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## WITHOUT THE PRETENSE OF LEGISLATIVE INTENT

*John F. Manning\**

### INTRODUCTION

The much-discussed *King v. Burwell*<sup>1</sup> decision presented the very complexities that make statutory interpretation simultaneously frustrating and fun.<sup>2</sup> How should a court handle an unanticipated issue that arises after enactment? What should a court do when a piece of the statutory text, as written, does not further the statute's overall policy? What does it mean to be a faithful agent in those circumstances? What inherent powers does a court have to fix statutory problems on its own account?

The question in *Burwell* was breathtakingly important: whether people in thirty-four states were eligible for the health insurance tax credits that the Affordable Care Act<sup>3</sup> (ACA) relied on to keep healthy people in the risk pool, even as the Act simultaneously gave such people the right to buy health care at no extra cost after they became ill.<sup>4</sup> The problem at issue in *Burwell* was that, for some reason, Congress made the tax credits available only to those who buy their policies through a specified government clearinghouse — an American Health Benefit Exchange “established by [a] State under [Section] 1311” of the ACA.<sup>5</sup> On its face, that language pretty clearly excludes people who bought their policies

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\* Morgan and Helen Chu Dean and Professor of Law, Harvard Law School. I thank Bradford Clark, Daniel Coquillette, Susan Davies, Jack Goldsmith, Tara Grove, William Kelley, Gillian Metzger, Martha Minow, Henry Monaghan, Frederick Schauer, and Adrian Vermeule for their thoughtful comments. I am also grateful for the insightful questions that were asked by faculty and students at the Scalia Lecture at Harvard Law School in March 2017. I thank Alex Miller for outstanding research assistance.

<sup>1</sup> 135 S. Ct. 2480 (2015).

<sup>2</sup> For an excellent account of these difficulties, see Abbe R. Gluck, *The Supreme Court, 2014 Term — Comment: Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62 (2015).

<sup>3</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

<sup>4</sup> In *Burwell*, the Court explained the role of tax subsidies in the overall scheme of the ACA. To simplify: The statute requires insurers to cover individuals with preexisting conditions without charging higher premiums. *Burwell*, 135 S. Ct. at 2486 (discussing 42 U.S.C. § 300gg-1(a) (2012)). In order to prevent healthy individuals from staying out of the insurance pool and buying insurance only when they get sick, the ACA imposes an individual mandate requiring everyone either to have health insurance or to pay a tax or penalty to the Internal Revenue Service. *Id.* (quoting 42 U.S.C. § 18091(2)(I)). Because of the high cost of health insurance, the tax credit makes it possible for lower-income individuals to buy such insurance rather than pay the tax or penalty. *See* 26 U.S.C. § 36B (2012); *Burwell*, 135 S. Ct. at 2487.

<sup>5</sup> 26 U.S.C. § 36B. Section 1311 provides that “[e]ach State shall . . . establish an American Health Benefit Exchange . . . for the State.” 42 U.S.C. § 18031(b)(1).

through the alternative Exchanges that another provision — Section 1321 of the Act — empowers the Secretary of Health and Human Services (HHS) to establish when a state elects not to set up one of its own.<sup>6</sup> No one seemed to anticipate that so many states — again, thirty-four in all<sup>7</sup> — would elect not to establish Exchanges; it was potentially a body blow to the Act's success.

The Court divided over whether to read the tax credit provision literally. Despite that provision's surface clarity, the majority read it to authorize payments to individuals purchasing insurance through *any* Exchange established pursuant to the Act. In the Court's view, the Act's technical definition of "Exchange" introduced a shadow of a doubt about whether Congress had treated state- and HHS-run Exchanges as equivalents for purposes of the tax credit provision.<sup>8</sup> The Court also thought that reading that provision as written would create weird incongruities with many other ACA provisions.<sup>9</sup> Most importantly, reading the statute to make the tax credit unavailable in thirty-four states would directly undermine the legislation's overall purposes.

In dissent, Justice Scalia cried foul, arguing that there was simply no way to read "Exchange established by [a] State under [S]ection 1311" to cover an Exchange established by HHS under Section 1321.<sup>10</sup> To him,

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<sup>6</sup> 42 U.S.C. § 18041(c) (codifying Section 1321 of the ACA).

<sup>7</sup> *Burwell*, 135 S. Ct. at 2487.

<sup>8</sup> In particular, the Court stressed that the ACA "defines the term 'Exchange' to mean 'an American Health Benefit Exchange established under [S]ection [1311].'" *Id.* at 2490 (quoting 42 U.S.C. § 300gg-91(d)(21)). Hence, all Exchanges are defined as those established under the provision authorizing state-established Exchanges. In addition, when a state forgoes establishing an Exchange under Section 1311, Section 1321 instructs the Secretary of HHS to establish "*such* Exchange" in the state's place. 42 U.S.C. § 18041(c) (emphasis added). In the Court's view, "[b]y using the phrase 'such Exchange,' Section [1321] instructs the Secretary to establish and operate the *same* Exchange that the State was directed to establish under Section [1311]." *Burwell*, 135 S. Ct. at 2489.

<sup>9</sup> See *Burwell*, 135 S. Ct. at 2491–92. For example, the Court pointed to "several provisions that assume tax credits will be available on both State and Federal Exchanges." *Id.* at 2491. Among other things, the Court noted, "the Act requires all Exchanges to create outreach programs that must 'distribute fair and impartial information concerning . . . the availability of premium tax credits under section 36B.'" *Id.* (omission in original) (quoting 42 U.S.C. § 18031(i)(3)(B)). In the Court's view, applying such a requirement to federally established Exchanges "would make little sense" if those who buy health insurance through such Exchanges are not entitled to those tax credits. *Id.* at 2492.

<sup>10</sup> Justice Scalia thus wrote:

Words no longer have meaning if an Exchange that is *not* established by a State is "established by the State." It is hard to come up with a clearer way to limit tax credits to state Exchanges than to use the words "established by the State." And it is hard to come up with a reason to include the words "by the State" other than the purpose of limiting credits to state Exchanges.

*Id.* at 2497 (Scalia, J., dissenting).

moreover, this odd statute produced just as many incongruities under the majority's reading as under a more "conventional" reading.<sup>11</sup>

Why start an Essay about the history of statutory interpretation at Harvard Law School with *King v. Burwell* and the ACA? The case encapsulates themes and concerns that defined the work of many of Harvard's most prominent judges and scholars who wrote about how to read statutes. The ACA, not to mention the process that produced it, was a mess. If ever a statutory outcome reflected path dependence, it was the one with which the Court struggled in *Burwell*.<sup>12</sup> Given the incongruities in the statute and the chaotic and closely fought enactment process, one cannot plausibly conclude that Congress decided — that is, formed a "legislative intent" about — the question of whether tax credits should be paid in states in which HHS established Exchanges.<sup>13</sup> And, yet, the Court nonetheless concluded that tax credits must be available through either kind of Exchange because that was the way "Congress meant the Act to operate" and because a contrary reading would not effectuate the ACA "as Congress intended."<sup>14</sup>

*Burwell* represents a long tradition of the Court's taking a hard, even insoluble question and asserting that it has identified what

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<sup>11</sup> See *id.* at 2498–99.

<sup>12</sup> The ACA passed by the thinnest of margins, with literally not a vote more than the sixty needed for Senate cloture. See John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 LAW LIBR. J. 131, 154–58 (2013); see also STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, R. XXII § 2, at 16 (2013). And Professor Abbe Gluck has shown that the incongruities grew out of the Senate bill, which awkwardly mashed together two committees' bills that had handled the Exchange question quite differently. See Gluck, *supra* note 2, at 76–79. After the initial passage of the House and Senate bills, one might have expected that a House-Senate Conference would fix the incongruities in the mashed-up Senate bill. See *id.* at 78. But when Massachusetts elected Republican Scott Brown to the Senate in a special election held soon after the initial vote in both Houses, the Democrat majority suddenly lost its sixtieth vote for cloture on any amended version of the Senate bill. See *id.* In order to pass the ACA, the House had to adopt the Senate bill as it was, warts and all, without any chance for a conference to clean up the bill's incongruities. See *id.*

<sup>13</sup> In light of the procedural history, it is not clear how one would even go about reconstructing what Congress meant or intended. Since Senator Brown supplied the forty-first vote for the Republican filibuster, would we want to know his intention about how to answer the question if he were to vote to solve it? Or, since any of the forty-one Republican Senators could have provided that key vote, should the Court try to figure out the softest nay vote and imagine what he or she would have done? Should it be the hypothetical median position of the forty-one holdouts? And how should we take into account the possibility that perhaps none of them would vote for cloture under any circumstances or, at least, not under any circumstances that would have been acceptable to the then-Democrat majority and President? Should we try to figure out what the median voter in Congress would have done? Even if we could figure that out (and, in this case, perhaps we could), why should it matter if the median voter could not fix the legislation without busting the Republican filibuster?

<sup>14</sup> *Burwell*, 135 S. Ct. at 2494 (second quoting Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 702 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting)).

Congress *intended* to do about that very question.<sup>15</sup> Though the search for legislative intent may include (as in *Burwell*) consultation of the statute's background purpose or "general aim,"<sup>16</sup> the Court's invocation of intent commonly refers to something more ambitious — the premise that interpreters can somehow zero in on "the specific, particularized application which the statute was 'intended' to be given" in the circumstances of the case.<sup>17</sup> Or as Judge Posner once wrote, it is an effort "to think [one's] way . . . into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar."<sup>18</sup> On that account, even when Congress has not explicitly answered a question, even when it has sent conflicting signals, or even when it has enacted a policy that seems more than a little bit off, the judge properly asks what Congress intended about the problem at hand and then attributes the answer to the legislature.

In work ranging from legal realism to Legal Process purposivism to the formalist "new textualism," a long line of Harvard judges and law professors have resisted that intentionalist frame of analysis. In the hard cases that judges and law professors worry about (cases like *Burwell*), legislative intent is a fiction, something judges invoke to elide the fact that they are constructing rather than identifying a legislative decision. And many Harvard judges and professors have made it their project to separate statutory interpretation from the security blanket of "legislative intent," replacing it with a less soothing but franker assessment of how alternative approaches allocate power among competing government institutions.

Certainly, human beings routinely *attribute* intentions to multimember institutions such as sports teams, businesses, and armies.<sup>19</sup> But when the questions get tough, those intentions are constructed, not

<sup>15</sup> See *infra* text accompanying notes 27–32.

<sup>16</sup> Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 370 (1947). Professor Archibald Cox noted that "intent" is sometimes used in that broader sense. See *id.* at 370–71. This Essay uses "intent" in a second, more technical sense. See *infra* note 17 and accompanying text. Note that the invocation of a statute's purpose or general aim carries its own set of challenges. See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 876–77 (1930) (discussing the problems of identifying the proper level of generality at which to describe a statute's purpose).

<sup>17</sup> Cox, *supra* note 16, at 371.

<sup>18</sup> Richard A. Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983).

<sup>19</sup> See, e.g., STEPHEN BREYER, ACTIVE LIBERTY 87 (2005) (observing that it is common "to speak of the intentions of an army or a team, even when they differ from those of any, or every, soldier or member"); ROBERT A. KATZMANN, JUDGING STATUTES 34–35 (2014) (making a similar point about "local governments, trade associations, and businesses," *id.* at 35).

real.<sup>20</sup> Hence, in the case of statutory interpretation, the challenge is how to decide what *should* count as Congress's decision and to determine what creative license judges *should* have to build upon or repair Congress's handiwork. Should the Court in *Burwell* have read the tax credit provision in a way that made the statute more coherent with the general background purposes evident from the overall statutory scheme? Or should it have hugged the seemingly plain language of the most immediately applicable text, as Justice Scalia would have?<sup>21</sup> Each position has a plausible institutional grounding in legislative supremacy and judicial power; neither can claim to capture an *actual* decision made by Congress on the question at issue.

Though an institutional approach to reading statutes is hardly the exclusive preserve of Harvard judges and scholars,<sup>22</sup> such an approach has pervaded Harvard's take on statutes for more than half of its two centuries. Having very little material to work with (the Constitution says almost nothing directly),<sup>23</sup> a good deal of Harvard's legislation scholarship focuses on theories of legislative and judicial power rather than on trying to perfect the search for legislative intent. In particular, a hallmark of Harvard's contributions to the field has been what Professors Henry Hart and Albert Sacks came to describe as "institutional settlement" — the proposition that fights about interpretation theory are really fights about different actors' complex institutional roles and relationships.<sup>24</sup> That theme, in fact, has run through the work of Harvard's realists, progressives, New Dealers, Legal Process purposivists, and modern formalists. Thinkers as far apart in their *prescriptions* as Dean James Landis and Justice Scalia used the same *framework* for analysis — the one formalized and named by Hart and Sacks. All of these thinkers, moreover, have tried to answer the same puzzle: how to

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<sup>20</sup> Scholars who invoke legislative intent are more apt than the Court to acknowledge that the idea is a construct or metaphor for something more complex. See, e.g., Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 81 (2012).

<sup>21</sup> See *King v. Burwell*, 135 S. Ct. 2480, 2496–97 (2015) (Scalia, J., dissenting) (emphasizing the clear import of the tax credit provision).

<sup>22</sup> See, e.g., Jerry Mashaw, *As if Republican Interpretation*, 97 YALE L.J. 1685, 1686 (1988) (arguing that any interpretive method necessarily reflects a theory of appropriate "institutional roles" for the actors involved); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 593–94 (1995) (maintaining that every theory of interpretation involves a theory of legislation and of adjudication). Obviously, the institutional approach applies with no less force to the way agencies approach Acts of Congress and the way courts review agency interpretations of law. For simplicity, this Essay will focus on the relationship between Congress and the judiciary.

<sup>23</sup> See *infra* note 187 and accompanying text.

<sup>24</sup> See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 4–5 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958).

recognize Congress's pride of place in statutory decisions while also accepting that Congress typically makes no actual decision on the hard questions that occupy judges and law professors.

Part I of this Essay briefly traces the thread of intent skepticism through the work of many Harvard judges and law professors. While not every one of these examples displays a thoroughgoing form of intent skepticism, all recognize that statutory meaning inevitably runs out and that judges must take up where the statute leaves off. Part II sketches prominent examples of normative approaches that Harvard's interpretation theorists have used to define legislative supremacy and judicial power. Part III then contends that the leading schools of thought in the Harvard tradition do a surprisingly good job of (a) articulating how a preferred approach furthers Congress's constitutional position without (b) claiming to find Congress's actual decisions. It also briefly considers some alternatives to the first-order institutional debates that have defined most of those schools of thought.

Before turning to the analysis, let me offer three clarifying statements that lie somewhere between glossary and disclaimer. First, to keep the narrative manageable, this Essay tells the story of statutory interpretation at Harvard mainly through judges who went here and professors who taught here. And because Harvard has remained so active in this field, the need for manageability — really, for triage — has limited the Essay's focus almost entirely to judges and professors who are no longer active today. Second, like Professor Adrian Vermeule's Essay on administrative law in these pages, my interest here is primarily analytical rather than historical.<sup>25</sup> That is, although it should come as no surprise that many of the prominent figures in this Essay had fairly close connections to one another as Harvard teachers, students, or colleagues,<sup>26</sup>

<sup>25</sup> See Adrian Vermeule, Essay, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2466 (2017).

<sup>26</sup> For example, during his brief time as a student at Harvard Law School, future Dean Roscoe Pound was Professor John Chipman Gray's student. See N.E.H. HULL, ROSCOE POUND & KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 109 (1997); DAVID WIGDOR, ROSCOE POUND: PHILOSOPHER OF LAW 39 (1974). Future Harvard Law School Professor and Supreme Court Justice Felix Frankfurter, moreover, served as Gray's research assistant. See Brad Snyder, *The House that Built Holmes*, 30 LAW & HIST. REV. 661, 671 n.50 (2012). Graduate student (and later-Dean) James Landis took federal jurisdiction with then-Professor Frankfurter, and the two collaborated on scholarship after Landis joined the faculty. See ARTHUR E. SUTHERLAND, THE LAW AT HARVARD 301–02 (1967). Professor Frankfurter also taught Hart, who later taught Sacks. See William N. Eskridge, Jr. & Philip P. Frickey, Commentary, *The Making of The Legal Process*, 107 HARV. L. REV. 2031, 2033–34, 2041 (1994) [hereinafter Eskridge & Frickey, *Legal Process*]. And Justice Scalia was one of at least five Harvard-educated Justices who, as students, took the Legal Process course developed by Hart and Sacks. See William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term — Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 27 (1994) [hereinafter Eskridge & Frickey, *Law as Equilibrium*] (noting that Justices Scalia, Kennedy, Souter, Ginsburg, and Breyer took the Legal Process course while at Harvard).

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the point here is not to demonstrate causal connections running through their work (as a historian might try to do), but rather to investigate a strong analytical theme that has been a consistent feature of Harvard's tradition. Third, to state that the institutional theme describes a prominent line of thinking at Harvard is not to suggest that it is the only strain of thought there. But, as you will see, the diverse set of thinkers who subscribe to the institutional theme is an impressive one, as is the degree to which they build on common premises.

### I. INDETERMINACY AND INTENT SKEPTICISM

The appeal of the idea of legislative intent is undeniable. American judges have invoked it from the beginning of the Republic. The objective of seeking "intended meaning," moreover, finds support in prominent strains of both language theory and political theory. To put it simply, someone trying to decipher another person's utterance presumably wants to know what the speaker meant to say. And if one wishes to respect the decisions of Congress, then one might want to identify what policies the majority intended to adopt. Despite those considerations, however, the reality seems to be that a complex, multimember legislature likely has no genuine intent about the outcomes in the hard cases that make their way into court.

Section I.A discusses the factors that seem to have given the concept of legislative intent its considerable staying power. Section I.B discusses ways in which Harvard judges and scholars have expressed doubts about actual legislative intent and consequently about its primacy as an organizing principle in statutory interpretation.

#### A. *The Case for Legislative Intent*

Several considerations underpin the judiciary's invocation of legislative intent. For one thing there is tradition. From the earliest days of the Republic, the Supreme Court has sought to trace statutory outcomes to legislative intent. No later than the Marshall Court, the Justices declared it obvious that "the duty of the court [is] to effect the intention of the legislature."<sup>27</sup> In those formative years, opinion after opinion made clear that the object of interpretation was to implement

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I offer these examples not in an effort to exhaust all of the connections among Harvard's statutory interpretation scholars or to establish how one thinker may or may not have influenced the next. To do either of those tasks would require a different kind of Essay. Instead, I offer these examples simply to underscore the obvious fact that many of Harvard's leading thinkers in this debate had occasions for meaningful interaction with one another through the school.

<sup>27</sup> *Schooner Paulina's Cargo v. United States*, 11 U.S. (7 Cranch) 52, 60 (1812).

the “will,” “intent,” “design,” or “mind” of the legislature.<sup>28</sup> And while the Court’s emphasis and technique have changed from period to period,<sup>29</sup> a focus on legislative intent has been a constant in the Court’s doctrine ever since.<sup>30</sup> “In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress.”<sup>31</sup> This idea has even retained some resonance in the age of textualism (if that is the age we are in).<sup>32</sup>

To longstanding tradition one can add prominent strains of language theory. Anyone who has ever had to tell a fellow human, “That’s not what I meant,” understands why some language philosophers claim that meaning depends on what a speaker intends to convey by the words he or she has used.<sup>33</sup> Of course, some estimable philosophers take a different view — perhaps most prominently, that meaning is a function of social practice or context rather than speakers’ intent.<sup>34</sup> But that reality does not negate the intuitiveness of the proposition that when a listener

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<sup>28</sup> *E.g.*, *Pennock v. Dialogue*, 27 U.S. (2 Pet.) 1, 21 (1829) (Story, J.) (“[T]he will of the legislature must still be obeyed. It cannot and ought not to be disregarded, where it plainly applies to the case.”); *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.) (“Where the intent is plain, nothing is left to construction. Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived . . .”); *Pennington v. Coxe*, 6 U.S. (2 Cranch) 33, 52 (1804) (Marshall, C.J.) (concluding that the object of interpretation is to “discover[] the mind of the legislature”).

<sup>29</sup> *See generally* Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149 (2001).

<sup>30</sup> *See, e.g.*, *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975) (“Our objective in a case such as this is to ascertain the congressional intent and give effect to the legislative will.”); *ICC v. Baird*, 194 U.S. 25, 38 (1904) (“The object of construction, as has been often said by the courts and writers of authority, is to ascertain the legislative intent, and, if possible, to effectuate the purposes of the lawmakers.”); *Rodgers v. United States*, 185 U.S. 83, 86 (1902) (“The primary rule of statutory construction is, of course, to give effect to the intention of the legislature.”).

<sup>31</sup> *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 542 (1940).

<sup>32</sup> *See, e.g.*, *Dan’s City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013) (“[W]e focus first on the statutory language, ‘which necessarily contains the best evidence of Congress’ pre-emptive intent.” (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993))); *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 838 (1990) (finding “that the plain language” of the governing statute “evidences clear congressional intent”).

<sup>33</sup> *See, e.g.*, Stanley Fish, *Intention Is All There Is: A Critical Analysis of Aharon Barak’s Purposive Interpretation in Law*, 29 CARDOZO L. REV. 1109, 1112 (2008); Steven Knapp & Walter Benn Michaels, *Against Theory*, 8 CRITICAL INQUIRY 723, 724 (1982). Intentionalist law professors have followed suit. *See, e.g.*, Larry Alexander & Saikrishna Prakash, “*Is That English You’re Speaking?*” *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 977 (2004).

<sup>34</sup> *See, e.g.*, LUDWIG WITTMENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 134–142 (G.E.M. Anscombe trans., 3d ed. 1953) (emphasizing word usage and practice within a linguistic community); John R. Searle, *Literal Meaning*, 13 ERKENNTNIS 207, 207 (1978) (arguing that meaning is a function of background assumptions and context).

wants to know what a word or phrase means, he or she “is only interested in learning what meaning [the speaker] is trying to convey.”<sup>35</sup>

No less intuitive is the claim of political philosophers that anyone serious about legislative supremacy must, at some level, care about legislative intent. Professor Joseph Raz thus asks, if “the law made by legislation is not the one intended by the legislature,” then “why does it matter who the members of the legislature are, whether they are democratically elected or not, whether they represent different regions in the country, or classes in the population, whether they are adults or children, sane or insane?”<sup>36</sup> For that reason, it is perhaps unsurprising that the idea of legislative intent is closely linked to the constitutional premise of legislative supremacy.<sup>37</sup> If we are to respect Congress’s place as the government’s chief policymaker (within constitutional limits), presumably we want to know what policy decisions Congress made or would have made in contested cases.

For all of these reasons, the idea of legislative intent has been a highly durable organizing principle in the law of statutory interpretation.

### B. *The Case for Intent Skepticism*

However attractive the idea of “legislative intent” might seem, there is good reason to doubt whether a judge can find any such thing in any case worth worrying about. With the complexity and opacity of the legislative process, it is said that no one can really “imagine” what a majority of legislators would do (or would have done) about a question that the statute does not clearly resolve.<sup>38</sup> And NYU and Oxford Professor (and Harvard Law School graduate) Ronald Dworkin showed

<sup>35</sup> Frank E. Horack, Jr., *In the Name of Legislative Intention*, 38 W. VA. L.Q. 119, 120 (1932). Professor Horack illustrates his point as follows:

When X says, “A big bundle of bills came this morning”, does Y know what X received? Was it a handsome stack of ‘greenbacks’, bothersome evidences of unpaid debts, or a package intended for his friend, William? The statement is clear to X; to Y it may or may not be ambiguous.

*Id.*

<sup>36</sup> Joseph Raz, *Intention in Interpretation*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 258, 264–66 (Robert P. George ed., 1996).

<sup>37</sup> See, e.g., T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 23 (1988) (explaining without endorsing the connection); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 251–52 (1992) (same).

<sup>38</sup> In one of the most famous articulations of this point, legal realist Max Radin wrote that the odds that “several hundred” legislators “will have exactly the same determinate situations in mind . . . are infinitesimally small.” Radin, *supra* note 16, at 870. And “[e]ven if the contents of the minds of the legislature were uniform, we have no means of knowing that content except by the external utterances or behavior of these hundreds of [legislators],” which “in almost every case” involves only “the extremely ambiguous [act] of acquiescence, which may be motivated in literally

that the whole inquiry is a bit made up, at least if one is claiming to find the *actual* intent of Congress.<sup>39</sup> Since Congress is a “they,” not an “it,”<sup>40</sup> there is no natural or neutral way to aggregate legislative intent; that is, such intent does not exist as a fact in the world, simply waiting to be found. With so many different kinds of legislative, executive, and private actors contributing to the final output, exactly whose intentions should count in the tabulation of “Congress’s intent?”<sup>41</sup> Is it the intentions of the entire Congress, the enacting majority, the legislators who drafted the bill, the agency officials who helped shape it, or perhaps the President who signed it?<sup>42</sup> And even if one could decide that a particular group’s intention is dispositive (say, the enacting majority), how does one sum up the intentions of its members if they are not all of one mind on the question at hand?<sup>43</sup> On top of all that, the counterfactual question of what Congress *would have* intended to do on an ambiguous point depends entirely upon how one frames the question.<sup>44</sup> In the hard cases, in other words, legislative intent is not real. To borrow a phrase that Justice Jackson used in a different context, the Court uses legislative

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hundreds of ways.” *Id.* at 870–71. In contemporary writing, that concern is often framed by Arrow’s Theorem, which shows that when three or more lawmakers confront three or more policy choices, there may be no stable equilibrium, and the outcome of the legislative process may reflect arbitrary (or, at least, nonsubstantive) factors such as the order in which alternatives are presented. See, e.g., Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239, 241–44 (1992). See generally KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963). For the contrary suggestion that congressional procedure can and does produce a stable equilibrium, see, for example, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE 38–42 (1991).

<sup>39</sup> See RONALD DWORKIN, LAW’S EMPIRE 337–38 (1986).

<sup>40</sup> Shepsle, *supra* note 38, at 239.

<sup>41</sup> DWORKIN, *supra* note 39, at 318.

<sup>42</sup> In Dworkin’s words:

Whose mental states count in fixing the intention behind [a statute]? Every member of the Congress that enacted it, including those who voted against? Are the thoughts of some — for example, those who spoke, or spoke most often, in the debates — more important than the thoughts of others? What about the executive officials and assistants who prepared the initial drafts? What about the president who signed the bill and made it law? Should his intentions not count more than any single senator’s? . . . What about the various lobbies and action groups who played their now-normal role?

*Id.*

<sup>43</sup> Again, Dworkin makes the point with devastating pith: Should [an interpreter] use a “majority intention” approach, so that the institutional intention is that of whichever group, if any, would have been large enough to pass the statute if that group alone has voted for it? Or a “plurality” intention scheme, so that the opinion of the largest of three groups would count as the opinion of the legislature, even if the other two groups, taken together, were much larger? Or some “representative intention” approach, which supposes a mythical average or representative legislator whose opinion comes closest to those of most legislators, though identical to none of them? If the last, how is the mythical average legislator to be constructed?

*Id.* at 320–21 (citations omitted).

<sup>44</sup> See *id.* at 325–27.

intent almost as “a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.”<sup>45</sup>

Harvard’s statutory interpretation scholarship has consistently stressed variants of that theme. In much of this work, the bottom line has been that, in the hard cases, “Congress” has not actually formed an intention on (*viz.* resolved) the precise question at issue. Although couched in stronger or weaker terms, the central point has been that when meaning runs out, judges must acknowledge their own creative or lawmaking function rather than pretend to reconstruct legislative intent.

Perhaps the earliest hint of such skepticism comes in then-Judge Oliver Wendell Holmes’s famous article, *The Theory of Legal Interpretation*.<sup>46</sup> In that paper, Judge Holmes spoke of interpreting all sorts of written instruments. With respect to contracts, he wrote that while “the purpose of written instruments is to express some intention or state of mind of those who write them,” the parties to a contract — especially a contract that goes to litigation — may have different intentions concerning its meaning.<sup>47</sup> Hence, Judge Holmes wrote, unless the court is willing to void contracts in such circumstances, the judge should presume that the parties “will understand [one another’s] words according to the usage of the normal speaker of English under the circumstances.”<sup>48</sup>

Judge Holmes applied the same lesson to statutes. He allowed that “it would be possible to say that as we are dealing with the commands of the sovereign the only thing to do is to find out what the sovereign wants.”<sup>49</sup> That approach, however, would make sense only “[i]f supreme power resided in the person of a despot.”<sup>50</sup> Likening the proper approach to statutes to “our way of dealing with a contract,” Judge Holmes wrote that “[w]e do not inquire what the legislature meant; we ask only what the statute means.”<sup>51</sup> Thus, although he (characteristically) offered little detail for his rationale, Judge Holmes plainly forswore the pretense of seeking a legislature’s actual decision on matters requiring interpretation.

In the 1909 Carpentier Lectures — published as *The Nature and Sources of Law* — Professor John Chipman Gray offered a more explicit

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<sup>45</sup> *FTC v. Ruberoid Co.*, 343 U.S. 470, 487–88 (1952) (Jackson, J., dissenting).

<sup>46</sup> See Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899).

<sup>47</sup> *Id.* at 419.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

account of intent skepticism.<sup>52</sup> An early legal realist,<sup>53</sup> Gray believed that a legislature lacked intent in all but the easiest cases:

Interpretation is generally spoken of as if its chief function was to discover what the meaning of the Legislature really was. But when a Legislature has had a real intention, one way or another, on a point, it is not once in a hundred times that any doubt arises as to what its intention was.<sup>54</sup>

From that starting point, Gray deemed it evident that “the difficulties of so-called interpretation arise when the Legislature has had no meaning at all” — that is, “when the question which is raised on the statute never occurred to it.”<sup>55</sup> In those hard cases, “when the judges are professing to declare what the Legislature meant, they are, in truth, themselves legislating to fill up *casus omissi*.”<sup>56</sup>

In the Storrs Lectures delivered at Yale in 1921 and 1922, Harvard Law School Dean Roscoe Pound — himself a student of Gray’s<sup>57</sup> — sounded a similar theme. In calling for sociological and common law approaches to interpretation, Pound praised “the analytical jurisprudence of the last century” for showing “that the greater part of what goes by the name of interpretation . . . is really a lawmaking process, a supplying of new law where no rule or no sufficient rule is at hand.”<sup>58</sup> He reasoned that no legislature can “make laws so complete and all-embracing” as to preclude any “lawmaking function” for the judge.<sup>59</sup> And he agreed with Gray that, in difficult cases, the legislature “had no actual intent” on the question at issue.<sup>60</sup> For Pound, cases appropriate for “genuine interpretation [would be] relatively few and simple.”<sup>61</sup> And “genuine interpretation of the existing rules” would often reveal “that

<sup>52</sup> See JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF LAW* (1909).

<sup>53</sup> See William N. Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell*, 61 GEO. WASH. L. REV. 1731, 1736 n.31 (1993) (describing Gray as a “pre-realist”); Stephen A. Siegel, *John Chipman Gray and the Moral Basis of Classical Legal Thought*, 86 IOWA L. REV. 1513, 1529 & n.111, 1539 (2001) (observing that “scholars who focus on [Gray’s] jurisprudential writing treat him as a proto-realist,” *id.* at 1529). Some associate Gray with the progressive movement. See William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799, 823–26 (1985) (treating Gray as a progressive). Which of the two is the better fit has no impact on the analysis here.

<sup>54</sup> See GRAY, *supra* note 52, at 165.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See HULL, *supra* note 26, at 109; WIGDOR, *supra* note 26, at 39.

<sup>58</sup> ROSCOE POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 103 (1922).

<sup>59</sup> *Id.* at 105.

<sup>60</sup> *Id.* at 108; see also *id.* at 103 (reiterating Gray’s position that “the difficulties of so-called interpretation arise when the legislature has had no meaning at all” (quoting GRAY, *supra* note 52, at 165)).

<sup>61</sup> *Id.* at 105.

none is adequate to cover the case and that . . . a new one must be supplied.”<sup>62</sup> In that light, Pound thought that the impulse to ascribe judicial outcomes to legislative decisions was just a misplaced “attempt to maintain the separation of powers” by “rigidly fenc[ing] off” legislative from judicial functions.<sup>63</sup>

A similar thread ran through the work of prominent New Dealer and Harvard Law School Dean James Landis. For institutional reasons, Landis did embrace the relevance and the possibility of a legislative intent in one context.<sup>64</sup> But he allowed that in the hard cases in which “the meaning of the legislature is not discoverable,” courts invoke “the

<sup>62</sup> *Id.* at 104.

<sup>63</sup> *Id.* at 103–04.

<sup>64</sup> Landis allowed that legislative history might reveal legislative intent. James M. Landis, A “Note” on *Statutory Interpretation*, 43 HARV. L. REV. 886, 888–89 (1930). In a famous passage, he wrote that this conclusion reflected “the realities of legislative procedure.” *Id.* at 888. In particular, “[t]hrough the committee report, the explanation of the committee chairman, and otherwise, a mere expression of assent becomes in reality a concurrence in the expressed views of another.” *Id.* at 888–89 (footnotes omitted). In other words, because legislative practice had come to treat the utterances of certain pivotal actors as authoritative explanations of the bill’s detailed meaning or purposes, the views expressed by those actors become “the common possession of the majority.” *Id.* at 889.

Although Landis spoke in terms of “real” legislative intent, *id.*, notice that he did not claim that most legislators who cast an “aye” vote have *actually* read or assented to the contents of the reports or sponsor’s statements, *id.* at 888. However he may have framed his argument, Landis seems to have been referring to *constructive* intent — *imputing* the utterances of pivotal committees or legislators to the enacting majority based on “realities of legislative procedure.” And by that he presumably meant that Congress had come to operate under a tacit understanding or expectation that those pivotal actors would speak for the majority when they specified the details or aims of a bill.

Two great Harvard judges made Landis’s allocation-of-power point explicit. The first, Judge Learned Hand, made the point very shortly after Landis did. In *SEC v. Robert Collier & Co.*, 76 F.2d 939 (2d Cir. 1935), *rev’d sub nom. SEC v. Stock Mkt. Fin.*, 79 F.2d 1010 (2d Cir. 1935), Judge Hand wrote:

It is of course true that members who vote upon a bill do not all know, probably very few of them know, what has taken place in committee. On the most rigid theory possibl[e] we ought to assume that they accept the words just as the words read, without any background of amendment or other evidence as to their meaning. But courts have come to treat the facts more really; they recognize that while members deliberately express their personal position upon the general purposes of the legislation, as to the details of its articulation they accept the work of the committees; so much they delegate because legislation could not go on in any other way.

*Id.* at 941. Judge Henry Friendly wrote to similar effect that Members of Congress “relied for the details [of legislative policy] on members who sat on the committees particularly concerned, and were quite willing to adopt these committees’ will on subordinate points as their own.” Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in BENCHMARKS 196, 216 (1967). Starting as a statement about legislative intent, the Landis position evolved into one about internal delegation — about structuring the legislative process in a way that enabled Congress to meet the increasing, and increasingly complicated, demands of modern legislation.

intent of the legislature” as a way to elide “their rôle as actual lawgivers.”<sup>65</sup> This habit, he added, permits the judge to “talk[] in terms of the intent of the legislature, as if the legislature had attributed a particular meaning to certain words, when it is apparent that the intent is that of the judge.”<sup>66</sup> Even worse, when judges actually undertook to rewrite an awkward or unjust statute “[u]nder the guise of interpretation,” they engaged in what Landis regarded as a form of “dissembling” that “discredit[ed] the conception that there is any science of interpretation.”<sup>67</sup>

Perhaps most surprising is the fact that intent skepticism also underlay the Legal Process approach of Professors Hart and Sacks. The legal academy’s most prominent purposivists, Hart and Sacks argued that, while interpreters should read statutes “so as to carry out the[ir] purpose,” they should eschew any pretense of seeking “intention of the legislature with respect to the matter at issue.”<sup>68</sup> As noted, in the terms of the trade, “purpose” typically connotes the *general* aims of legislation, whereas “intent” refers to claims about the *specific* way the legislature meant to answer the precise question at issue.<sup>69</sup> Hart and Sacks thought it possible to identify the former but fanciful to try to reconstruct the latter. For them, “the overwhelming probability” in difficult cases was “that the legislature gave no particular thought to the matter [at issue] and had no intent concerning it.”<sup>70</sup> Moreover, interpreters would have no good way to reconstruct such intent even if it *did* exist:

[O]n what basis does a court decide what [the] legislature . . . would have done had it foreseen the problem? Does the court consider the political structure of the . . . legislature? Does the court weigh the strength of various pressure groups operating at the time? How else can the court form a judgment as to what the legislature would have done?<sup>71</sup>

Other prominent purposivists — those who helped lay the foundation for the Legal Process approach — shared this intent skepticism. Among them were Harvard lawyers no less prominent than Justice

<sup>65</sup> Landis, *supra* note 64, at 891.

<sup>66</sup> *Id.*

<sup>67</sup> James McCauley Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213, 218–19 (Roscoe Pound ed., 1934).

<sup>68</sup> HART & SACKS, *supra* note 24, at 1374.

<sup>69</sup> See *supra* notes 16–17 and accompanying text.

<sup>70</sup> HART & SACKS, *supra* note 24, at 1182.

<sup>71</sup> *Id.* at 1183.

Felix Frankfurter,<sup>72</sup> Judge Learned Hand,<sup>73</sup> and Professor Archibald Cox.<sup>74</sup>

Finally, the same intent skepticism framed the formalism and textualism of Justice Scalia, who was not only Harvard educated but also a student in the Legal Process course during its heyday.<sup>75</sup> Justice Scalia thought it obvious that “with respect to 99.99 percent of the issues of construction reaching the courts, there *is* no legislative intent.”<sup>76</sup> To him, the search for “genuine” legislative intent was a “wild-goose chase.”<sup>77</sup> That conclusion reflected Justice Scalia’s assessment of the realities of the legislative process:

With regard to the vast majority of issues of statutory construction that I have confronted . . . , th[e] assumption [that there was a congressional intent] is utterly implausible. Most of th[e] issues involve points of relative

<sup>72</sup> Justice Frankfurter stressed that the question of how to interpret a statute arose only in “cases in which there is a fair contest between two readings, neither of which comes without respectable title deeds.” Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 527–28 (1947). A statute, he added, “is not . . . an expression of individual thought to which is imparted the definiteness a single authorship can give.” *Id.* at 528. And indeterminacies will arise because legislators “solve[] problems by shelving them temporarily” or by passing laws that “embody purposeful ambiguity or are expressed with a generality for future unfolding.” *Id.* On top of that come “[t]he intrinsic difficulties of language and the emergence . . . of situations not anticipated by the most gifted legislative imagination.” *Id.* at 529. In the “many instances” in which a statute was “not directed towards the troubling question” before the court, judicial efforts to speculate about what Congress would have decided “tempt[] inquiry into the subjective and might seem to warrant the court in giving answers based on an unmanifested legislative state of mind.” *Id.* at 539.

<sup>73</sup> Judge Hand wrote that legislators who adopted a statute’s language often “did not have any intent at all about the case that has come up; it had not occurred to their minds.” Learned Hand, *How Far Is a Judge Free in Rendering a Decision?*, in *THE SPIRIT OF LIBERTY* 103, 106 (Irving Dilliard ed., 3d ed. 1960). And “it is impossible to know what they would have said about [the question], if it had [occurred to them].” *Id.* And while he thought it an error for judges to be “too literal,” *id.* at 107, Judge Hand also believed that “[w]hen a judge tries to find out what [the legislature] would have intended which it did not say, he puts into its mouth things which he thinks it ought to have said.” *Id.* at 108. Note that Judge Hand did not speak with perfect consistency on the subject. See *United States v. Klinger*, 199 F.2d 645, 648 (2d Cir. 1952) (Learned Hand, J.) (“Flinch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words, and to impute to them how they would have dealt with the concrete occasion.”), *aff’d by an equally divided court*, 345 U.S. 979 (1953) (per curiam). Even in his oft-cited statement in *Klinger*, however, Judge Hand acknowledged that his job was to “impute,” and not unearth, the intended meaning. *Id.*

<sup>74</sup> As Cox put it, “[f]ew . . . legislators think in terms of the specific controversies which courts must settle by giving a statute one or another meaning.” Cox, *supra* note 16, at 371–72.

<sup>75</sup> See Eskridge & Frickey, *Law as Equilibrium*, *supra* note 26, at 27 (noting that Justice Scalia took the Legal Process course while at Harvard).

<sup>76</sup> Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 32 (Amy Gutmann ed., 1997).

<sup>77</sup> Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517.

detail, compared with the major sweep of the statute in question. That a majority of both houses of Congress (never mind the President, if he signed rather than vetoed the bill) entertained any view with regard to such issues is utterly beyond belief. For a virtual certainty, the majority of Members were blissfully unaware of the existence of the issue, much less had any preference as to how it should be resolved.<sup>78</sup>

From this starting point, he described the courts' "traditional function" as being "to 'fill in' those elements of the legal scheme which the legislature in fact never considered."<sup>79</sup> While acknowledging that this "exercise is conducted under the rubric of effectuating the legislative intent," Justice Scalia thought the process of statutory interpretation "much more creative than that."<sup>80</sup>

Obviously, not all of Harvard's judges and law professors have presented themselves as intent skeptics. Justice Breyer, for example, is among the most thoughtful contemporary proponents of the idea of legislative intent.<sup>81</sup> And, as noted, Judge Posner has articulated a particularly influential formulation of intentionalism.<sup>82</sup> Conversely, plenty of intent skeptics are not sons and daughters of Harvard.<sup>83</sup> Still, many prominent Harvard judges and professors have pressed the same powerful themes: (a) statutory meaning inevitably runs out, leaving important questions genuinely undecided; and (b) judges cannot resolve those indeterminacies by reconstructing what Congress *actually* intended. Again, that tendency cuts far and wide — from legal realists, to progressives, to New Dealers, to Legal Process purposivists, and ultimately to the new formalists. As the next Part argues, that position tends to run hand in hand with an equally pronounced tendency to think of statutory interpretation quite explicitly as a matter of proper institutional functions and roles.

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<sup>78</sup> Antonin Scalia, Speech on the Use of Legislative History 5 (delivered between Fall 1985 and Spring 1986 at various law schools) (transcript on file at the Harvard Law School Library).

<sup>79</sup> *Id.* at 8.

<sup>80</sup> *Id.*

<sup>81</sup> See Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 864–67 (1992) (describing the ways we ascribe intentions to collective institutions and the role legislative history might play in doing so).

<sup>82</sup> See *supra* text accompanying note 18.

<sup>83</sup> See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547–48 (1983) (University of Chicago); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 347–48 (1990) (Yale and Berkeley).

## II. INSTITUTIONAL SETTLEMENT

Though people have long thought of statutory interpretation in terms of the allocation of lawmaking power, Hart and Sacks gave the phenomenon a name that stuck when they called it “institutional settlement.”<sup>84</sup> The idea is straightforward. Incorporating conventional social contract theory,<sup>85</sup> institutional settlement presumes that in order to avoid “chaos” and “advance the larger purposes” of the polity,<sup>86</sup> society “establish[es] . . . regularized and peaceable methods of decision.”<sup>87</sup> And where a given legal outcome is “the product of a particular kind of procedure,” the character of that legal process will “aid in determining the effect to be given decisions arrived at in accordance with that procedure.”<sup>88</sup> Hence, basic interpretive questions — such as whether a “statute [ought] to be read as reaching [a] situation which its words literally cover but its apparent purpose does not” — require consideration “of the role which the particular processes of decision . . . play in the total complex of decisional processes which make up the institutional system as a whole.”<sup>89</sup> Put in simpler terms, the rules of interpretation allocate lawmaking power among the branches of government, and those rules should reflect and respect what, if anything, the Constitution has to say about that allocation.

Accordingly, rather than argue about the imponderable question of how best to find congressional intent, proponents of institutional settlement push interpretive theory toward questions of constitutional structure. What is the nature of judicial authority? How does the judicial power relate to the legislative power? Are judges the legislature’s subordinate agents or its junior partners? And how should one understand the legislative power? Should interpreters think of the legislature as a general problem solver or as a picky line drawer?

All of these questions come into sharp focus in cases involving the problem of means-end fit that has troubled the law of interpretation at least since Aristotle.<sup>90</sup> *Burwell* is perhaps the most prominent recent

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<sup>84</sup> HART & SACKS, *supra* note 24, at 4.

<sup>85</sup> See, e.g., F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 177–82 (1960); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 32 (C.B. Macpherson ed., 1980) (1690); JOHN RAWLS, *A THEORY OF JUSTICE* 11–12 (1971).

<sup>86</sup> HART & SACKS, *supra* note 24, at 6.

<sup>87</sup> *Id.* at 4.

<sup>88</sup> *Id.* at 5.

<sup>89</sup> *Id.*

<sup>90</sup> ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, at 133 (W.D. Ross trans., 1925) (“When the law speaks universally . . . and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission — to say what the legislator himself would have said had [the legislator] been present, and would have put into his law if he had known.”).

decision of its sort. But it lies within a long tradition in which judges ascribe hard decisions to the intent of the legislature.<sup>91</sup> Many of these cases are classics.<sup>92</sup> *Church of the Holy Trinity v. United States*,<sup>93</sup> for example, held that a statute prohibiting the importation of foreign nationals to perform “labor or service of any kind”<sup>94</sup> did not reach a contract that brought a pastor from England to lead a New York congregation. Although the Court allowed that the “letter” of the statute covered the case,<sup>95</sup> the Justices found, *inter alia*, that the internal legislative history demonstrated a narrower congressional intent to exclude only low-wage, manual labor.<sup>96</sup> (What Congress, moreover, would “intend” to apply an immigration ban to a minister, given the deep religiosity in the nation’s traditions?)<sup>97</sup> Equally famous, *Riggs v. Palmer*<sup>98</sup> held that, while the New York statute of wills specified precise and limited conditions for both making *and* voiding a valid will, the court could properly recognize and enforce an *uncodified* legislative intention to void a valid will when an heir murdered a testator in order to collect his inheritance.<sup>99</sup>

In cases like *Burwell*, *Holy Trinity*, and *Riggs*, the courts address problems that make one’s head hurt — profound conflicts between clear text and background purpose, puzzling incongruities in the legislative

<sup>91</sup> Scholars have divided over whether *Burwell* reflects the same strong, atextual approach that defines the cases that follow. Compare, e.g., Gluck, *supra* note 2, at 90 (arguing that *Burwell* took pains to identify conflicting textual signals before invoking legislative intent), with Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2D 407, 413–15 (2015) (arguing that *Burwell* revives the Court’s tradition of strong atextual interpretation). For present purposes, I am agnostic about which understanding of *Burwell* is correct; instead, what is important here is that the Court in *Burwell* used legislative intent to elide the fact that *the Court* necessarily made a choice about the statute’s appropriate meaning when it sorted through the ACA’s mixed and complex cues.

<sup>92</sup> Leading legislation casebooks, for example, include as principal cases at least one of the cases discussed in this paragraph. See, e.g., WILLIAM N. ESKRIDGE, JR., ABBE R. GLUCK & VICTORIA F. NOURSE, STATUTES, REGULATION, AND INTERPRETATION 305–09 (2014); JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 29–33, 36–39 (2d ed. 2013); ABNER J. MIKVA, ERIC LANE & MICHAEL J. GERHARDT, THE LEGISLATIVE PROCESS 818–23 (4th ed. 2015); CALEB R. NELSON, STATUTORY INTERPRETATION 7–14, 27–34 (2011).

<sup>93</sup> 143 U.S. 457 (1892).

<sup>94</sup> Alien Contract Labor Act of 1885, ch. 164, 23 Stat. 332 (repealed 1952).

<sup>95</sup> *Holy Trinity*, 143 U.S. at 458.

<sup>96</sup> See *id.* at 465 (explaining “the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of . . . cheap unskilled labor”).

<sup>97</sup> See *id.* at 472 (concluding that a contract to bring a Christian pastor from abroad to minister to a congregation in the United States “could not have been intentionally legislated against”).

<sup>98</sup> 22 N.E. 188 (N.Y. 1889).

<sup>99</sup> See *id.* at 189–90 (finding that the New York legislature would not have intended to cover such a case).

record, or results that the statute seems to require but that seem downright silly. Whereas cases of this sort typically purport to solve such problems by imagining the legislature's intention or will (on a question that the legislature did not expressly decide),<sup>100</sup> prominent writings by Harvard judges and professors have sought to recast the problem in the franker and more accurate terms of institutional settlement.

For example, a progressive and reformist strain of early twentieth-century scholarship maintained that judges have intrinsic common law powers to make legislation more effective and fair, just as they have the power to shape their own common law precedents. In a subtle shift at mid-century, the Legal Process school focused more upon the nature of legislative power, arguing that Congress passes statutes to solve problems and that courts should read legislation accordingly (rather than sweating the textual details). Finally, the new formalism that emerged in the late twentieth century took the opposite position on both points. Justice Scalia, in particular, argued that Congress is not a problem solver in gross, but rather a compromiser that needs to draw sometimes-fine lines. On that view, when the judiciary exercises common law powers without statutory authorization to do so, it diminishes Congress's capacity to draw those lines. Again, though the particular conclusions and prescriptions differ sharply, all of these philosophies unmistakably reflect the Legal Process approach of institutional settlement. This Part briefly considers each of these approaches in turn.

#### A. *Judges as Partners*

Standard legal theory assumes that if one accepts the idea of legislative supremacy, then it follows that judges should be faithful agents, implementing decisions the judges themselves have not made.<sup>101</sup> Imagine, however, that the judicial function in our legal tradition means something different — that it makes judges more like the legislature's partners, so that judges can extend or distinguish legislative policy much as they do common law precedents. On that theory, the power to make the kinds of adjustments the courts made in *Burwell*, *Holy Trinity*, and *Riggs* would not be about uncovering “legislative intent,” but rather would be an effort to make sense of the *corpus juris* as common law judges do. Two Harvard Law School Deans — progressive Roscoe

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<sup>100</sup> See *Holy Trinity*, 143 U.S. at 459 (invoking the “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”); *Riggs*, 22 N.E. at 189 (reasoning that “a construction ought to be put upon a statute as will best answer the intention which the makers had in view”); see also *supra* text accompanying note 14 (discussing *Burwell*'s invocation of intent).

<sup>101</sup> See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) (describing the faithful agent idea as “the most prominent conception of the role of courts in statutory construction”).

Pound and New Deal reformer James Landis — developed such a position in foundational twentieth-century scholarship.

Pound's writings are too voluminous (and, frankly, too nonlinear) to do them justice in brief. As Professor Frederick Schauer nicely lays out in his contribution here, Pound's larger philosophical commitment was to a progressive, policy-oriented approach to law — to a “sociological jurisprudence” that called upon judges to decide cases “in light of law's larger goals” and to make use of “all available empirical and policy resources” to that end.<sup>102</sup> Pound denounced “mechanical jurisprudence” — deductive, logical, and purportedly scientific reasoning that sought predictability and neutrality at the expense of justice.<sup>103</sup> And he favored an “equitable” approach to judging — one in which “the legal rule [served] as a general guide to the judge” but also left the judge able “within wide limits . . . to deal with the individual case, so as to meet the demands of justice between the parties and accord with the general reason of ordinary men.”<sup>104</sup>

In matters of statutory interpretation, Pound sought to justify his sociological approach in terms of the proper role of the courts in a system of separated powers. Although Pound worried that excessive flexibility (as in *Riggs*)<sup>105</sup> might introduce a “personal element into judicial administration” and “bring law into disrepute,”<sup>106</sup> he also believed that the American constitutional tradition left judges plenty of leeway to adapt statutes to what justice might require. He wrote that “a complete separation [of powers]” — one that gives the respective branches “exclusive functions to make laws, to execute laws, [and] to apply laws” — “never existed anywhere,” much less in our legal system.<sup>107</sup> Rather, for him, separation of powers seemed more like “a practical device, existing for practical ends” — something that promotes a “division of labor” rather than rigidly defines “the legal order.”<sup>108</sup> From that starting point, Pound had no trouble concluding that when one “organ” of government failed

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<sup>102</sup> Frederick M. Schauer, Essay, *Law's Boundaries*, 130 HARV. L. REV. 2434, 2444 (2017); see, e.g., G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1004–05 (1972) (discussing the features of Pound's approach). Pound developed the idea of sociological jurisprudence in several papers. See, e.g., Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607 (1907); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911) (pt. 1), 25 HARV. L. REV. 140 (1912) (pt. 2), 25 HARV. L. REV. 489 (1912) (pt. 3) [hereinafter Pound, *Sociological Jurisprudence*].

<sup>103</sup> Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 605 (1908).

<sup>104</sup> Pound, *Sociological Jurisprudence* (pt. 3), *supra* note 102, at 515.

<sup>105</sup> See Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 382 & n.3 (1907) (criticizing *Riggs*).

<sup>106</sup> *Id.* at 384.

<sup>107</sup> Roscoe Pound, *Courts and Legislation*, 7 AM. POL. SCI. REV. 361, 363 (1913).

<sup>108</sup> Pound, *supra* note 105, at 384.

in its presumptive duty, say, of supplying a needed rule of decision, it was “often better that some other organ perform the special function in single instances, than that it go wholly unperformed.”<sup>109</sup> For Pound, then, the function of “supplementing, developing, and shaping” the law was “a necessary part of judicial power.”<sup>110</sup>

Pound also used the separation of powers to decry the common law’s apparent resistance to legislative innovation — a longstanding tendency that was captured by the maxim that statutes in derogation of the common law are to be strictly construed.<sup>111</sup> In notable tension with the views described above, Pound wrote that because “our constitutional polity expressly contemplates a complete separation of legislative from judicial power,” the common law “antipathy toward legislative innovation” simply did not fit with “American conditions.”<sup>112</sup> Indeed, when the courts “stand between” the legislature and the public to protect an individual’s common law entitlements, the judiciary impermissibly places itself “between the public and what the public needs and desires.”<sup>113</sup> In other words, Pound wanted judges to have flexibility to use their inherent power not to limit legislative initiative, but rather to *enhance* it by treating legislation as “not only a rule to be applied but a principle from which to reason.”<sup>114</sup>

James Landis, Pound’s immediate successor in the Harvard deanship, offered a more focused, historically grounded defense of essentially the same view of judicial power.<sup>115</sup> The quintessential New Dealer, Landis of course was committed to the idea of law as an instrument “to achieve just ends.”<sup>116</sup> Landis famously argued for sufficient constitutional flexibility to permit administrative agencies to regulate the complex problems of modern industrial society.<sup>117</sup> Though Pound and Landis would come to disagree sharply about the propriety of such administrative discretion,<sup>118</sup> in matters of statutory interpretation, the two largely saw eye to eye on the question of whether American judges retained broad common law authority to reshape statutes. In particular,

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<sup>109</sup> *Id.*

<sup>110</sup> POUND, *supra* note 58, at 105–06.

<sup>111</sup> See Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 387 (1908) (discussing the maxim).

<sup>112</sup> *Id.* at 403.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 385.

<sup>115</sup> See Landis, *supra* note 67, at 214–30 (grounding interpretive flexibility in specific English and American traditions of judicial power).

<sup>116</sup> THOMAS K. MCCRAW, *PROPHETS OF REGULATION* 204 (1984).

<sup>117</sup> JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 12 (1938); see also *id.* at 10–12, 46 (elaborating on that contention).

<sup>118</sup> See Charles H. Koch, Jr., *James Landis: The Administrative Process*, 48 ADMIN. L. REV. 419, 420 (1996).

Landis believed that, contrary to standard separation of powers theory, American judges were proper heirs to the English tradition “of the equity of the statute.”<sup>119</sup> Simply put, that doctrine gave English judges *inherent* power “to do equity and so [to] mould the law to conform more closely to its recognized aims.”<sup>120</sup> That authority, he argued, not only had deep roots in the English conception of judicial power, but also “held considerable sway” in the United States until “American fadism for fashions in thinking” elevated “the doctrine of the separation of powers into a constitutional maxim.”<sup>121</sup> Even then, however, cases such as *Holy Trinity* continued to use the flexible, atextual, purposive technique of equitable interpretation — albeit in “the guise of interpretation” rather than in the name of inherent judicial authority.<sup>122</sup> Landis, in short, believed that judicial flexibility rather than formalism better captured the arc of our constitutional history.

From that starting point, Landis argued that it was better for American courts to put an end to the “dissembling” of a case like *Holy Trinity* and to return to “an appropriate juristic approach towards statutes as a source of ‘common law.’”<sup>123</sup> In classic New Deal thought, Landis stressed that “civilization [was] achieving a complexity that outstrips [any] effort to embrace its multitudinous activities by rules.”<sup>124</sup> Legislation alone could not meet society’s needs. And so a return to equitable interpretation — to treating statutes as “points of departure” or “germinating principles” for further common law reasoning — would actually produce a fuller realization of the “legislative power” that modern governance demanded.<sup>125</sup> Like Pound, Landis sought judicial flexibility in the constitutional authority of judges and, in so doing, eschewed the pretense of legislative intent. Before the end of the New Deal, the idea of inherent judicial power to engage in equitable interpretation had become “a recurring theme” in legal scholarship.<sup>126</sup>

### B. Congress the Problem Solver

By mid-century, Legal Process purposivists were making similar claims about judicial flexibility but were rooting them primarily in a

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<sup>119</sup> Landis, *supra* note 67, at 214.

<sup>120</sup> *Id.* at 215.

<sup>121</sup> *Id.* at 217–18.

<sup>122</sup> *See id.* at 217–18; *see also id.* at 218–19 & n.14.

<sup>123</sup> *Id.* at 219.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HART & SACKS, *supra* note 24, at lxiv; *see also, e.g.*, Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 12–13 (1936); S.E. Thorne, *The Equity of a Statute and Heydon’s Case*, 31 ILL. L. REV. 202, 203–04 (1936).

theory about the nature of legislative rather than judicial power. Others have written, in rich detail, about the intellectual origins of the Legal Process approach and the many thinkers, at Harvard and elsewhere, who contributed to that development.<sup>127</sup> Perhaps in part a reflection of mid-century optimism that pluralism in the legislative process would produce wise policy outcomes,<sup>128</sup> and in part a reaction against a strong version of legal realism that treated law as raw policymaking,<sup>129</sup> the Legal Process materials invited interpreters to place a rational, coherent, and purposive overlay on legislation, if possible.<sup>130</sup> Legal Process scholars rested this position not on any claim that it was a superior way to “decode” actual congressional instructions about the precise question at issue,<sup>131</sup> but rather on an explicitly normative account of the legislative power and the proper role of the courts in our system of government.

The academy’s purposivists-in-chief, Harvard Professors Henry Hart and Albert Sacks, were good old-fashioned legislative supremacists; they took it as a given, as most do, that Congress is “the chief policy-determining agency of the society.”<sup>132</sup> What made the Legal Process approach distinctive was the way Hart and Sacks understood that imperative. Certainly, one might think of the legislative power as simply a means of agreeing upon discrete rules or standards to be decoded as accurately as possible.<sup>133</sup> The Legal Process school, however, had a clear — and clearly much broader — view of the nature of the legislative power. Congress legislates to solve problems, plain and simple. One of the movement’s elder statesmen, Justice Frankfurter, captured that idea when he wrote: “Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a [change] of policy, to formulate a plan of government.”<sup>134</sup> Or as Archibald Cox put it, a “general aim or policy” necessarily “lies behind all intelligible legislation.”<sup>135</sup> By the time Hart and Sacks produced their materials, it had become an article

<sup>127</sup> See, e.g., Eskridge & Frickey, *supra* note 126, at lxviii–xcvi; Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1 (2013); Eskridge & Frickey, *Legal Process*, *supra* note 26, at 2047–49.

<sup>128</sup> See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1014 (1989).

<sup>129</sup> See Eskridge & Frickey, *supra* note 126, at lviii, lxv–lxviii.

<sup>130</sup> See *id.* at xci–xcii.

<sup>131</sup> See *supra* text accompanying notes 68–71.

<sup>132</sup> HART & SACKS, *supra* note 24, at 1374.

<sup>133</sup> This view is analogous to what Dworkin described as a “rulebook” community, which treats legal rules as matters of “compromise between antagonistic interests or points of view” and treats “the content of these rules [as] exhaust[ing] [the parties’] obligation.” DWORKIN, *supra* note 39, at 209–10.

<sup>134</sup> Frankfurter, *supra* note 72, at 538–39.

<sup>135</sup> Cox, *supra* note 16, at 370.

of faith that “a statute without an intelligible purpose is foreign to the idea of law and inadmissible.”<sup>136</sup>

That view of the legislative process, in turn, informed what it meant to be a faithful interpreter. If Congress passed laws to solve problems, then a faithful interpreter should help it do so rather than sweat the details of grammar, syntax, and punctuation. Professor Lon Fuller, another key architect of the Legal Process approach,<sup>137</sup> thought that since legislation is purposive by nature, one could not “interpret a word in a statute without knowing the aim of the statute.”<sup>138</sup> And anyone trying to effectuate a statute, and to do so properly, would necessarily have to grasp what “evil” its drafters sought to avert or what “good” they meant to promote.<sup>139</sup> Hart and Sacks thought so too; simply put, their ideal court showed fidelity to society’s chief policymaker by trying to “[i]nterpret the words of the statute immediately in question so as to carry out the purpose as best it can.”<sup>140</sup>

This approach, it should be said, did not ignore the words of the statute; statutory language was the primary and best source for identifying the statute’s purpose.<sup>141</sup> Yet, while Hart and Sacks admonished interpreters not to give the words of the statute “a meaning they will not bear,”<sup>142</sup> they immediately qualified that observation with the further remark that a word’s meaning “can *almost always* be narrowed” in context.<sup>143</sup> Even more striking, they argued that a court can use a statute’s *policy* as the basis for “formulating, upon [the court’s] own responsibility, a parallel ground of decision in the case at bar”<sup>144</sup> — a claim whose lineage traces, of course, to Pound and Landis.<sup>145</sup> Under that framework, the ACA’s expressed conditions for receiving a tax credit could presumably be adjusted, as in *Burwell*, in order to ensure the statute functioned to fulfill its overall policy objective of keeping healthy people

<sup>136</sup> HART & SACKS, *supra* note 24, at 1124.

<sup>137</sup> See Eskridge, *supra* note 53, at 1743; see also Eskridge & Frickey, Legal Process, *supra* note 26, at 2047–49; David L. Shapiro, *The Case of The Speluncean Explorers: A Fiftieth Anniversary Symposium — Foreword: A Cave Drawing for the Ages*, 112 HARV. L. REV. 1834, 1840 (1999).

<sup>138</sup> Lon L. Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630, 664 (1958).

<sup>139</sup> *Id.* at 665–66. Hence, Fuller asked, if local law makes it a misdemeanor “to sleep in any railway station,” does “fidelity to law” entail reading the ordinance to cover a traveler who has nodded off while “waiting at 3 A.M. for a delayed train”? *Id.* at 664.

<sup>140</sup> HART & SACKS, *supra* note 24, at 1374.

<sup>141</sup> See, e.g., *id.* at 1375.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 1376 (emphasis added).

<sup>144</sup> *Id.* at 1194.

<sup>145</sup> The Court took up that invitation in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), which relied on the policy of various state and federal statutes to revise a longstanding doctrine of admiralty law. *Id.* at 389–403.

in the insurance risk pool. Or, as in *Riggs*, even if the statute of wills did not expressly exclude a murderous heir, a court could properly read that sensible limitation into the “legislature’s general direction” — and could do so without having “to pretend to guess what the enacting legislature would have done” about a question that the legislature did not “consciously . . . settl[e].”<sup>146</sup>

In short, Hart and Sacks preferred courts to take responsibility for the interstitial lawmaking that all judges sometimes do in order to make legislation work. In their conception, legislatures did their job by setting general policy and did not do well at anticipating and providing for the implemental details necessary to carry out that policy successfully. Indeed, Hart and Sacks openly questioned whether “a policymaker’s purposes are usually best served . . . [by] tak[ing] his general expressions literally, without regard to the possibility of unexpressed or unanticipated qualifications.”<sup>147</sup> And they thought it would make legislation worse and more confusing if rules of interpretation compelled legislatures to “go[] into great detail in dealing with all possible problems.”<sup>148</sup> For them, if the legislature did not actually settle the hard questions anyway, judges could help make legislation work by presuming that a statute had been enacted by “reasonable persons pursuing reasonable purposes reasonably,” whether that was true in the particular case or not.<sup>149</sup> In that framework, the court takes responsibility for solving the interpretive problems that the legislature has not — and does so with an eye toward fulfilling the larger policy aims that the legislature set for society.

### C. Congress the Line Drawer

Perhaps the most surprising thing to come out of the Harvard tradition is that Justice Scalia, proud formalist that he was, also subscribed to the Legal Process approach — at least when it came to the idea of institutional settlement. Of course, he was not like Pound, Landis, Hart, or Sacks, all of whom liked judicial flexibility. Justice Scalia wanted courts to follow the text — and to do so strictly when the text was clear.<sup>150</sup> In incautious moments, he might justify that propensity as the best way to determine legislative intent or purpose.<sup>151</sup> But Justice

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<sup>146</sup> HART & SACKS, *supra* note 24, at 93.

<sup>147</sup> *Id.* at 91.

<sup>148</sup> *Id.* at 92.

<sup>149</sup> *Id.* at 1378.

<sup>150</sup> See, e.g., *Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) (“We are to read the words of that text as any ordinary Member of Congress would have read them, and apply the meaning so determined.” (citation omitted)).

<sup>151</sup> Justice Scalia thus stated that “[t]hough I am sure I have been guilty of it myself, I think it a mistake, in legal writing, to use the formulary phrase ‘the congressional intent,’ or ‘Congress did

Scalia's writings left little doubt that his commitment to the text, properly understood, rested on a more sophisticated theory of the relationship between legislative and judicial power.

Consider first the nature of the "legislative Powers" exercised by Congress.<sup>152</sup> Like Hart and Sacks, Justice Scalia started from a well-defined view of such power. His institutional theory had formal and functional elements. The formal element stressed the rule of law as filtered through the Article I, Section 7 process of bicameralism and presentment.<sup>153</sup> For Justice Scalia, the key point was that "[n]othing but the text has received the approval of the majority of the legislature and of the President."<sup>154</sup> In "a government of laws,"<sup>155</sup> he added, "[w]e are governed by the laws that the Members of Congress enact, not by their unenacted intentions."<sup>156</sup> Even if one could conclusively prove that a majority of Congress "said 'up' when they meant 'down,'" what mattered to Justice Scalia was what Congress chose to enact into law.<sup>157</sup>

To give substance to his formal claim, Justice Scalia pressed a functional account of legislative power quite different from the Hart-and-Sacks view of things. In contrast with mid-century optimism about the possibilities of pluralism, late twentieth-century political science had absorbed the lessons of public choice theory and the possibility that legislation might reflect a hard-edged bargain among interest groups not always acting in the common good.<sup>158</sup> More important, however, was the

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not intend." Antonin Scalia, Use of Legislative History: Judicial Abdication to Fictitious Legislative Intent 6 (Mar. 16, 1992) (on file with the Harvard Law School Library); *see also, e.g.*, *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (Scalia, J.) ("The question [of preemption], at bottom, is one of statutory intent . . ."); *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 98 (1991) (Scalia, J.) ("The best evidence of [congressional] purpose is the statutory text . . .").

Justice Scalia also wrote that the judge's task was to find "a sort of 'objectified' intent — the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*." Scalia, *supra* note 76, at 17. Though couched in the language of intent, that passage is just another way of saying that he wanted to find the meaning of the text by identifying how a reasonable person would have read it.

<sup>152</sup> U.S. CONST. art. I, § 1.

<sup>153</sup> *See id.* art. I, § 7.

<sup>154</sup> Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1612 (2012).

<sup>155</sup> *Id.* (quoting MASS. CONST. art. XXX (1780)).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 1612–13.

<sup>158</sup> *See, e.g.*, William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). Especially before it became possible to mobilize mass movements online, conventional wisdom held that concentrated interests would have higher stakes, lower organizational costs, and an easier time policing free riders than would groups committed to the public interest more broadly. *See* MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 40–41 (1965). On this

normative and institutional discussion that this shift in attitude fueled. Instead of presuming, with Hart and Sacks, that judges should read legislation with an overlay of reasonableness, modern textualists like Justice Scalia have thought it more faithful to our constitutional system to lean into the unruliness of the legislative process, with all its flaws. In Justice Scalia's view, the nature of legislative power was to draw lines, not to solve problems in gross. What was important to him was that "[t]he final form of a statute . . . is often the result of compromise among various interest groups, resulting in a decision to go so far and no farther."<sup>159</sup> And he worried that "[d]eduction from the 'broad purpose' of a statute begs the question if it is used to decide by what *means* (and hence to what *length*) Congress pursued that purpose."<sup>160</sup> For Justice Scalia, treating statutes as the instantiation of broad purposes, as Hart and Sacks did, diminished Congress's ability to strike and record imperfect legislative compromises.

This set of assumptions did not mean, as one might think, that Justice Scalia viewed textualism as a superior way to capture actual compromises *consciously* struck by Congress.<sup>161</sup> Although it sometimes sounded as if that is what he meant,<sup>162</sup> his views on the legislative process left little doubt about his intent skepticism or about his view that, in most cases, Congress gave no conscious thought to the precise question at issue before the court.<sup>163</sup> When he was being precise about his deeper commitments, Justice Scalia made clear that he followed the statutory text not because it *did* capture a compromise but because it *may have* done so.<sup>164</sup> And to acknowledge even the *possibility* of compromise

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theory, for example, auto companies would exert disproportionate influence relative to breathers of air in framing environmental legislation.

<sup>159</sup> E. *Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 68–69 (2000) (Scalia, J., concurring in the judgment).

<sup>160</sup> *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 726 (1995) (Scalia, J., dissenting).

<sup>161</sup> See John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 24 (2014) (suggesting that one might read some versions of the text-as-compromise position as a "thinly veiled intentionalist argument").

<sup>162</sup> In his dissent in *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003), for example, Justice Scalia wrote that "[t]he best way to be faithful to the resulting compromise is to follow the statute's text," *id.* at 184.

<sup>163</sup> See *supra* pp. 15–16 (discussing Justice Scalia's intent skepticism).

<sup>164</sup> See, e.g., *Abramski v. United States*, 134 S. Ct. 2259, 2280 (2014) (Scalia, J., dissenting) ("Or *perhaps* Congress drew the line where it did because the Gun Control Act, like many contentious pieces of legislation, was a 'compromise' among 'highly interested parties attempting to pull the provisions in different directions.'" (emphasis added) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461 (2002))); *Artuz v. Bennett*, 531 U.S. 4, 10 (2000) (Scalia, J.) (holding that one should follow the clear text rather than its apparent background policy or purpose because the text itself "may, for all we know, have slighted policy concerns on one or the other side of the issue as part of the legislative compromise that enabled the law to be enacted" (emphasis added)).

was enough for him to justify following the text, whether or not the text actually captured a compromise in the particular case.

Why did Justice Scalia believe that? By presuming that Congress meant what it said, that it chose its words with care, a court that practiced textualism made it *possible* for Congress to write down bargains that went so far and no farther and to make them stick. As Justice Scalia explained, “[w]hether or not Congress is always meticulous, if we don’t *assume* that Congress picks its words with care, then Congress won’t be able to rely on words to specify what policies it wishes to adopt or, as important, to specify just how far it wishes to take those policies.”<sup>165</sup> On Justice Scalia’s view, then, legislative supremacy means that Congress must be able to draw lines of inclusion and exclusion, and textualism promotes legislative supremacy by enabling Congress to use its words to draw those lines.<sup>166</sup>

In addition to his theory of legislative power, Justice Scalia also developed a “judicial power” justification for his approach. Where Pound and Landis thought of American judges as common law judges, Justice Scalia thought of *federal* judges, at least, as lacking general common law powers.<sup>167</sup> That view of the judicial power had implications for his views of legislative intent. In particular, he wrote that “under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires, extending their lawmaking proclivities from the common law to the statutory field.”<sup>168</sup> Implicitly distancing himself from the Hart-and-Sacks “reasonable legislator” presumption, Justice Scalia added: “When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant*, . . . your best shot . . . is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean.”<sup>169</sup> Like Landis, Justice Scalia criticized the famous *Holy Trinity* decision for relying on “unexpressed legislative intent’ [to] make[] everything seem alright.”<sup>170</sup> In contrast with Landis, however, he denounced that decision’s flexible, atextual, common law approach as “an invitation to judicial lawmaking” and as an “obvious . . . usurpation” of

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<sup>165</sup> Scalia & Manning, *supra* note 154, at 1613.

<sup>166</sup> See *Finley v. United States*, 490 U.S. 545, 556 (1989) (Scalia, J.) (“What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.”).

<sup>167</sup> See Scalia, *supra* note 76, at 13 (arguing that “in the federal courts, . . . with a qualification so small it does not bear mentioning, there is no such thing as common law”).

<sup>168</sup> *Id.* at 17–18.

<sup>169</sup> *Id.* at 18.

<sup>170</sup> *Id.* at 21.

democratic prerogatives.<sup>171</sup> Still, notice that while Scalia and Landis drew the opposite conclusions, they were arguing about the same thing, and it was not legislative intent.

### III. LEGISLATIVE SUPREMACY WITHOUT LEGISLATIVE INTENT

Despite important differences in the preferred methodologies of these varied thinkers, all of them ultimately fought on the same terms. None of them tried to assert a superior method of identifying what Congress had decided. None of them believed that, in difficult cases, Congress had decided the question at issue. Hence, they argued about both the nature and the proper allocation of legislative and judicial power — about institutional settlement.

What is so striking is how plausibly each of these theories promotes legislative supremacy, while still rejecting the idea of legislative intent. This quality describes even the work of Pound and Landis, whose ideas of institutional settlement rested upon an assertive view of judicial power. Pound thought common law judges advanced democracy when they *built upon* the policies of legislation, but not when they read statutes literally, stingily, or narrowly as a way to preserve their own common law rules.<sup>172</sup> Landis held comparable views.<sup>173</sup>

The Legal Process school took a similar stance, only from the legislative perspective. Even if one could not identify the specific intentions of Congress — that is, even where Congress did not make the interpretive decision in question — the judiciary respected legislative supremacy by implementing the apparent legislative plan of action. If one thinks of Congress as a problem-solver in gross, if one rejects the presumption that Congress picks each word or punctuation mark “with meticulous care,”<sup>174</sup> then judges show Congress respect by adapting or supplying the implemental means to further the perceived statutory ends, whether

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<sup>171</sup> *Id.*; see also, e.g., *E. Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 69 (2000) (Scalia, J., concurring in the judgment) (“[I]t seems to me we set our face against judicial correction of the omissions of the political branches when we declined the power to define common-law offenses.” (citing *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812))); *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 101 (1991) (Scalia, J.) (“To supply omissions transcends the judicial function.” (quoting *Iselin v. United States*, 270 U.S. 245, 251 (1926) (Brandeis, J.))).

<sup>172</sup> See Pound, *supra* note 111, at 385, 387–88.

<sup>173</sup> As noted, see *supra* text accompanying notes 119–26, Landis’s call for equitable interpretation insisted that common law judges give “sympathetic attention” to the aims behind legislation while rejecting the “antagonistic maxim that statutes in derogation of the common law . . . be narrowly construed.” Landis, *supra* note 67, at 216–17.

<sup>174</sup> Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 406 (1942) (“To say that the legislature is ‘presumed’ to have selected its phraseology with meticulous care as to every word is in direct contradiction to known facts and injects an improper element into the relation of courts to the statutes. The legislature has no constitutional warrant to demand reverence for the words in which it frames its directives.”).

or not doing so captures some *actual* decision that Congress made or would have made.

Though looked at from different sides of the court-legislature relationship, both sets of theories promote legislative supremacy in the same way. From the judicial perspective taken by Pound and Landis, judges function as “relational agents” — the kind of agents who serve their principal not through strict adherence to particular instructions but through the kind of creative license that makes the enterprise work.<sup>175</sup> Looking at it from Congress’s perspective, Lon Fuller powerfully explained that “[n]o superior wants a servant who lacks the capacity to read between the lines.”<sup>176</sup> Hence, “[t]he correction of obvious legislative errors or oversights is not to supplant the legislative will, but to make that will effective.”<sup>177</sup> Or as modern Legal Process great Daniel J. Meltzer put it, judges best promote legislative supremacy by acting as Congress’s junior partners, supplying sensible means of carrying out legislative policies that Congress cannot possibly spell out completely in a world of great and ever-changing complexity.<sup>178</sup>

At the same time, Justice Scalia’s formalist take on institutional settlement *also* reflects a serious and substantial theory of legislative supremacy. Properly understood, Justice Scalia’s approach advances congressional prerogatives and policymaking authority in a forward-looking way. Since Justice Scalia doubted that Congress almost ever made an actual decision about the hard questions that made it to litigation, he thought judges best respected legislative supremacy through presumptions that *enabled* Congress to make and specify precise judg-

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<sup>175</sup> Professor William Eskridge has thoughtfully pressed the idea that a relational-agent approach best serves legislative supremacy. See William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 322–27 (1989).

<sup>176</sup> Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 625 (1949).

<sup>177</sup> *Id.* at 626.

<sup>178</sup> See, e.g., Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 14–34 (2013) (discussing the institutional, conceptual, and linguistic challenges of anticipating and providing for norms of preemption); Daniel J. Meltzer, *The Supreme Court’s Judicial Passivity*, 2002 SUP. CT. REV. 343, 345 (arguing that “an important tradition in the Anglo-American legal system” assigns courts “a distinctive responsibility for promoting legal coherence” and that judicial “hesitancy about discharging [such] traditional and important responsibilities can hamstring the effectiveness of legislation as much as does outright constitutional invalidation”); see also Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2033 (2007) (“[T]he Common Law Model views courts as having a creative, discretionary function in adapting constitutional and statutory language — which is frequently vague, and even more frequently reflects imperfect foresight — to novel circumstances.”); Richard H. Fallon, Jr., *On Viewing the Courts as Junior Partners of Congress in Statutory Interpretation Cases: An Essay Celebrating the Scholarship of Daniel J. Meltzer*, 91 NOTRE DAME L. REV. 1743, 1780 (2016) (arguing that the partnership “approach presupposes that courts can play a useful role, not only in assisting Congress, but also, by doing so, in promoting justice and human welfare”).

ments on an ongoing basis. Legislative communication, like any communication, is possible only by virtue of shared social and linguistic practices.<sup>179</sup> And since Congress has the constitutional right to enact awkward and even strange laws (as long as they pass a very low threshold of rationality),<sup>180</sup> the formalist presumption that Congress “means . . . what it says”<sup>181</sup> enables Congress to draw its lines reliably — without risking that a court will treat an awkward, strange, behind-the-scenes compromise as a legislative error or oversight.<sup>182</sup>

The formalist position, moreover, stresses that Congress *chooses* to express its policies by drafting formal, technical, often turgid texts and then by voting on those texts rather than on broad policy outlines or bullet points.<sup>183</sup> If courts consistently take Congress at its word, it becomes possible for Congress to choose whether to express small and precise policies or, in particular statutes, to adopt the goal-oriented approaches preferred by the Legal Process school.<sup>184</sup> And as long as judges read the statute as would any reasonable person conversant with applicable social and linguistic practices, the demands of legislative supremacy are satisfied, even if Congress has no actual intention about the question at issue in a case.<sup>185</sup>

<sup>179</sup> In Professor Jeremy Waldron’s words:

A legislator who votes for (or against) a provision . . . does so on the assumption that — to put it crudely — what the words mean to him is identical to what they will mean to those to whom they are addressed (in the event that the provision is passed). . . . That such assumptions pervade the legislative process shows how much law depends on language, on the shared conventions that constitute a language, and on the reciprocity of intentions that conventions comprise.

Jeremy Waldron, *Legislators’ Intentions and Unintentional Legislation*, in LAW AND INTERPRETATION 329, 339 (Andrei Marmor ed., 1995).

<sup>180</sup> See, e.g., FCC v. Beach Commc’ns, Inc., 508 U.S. 307, 315 (1993); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 175–76 (1980); Vance v. Bradley, 440 U.S. 93, 108 (1979).

<sup>181</sup> Conn. Nat’l Bank v. Germain, 503 U.S. 249, 254 (1992).

<sup>182</sup> See Manning, *supra* note 161, at 67.

<sup>183</sup> See, e.g., Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (“The law as it is passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself . . . .” (emphasis omitted) (quoting Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845))). Evidently, committees frequently transmit policy-oriented bullet points to a separate congressional drafting staff for translation into a formal text for congressional vote. See Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 740–41 (2014) [hereinafter Bressman & Gluck, *Part II*].

<sup>184</sup> See Easterbrook, *supra* note 83, at 545–47.

<sup>185</sup> If legislators have no actual intention about the litigated issue, but possess the “minimal intention” to have the enacted text decoded according to established social and linguistic conventions, then that fact alone is enough “to preserve the essential idea that legislators have control over the law.” JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION 284 (2009). The reason is straightforward:

Legislators who have the minimal intention know that they are, if they carry the majority, making law, and they know how to find out what law they are making. All they have to

Of course, the good news — that all of these positions on institutional settlement are so plausible — is also the bad news. It seems that “legislative supremacy is an essentially contested concept that is compatible with a wide range of conceptions.”<sup>186</sup> The constitutional text contains almost nothing explicit about how to interpret its own provisions, much less how to interpret statutes enacted pursuant to its authority.<sup>187</sup> And historical and structural inferences about the nature of the legislative power and the proper role of the federal courts offer plenty of evidence to support the common law, Legal Process, and formalist positions.<sup>188</sup> It is no wonder that the Court has shifted its federal statutory practice again and again.<sup>189</sup> If the Constitution does not put the question beyond reasonable dispute, how should judges go about devising their preferred approach?

In view of the apparent indeterminacy about such “first-best” questions of statutory interpretation methodology,<sup>190</sup> recent scholarship has sought to move past the seeming conceptual stalemate by calling for empirical study into the efficacy of interpretive methods.<sup>191</sup> Such an

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do is establish the meaning of the text in front of them, when understood as it will be according to their legal culture assuming that it will be promulgated on that occasion.

*Id.* at 284–85. In other words, if courts apply standard interpretive conventions, then legislators can justly be charged with knowledge of what they voted to pass, whether or not they formed an actual opinion about its meaning.

<sup>186</sup> ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 31 (2006).

<sup>187</sup> The document contains three explicit rules of interpretation, each of which governs constitutional rather than statutory questions. *See* U.S. CONST. amend. IX (instructing interpreters not to treat the Constitution’s enumeration of rights as exclusive); *id.* amend. X (explaining that the enumeration of federal powers was meant to be exclusive and that powers not granted to the United States or forbidden to the states were reserved to the states and the people); *id.* amend. XI (directing courts how to read the grant of “the judicial power” in relation to certain categories of suits against states).

<sup>188</sup> Compare, e.g., William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001) (arguing that the separation of powers contemplates that judges would use statutory interpretation as a means to check legislative power and that early Americans would have understood “[t]he judicial Power,” U.S. CONST. art. III, § 1, to include equitable authority to make federal statutes more coherent and just), with John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 56–105 (2001) (arguing that bicameralism and presentment place a high premium on following lines of textual compromise and that the history of federal judicial power supports a faithful agent rather than an equitable approach).

<sup>189</sup> *See generally* Vermeule, *supra* note 29.

<sup>190</sup> VERMEULE, *supra* note 186, at 31.

<sup>191</sup> *See id.* at 186–87; Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 648 (1999).

effort, it is said, “may allow interpreters who hold different commitments to converge on particular interpretive rules while bracketing disagreements about their preferred first-best accounts.”<sup>192</sup>

For example, my colleague Adrian Vermeule notes that all major interpretive approaches treat a “clear and specific text as the single best source of interpretive information (about meaning, intentions, or purposes).”<sup>193</sup> From that starting point, he argues that because judges labor under significant cognitive, temporal, and informational constraints,<sup>194</sup> judicial efforts to impeach a clear text through “legislative history or other nontextual sources” will yield only “conjectural” *benefits* (in terms of further accuracy) along with “large” and “certain” *costs* (in terms of searching and processing extrinsic sources).<sup>195</sup> Hence, judges should forgo reliance on such sources and stick to the surface meaning of the text.

In contrast, after conducting an extensive survey of legislative staffers concerning actual legislative practices, Professors Abbe Gluck and Lisa Bressman concluded that legislative history is quite probative of the legislative decision, perhaps more so than the statutory text.<sup>196</sup> In particular, their survey revealed (a) that committee reports tend to be written by policy staffers who are actually privy to the legislative deal; (b) that statutory language tends to be produced by each chamber’s Office of Legislative Counsel, whose career staffers neither participate in striking the deals nor answer to the legislators who do so; and (c) that legislators and their staff are more likely to learn about the contents of a bill from the committee reports than from the technical language of the bills themselves.<sup>197</sup> Though Gluck and Bressman take no position on *Holy Trinity*, their findings might be taken to support the Court’s reliance on committee reports to impeach the plain meaning of the text.

Although empirical claims of this sort shed important light on the problem of interpretation,<sup>198</sup> I think they cannot spare us from thinking

<sup>192</sup> Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 889 (2003).

<sup>193</sup> VERMEULE, *supra* note 186, at 186.

<sup>194</sup> *See id.* at 115, 189–90.

<sup>195</sup> *Id.* at 186.

<sup>196</sup> *See* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 967–70, 988–89 (2013) [hereinafter Gluck & Bressman, *Part I*]; Bressman & Gluck, *Part II*, *supra* note 183, at 735–47, 784–85.

<sup>197</sup> Gluck & Bressman, *Part I*, *supra* note 196, at 967–69.

<sup>198</sup> Thoughtful scholarship digging into actual legislative practice and expectations has proliferated in recent years. *See, e.g.*, EINER ELHAUGE, STATUTORY DEFAULT RULES 116 (2008) (arguing that judges should consult legislative history because Members of Congress expect and want them to do so); KATZMANN, *supra* note 19, at 19–20 (contending that legislators have come to rely on committee reports rather than statutory text both to communicate, and to learn, the policies

about the first-order questions of proper institutional roles that have long preoccupied the Harvard school of statutory interpretation. In fact, the new turn in interpretation scholarship, properly understood, highlights the necessity of making first-order judgments about the respective roles of legislatures and courts. For example, as institutionally thoughtful as Vermeule's analysis is, it necessarily presupposes a version of the faithful agent theory — the idea that the goal of interpretation is, at some level, to capture rather than build or improve upon congressional directives.<sup>199</sup> But Pound and Landis might have replied that even if the surface meaning of the text *is* the best evidence of Congress's decision, our constitutional tradition assigns judges common law powers to adjust or extend the statute's overall policy to matters or issues that the drafters did not anticipate and that the statute did not address. Perhaps the atextual interpretation in *Holy Trinity* would not take us any closer to Congress's actual meaning, intent, or purpose, but perhaps, as Landis suggested, the Court properly exercised some sort of inherent equitable power to make the statute more coherent and just.<sup>200</sup> Vermeule's second-order solution thus necessarily picks sides between the Pound-Landis position and the Scalia position on the first-order question of judicial power.

Gluck and Bressman's important findings similarly highlight the way the Legal Process idea of institutional settlement frames the debate. Assume that the facts on the ground are just as Gluck and Bressman say — that committee reports more likely reflect the bargain struck by key legislators and that rank-and-file legislators and their staff are more likely to consult the committee report than the statutory text to learn about the mischief or the policy at stake. As I have previously argued, that finding tells us little without making a *normative* determination of whether Congress's *choice* to vote on the dry, boring text rather than the committee report is constitutionally significant.<sup>201</sup> In other words, making sense of the facts on the ground requires a value judgment, not a factual judgment, about whether something other than *the text on which legislators chose to vote* can properly count as the "legislative bargain," especially when the enacted text and the extrinsic sources of legislative intent diverge. As Professors William Baude and Stephen Sachs put it, the question of what interpretive force to give committee reports

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upon which Congress will vote when it enacts legislation); Nourse, *supra* note 20, at 91–92 (arguing that judges should filter their understanding of legislative history, for example, through the rules of Congress governing the production of meaning).

<sup>199</sup> See VERMEULE, *supra* note 186, at 183–84.

<sup>200</sup> See Landis, *supra* note 67, at 218–19, 236 n.14.

<sup>201</sup> See John F. Manning, Essay, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1946 (2015).

“can’t be resolved by pointing to committee practice, because the question is what force the law gives to that practice.”<sup>202</sup> That question, in other words, is one of institutional settlement, “perhaps informed by the specification of the legislative process in Article I, Section 7.”<sup>203</sup>

#### IV. CONCLUSION

Dworkin seems to have had it just right. Even if one thought it best to trace interpretive outcomes to the intentions of Congress, as the Court often does, that ambition aspires to an “unknown ideal.”<sup>204</sup> It is impossible to find the “will,” “design,” “intent,” or “mind” of 536 people, spread across three competing institutions, without making some value judgment about what *should* count as that legislature’s intended decision and why. Except in the easiest cases — the kind that almost never make it to any court, much less the Supreme Court — “legislative intent” is always something to be constructed, not to be “found.” How one identifies and makes sense of the meaning of legislation is ultimately a question of power. What is the nature of the power Congress exercises? How do courts properly identify what legally counts as binding legislative output? And how much power do they have to fix and improve upon Congress’s handiwork without intruding upon the powers vested in the legislative branch?

For these reasons, one simply cannot avoid the question of institutional settlement in choosing a method of interpretation. Since every theory of interpretation involves a question of legislation and a question of adjudication, no interpretative theory can entirely avoid first-order questions about the nature of legislative power and the proper role of the courts in our constitutional system.<sup>205</sup> And it seems true but hardly decisive that the constitutional law of statutory interpretation admits of no easy answers and has produced sustained debate. Neither disagreement nor ambiguity distinguishes the constitutional law of statutory interpretation from other questions of constitutional law, in general, or from other questions of structural constitutional law, in particular.

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<sup>202</sup> William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1114 (2017).

<sup>203</sup> *Id.*

<sup>204</sup> Apologies to William Eskridge for borrowing his catchy phrase. See William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1557 (1998) (reviewing ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)).

<sup>205</sup> See Henry Paul Monaghan, *Taking Bureaucracy Seriously*, 99 HARV. L. REV. 344, 354–55 (1985) (book review) (pointing out that a theory of legislation does not tell us how to interpret statutes without “an adequate political theory,” *id.* at 355, that relates the power of legislation to the power of adjudication).

Think about standing,<sup>206</sup> federalism,<sup>207</sup> the removal of executive officers,<sup>208</sup> the status of non–Article III courts,<sup>209</sup> the permissibility of jurisdiction stripping,<sup>210</sup> and the like. Our spare constitutional structure poses more questions than it answers.<sup>211</sup> And any serious question of structural constitutional law will be a matter of ongoing and shifting debate. Surely, the availability of more than one plausible answer to a question does not disable constitutional inquiry.

The closeness of the questions at issue, however, may suggest that *Congress* can provide a way out of the conceptual stalemate by specifying its own preferences about the way courts should read its handiwork.<sup>212</sup> A good number of states have codified the canons of interpretation to be applied to their statutes.<sup>213</sup> But, with fairly trivial exceptions found today in the Dictionary Act,<sup>214</sup> Congress has not yet chosen to do so. If it did, however, it could specify, either in broad or in fairly specific terms, what it expects of courts in matters of interpretation. Should courts hew closely to the letter of the law when clear? Or should courts construe statutes liberally to fulfill the statutes’ remedial purposes, even if it means adjusting the details of the text? Should courts be given background common law authority to “complete” a statutory scheme — to add omitted remedial features such as implied rights of action or statutes of limitations that make the law more effective? Since the Constitution speaks so softly about the nature of the legislative power to enact law and of the judicial power to say what the law is, one might think that Congress has the discretion, within a broad range, to specify the means by which it wishes the courts to decipher and carry

<sup>206</sup> See, e.g., *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016); *Raines v. Byrd*, 521 U.S. 811 (1997); *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992).

<sup>207</sup> See, e.g., *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743 (2002); *Alden v. Maine*, 527 U.S. 706 (1999); *Printz v. United States*, 521 U.S. 898 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996); *New York v. United States*, 505 U.S. 144 (1992).

<sup>208</sup> See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Morrison v. Olson*, 487 U.S. 654, 685–93 (1988); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 626–32 (1935); *Myers v. United States*, 272 U.S. 52, 107–64 (1926).

<sup>209</sup> See, e.g., *Stern v. Marshall*, 564 U.S. 462 (2011); *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 853–58 (1986); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64–66 (1982) (plurality opinion).

<sup>210</sup> See, e.g., *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871).

<sup>211</sup> Madison so observed. See *THE FEDERALIST NO. 37*, at 224 (James Madison) (Clinton Rossiter ed., 2003).

<sup>212</sup> See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2148–49 (2002) (arguing that Congress could adopt a code of statutory interpretation).

<sup>213</sup> See WILLIAM N. ESKRIDGE JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 21 (2016).

<sup>214</sup> See, e.g., 1 U.S.C. § 4 (2012) (“The word ‘vehicle’ includes every . . . artificial contrivance used, or capable of being used, as a means of transportation on land.”).

into execution its commands.<sup>215</sup> But until Congress does so, lawyers, judges, and scholars addressing questions of statutory interpretation will have to debate questions of institutional settlement — the constitutional law of statutory interpretation. That debate has been flourishing at Harvard Law School for more than a century.

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<sup>215</sup> See Manning, *supra* note 161, at 48–67 (arguing that the Necessary and Proper Clause gives Congress broad discretion to prescribe governmental processes and to structure relations among the branches).