhibit an unwarranted and uncharacteristic disrespect for congressional judgments about the most efficacious manner in which to organize the legislative process.

First, jurists who adopt new textualism purely for instrumental reasons impose severe societal costs by frustrating majority rule and denigrating the traditional role of courts in dispute resolution. Every time judges refuse to adhere to congressional desires because of imprecise statutory language or because Congress placed those desires in legislative history rather than in statutory text, judges denigrate majority rule. For judges who prize majority rule, determining how a majority of the enacting legislature would have decided the issue had it arisen is central to proper interpretation. To them, the text of a statute has little inherent importance – its importance stems from its reflection of the policy of the enacting legislative majority. When the text of the statute does not reflect majority desires, either because of imprecision in the use of language or the legislature's failure to fully consider the nuances of problems, citizens are governed not by the policies reflecting majority views but by random policies that result from the legislature's poor draftsmanship. In effect, focusing on statutory text despite convincing evidence that the statute's words inadvertently fail to reflect the

[86] Hirschey v. Federal Energy Regulatory Commission, 777 F.2d 1, 7-8 (D.C. Cir. 1985).

[87] See Wallace v. Christensen, 802 F.2d 1539, 1559-60 (9th Cir. 1986) (Kozinski, J., concurring in the judgment) (noting that committee reports "are usually written by staff or lobbyists").

majority's decision exalts form over substance by giving precedence to Congress's form of expression rather than the ideas it sought to convey.[88]

By privileging text, the publicly expressed or otherwise-clear majority views regarding citizens' rights and responsibilities may be violated. Eventually, the principle desired by the majority may be established, and Congress may even learn to draft statutes more precisely. In the meantime, however, costs are imposed upon individual litigants seeking resolution of their disputes. While the courts interpret statutes strategically to encourage greater congressional responsibility, these individual litigants will suffer unjustly or benefit undeservedly because of poor congressional drafting. In a sense, individual litigants would become pawns in the judicial effort to force legislative precision, to increase legislative deliberation, or to decrease dependence upon legislative staff.[89] Injuries to litigants who rely on impartial justice to resolve their disputes are a significant price to pay for a judge's instrumentalism, particularly if the interpretive strategies used to force change are likely to prove ineffective.[90]

---

[88] Cf. In re Erickson, 815 F.2d 1090, 1092-93 (7th Cir. 1987). In *Erickson*, Judge Easterbrook had to construe a statute that included the word "haybine," a type of farm equipment that, through technological advancement, had become disassociated from the enacting legislators' understanding of the word. See id. at 1092. Judge Easterbrook asserted that a statutory word of description, such as "haybine," does not designate a particular item, but rather a class of items that has some important characteristic, and that the usage of the word in everyday language cannot be determinative when language usage is changing. See id. at 1092-93. Using the fanciful example of an item that comes to be known as a "stereolounger," a piece of furniture that serves both as a recliner and a sound system, Judge Easterbrook argued that a "stereolounger" may nevertheless be a "chair" for purposes of a statute governing chairs. See id.

[89] Judge Ralph K. Winter's dissent in *United States v. University Hospital*, 729 F.2d 144, 161-63 (2d Cir. 1984) (Winter, J., dissenting), provides an example of this potential problem. In that case, the Second Circuit considered whether the Rehabilitation Act, 29 U.S.C. §§ 701-794 (1994), which prohibits federally funded programs from discriminating against the handicapped, precludes a federally funded hospital from foregoing surgery to correct one of two severe birth defects afflicting an infant. See University Hosp., 729 F.2d at 146. The congressional majority that enacted the Rehabilitation Act probably did not envision their admittedly categorical language overriding parental and medical judgments about the medical treatment to be provided infants suffering from multiple, severe birth defects. See id. at 157. As the majority noted, Congress did not discuss the treatment of infants suffering from birth defects when it enacted the statute. See id. at 157.

In his dissent, Judge Winter argued that the court should nevertheless construe the Rehabilitation Act as it would construe Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d (1994), on which the Rehabilitation Act's categorical language was based, and require the defendant hospital to treat a child with spina bifida and microcephaly despite the contrary judgment of the parents and the hospital. See University Hosp., 729 F.2d at 163 (Winter J., dissenting). Such a ruling, he explained, would encourage Congress to consider seriously all aspects of proposed statutes without expecting courts to save them from the folly of passing poorly conceived symbolic legislation. A large number of such rulings might indeed lead Congress to become more deliberative, but only at the expense of forcing parents to submit their children to invasive medical procedures that, in the parents' judgment, will provide little benefit.

[90] Given judicial deference to agency construction of statutes, instrumentalist theories of statutory interpretation may accomplish little. Bernard W. Bell, Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-Chevron Era?, 13 J.L. & Pol. 105, 128-32 (1997).

For example, the Supreme Court's insistence upon textual clarity deprived many litigants of the benefits of policies that congressional majorities sought to establish by enacting the Age Discrimination in Employment Act of 1967 (ADEA).[91] The Supreme Court twice construed the ADEA provision that prohibited employee benefit plans from requiring mandatory retirement as a means of avoiding the ADEA.[92] After each decision, Congress legislatively reversed the result of the cases by amending the statutory text to include policies Congress had previously expressed only in legislative history.[93] Unsuccessful plaintiffs, whose cases were decided before Congress could convert the legislative history into statutory text, suffered. The plaintiffs could not bring actions that a congressional majority thought it had authorized. While this result is just from an intrinsically based, new textualist perspective, this series of judicial decisions and legislative reversals assumes disturbing proportions for those who view intent as the touchstone of interpretation. Moreover, the disturbing nature of the harm to the individuals cannot be justified by the conviction that the courts' interpretive approach will eventually lead to better legislation for all.

In short, as an instrumental technique, new textualism involves significant sacrifices. It denigrates majority rule and subordinates the responsibilities courts owe individual litigants to further jurists' strategic efforts to improve the legislative process.

Moreover, new textualism embodies a skepticism of legislative judgments that, in other contexts, courts eschew and new textualists disclaim. With respect to the issues new textualists highlight – the vagueness of statutes, the reliability of congressional documents, and the role of staff and interest groups – the new textualists appear willing to impose their own judgments upon legislatures. Significantly, Congress' assessment of the legislative process appears to differ from that of the new textualists.

Congress has embraced the use of imprecise statutes supplemented by legislative history; and it frequently enacts legislation in just such a manner. Congress has modified the procedures for compiling committee reports and the *Congressional Record*, yet apparently has not concluded that committee reports and the *Congressional Record* are unduly manipulable. Congress appears to have concluded that staff and interest groups do not wield excessive power — or at least such influence does not warrant changing the significance accorded to or the manner of compiling legislative history. Congress could address the new textualist concerns about statutory vagueness, manipulation of legislative history by legislative minorities, and undue influence of staff and interest groups if it chose to do so. More generally, despite the vocal statements of new textualist academics and jurists, members of Congress do not seem to have concluded that the use of legislative history is problematic. Legislative history has hardly been the central battleground of internal or public

---

[91] Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C.A. §§ 621-634 (West 1999 & Supp. 1999)).

[92] See Public Employees Retirement Sys. v. Betts, 492 U.S. 158, 168 (1989); United Air Lines, Inc. v. McMann, 434 U.S. 192, 203 (1977).

[93] See Brudney, supra note 63, at 15-16.

pressure for congressional reform. And indeed, members of Congress appear to support the continued use of legislative history in interpreting statutes. Many even view legislative history as a helpful tool in crafting legislation.

This new textualist willingness to review legislative judgments appears to conflict with the deference that the courts in general, and the new textualists in particular, accord legislative judgments in a wide variety of contexts. When addressing due process and equal protection challenges to substantive legislation, federal and state courts often exhibit great deference to legislative judgments. When litigants challenge congressional procedures, federal courts show great deference to legislative judgment, dismissing most such cases without even considering the challenge's merits. When litigants challenge certification by the presiding officers of the House and the Senate that bills have been adopted in accordance with governing procedures, the courts do not permit such challengers to proffer supporting evidence. Each of these doctrines offers a striking contrast to new textualism's dismissal of congressional judgments.

When a citizen challenges the constitutionality of a statute, the courts presume that the statute can pass constitutional muster. Unless a statute impairs a fundamental interest, such as freedom of speech, or employs a suspect classification, such as race, courts will uphold any statute that has a rational basis. The requirement that government action have a rational basis is not a demanding one, and under it the political branches receive considerable deference. A court will hold that a statute has a rational basis if any reasonably conceivable justification for the statute exists. In effect, courts leave Congress free to resolve issues on which reasonable people can disagree.[94] Such deference minimizes the counter-majoritarian difficulty.[95] Thus, when deferring to legislative judgments, the Supreme Court explains that it cannot engage in more aggressive judicial review without assuming the role of a "superlegislature" or "Council of Revision" that merely substitutes its own value judgments for the legislature's.[96] Indeed, in these substantive constitutional challenges, the Court refuses to consider claims that the statutory text reflects the intent of a mere legislative minority or the undue influence of interest groups.[97] The new textualists' willingness to express disapproval of congressional decisions regarding the reliability of legislative history, the appropriate level of statutory precision, and the role of staff and interest groups seems inconsistent with the deference courts (and new textualists) accord congressional judgments when addressing due process or equal protection challenges.

---

[94] See United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938).

[95] For classic statements of the counter-majoritarian difficulty, see Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16-23 (Yale Univ. Press 2d ed. 1986); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 7-9, 43-72 (1980).

[96] In particular, Justice Scalia, the premier “new textualist” often berates his colleagues for failing to accord appropriate deference to the political branches of government when considering claims that governmental actions violate the individual rights clauses of the Constitution. See Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 299- 301 (1990) (Scalia, J., concurring).

[97] See United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 179 (1980).

Courts also defer to congressional judgments regarding appropriate legislative procedures when legislators or citizens challenge the validity of those procedures directly. Such procedural challenges perhaps more closely resemble the new textualist challenges than do the substantive constitutional challenges discussed above. Often, in reliance on the Constitution's Rulemaking Clause,[98] the Court refuses to entertain challenges to congressional procedures.[99] Lower courts have refused to consider challenges to the practice of allocating the majority party more than its proportional share of seats on congressional committees, the congressionally-authorized practice of concealing Central Intelligence Agency appropriations in other budget accounts,[100] and the establishment of a rule requiring a three-fifths majority vote to raise federal income tax rates.[101] Even when courts do not summarily dismiss procedural claims, they accord extraordinary deference to the legislature. For example, the Supreme Court has held that the Senate, in considering articles of impeachment, has discretion either to hear testimony itself or to delegate the task to a Senate committee.[102] Likewise, the federal courts uphold revenue statutes against claims brought under the Constitution's Origination Clause[103] after only the most cursory examination of legislative records.[104]

Some rejected procedural challenges have raised issues resembling the complaints offered by the new textualists. *Gregg v. Barrett*[105] addressed claims resembling new textualists' concerns about the *Congressional Record*'s manipulability. In *Gregg*, the D.C. Circuit dismissed the plaintiff's

---

[98] U.S. Const. art. I, § 5, cl. 2 ("Each House may determine the Rules of its Proceedings ....").

[99] See Nixon v. United States, 506 U.S. 224, 226 (1993) (holding a claim that challenged Senate impeachment procedures to be nonjusticiable); Gregg v. Barrett, 771 F.2d 539, 549 (D.C. Cir. 1985) (refusing to consider a claim that the method of compiling of the *Congressional Record* permitted manipulation of the official record of congressional debates because even attempting to resolve the claim on the merits would interfere with Congress's constitutional power to manage its own affairs); Moore v. United States House of Representatives, 733 F.2d 946, 956 (D.C. Cir. 1984) ("We are reluctant to meddle in the internal affairs of the legislative branch, and the doctrine of remedial discretion properly permits us to consider the prudential, separation-of-powers concerns posed by a suit for declaratory relief against the complainant's colleagues in Congress."); Vander Jagt v. O'Neill, 699 F.2d 1166, 1182 (D.C. Cir. 1983) (Bork, J., concurring) (concurring in court's refusal to adjudicate a claim of maldistribution of committee seats in the U.S. House of Representatives because "[t]here is a very real problem of a lack of judicial competence to arrange complex, organic, political processes within a legislature").

[100] See Harrington v. Bush, 553 F.2d 190, 215 (D.C. Cir. 1977); see also United States v. Richardson, 418 U.S. 166, 180 (1974).

[101] Skaggs v. Carle, 898 F. Supp. 1, 2-3 (D.D.C. 1995).

[102] See Nixon v. United States, 506 U.S. at 238.

[103] U.S. Const. art. I, § 7, cl. 1. The Origination Clause requires that all bills raising revenue originate in the House of Representatives.

[104] See United States v. Munoz-Flores, 495 U.S. 385, 387-88 (1990); Texas Ass'n of Concerned Taxpayers, Inc. v. United States, 772 F.2d 163, 165, 168 (5th Cir. 1985).

[105] 771 F.2d 539 (D.C. Cir. 1985).

challenges to the procedures for compiling the *Congressional Record*. In rejecting the claim, Judge Abner J. Mikva, writing for the court, explained that "our deference and esteem for [Congress] and for the constitutional command that [Congress] be allowed to manage its own affairs precludes us from even attempting a diagnosis of the problem."

Likewise, the courts have refused to address questions of the proper role of legislative staff, albeit in the context of challenges to the use of staff for non-legislative purposes. Thus, in *United States ex rel . Joseph v. Cannon*,[106] the D.C. Circuit refused to entertain a *qui tam* action seeking to recover from Senator Howard Cannon the salary his congressional office paid a staff member who allegedly worked exclusively on matters relating to the Senator's re-election campaign. In doing so, the court explained that the judiciary must avoid questions for which it is "fundamentally under equipped" and refused to "develop standards of conduct for matters not legal in nature." The court concluded that a "challenge to the interworkings of a Senator and his staff member raises at the outset the specter that such a question lurks."

Even with respect to the validity of legislative documents, courts do not second-guess legislative bodies. The federal courts have long employed the enrolled bill rule, which precludes them from questioning presiding legislative officers' certifications that the respective legislative chambers have passed a bill pursuant to proper procedure.[107] Several justifications have been offered for this rule, however, the justification most relevant for our purposes is that the courts would show disrespect for legislatures if they questioned such certifications by legislative officers.[108]

In many contexts, judges who find new textualism attractive berate their colleagues for furthering controversial principles by means of judicial review and seeking to substitute judicial judgments for those of elected representatives. However, in espousing new textualism, these same judges advocate, and seek to impose upon elected officials, their own controversial assessments of the legislative process by means of an instrumentalist approach to statutory interpretation. I will briefly discuss the new textualist's argument that legislative staff have too great an involvement in the legislative process, as an example of new textualism's reliance on very controversial assessments of the legislative process.

New textualists' perception that staff involvement in the legislative process is pervasive is undoubtedly correct. Staff members routinely participate in resolving policy differences among members of Congress. Committee reports are primarily written by staffers and often are not fully

---

[106] 642 F.2d 1373 (D.C. Cir. 1981).

[107] Field v. Clark, 143 U.S. 649, 672 (1892)(refusing to entertain a claim that Congress had not voted upon one part of the Tariff Act of 1890). In *Field*, the Court explicitly acknowledged that the presiding officer of each chamber has a legal obligation to refrain from falsely certifying compliance with proper procedures, but noted that the judiciary simply was not the proper institution to police legislative leaders. Id. at 669-73. See 1 Norman J. Singer, Statutes and Statutory Construction § 15.03, at 748-53 (5th ed. 1994).

[108] See United States v. Munoz-Flores, 495 U.S. at 408-10 (Scalia, J., concurring); Field, 143 U.S. at 672.

reviewed by the whole committee or even a substantial portion of it. Many have decried congressional staff's increasing role in the legislative process. Nevertheless, reasonable people have long differed on the appropriate role of staff, and resolving the issue requires weighing competing considerations.

The concern about staff involvement in the legislative process is certainly legitimate. At the most basic level, legislators--not staff members--are elected to make laws. To the extent that "law" derives from staff decisions, it does not deserve the respect due "law" that is adopted by elected representatives.[109] This complaint closely reflects new textualists' concerns.[110]

Michael Malbin has identified a more subtle injury produced by staffers' ubiquitous presence. He argues that deliberation, the exposure of legislators to their fellow legislators' views, forms a crucial part of the legislative process.[111] The ascendancy of legislative staffs has reduced members' direct contact with one another. Issues legislators once would have resolved by direct contact are now resolved in discussions among staff. Malbin argues that hearing arguments indirectly through staff rather than directly from fellow legislators reduces the likelihood that a member will seriously consider those views.

The increased number of staffers and their greater involvement in the legislative process produces benefits, however. Given the relatively small number of legislators and the great demands on their time, staff surely reduces legislators' dependence on the executive branch, congressional leadership, committee chairs, and interest groups, and it also allows them to exercise more independent judgment. Staff may also enable members to consider more issues in greater depth than they could without staff assistance. In periodically expanding the size of various legislative staffs since the 1960s, Congress has clearly concluded that the presence of staff provides a necessary enhancement of Congress's ability to make independent and informed judgments and that those benefits outweigh concerns about increasing the role of staff vis-a-vis members of Congress.

The concern about the democratic pedigree of agreements made between unelected representatives is ameliorated by members' absolute control over staff. Staff have no formal independence and must be careful not to displease the congressperson for whom they work, and there may well be informal mores and pressures that ensure that staff members do not act in ways that are

---

[109] Paul Campos argues that staff involvement may create what he calls a "pseudotext." Paul F. Campos, The Chaotic Pseudotext, 94 Mich. L. Rev. 2178, 2213-14 (1996). Pseudotext are rules promulgated by individuals (such as congressional staff members) who lack the authority to issue rules.

[110] In response to the new textualists, some commentators argue that the role that staff assumes in the legislative process is no less justified than the role that law clerks play in the adjudicatory process. Just as members of Congress do not write committee reports, judges often allow their law clerks to draft judicial opinions. However, the analogy fails. Judges ultimately sign, or at least formally join, opinions. Legislatures do not formally vote on committee reports, and even the committees that report bills do not sign or formally vote on the reports.

[111] Michael J. Malbin, Unelected Representatives: Congressional Staff and the Future of Representative Government 240-42 (1980).

contrary to their employers' interests. For instance, Malbin concludes that staffers efforts as policy entrepreneurs generally reflect the legislators' interests, not those of the staffs.

Given the members' time constraints, as well as the breadth and complexity of issues they must address, it may not be possible to reduce the current level of staff involvement in the legislative process. Indeed, the Supreme Court long ago reconciled itself to the high level of staff participation in agency decisionmaking. The Court, in a series of decisions from 1936 to 1941, decided that the degree of staff involvement in administrative decisionmaking does not provide a basis for challenging those decisions. Initially, in the first of four decisions in *Morgan v. United States*, the Court declared that the agency official "who decides must hear," meaning that the official who decides an issue must personally consider and appraise the relevant evidence.[112] Thus, the Supreme Court held that the trial court had erred in dismissing a claim that the Secretary of Agriculture's order setting the maximum livestock prices could not stand because the Secretary had not personally heard or read any of the relevant evidence.[113] In the succeeding series of decisions revisiting the controversy, the Court ultimately found its effort to police the level of staff involvement in administrative decisionmaking to be unworkable.[114]

The legitimate difference of opinion concerning the costs and benefits attendant to legislative staffs' current role suggests that the issue of the level of staff involvement is not an appropriate one for judicial resolution. Moreover, Congress has not ignored staffing issues. Rather, Congress revisits and acts on the subject periodically and even considered the subject during the recent comprehensive examination of its organization. In 1995, the House reduced committee staffs by one-third.[115]

Finally, the disregard of legislative history would not cure the problem of excessive staff involvement in the legislative process, even if we were to concede the correctness of the new textualists' perceptions and judgments about the excessive influence of staff. The ubiquity of staff and the time constraints on legislators mean that staff are no less involved in drafting and negotiating statutory text than in drafting and negotiating legislative history. Members of Congress have no more time to parse statutory language than they do to consider the more readable legislative history. Thus, an exclusive focus on legislative history will almost certainly not change the congressional dynamic that has led to the omnipresent and central role of staff. In short, the new textualist argument for disregarding legislative history because of staff involvement again involves improper intrusion into congressional judgments about issues on which reasonable people can disagree.

---

[112] Morgan v. United States ("Morgan I"), 298 U.S. 468, 481-82 (1936), rev'd by 304 U.S. 1 (1938).

[113] Morgan alleged that the Secretary of Agriculture had relied solely on consultations with his subordinates in making the challenged decision. See id. at 474-46 & n.1, 482.

[114] See United States v. Morgan ("Morgan IV"), 313 U.S. 409, 422 (1941); Morgan v. United States ("Morgan II"), 304 U.S. 1, 17-18 (1938), overruled by 313 U.S. 409 (1941)

[115] H. Res. 6, 104th Cong. (1995) (enacted) (Sup. Docs. No. Y1.1/8:104- 6). Congress not only has periodically considered its staffing needs, but also has addressed the issue of dominance of committee staff by committee chairs. The effort to ameliorate this problem has involved funding minority staff positions.

VI. Conclusion

In many ways the conventional approach to interpreting statutes, reading text in the context of limited portions of legislative history, is a sound approach in need of a supporting theory. As we have seen, justifying the use of legislative history based on the concept of legislative intent has produced two consequences. First, when scholars, from Max Radin to the new textualists, began to argue that the legislature could only be treated as the sum of individual legislators, the notion of legislative intent became untenable. Even when scholars who found legislative intent useful argued that a legislature should be viewed as an institution in which authority is delegated to certain institutional actors subject to expressions of assent by the entire chamber, they did not provide a convincing normative reason for viewing the vote on the statute as an endorsement of the explanatory statements provided by the institutional actors. Second, the concept of "legislative intent," in conjunction with both the argument that the legislature is merely the sum of individuals and the documentation of more of the legislative process, has produced serious methodological consequences. Interpretation of statutes has almost become a factual inquiry into subjective intent in which courts either lack the most probative evidence or seem to arbitrarily refuse to pursue all the relevant evidence.

The public justification approach addresses these problems. It provides a basis for asserting that legislatures have a duty not merely to enact statutes, but to explain them as well, and that accordingly legislators have a duty to respond to the institutional explanations of those statutes. The public justification approach allows courts to examine legislative history without conceiving of the interpretive task as a factual inquiry into subjective intent and provides something of a guide to distinguishing documents that should be given weight in the interpretive process from those documents that should not.