Second-Generation Textualism

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INTRODUCTION

In his perceptive histories of the late-twentieth-century revival of interest in statutory interpretation theory,1 Philip P. Frickey, always modest, predictably failed to account for his own large contribution to the debate. Assessing this contribution, of course, would present difficulty for anyone, as the work spans so widely. With his frequent coauthor, William Eskridge, Professor Frickey explained statutory interpretation as a form of practical reasoning that transcends any single foundational approach to the subject;2 thoughtfully explored the utility and dangers of the Supreme Court’s renewed interest in canons of construction, both substantive and procedural;3 and developed an intellectually rich casebook that reintroduced Legislation as a core element of the law school curriculum.4 Writing on his own, Professor Frickey enriched our understanding of the canon of constitutional avoidance as a pragmatic instrument for a Court to use in times of political peril,5 the transitional
problems associated with abrupt changes in the Court's approach to statutes, and the importance of judicial craft in statutory cases.\(^6\) Because one paper cannot do justice to all that Professor Frickey has done, one must inevitably pick and choose. Rather than focus on Frickey's own pragmatic approach to interpretation, this Essay will examine the contribution of his work with Daniel Farber questioning the empirical foundations of early textualism.\(^8\) Textualism maintains that judges should seek statutory meaning in the semantic import of the enacted text and, in so doing, should reject the longstanding practice of using unenacted legislative history as authoritative evidence of legislative intent or purpose.\(^9\) Its earliest proponents—Justice Antonin Scalia of the Supreme Court and Judge Frank Easterbrook of the Seventh Circuit—defended textualism, in part, by emphasizing a cynical view of the legislative process associated with a branch of political science known as public choice theory, which uses the tools of economics and game theory to help analyze and predict official behavior. For example, starting from the public choice premise that concentrated interest groups often manipulate the legislative process for private ends, early textualists maintained that legislators and their staffs salt the legislative history with statements that benefit such groups without reliably capturing the views of the chamber as a whole.\(^10\) Early textualists also invoked public choice theory to support the more general claim that the legislative process is simply too chaotic, too path dependent, and too fraught with strategic behavior to yield a meaningful "legislative intent" on any significant interpretive question.\(^11\) These claims had a lot of intuitive "pop" and attracted a great deal of attention from judges and scholars.\(^12\)


10. See infra Part I.A.
12. See infra text accompanying note 52.
Critical Introduction, Farber and Frickey collected, analyzed, and translated political science scholarship that questioned the claims about interest group manipulation and legislative chaos on which early textualists relied.\textsuperscript{14} For instance, Farber and Frickey cited significant evidence indicating that, while interest groups have some sway in the legislative process, there are other important factors that influence the framing of legislation, including legislators’ commitment to the public interest.\textsuperscript{15} They also cited political science scholarship suggesting that legislatures, in practice, successfully deploy procedures such as committee gatekeeping to control legislative chaos, and that judges can learn a lot about “legislative intent” by paying attention to the signals of legislative actors to whom those procedures assign a pivotal role.\textsuperscript{16} In a fast-moving debate, these (along with other) critiques of the public choice foundations of textualism supplied a serious counterweight to the textualists’ most intuitive arguments for disregarding legislative history.

Writing from the textualist perspective, I submit that Farber and Frickey’s critique of public choice theory—along with others of its kind—may have actually improved, perhaps even saved, textualism by calling into question its early reliance on deeply cynical arguments about the legislative process. To many, early textualism’s grounding in public choice theory seemed to reflect an antipathy to the legislative process or, at least, had a certain “eat your spinach” quality to it.\textsuperscript{17} In a constitutional system predicated on a deep sense of legislative supremacy, any interpretive philosophy that carried the burden of such an impression could not long survive. Ironically, by undermining the cynical basis for textualism, critiques such as Farber and Frickey’s may have helped create an environment in which textualists thought it better to emphasize a more appealing foundation for their approach.

Indeed, although I could find no direct evidence of a causal connection, the empirical critiques of early textualism suggestively coincided with the emergence of what I call second-generation textualism. Compared with those of first-generation textualism, the aims of second-generation textualism are both more modest in their reach and more fundamental in what they imply about the nature of interpretation. Rather than focusing primarily on the broader question of whether to use legislative history generally, second-generation

\textsuperscript{14.} See Farber & Frickey, Law and Public Choice, supra note 8, at 24–33, 46–62.
\textsuperscript{15.} See infra Part II.A.
\textsuperscript{16.} See infra Part II.B.
textualism emphasizes that judges in our system of government have a duty to enforce clearly worded statutes as written, even if there is reason to believe that the text may not perfectly capture the background aims or purposes that inspired their enactment. If a legislature passes a statute saying “no dogs” in the park, a court should not read it as saying “no disruptive animals,” even if the goal of keeping out all disruptive animals apparently inspired the enactment. Why? Second-generation textualism argues that lawmaking inevitably involves compromise; that compromise sometimes requires splitting the difference; and that courts risk upsetting a complex bargain among legislative stakeholders if judges rewrite a clear but messy statute to make it more congruent with some asserted background purpose. Simply put, when a statute speaks unambiguously, judges must presume that Congress chose its words for a reason; to assume otherwise would be to undercut Congress’s ability to use semantic meaning to express and record its agreed-upon outcomes. Perhaps in part because this newer emphasis does not depend on assumptions about interest group manipulation or legislative chaos, it has gained far more traction with the Court as a whole than did first-generation textualism.

This Essay explores the evolution from first- to second-generation textualism. Part I describes the origins of first-generation textualism in the skeptical premises of public choice theory. Part II explores Farber and Frickey’s research as part of a broader set of critiques of public choice theory and explains how those critiques called into question the early empirical foundations of textualism. Part III discusses various ways in which textualism evolved following those critiques and assesses the development of a second generation of textualism. In particular, it suggests that second-generation textualism relies less upon skeptical empirical claims about the (un)reliability of legislative history, and more upon conceptual claims about the crucial role of legislative compromise in our constitutional system and the consequences for interpretation that flow from such a conclusion.

I

PUBLIC CHOICE THEORY AND EARLY TEXTUALISM

Although a short essay does not permit full evaluation of the developments giving rise to modern textualism, it is possible to sketch in brief the key premises of Justice Scalia’s and Judge Easterbrook’s initial critiques of the Supreme Court’s then-longstanding practice of relying upon legislative history to interpret statutes. The Court has long made clear that in a system

18. See infra Part III.C.
21. See infra text accompanying notes 112–119.
predicated on legislative supremacy, courts have a duty to construe statutes to effectuate legislative intent or purpose. To be sure, the requisite intent or purpose can be found primarily in the words chosen by the legislature to express its commands. But beginning in around 1940, the legal culture began to treat as uncontroversial the idea that legislative history can also supply authoritative evidence of legislative intent or purpose. In the decades that followed, it was not uncommon for the Court to resolve statutory ambiguity by scouring the legislative record for statements by pivotal actors such as the originating committees or sponsors of a bill. Nor was it unusual for the Court to conclude that the apparent import of a statutory text had to yield to equally clear expressions of legislative "intent" or "purpose" found in the legislative history. In the decade before the emergence of textualism, matters had reached a point where the Court in one case wrote that because "[t]he legislative history . . . is ambiguous . . . it is clear that we must look primarily to

22. See, e.g., Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) ("Our objective . . . is to ascertain the congressional intent and give effect to the legislative will."); United States v. Am. Trucking Ass'ns, 310 U.S. 534, 542 (1940) ("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."); 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."). The concepts of "intent" and "purpose" have considerable overlap and are sometimes used interchangeably. To the extent there is a difference, it is helpful to think of "intent" as "the specific, particularized application which the statute was 'intended' to be given" and of "purpose" as "the general aim or policy which pervades a statute but has yet to find specific application." Archibald Cox, Judge Learned Hand and the Interpretation of Statutes, 60 Harv. L. Rev. 370, 370-71 (1947).

23. See, e.g., Schooner Paulina's Cargo v. United States, 11 U.S. (7 Cranch) 52, 60 (1812) (Marshall, C.J.) (noting that legislative intent "is to be searched for in the words which the legislature has employed to convey it"); Am. Trucking Ass'n, 310 U.S. at 543 ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation.").

24. See Jorge L. Carro & Andrew R. Brann, The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis, 22 Jurimetrics J. 294, 302-03 (1982) (chronicling the increase in citations of legislative history by the Supreme Court between 1938 and 1978). The turning point was Am. Trucking Ass'ns, 310 U.S. 534, which stated: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" Id. at 543-44 (quoting Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928); Helvering v. N.Y. Trust Co., 292 U.S. 455, 465 (1934)).

25. See, e.g., North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 526-27 (1982) ("Although the statements of one legislator made during a debate may not be controlling, Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction.") (citation omitted); Steadman v. SEC, 450 U.S. 91, 101 (1981) (noting that "[a]ny doubt as to the intent of Congress is removed by the House Report"); J.W. Bateson Co. v. United States ex rel. Bd. of Trs. of the Nat'l Automatic Sprinkler Indus. Pension Fund, 434 U.S. 586, 591 (1978) (concluding that "the authoritative Committee Reports" "leave[] no room for doubt about Congress' intent").

the statutes themselves to find the legislative intent." The Court's statement, while unusual, flowed naturally from an established jurisprudence that regularly equated legislative history with the views of Congress as a whole.

When textualism emerged in the early 1980s, its proponents defined themselves largely in opposition to the foregoing practices. Early textualists raised a variety of objections: among them were that treating unenacted legislative history as authoritative evidence of statutory meaning makes an end run around the constitutional practices of bicameralism and presentment; that expanding the interpretive inquiry from the text to the accompanying legislative history increases judicial discretion; and that crediting legislative history rather than the text risks upsetting legislative compromises that may have been essential to the bill's enactment. But in this period, the most prominent and, in my judgment, most influential line of argument against the use of legislative history was grounded in public choice theory.

Public choice theory has rather broad and ill-defined boundaries, but two aspects of the discipline gave textualists effective grounds for criticizing the Court's use of legislative history. First, the early textualist critique relied heavily upon interest group theory, which presupposes that interest groups manipulate legislative outcomes for private gain. Second, building on game theoretic insights associated primarily with the work of Kenneth Arrow and others (Arrovian social choice theory), textualists called into question the very possibility of a legislature's forming a coherent intent or purpose on matters that the statutory text did not address explicitly.

28. See, e.g., Thompson v. Thompson, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring in the judgment) ("Committee reports, floor speeches, and even colloquies between Congressmen, are frail substitutes for bicameral vote upon the text of a law and its presentment to the President."); In re Sinclair, 870 F.2d 1340, 1344 (7th Cir. 1989) (Easterbrook, J.) ("It would demean the constitutionally prescribed method of legislating to suppose that its elaborate apparatus for deliberation on, amending, and approving a text is just a way to create some evidence about the law, while the real source of legal rules is the mental processes of legislators."); Eagle-Picher Indus. v. EPA, 759 F.2d 922, 929 n.11 (D.C. Cir. 1985) (Starr, J.) ("The statute is, after all, the only measure which is laid before all members of Congress; and the statute is the only true indicator of what the members, collectively, believed the statute said. We must also keep in mind, in this respect, the oft-forgotten, bedrock fact that the President has an indispensable role to play under the Constitution . . . .").
29. See, e.g., Antonin Scalia, Speech on Use of Legislative History 13 (delivered during fall 1985 and spring 1986 at various law schools) (transcript on file with the California Law Review) [hereinafter Scalia, Legislative History Speech] (arguing that the use of legislative history "substantially increases, rather than reduces, the scope of judicial discretion").
30. See, e.g., Frank H. Easterbrook, The Role of Original Intent in Statutory Construction, 11 HARV. J.L. & PUB. POL'Y 59, 63 (1988) (arguing that the search for legislative intent "ignores the fact that laws are born of compromise" and that lawmakers do not pursue their objectives at all costs).
31. See infra Part I.A.
33. See infra Part I.B.
A. Early Textualism and Interest Group Theory

Interest group theory, a branch of public choice theory, provided a crisply intuitive basis for the early textualist technique. The interest group branch argues that interest groups "purchase" legislation with "campaign contributions, votes, implicit promises of future favors, and sometimes outright bribes."

Even worse, because of collective action problems, groups representing narrow, concentrated interests are likely to exert disproportionate influence in the process, typically at the expense of the general public.

Working from the premise that legislative history is "cheaper" to acquire than statutory text, early textualists criticized reliance on legislative history, in part, on the ground that such material could easily be procured by lobbyists who did not wish, or could not afford, to pay full freight to get their desired language into the text.

In one of his most talked-about separate opinions, Blanchard v. Bergeron, Justice Scalia crystallized this point. He decried the Court's reliance on a committee report's account of lower-court cases that, in the committee's view, described the proper approach to an attorney's fee statute. Refusing to join the portion of the Court's opinion relying on that legislative


35. In particular, concentrated interest groups have (a) lower costs of organizing, (b) reader means of detecting and policing free riders, and (c) higher per capita benefits from a favorable regulatory outcome. See Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups 40–41 (1965); Elhauge, supra note 13, at 35–44 (critically discussing interest group theory).


37. See, e.g., FEC v. Rose, 806 F.2d 1081, 1090 (D.C. Cir. 1986) (Starr, J.) (noting "the well-recognized phenomenon of deliberate manipulation of legislative history at the committee level to achieve what likely cannot be won before Congress as a whole"); Wallace v. Christensen, 802 F.2d 1539, 1560 (9th Cir. 1986) (en banc) (Kozinski, J., concurring in the judgment) ("Reports are usually written by staff or lobbyists, not legislators; few if any legislators read the reports; they are not voted on by the committee whose views they supposedly represent, much less by the full Senate or House of Representatives . . . ."); Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 Harv. J.L. & Pub. Pol’y 61, 61 (1994) ("These clues are slanted, drafted by the staff and perhaps by private interest groups."); Kenneth W. Starr, Observations About the Use of Legislative History, 1987 Duke L.J. 371, 376 (1987) ("Lobbyists maneuver to get their clients' opinions into the mass of legislative materials . . . .").


39. See Blanchard, 489 U.S. at 98–99 (Scalia, J., concurring in part and concurring in the judgment).
history, Justice Scalia wrote:

That the Court should refer to the citation of three District Court cases in a document issued by a single committee of a single house as the action of Congress displays the level of unreality that our unrestrained use of legislative history has attained. I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question, even if (as is not always the case) the Reports happened to have been published before the vote; that very few of those who did read them set off for the nearest law library to check out what was actually said in the . . . cases at issue (or in the more than 50 other cases cited by the House and Senate Reports) . . . .

As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . ., but rather to influence judicial construction.40

Here, Justice Scalia evokes a common theme in his early opinions: legislative committees often do not reliably speak for Congress as a whole,41 but rather generate legislative history strategically at the behest of client interest groups.42

40. Id.

41. See, e.g., Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 620 (1991) (Scalia, J., concurring in the judgment) (contending that the understanding of a statute expressed in committee reports “does not necessarily say anything about what Congress as a whole thought”); Edwards v. Aguillard, 482 U.S. 578, 637 (1986) (Scalia, J., dissenting) (questioning whether all legislators would “agree with the motivation expressed in the staff-prepared committee reports they might have read”); Hirschey v. FERC, 777 F.2d 1, 7–8 (D.C. Cir. 1985) (Scalia, J., concurring) (“And I think it time for courts to become concerned about the fact that routine deference to the detail of committee reports, and the predictable expansion in that detail which routine deference has produced, are converting a system of judicial construction into a system of committee-staff prescription.”).

42. Accordingly, the suspicion is that committees represent narrower interests than the chamber as a whole. See, e.g., Barry R. Weingast & Mark J. Moran, Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission, 91 J. Pol. Econ. 765, 771–72 (1983). But see, e.g., Keith Krehbiel, Are Congressional Committees Composed of Preference Outliers?, 84 AM. POL. SCI. REV. 149, 154–55 (1990) (arguing that committees reflect the ideology of the entire chamber). While political scientists do not all agree on this point, a good deal of evidence suggests that many committees are imperfectly representative of the legislature as a whole. See, e.g., John R. Boyce & Diane P. Bischak, The Role of Political Parties in the Organization of Congress, 18 J.L. Econ. & Org. 1, 2–3 (2002) (summarizing the debate).

In the legislative history speech he gave at various places in the 1980s, Justice Scalia built directly on this theme:

Nor, in the realities of the modern Congress, is a committee likely to represent a microcosm of the whole body, with “middle-of-the-road” views on the issues it addresses. To the contrary, by process of self-selection the committee is almost invariably “out in front” of the remainder of the Congress on the issues for which it has responsibility. A farm bill adopted by the Agriculture Committee in either house, for example, would be a far cry from what the full Congress would adopt. Why, then,
Hence, if an interest group cannot secure the assent of Congress to a policy detail, perhaps it can slip that detail into the report of a friendly committee or the floor statement of a friendly legislator.43 If so, courts presumably should not treat such materials as representative of Congress's understanding of the statutory text.

B. Early Textualism and Arrovian Social Choice Theory

In addition to interest group theory, early textualism also rested on the empirical premise that legislatures behave chaotically and that "the concept of 'an' intent for a person is fictive and for an institution hilarious."44 Primarily associated with Judge Easterbrook, this line of argument built upon social choice theory developed by Kenneth Arrow and others.45 Invoking Condorcet's paradox, social choice theorists have emphasized that while individual preferences will tend to be transitive (if I prefer A to B and B to C, I will prefer A to C), the preferences of a multi-member legislative body may be intransitive (the legislature may prefer A to B and B to C, but also C to A).46 Unless the legislative process is structured to produce a final vote, majorities could cycle endlessly.47 Because final outcomes will depend on the sequence of consideration of pairwise alternatives and the point at which voting is cut off, Arrovian social choice theory suggests that such outcomes frequently depend on voting sequence (agenda control) and strategic voting (including logrolling), rather than substantive policy preferences.48

should we assume that a legislative history largely fabricated by such a committee will be representative of the full Congress? It almost assuredly will not.


43. As Judge Buckley has put it, "to the degree that judges are perceived as grasping at any fragment of legislative history for insights into congressional intent, to that degree will legislators be encouraged to salt the legislative record with unilateral interpretations of statutory provisions they were unable to persuade their colleagues to accept." IBEW, Local No. 474 v. NLRB, 814 F.2d 697, 717 (D.C. Cir. 1987) (Buckley, J., concurring).

44. Frank H. Easterbrook, Some Tasks in Understanding Law Through the Lens of Public Choice, 12 INT'L REV. L. & ECON. 284, 284 (1992). Although Judge Easterbrook was primarily responsible for developing this strand of argument, Justice Scalia apparently agreed with him. See Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 DUKE L.J. 511, 517 ("[T]he quest for the 'genuine' legislative intent is probably a wild-goose chase.").

45. See generally ARROW, supra note 32; BLACK, supra note 32.

46. See, e.g., FARBER & FRICKEY, LAW AND PUBLIC CHOICE, supra note 8, at 38–39 (describing the problem of intransitivity). Consider the following illustration:

{Assume three voters with the following preference orderings: (1) voter 1 prefers A > B > C; (2) voter 2 prefers B > C > A; and (3) voter 3 prefers C > A > B. In a vote between A and B, A wins 2-1. In a vote between B and C, B wins 2-1. And in a vote between C and A, C wins 2-1.

Elhauge, supra note 13, at 101 n.261.

47. In the previous example, see supra note 46, if the first vote produces choice A, voters 2 and 3 can vote to reconsider and select option C; at that point, voters 1 and 2 will want to shift their votes to option B; and so forth.

Building on these premises, Judge Easterbrook’s earliest and perhaps most influential writing on the subject denied the possibility that legislative bodies might have a coherent intent concerning any question not clearly addressed by the statute:

Although legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice. Every system of voting has flaws. The one used by legislatures is particularly dependent on the order in which decisions are made. Legislatures customarily consider proposals one at a time and then vote them up or down. This method disregards third or fourth options and the intensity with which legislators prefer one option over another. Additional options can be considered only in sequence, and this makes the order of decision vital. It is fairly easy to show that someone with control of the agenda can manipulate the choice so that the legislature adopts proposals that only a minority support. The existence of agenda control makes it impossible for a court—even one that knows each legislator’s complete table of preferences—to say what the whole body would have done with a proposal it did not consider in fact.

One countervailing force is logrolling, in which legislators express the intensity of their preferences by voting against their views on some proposals in order to obtain votes for other proposals about which their views are stronger. Yet when logrolling is at work the legislative process is submerged and courts lose the information they need to divine the body’s design. A successful logrolling process yields unanimity on every recorded vote and indeterminacy on all issues for which there is no recorded vote.49

Judge Easterbrook had in his sights the idea, associated with such worthies as Learned Hand and Richard Posner, that the judge should, if possible, imaginatively reconstruct from the range of clues (including legislative history) how Congress would have resolved an issue before the court.50 If legislative outcomes depend on non-substantive and often unknowable factors, then the invocation of “legislative intent” merely masks a process of judicial choice that rests on something other than decoding Congress’s instructions.

49. Easterbrook, supra note 11, at 547–48 (footnotes omitted).
50. See United States v. Klinger, 199 F.2d 645, 648 (2d Cir. 1952) (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 per curiam by an equally divided Court, 345 U.S. 979 (1953); Richard A. Posner, Statutory Interpretation—in the Classroom and in the Courtroom, 50 U. Chi. L. Rev. 800, 817 (1983) (“[T]he task for the judge called upon to interpret a statute is . . . one of imaginative reconstruction. The judge should try to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar.”) (footnote omitted)).
Certainly, early textualism rested on more than public choice skepticism. As noted, the early textualist critique of legislative history also invoked a variety of other arguments, some grounded in constitutional assumptions about bicameralism and presentment and the properly limited role of the judiciary in our constitutional system. But it is fair to say that the pragmatic, skeptical arguments outlined above captured much of textualism’s initial tone and produced a great deal of its early buzz. It is perhaps telling, on this score, that in then-Judge Scalia’s famous legislative history speech, which he delivered at various law schools in the mid-1980s, he devoted four or five paragraphs to a rather oblique discussion of constitutional issues while spending ten solid pages on pragmatic objections to the use of legislative history. Especially because the Court had led with its chin in its more extravagant claims equating legislative history and congressional intent, early textualist concerns about the legislative process perhaps had more than a ring of plausibility. Why should one think that snippets of legislative history represented sincere expressions of

51. See supra text accompanying notes 28–30.

52. For example, in his well-regarded account of the revival of statutory-interpretation theory, Professor Frickey described Justice Scalia’s early critique of textualism in the following terms:

Scalia charged that legislative history is the product of legislators at their worst—promoting private interest deals, strategically posturing to mislead judges, or abdicating all responsibility to their unelected staff, who create legislative history at the behest of interest groups or to promote their own private agenda. This critique embraces the realistic, even cynical, assumptions about politics that underlie public choice theory.


53. Compare Scalia, Legislative History Speech, supra note 29, at 8, 15–16 (citing separation of powers concerns about the use of legislative history), with id. at 5–7, 9–15 (discussing pragmatic difficulties with using legislative history as evidence of legislative intent).
congressional consensus rather than strategic posturing by legislators acting at the behest of interest groups? Why would one assume that a complex, opaque, and path-dependent legislative process yields a meaningful collective intent on questions that Congress has not explicitly addressed in the statute?

Despite the intuitive appeal of these claims, critics of textualism responded quickly with their own empirical evidence suggesting that this suspicion of the legislative process might itself be overblown. The work of Farber and Frickey was at the cutting edge of that response.

II
THE EMPIRICAL CRITIQUE OF EARLY TEXTUALISM

Scholarly critiques of early textualism took a variety of approaches. One suggested Congress had evolved into a modern bureaucratic institution capable of generating meaningful corporate intents.54 Another denounced the textualist position as overbroad, proposing criteria to help judges distinguish reliable, probative legislative history from that which has been somehow “cooked.”55 Yet another suggested that adopting textualism would amount to bait-and-switch judging, given Congress’s longstanding reliance on judicial practice crediting legislative materials.56

Amidst a great deal of scholarship that challenged the practical assumptions underlying textualism,57 Farber and Frickey’s political science arbitrage stood out for its comprehensive treatment of the textualists’ most intuitively appealing empirical claims about (a) the role of interest groups and (b) the implausibility of a coherent “legislative intent.” Each point merits consideration.

A. Critique of Interest Group Theory

Farber and Frickey contested the empirical underpinning of the textualists’ claim that legislation represents a commodity purchased by bargain-hunting groups who prefer, wherever possible, to slip policy details into the legislative history rather than into the more expensive statutory text. They noted, for example, that there is no one “interest group theory” of legislation;

54. See Breyer, supra note 36, at 859 (“The [legislative] process ... is an institutional one, in which the legislator relies in part upon the work of staff. ... [N]o legislator reads every word of every report or floor statement or proposed statute, which may consist of hundreds of pages of text. However, ... those words are carefully reviewed by those whom they will likely affect and by the legislator’s own employees.”).

55. See Zeppos, supra note 52, at 1335–60.

56. See, e.g., Eskridge, supra note 9, at 683 (“[F]or most of this century the Court has told Congress, ‘We shall attend to committee reports, at least.’ That has encouraged Congress to develop conventions by which much of the elaboration of statutes ... has been put in committee reports rather than in the statutes themselves, where most of it would be cumbersome and out-of-place anyway.”).

57. See infra text accompanying notes 80–82.
rather, the conventional wisdom among political scientists has gone back and forth on whether concentrated interest groups dominate the legislative process.\(^5\) Sometimes the field has viewed interest groups as dominating the legislative process; at other times, the prevailing sense has been that such groups are "usually underfinanced, poorly organized, overworked, and often cancel[ ] each other out."\(^6\)

In addition, building on the findings of a then-recent study, Farber and Frickey made the common-sense suggestion that interest group influence, in fact, plays out in more complex ways than any stylized account suggests:

Group influence is likely to be strongest when the group is trying to block rather than obtain legislation; when the group's goals are narrow and have low visibility; when the group has substantial support from other groups and public officials . . . ; and when the group is able to move the issue to a favorable forum such as a sympathetic congressional committee.\(^6\)

From these considerations, Farber and Frickey concluded that the role of interest groups in the legislative process is far "too complex for simple predictive modeling" of the sort that one finds in accounts of interest groups purchasing legislation.

Farber and Frickey's book then challenged perhaps the key economic premise of interest group theory—that legislators operate based on the self-interested goal to maximize their chances of reelection, thereby requiring them to seek the financial, organizational, and other assistance that interest groups provide.\(^6\) Amidst a broad set of arguments against an economic theory of legislative behavior,\(^6\) Farber and Frickey suggested several grounds for

\(\text{\textsuperscript{5}}\) See Farber & Frickey, Law and Public Choice, supra note 8, at 17–21.

\(\text{\textsuperscript{6}}\) See id. at 18. For example, the leading figure in post-war pluralist theory, Robert Dahl, argued that political outcomes represent an equilibrium among interest groups. See generally Robert Dahl, Who Governs? Democracy and Power in an American City (1961), discussed in Farber & Frickey, Law and Public Choice, supra note 8, at 17.

\(\text{\textsuperscript{6}}\) Farber & Frickey, Law and Public Choice, supra note 8, at 19. The then-recent empirical study was by Professors Kay Lehman Schlozman and John T. Tierney. See Kay Lehman Schlozman & John T. Tierney, Organized Interests and American Democracy (1986).

\(\text{\textsuperscript{6}}\) Farber & Frickey, Law and Public Choice, supra note 8, at 19. Farber and Frickey also challenged the early textualists' specific factual claim that legislators do not necessarily read committee reports. See id. at 98 n.28 (noting a former Senate staffer's remark that "[w]ithin the Senate itself, reports are important chiefly because many Senators read nothing else before deciding how to vote on a particular bill" (quoting Eric Redman, The Dance of Legislation 140 (1973))).

\(\text{\textsuperscript{6}}\) Id. at 20–21. The idea that legislators are "single-minded seekers of reelection" is most closely associated with the work David R. Mayhew, Congress: The Electoral Connection 5 (1974). For a significant contrasting position of the same vintage, see, for example, Richard F. Fenno, Jr., Congressmen in Committees (1973).

\(\text{\textsuperscript{6}}\) At their broadest, Farber and Frickey argued generally that "crucial features of the political world do not fit the economic model" of political behavior. Farber & Frickey, Law and Public Choice, supra note 8, at 24. In particular, they noted that economic theories cannot
doubting that legislators typically act at the behest of special interests rather than the general interest. For example, they noted that even if legislators seek financial and electoral support from—and thus, in some sense, answer to—interest groups, standard economic literature on agency apparently predicts that any such principal-agent relationship will leave legislators some slack to pursue their conceptions of the public interest. In addition, the book extensively discussed empirical studies suggesting that a legislator’s annual rating by the Americans for Democratic Action (ADA)—a standard measure of a legislator’s ideology—supplied a better predictor of a legislator’s votes than did the economic interests of his or her constituents. In light of this study, it became at least more difficult to conclude that legislators routinely base their actions upon a rational calculation of self-interest rather than some conception of the public good.

From these considerations, Farber and Frickey concluded that the evidence supports “a mixed model [of legislative behavior] in which constituent interest, special interest groups, and ideology all help determine legislative conduct.” They suggested that while interest groups surely exert significant influence in the legislative process, the role of such groups does not map onto legislative behavior in a straightforward, predictable way. If that premise is correct, then interest group theory alone could not supply the basis for conclusions regarding the reliability vel non of any particular piece of legislative history, at least without detailed analysis of the actual political dynamics surrounding a particular bill. Thus, while conceding that “legislative history does require careful handling,” Farber and Frickey concluded that the interpreter’s appropriate response to that reality is not to reject legislative explain the most basic of political acts—voting by individuals in popular elections. See id. Citing data from a then-recent political science study, they argued that given the infinitesimally small chance that a single vote will change any election’s outcome, “no economically rational person” would choose to incur the time and expense necessary to vote. Id. at 24 & n.53 (citing and discussing Carroll B. Foster, The Performance of Rational Voter Models in Recent Presidential Elections, 78 AM. POL. SCI. REV. 678 (1984)). Accordingly, they asked: “[I]f public choice cannot explain such a fundamental aspect of political behavior as voting, can we trust its explanations of other political behavior?” Id. at 25.

64. Id. at 27 (citing Joseph H. Kalt & Mark A. Zupan, Capture and Ideology in the Economic Theory of Politics, 74 AM. ECON. REV. 279, 282–84 (1979)).

65. See id. at 29–33; see also sources cited in id. at 29 n.75. Acknowledging that a legislator’s ADA rating might itself be determined, in part, by the economic interests of his or her constituents, Farber and Frickey emphasized that “[s]everal researchers have developed techniques of ‘cleansing’ ADA scores of their association with constituent makeup.” Id. at 30. Under that approach, they added, the legislators’ votes still were “significantly related” to their ideological scores. Id.

66. Id. at 33.

67. See id. Indeed, noting that “legislation today often involves numerous conflicting interest groups,” they added that “the possibility of ‘pulling a fast one’ in the legislative history is somewhat remote. What one group smuggles into the history, other groups have an incentive to find and counter.” Id. at 98 (citing MORRIS FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 122 (2d ed. 1989)).
history altogether, but rather to learn "how to sort the wheat from the chaff."\textsuperscript{68}

\section*{B. Critique of Social Choice Theory}

Turning to Arrovian social choice theory, Farber and Frickey started by observing that the theory's predictions of legislative chaos and incoherence simply do not match "our empirical knowledge of legislatures such as the U.S. Congress."\textsuperscript{69} Drawing on recent political science literature, Farber and Frickey suggested several reasons for this divergence between theory and experience. For one thing, political scientists evidently have shown that cycling\textsuperscript{70} will not occur if preferences are "unipeaked": that is, if legislators' preferences on a given matter lie along something like a left-right spectrum, they can just vote for the policy point closest to their "own ideal location on the scale."\textsuperscript{71} Further, party discipline in a two-party system can help control cycling by disciplining legislative preferences.\textsuperscript{72} Finally, and most importantly, work on what political scientists call "structure-induced" equilibrium shows that legislatures employ a host of "structures, rules, and norms"—including gatekeeping committees, germaneness requirements, and the pairing of proposed legislation against the status quo—to help produce more predictable and intelligible equilibria than Arrovian theory would predict.\textsuperscript{73}

Farber and Frickey also drew an important conceptual inference from the work on structure-induced equilibrium: even if these stabilizing procedures produce legislative outcomes that turn more upon the strategic objectives of agenda setters than upon straightforward majority will, the outcomes nonetheless have a claim to legitimacy.\textsuperscript{74} In fact, as they elaborated, "democracy involves more than simply majority rule," and "we have no basis for claiming

\begin{thebibliography}{99}
\bibitem{68} Id. at 99.
\bibitem{69} Id. at 48 (quoting William H. Panning, \textit{Formal Models of Legislative Process}, in \textit{Handbook of Legislative Research} 689 (Gerhard Lowenberg et al. eds., 1985)).
\bibitem{70} See supra text accompanying notes 46-47 (discussing the phenomenon of cycling).
\bibitem{71} Id. at 51.
\bibitem{73} Id. at 49.
\bibitem{74} Id. at 49–50; see also id. at 50 n.23 (citing Kenneth J. Shepsle & Barry Weingast, \textit{Structure-Induced Equilibrium and Legislative Choice}, 37 Pub. Choice 502, 503–19 (1981); Kenneth J. Shepsle & Barry Weingast, \textit{Uncovered Sets and Sophisticated Voting Outcomes with Implications for Agenda Institutions}, 28 Am. J. Pol. Sci. 49, 69 (1984); Kenneth J. Shepsle & Barry Weingast, \textit{When Do Rules of Procedure Matter?}, 46 J. Pol. 206, 208 (1984)). Farber and Frickey added from that starting premise, political scientists have been able to develop mathematical models capable of describing "the focal area of legislative outcomes." Id. at 51.
\bibitem{75} Id. at 61 ("When agenda setters use their power to reach results that are systematically opposed to the preferences of the legislators, they are more likely to face challenges to their power."). For a similar analysis, see McNollgast, \textit{Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation}, 57 Law & Contemp. Probs. 3, 3, 24–25 (1994).
\end{thebibliography}
that there is a unique set of fair procedures that stabilize legislatures.\textsuperscript{75} In other words, if "pure majority rule is incoherent," then our democracy must be understood to include—and to be defined by—the filtering procedures adopted to aggregate society's preferences into a meaningful collective decision; these procedures avoid legislative cycling and its attendant instability.\textsuperscript{76}

Accordingly, Farber and Frickey contended that courts can legitimately credit the signals sent by actors—such as standing legislative committees—who the relevant procedures single out for pivotal roles in the process. If committees are known to serve as crucial "legislative 'gatekeeper[s]' and 'policy incubator[s]'\textsuperscript{77}" then "legislators outside the committee and their staffs [may] primarily focus on the [committee] report" to learn how a bill is to work in practice.\textsuperscript{78} In other words, whether or not the committee's views necessarily match up with those of the median legislator, the body as a whole might implicitly assign the committee authority to elaborate the details of legislative policy on the chamber's behalf.\textsuperscript{79}

* * *

Farber and Frickey's work was the most prominent in a wave of writings that challenged the empirical foundations of public choice theory in the context of legislation. A number of articles cited empirical evidence—both from the political science literature and from anecdotal observation—suggesting that a complex array of factors, not merely the influence of interest groups, affects how legislators vote.\textsuperscript{80} Many articles, moreover, invoked the idea of structure-induced equilibrium to challenge public choice theory's skeptical view of the legislative process.\textsuperscript{81} Indeed, relying directly on that concept, several prominent

\textsuperscript{75} Farber & Frickey, Law and Public Choice, supra note 8, at 57, 59.

\textsuperscript{76} Id. at 61.

\textsuperscript{77} Id. at 100.

\textsuperscript{78} Id. at 98.

\textsuperscript{79} As Farber and Frickey noted, id. at 101 & n.42, Judge Friendly made a similar observation, suggesting that members of Congress understood a bill's general purpose and "relied for the details 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).

\textsuperscript{80} See, e.g., Breyer, supra note 36, at 867 (noting the deregulation of the airline and trucking industries, despite industry opposition); Herbert Hovenkamp, Legislation, Well-Being, and Public Choice, 57 U. Chi. L. Rev. 63, 88–89 (1990) (citing empirical studies suggesting that legislation is not "for sale" to interest groups); Kelman, supra note 17, at 220–23 (citing deregulation as refuting the economic theory of legislation); Rubin, supra note 13, at 31–38 (discussing the varied factors that influence legislative voting).

\textsuperscript{81} See, e.g., Bernard Grofman, Public Choice, Civil Republicanism, and American Politics: Perspectives of a "Reasonable Choice" Modeler, 71 Tex. L. Rev. 1541, 1553–66 (1993) (cataloguing political scientists' arguments concerning the rarity of observed legislative cycling); Herbert Hovenkamp, Arrow's Theorem: Ordinalism and Republican Government, 75 Iowa L. Rev. 949, 954–66 (1990) (discussing mechanisms for avoiding cycling in the legislative process); Zeppos, supra note 52, at 1346 (discussing the implications of structure-induced equilibrium for statutory interpretation); see also, e.g., James J. Brudney, Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?, 93 Mich. L. Rev. 1, 46, 54 (1994)
political scientists famously defended the use of legislative history by arguing that bill sponsors and committees are repeat players who face sanctions if they misrepresent the majority coalition’s position in the legislative history they generate.\textsuperscript{82}

Operating within this broader framework, Farber and Frickey’s writings fought common-sense intuition with common-sense intuition. If textualists sowed doubt about the representativeness of legislative history and the very possibility that 535 legislators spread across two Houses could share a collective intent, the critics of textualism sowed corresponding doubt about its underlying public choice premises. They disputed the presumptions that legislators merely vote their self-interest, that interest groups regularly purchase legislation, and that the legislative process is too chaotic and random to permit the discernment of a meaningful legislative intent.

III
SECOND-GENERATION TEXTUALISM

Whatever the merits or demerits of the foregoing critiques (a question beyond this Essay’s scope), they clouded the cleanly intuitive appeal of the empirical claims made by first-generation textualists. Critics such as Farber and Frickey certainly did not deny that interest groups “play a major role in the legislative process” or claim that “chaos and arbitrariness are unheard of in actual deliberative bodies.”\textsuperscript{83} But by making the story more complex, their work dampened the intuitive impact of the ideas that committees speak for interest groups rather than the chamber as a whole and that the business of legislation is far too messy to produce coherent and recoverable intents. At a minimum, textualists wishing to rely on the empirical insights of public choice theory were forced to hedge their conclusions or expend considerable effort addressing the voluminous competing evidence brought forth by critics such as Farber and Frickey.\textsuperscript{84}
Although I can draw no direct causal connection with the empirical critiques of public choice theory, it is perhaps telling that, in the early 1990s, the emphasis of textualism shifted in ways that one might expect given those critiques. First, leading textualists—Justice Scalia, in particular—placed greater stress on formal constitutional arguments than pragmatic claims about the legislative process. Second, the salience of “the legislative history question” receded as the Court reached an apparent equilibrium in which it rejected textualists’ calls for the outright exclusion of legislative history, yet curtailed reliance on such materials because of their potential unreliability. Third, a narrower but more fundamental premise of textualism—the idea that courts must enforce a clearly worded statutory text even when its semantic import does not fully capture the statute’s apparent purpose—moved decidedly into the foreground.

I argue here that this third development—which, in my view, is the hallmark of “second-generation textualism”—has suggested a firmer conceptual basis for textualism. It rests on the simple intuitions that legislation often represents unknowable compromise, that compromise often requires legislators to embrace means that do not fully effectuate the ends that inspired the law’s enactment, and that judges who pursue a statute’s background purposes at the expense of its implemental detail therefore risk undermining rather than furthering the legislative design. These premises—which seem to embrace rather than resist the inevitable messiness of the legislative process—have gained considerable traction in the Supreme Court, even among its nontextualist members.

A. Textualists’ Increased Emphasis on Constitutional Arguments

The first shift—the textualists’ change in tone—is both the hardest to document and, in some senses, the least important in practical effect. But Justice Scalia’s work, in particular, has noticeably changed. Although Justice Scalia certainly has not abandoned his pragmatic concerns, his work in the

85. See infra text accompanying notes 105–115
86. See infra text accompanying notes 110, 116.
87. As discussed below, Judge Easterbrook’s work showed somewhat greater continuity, especially in the sense that fairly early on he developed the analytical framework for what would become second-generation textualism on the Supreme Court. See infra notes 105–108.
88. See, e.g., Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1342 (2010) (Scalia, J., concurring in part and concurring in the judgment) (“Even indulging the extravagant assumption that Members of the House other than members of its Committee on the Judiciary read the Report (and the further extravagant assumption that they agreed with it), the Members of the Senate could not possibly have read it, since it did not exist when the Senate passed the [relevant legislation].”) Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 73 (2004) (Scalia, J., dissenting) (“The Congressional Record or committee reports are used to make words appear to come from Congress’s mouth which were spoken or written by others (individual Members of Congress, congressional aides, or even enterprising lobbyists.”)); 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, 34 (Amy Gutmann ed., 1997) (“One of the routine tasks of the Washington lawyer-lobbyist is to draft language that
early 1990s began to place heavier and more explicit weight on formal constitutional concerns such as bicameralism and presentment and related nondelegation premises. Scalia's earlier references to the Constitution had typically been oblique, offhandedly linking his pragmatic objections to the idea that Congress passes laws rather than legislative history. And, in contrast to his later work, the mid-1980s version of his widely publicized legislative history speech did not mention bicameralism and presentment or Article I's vesting of legislative powers in Congress.

By the early 1990s, however, formal arguments based on Article I's vesting and structuring of legislative power moved front and center. For example, in 1993, Justice Scalia wrote:

The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators. As the Court said in 1844: “The law as it 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.”

In an important 1994 concurrence, moreover, he broadened his constitutional objection by arguing that if legislators do rely on committees to supply a statute's policy details, such an arrangement would violate the nondelegation doctrine:

Assuming [that] . . . Congress desire[s] to leave details to the committees, the very first provision of the Constitution forbids it. Article I, § 1, provides that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.” It has always been sympathetic legislators can recite in a prewritten ‘floor debate’—or, even better, insert into a committee report.”

89. See, e.g., Begier v. IRS, 496 U.S. 53, 68 (1990) (Scalia, J., concurring in the judgment) (“Congress conveys its directions in the Statutes at Large, not in excerpts from the Congressional Record . . . .”); Blanchard v. Bergeron, 489 U.S. 87, 98 (1989) (Scalia, J., concurring in part and concurring in the judgment) (“Congress is elected to enact statutes rather than point to cases [in committee reports] . . . .”); United States v. Taylor, 487 U.S. 326, 345–46 (1988) (Scalia, J., concurring in part) (“It should not be possible, or at least should not be easy, to be sure of obtaining a particular result in this Court without making that result apparent on the face of the bill which both Houses consider and vote upon, which the President approves . . . .”).

90. See generally, Scalia, Legislative History Speech, supra note 29. Indeed, in response to the contention that courts should credit committee reports because Congress implicitly delegated detail-setting authority to the originating committees in each House, Justice Scalia merely stated that our system assumes that such “de facto delegation” is directed to agencies and courts; he did not make a constitutional objection of any discernible sort. In particular, he argued:

It is realistic to posit, of course, a sort of resignation to de facto delegation. That is to say, if the members of Congress do not specify, in the law that they enact, all the details of its application they must realize that someone else will have to “fill in” those details. But the theory of our system is that de facto delegation goes initially to the agency administering the law and, ultimately, to the courts.

Scalia, Legislative History Speech, supra note 29, at 8.

assumed that these powers are nondelegable—or, as John Locke put it, that legislative power consists of the power “to make laws, . . . not to make legislators.” J. Locke, Second Treatise of Government 87 (R. Cox ed. 1982). No one would think that the House of Representatives could operate in such fashion that only the broad outlines of bills would be adopted by vote of the full House, leaving minor details to be written, adopted, and voted upon only by the cognizant committees. Thus, if legislation consists of forming an “intent” rather than adopting a text (a proposition with which I do not agree), Congress cannot leave the formation of that intent to a small band of its number, but must, as the Constitution says, form an intent of the Congress.  

This analysis—which he had previewed in a 1992 revision of his legislative history speech—took the form of confession and avoidance. Even if the legislative process, in fact, operates differently from his practical understanding, the end result runs afool of the nondelegation doctrine. In subtle but important ways, therefore, textualism in the 1990s took on a more formal, constitutionally grounded cast. In so doing, it reduced its necessary reliance on the sort of empirical assumptions that Farber and Frickey and other critics of public choice had called into question.

Although the Court has not embraced the full implications of the formalist position, Justice Scalia’s new emphasis on bicameralism and presentment, at a minimum, puts the theory of textualism on firmer ground. Quite apart from the previously discussed empirical concerns, the pragmatic and skeptical emphasis of early textualism did not present the best case for the approach. When the Court, in effect, tells a coordinate branch that it must do its business a different way (placing policy details in the text rather than the legislative history), it is imperative to anchor that instruction firmly in a source of higher law. Otherwise, it is not clear why the Court has any warrant to reform the

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93. See Antonin Scalia, Use of Legislative History: Judicial Abdication to Fictitious Legislative Intent 18–19 (speech written in 1992) (transcript on file with the California Law Review):

It may or may not be true that the houses entertain . . . a desire [to have committee reports treated as authoritative] . . . . But if it is true, it is unconstitutional. “All legislative powers herein granted,” the Constitution says, “shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” The legislative power is the power to make laws, not the power to make legislators. It is nondelegable. Congress can no more authorize one committee to “fill in the details” of a particular law in a binding fashion than it [can] authorize a committee to enact minor laws. Whatever Congress has not itself prescribed is left to be resolved by the Executive or (ultimately) the Judicial Branch.

The 1980s incarnation of the speech, as noted, contained nothing like this constitutional claim.
94. I explained and elaborated on Justice Scalia’s theory in John F. Manning, Textualism as a Nondelegation Doctrine, 97 COLUM. L. REV. 673 (1997). Among other things the constitutionally grounded version of textualism was more openly formalistic. See Scalia, supra note 88, at 25 (“Of course it’s formalistic! The rule of law is about form.”).
95. See infra Part III.B.
Certainly, judges might reasonably worry that interest groups are pulling a fast one by getting friendly legislators or staffers to slip favorable policy details into the legislative history. But the Court’s authority to address that problem comes, if anywhere, from the determination that the Constitution condemns the legislature’s choice to elaborate meaning in that way. Although early textualists certainly adverted to the constitutional issue, it was decidedly in the background. Moving it to the foreground made clearer that textualists advocate intervening in the affairs of another branch not because they think its practices unwise, but rather because they regard them as forbidden by the Constitution. This shift in emphasis, however, turned out to be less important than two other developments that gained greater traction with the Court.

B. The Receding Debate on Legislative History

A second shift occurred when legislative history simply ceased to be the epicenter of the judicial debate over textualism. Rather than embracing the textualists’ formalist argument for the complete exclusion of legislative history, the Court has opted instead for a middle ground. In particular, it has apparently reached an equilibrium that greatly tempers judicial reliance on legislative history as a source of evidence while enhancing judicial attention to the text.\(^\text{97}\)

\(^{96}\) See, e.g., Brudney, supra note 81, at 45–46 ("Given that Congress as an institution has chosen to order its legislative affairs in this manner, considerations of deference toward Congress would seem to warrant respect for its designated legislative process as well." (citation omitted)); Costello, supra note 52, at 67 ("If Congress chooses to rely heavily on committees in selecting and shaping legislation, why should courts deny the importance of the committee system when called upon to give meaning to the product that emerges from that system?" (citation omitted)); Spence, supra note 17, at 588 ("[T]extualism enhances judicial power at the expense of Congress’ primacy as the authors and masters of statutes, and at the expense of Congress’ right to determine the authoritative sources of statutory meaning."). For an excellent summary of complaints that early textualism interfered in congressional prerogatives over the ordering of its lawmaking process, see Bernard W. Bell, R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory, 78 N.C. L. Rev. 1253, 1257 n.12 (2000).

\(^{97}\) See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 794–95 (4th ed. 2007) (summarizing the current approach). A number of studies corroborate the trends of reduced reliance on legislative history and enhanced reliance on textual cues. See, e.g., James J. Brudney & Corey Ditslear, The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras, 89 JUDICATURE 220, 222 (2006) (documenting that in workplace law cases, “the Court’s reliance on legislative history declined from 51 percent during the Burger years to 29 percent in the Rehnquist era”); Michael H. Koby, The Supreme Court’s Declining Reliance on Legislative History: The Impact of Justice Scalia’s Critique, 36 HARV. J. ON LEGIS. 369, 386 (1999) (reporting that in the six years before Justice Scalia’s appointment, the Court averaged 3.47 citations of legislative history per opinion and that the average in the twelve years after his appointment dropped to 1.87); Thomas W. Merrill, Textualism and the Future of the Chevron Doctrine, 72 WASH. U. L.Q. 351, 356–63 (1994) (discussing the Rehnquist Court’s shift toward arguments based on semantic meaning and linguistic canons); Samuel A. Thumma & Jeffrey L. Kirchmeier, The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries, 47 BUFF. L. REV. 227, 252–60 (1999) (documenting a dramatic increase in the Court’s citation of dictionaries in the Rehnquist
The new equilibrium is perhaps best captured by Justice Kennedy's opinion for the Court in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, in which he famously wrote:

As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "'looking over a crowd and picking out your friends.'" See Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983). Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text. We need not comment here on whether these problems are sufficiently prevalent to render legislative history inherently unreliable in all circumstances, a point on which Members of this Court have disagreed. It is clear, however, that in this instance both criticisms are right on the mark.98

This new attitude seems to accommodate elements of both the public choice critique of legislative history and the previously discussed empirical critique of public choice theory: the Court recognizes that legislative history has its problems and must be approached with caution, but ultimately concludes that no one has made the case for the inherent unreliability of such materials in all contexts.

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98. 545 U.S. 546, 568–69 (2005). In a similar vein, Professor Eskridge, who is a friendly critic of textualism, has written that modern textualism usefully underscored that "the Court should devote more of its energy to analyzing statutory texts," while "reminding courts and attorneys that legislative history is, at best, secondary and supporting evidence of statutory meaning." William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. Rev. 621, 625 (1990). In addition, textualism caused the Court to be "more critical of the legislative history it uses," making sure that the legislative history in question has sufficient indicia of reliability and relevance. *Id.*
With this synthesis of the competing positions, the ferocity of the debate over legislative history has largely receded. While Justice Scalia continues to publish separate opinions refusing to join discussions of legislative history, his writing on the subject now has the feel of preserving rather than pressing his objection. Recently, his main cause for complaint seems to be that the Court invokes legislative history unnecessarily to confirm a result amply established through textual exegesis. On matters of interpretation, these days the action on the Supreme Court lies elsewhere.

C. Emergence of Second-Generation Textualism

A third development—which, I think, can fairly be described as the defining feature of "second-generation textualism"—provoked a particularly important shift in the Court's approach to statutes. With questions about the evidentiary value of legislative history fading in importance, textualists in the 1990s began to advance more vigorously the narrower but more fundamental proposition that courts must respect the terms of an enacted text when its semantic meaning is clear, even if it seems contrary to the statute's apparent

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99. To be fair, Judge Easterbrook has always been somewhat less fierce in his criticism of legislative history:
Textualists, like other users of language, want to know its context, including assumptions shared by the speakers and the intended audience. Words in legislation may be terms of legal art. Debates and remarks may tell us whether the words in a statute appeal to a lay understanding or to a technical one. Because laws themselves do not have purposes or spirits—only the authors are sentient—it may be essential to mine the context of the utterance out of the debates ....
Frank H. Easterbrook, Legislative History Values, 66 Chi.-Kent L. Rev. 441, 443 (1990). At the same time, Judge Easterbrook has also always been on the lookout for abuses of the practice. See, e.g., Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 448 (7th Cir. 2005) (arguing that "when the legislative history stands by itself ... unconnected to any enacted text, it has no more force than an opinion poll of legislators"); Cont'l Can Co. v. Chi. Truck Drivers, 916 F.2d 1154, 1156-57 (7th Cir. 1990) (showing how the Senate sponsor of a piece of legislation sought to use legislative history to manipulate its meaning). As discussed below, his main concern throughout has been to limit imaginative reconstruction of legislative intent that ascribes meaning that the language of a statute cannot bear. See infra text accompanying notes 105-108.

100. See, e.g., Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson, 130 S. Ct. 1396, 1411 (2010) (Scalia, J., concurring in part and concurring in the judgment); Zedner v. United States, 547 U.S. 489, 509-11 (2006) (Scalia, J., concurring in part and concurring in the judgment); Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 267 (2004) (Scalia, J., concurring in the judgment); Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 219 (1994) (Scalia, J., concurring in the judgment); see also Samantar v. Yousuf, 130 S. Ct. 2278, 2294 (2010) (Scalia, J., concurring in the judgment) (arguing that "legislative history is almost never the real reason for the Court's decision-and make-weights do not deserve a lot of the Court's time"). Periodically, Justice Scalia will break new ground on the question. See, e.g., Flores-Figueroa v. United States, 129 S. Ct. 1886, 1895 (2009) (Scalia, J., concurring in the judgment) (arguing that the rule of lenity precludes the use of legislative history to expand the reach of a criminal statute and likening such use to "the practice of Caligula, who reportedly 'wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people'" (quoting 1 William Blackstone, Commentaries on the Laws of England 46 (1765))). But for the most part, the salience of the issue seems to have diminished somewhat.

101. As I explained in an earlier article, textualists understand that semantic meaning
overall purpose. Until the late twentieth-century, the Court unflinchingly applied the norm most famously articulated in *Holy Trinity Church v. United States*—that the "letter" (text) of a statute, however clear, must yield when it conflicts with the "spirit" (purpose), provided that the latter is clear. The theory behind the *Holy Trinity* approach is straightforward. Congress passes statutes to achieve some purpose. It acts under constraints of limited time, resources, and foresight, so statutes will sometimes be over- or underinclusive relative to their background aims. Accordingly, to serve the interest of legislative supremacy, the Court found it uncontroversial to reshape a statute's semantic detail in order to capture more precisely its apparent background purpose.

The *Holy Trinity* approach—that letter must yield to spirit—became the main target of second-generation textualism on the Supreme Court. Judge Easterbrook had developed the intellectual framework of the critique in his writings and opinions: First, whether or not interest groups dominate the process, statutes typically represent the product of compromise, and compromises are not always tidy. Second, statutes reflect choices about means as well as ends, and the chosen means reflect the price that the legislature was willing to pay in order to achieve the desired ends. Third, a

depends on the conventions that a linguistic community shares for understanding language in context. For textualists, it includes not merely dictionary definitions, but also colloquial meanings, the technical definitions of terms of art, and background conventions associated with certain phrases or types of legislation. **See Manning, supra** note 84, at 2456–76.

105. **See, e.g.,** Kerr v. Puckett, 138 F.3d 321, 323 (7th Cir. 1998) ("Statutes are compromises among legislators who may hold incompatible conceptions of the public weal. . . . Instead of relying on 'common sense', which is an invitation to treat the law as if one side or the other had its way, a court should implement the language actually enacted—provided the statute is not internally inconsistent or otherwise absurd."); Heath v. Varity Corp., 71 F.3d 256, 258 (7th Cir. 1995) (Easterbrook, J.) ("Tensions among statutory provisions are common. Legislation reflects compromise among competing interests. . . . It upsets the legislative balance to push the outcome farther in either direction."); Chi. Prof'l Sports Ltd. P'ship v. NBA, 961 F.2d 667, 671 (7th Cir. 1992) ("Compromises draw unprincipled lines between situations that strike an outside observer as all but identical. The limitation is part of the price of the victory achieved, a concession to opponents who might have been able to delay or block a bill even slightly more favorable to the proponents.").
106. **See, e.g.,** Contract Courier Servs. v. Research & Special Programs Admin., U.S. Dep't of Transp., 924 F.2d 112, 115 (7th Cir. 1991) (Easterbrook, J.) ("Statutes do more than point in a direction . . . . They achieve a particular amount of that objective, at a particular cost in other interests."); Trs. of Iron Workers Local 473, Pension Trust v. Allied Products Corp., 872 F.2d 208, 213 (7th Cir. 1989) ("The crafting of specific language often reflects legislative compromise
statute's level of generality sends a crucial signal about the choice of means; some statutes adopt rules while others invoke standards.107 Treating a rule-based statute as if it adopts standards, or vice versa, displaces "the legislative choice as effectively as expressly refusing to follow the law."108

Although these themes had been evident in some first-generation textualist writings109—and, tellingly, in some earlier Supreme Court opinions written by nontextualists110—the Supreme Court's textualists made them central to their jurisprudence during the 1990s. The Court's most committed textualists, Justices Scalia and Thomas, stressed the importance of legislative compromise many times in separate opinions.111 More importantly, they and

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107. See, e.g., Adams v. Plaza Fin. Co., 168 F.3d 932, 939 (7th Cir. 1999) (Easterbrook, J., dissenting) ("Congress may prefer standards over rules in some statutes, yet choose rules over standards in others."); Fox Valley & Vicinity Const. Workers Pension Fund v. Brown, 897 F.2d 275, 284 (7th Cir. 1990) (Easterbrook, J., dissenting) ("But whether to have rules (flaws and all) or more flexible standards (with high costs of administration and erratic application) is a decision already made by legislation.").

108. Easterbrook, supra note 37, at 68; see also, e.g., City of Joliet v. New West, L.P., 562 F.3d 830, 837 (7th Cir. 2009) (Easterbrook, C.J.) ("When courts rely on purpose clauses, rather than the concrete rules that the political branches have selected to achieve the stated ends, judges become effective lawmakers, bypassing the give-and-take of the legislative process."); Jaskolski v. Daniels, 427 F.3d 456, 462 (7th Cir. 2005) (Easterbrook, J.) ("Judges ought not turn a rule into a standard; that amounts to little more than disagreement with a legislative choice. Boosting the level of generality by attempting to discern and enforce legislative 'purposes' or 'goals' instead of the enacted language is just a means to turn rules into standards.").

109. As compared with the Supreme Court's textualists, Judge Easterbrook showed somewhat greater continuity in his concerns between the two periods. See, e.g., Walton v. United Consumers Club, Inc., 786 F.2d 303, 311 (7th Cir. 1986) (emphasizing legislative compromise); Frank H. Easterbrook, Foreword: The Supreme Court, 1983 Term—Foreword: The Court and the Economic System, 98 Harv. L. Rev. 4, 46 (1984) (same); Easterbrook, supra note 11, at 546–47 (arguing that when the judiciary adapts statutory rules to make them more effective in achieving an apparent legislative goal, that move "denies to legislatures the choice of creating or withholding gapfilling authority").


111. See, e.g., Wyeth v. Levine, 129 S. Ct. 1187, 1215–16 (2009) (Thomas, J., concurring in the judgment) ("[A] statute's text might reflect a compromise between parties who wanted to pursue a particular goal to different extents."); Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644, 678 (2003) (Thomas, J., concurring in the judgment) (explaining that "the compromises embodied in the Medicaid Act" make clear "the impossibility of defining 'purposes' in complex statutes at . . . a high level of abstraction"); Barnhart v. Peabody Coal Co., 537 U.S. 149, 183–84 (2003) (Scalia, J., dissenting) ("The reality is that the Coal Act reflects a compromise between the goals of perfection in assignments and finality. . . . The best way to be faithful to the resulting compromise is to follow the statute's text, as I have done above—not to impute to Congress one statutory objective favored by the majority of this Court at the expense of other, equally plausible, statutory objectives."); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 561–62 (2001) (Scalia, J., dissenting) ("To remove that limit is to repeal subsection (a)(16) altogether, and thus to eliminate . . . .")
Justice Kennedy, who, if not an outright textualist, is at least a fellow traveler, have succeeded in attracting majorities for numerous opinions explicitly predicated on such reasoning. Justice Scalia thus wrote for the Court that judges may not base interpretations on “policy arguments” when they contradict the conventional import of the enacted text, “which 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.” Justice Kennedy likewise explained for the Court that “any key term in an important piece of legislation” typically reflects “the result of compromise between groups with marked but divergent interests in the contested provision,” and that “[c]ourts and agencies must respect and give effect to these sorts of compromises.” Further, in the course of rejecting a rather compelling purposive argument for departing from the clear terms of a complex regulatory statute, Justice Thomas stated for the Court:

Dissatisfied with the text of the statute, the [petitioner] attempts to search for and apply an overarching legislative purpose to each section of the statute. Dissatisfaction, however, is often the cost of legislative compromise. And negotiations surrounding enactment of this bill tell a typical story of legislative battle among interest groups, Congress, and the President. . . . Its delicate crafting reflected a compromise amidst highly interested parties attempting to pull the provisions in different directions. As such, a change in any individual provision could have unraveled the whole. It is quite possible that a bill [that avoided the awkward line-drawing challenged by petitioner] . . . would not have survived the legislative process. The deals brokered during a Committee markup, on the floor of the two Houses, during a joint House and Senate Conference, or in negotiations with the President, however, are not for us to judge or second-guess.

These opinions, moreover, coincide with the Court’s growing tendency, in the same period, simply to stick closely to the text of a statute when its semantic

import is clear. To be sure, the Court's adherence to that principle is not ironclad, and classical strong "purposivism" still has its defenders in the judiciary. But it is fair to say that the Court's second-generation textualists succeeded in dispatching Holy Trinity from the mainstream of the Court's jurisprudence. This newer textualism thus has gained more traction with the

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117. Despite its increasing emphasis on adherence to a clear text, the Court occasionally applies strongly purposive reasoning at the apparent expense of the most natural reading of the text. See, e.g., Clinton v. New York, 524 U.S. 417, 428-29 (1998) (broadening an expedited review provision because the literal meaning undermined the statutory purpose to provide "a prompt and authoritative judicial determination of the constitutionality of the [Line Item Veto] Act"); Lewis v. United States, 523 U.S. 155, 160 (1998) (refusing to enforce a statute's conventional meaning when "a literal reading of the words . . . would dramatically separate the statute from its intended purpose"); see also Daniel J. Meltzer, The Supreme Court's Judicial Passivity, 2002 SUP. CT. REV. 343, 364-68 (arguing that the Court engages in significant interpretive lawmaking in its implied preemption cases).

Even when the Court's recent decisions have applied strongly purposive reasoning, it has taken pains to show that its outcomes fit within the acceptable semantic confines of the enacted text. See, e.g., Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 94-99 (2007) (offering an elaborate defense of why the semantic meaning of the word "percentile" in the Federal Impact Aid Act could accommodate the Act's apparent purpose); Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 591 (2004) (carefully exploring the usage of the word "age" to demonstrate that "discriminat[ion] . . . because of [an] individual's age," 29 U.S.C. § 623(a)(1) (2006), was consistent with the Age Discrimination in Employment Act's apparent purpose to protect older workers against younger).

118. In recent years, Justices Stevens and Breyer have been the Court's most unflinching defenders of the practice. See W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 115 (1991) (Stevens, J., dissenting) ("[W]e do the country a disservice when we needlessly ignore persuasive evidence of Congress' actual purpose and require it . . . to restate its purpose in more precise English whenever its work product suffers from an omission or inadvertent error."); STEPHEN G. BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 87-101 (2005) (defending strong purposivism).

Court than did the first generation’s empirical critique.

As compared to early textualism, with its heavy reliance on intent skepticism, this more modest but more fundamental form of textualism has several related advantages that may have helped to attract repeated Court majorities to the approach. First, second-generation textualism carries less of an empirical burden than did its first-generation counterpart. Second-generation textualism contests the premise that when the rules embedded in a statutory text deviate from the statute’s apparent purpose, that deviation necessarily reflects some form of legislative “slip” or omission. From that starting point, it challenges the related idea that the Court serves legislative supremacy by adapting the text, however clear it may be, to its background purpose. Accordingly, second-generation textualism depends on the relatively modest empirical assumption that when the text of a statute is clear but fits awkwardly with its purpose, its unusual shape may reflect compromise rather than inadvertence. An interpreter in our system of government has strong normative reasons to presume such a compromise. In particular, to do otherwise would be to dilute important, constitutionally ordained, as well as legislatively adopted, procedural safeguards that give political minorities extraordinary power to block legislative change and insist on compromise as the price of assent. Political scientists have shown, for example, that the bicameralism and presentment requirements of Article I, Section 7 approximate a supermajority requirement, thereby giving political minorities extraordinary power to block legislative change. The legislative procedures adopted by each House—most notably, committee gatekeeping, the Senate filibuster, and the Senate’s unanimous consent requirement—accentuate that constitutional design feature. Accordingly, by assuming that a clear text reflects the product of compromise, second-generation textualism preserves the right of minorities and outliers to insist that the majority take half a loaf, even if the end result is not neatly logical, internally consistent, or tightly connected to the background purposes that seemingly inspired the majority to act.

120. I have laid out this argument in greater detail in Manning, supra note 108, at 70–78.
121. See James M. Buchanan & Gordon Tullock, The Calculus of Consent: Logical Foundations of Constitutional Democracy 233–48 (1962) (making this point about bicameralism even when the two houses are the same size). Indeed, by requiring equal representation of states in the Senate, the Constitution explicitly protects the political minority made up of small-state residents. See U.S. Const. art. I, § 3, cl. 1; Bradford R. Clark, Separation of Powers as a Safeguard of Federalism, 79 Tex. L. Rev. 1321, 1371–72 (2001) (discussing this feature of the Constitution).
123. See, e.g., Kenneth A. Shepsle & Barry R. Weingast, The Institutional Foundations of Committee Power, 81 Am. Pol. Sci. Rev. 85, 89 (1987) (noting, in general, that “veto groups are pervasive in legislatures” and, in particular, that “[a] small group of senators . . . may engage in filibuster and other forms of obstruction” and that “[a]ny individual senator may refuse unanimous consent to procedures that would expedite passage of a committee bill”).
Second, because second-generation textualism merely instructs interpreters to hew closely to the terms of a clear text, empirical tangles surrounding legislative history become less salient. Second-generation textualism assumes that if the text speaks clearly, courts must respect that signal. The newer textualist position thus does not depend on any factual assertion that legislative history is inherently unreliable or that the legislative process is incoherent. Rather, it requires only the conclusion that legislative history should not trump statutory text when both speak clearly but send conflicting signals. In that circumstance, the key point is that the text alone has gone through the procedural hurdles that protect political minorities and outliers.

Third, in contrast with first-generation textualism, second-generation textualism seems less susceptible to the charge of anti-legislative bias. First-generation textualism sought to control what it regarded as rampant interest-group influence on Congress, while also characterizing the legislative process as too chaotic to produce meaningful intent. Second-generation textualism seems to embrace the legislative process, with all its foibles. While still recognizing that the process is complex and path dependent, second-generation textualism acknowledges, as Farber and Frickey wrote, that judges must take democracy as they find it. If the constitutionally or legislatively prescribed rules of procedure give minorities and preference outliers a disproportionate voice in the legislative process, the judge’s job is to give effect to those procedures by enforcing a clear but awkwardly written text. To be sure, second-generation textualism, much like its earlier incarnation, still speaks of interest group influence. But it generally does so when making the broader point that legislation represents the product of compromise among competing interests—a premise that sometimes involves the presence of bargaining among formal interest groups, but in no way depends on their presence for its force or legal effect.


125. Judge Easterbrook emphasized the importance of the procedural hurdles even in his early writings. See, e.g., In re Sinclair, 870 F.2d 1340, 1343–44 (7th Cir. 1989) (“Desires become rules only after clearing procedural hurdles, designed to encourage deliberation and expose proposals (and arguments) to public view and recorded vote.”); Frank H. Easterbrook, What Does Legislative History Tell Us?, 66 CHI.-KENT L. REV. 441, 445 (1990) (“What distinguishes laws from the results of opinion polls conducted among legislators is that the laws survived a difficult set of procedural hurdles and either passed by a two-thirds vote or obtained the President’s signature.”) (emphasis omitted)).

126. See supra text accompanying notes 74–79 (discussing Farber and Frickey’s views).


128. As Jeremy Waldron has written, legislation is “the product of a multi-member assembly, comprising a large number of persons of quite radically differing aims, interests, and
Ultimately, second-generation textualism boils down to the simple idea that judges must respect the level of generality at which the legislature expresses its policies. In that sense, it is itself a *purposive* philosophy—one emphasizing that Congress expresses its purpose, in part, by specifying the preferred means (rules versus standards) of implementing its broader goals. Sometimes it picks a rule, with greater certainty but also greater problems of fit; other times it picks standards, with more flexibility but also greater agency and adjudication costs. To return to an earlier example, it means something very different for Congress to ban “dogs” rather than “disruptive animals” from a park and vice versa. Indeed, second-generation textualism may be more acceptable to nontextualists precisely because it is framed as defending Congress's prerogative to define its purposes through its choice of particular means. As Justice Scalia wrote, “it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large [the] degree [of interstitial lawmaking] shall be.” In a like spirit, the Court now deems itself “bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.” And noting that “the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone,” Justice Scalia has emphasized for the Court that “[t]he best evidence of that purpose is the statutory text adopted by both Houses of

backgrounds.” JEREMY WALDRON, LAW AND DISAGREEMENT 125 (1999). Accordingly, any statute’s “specific provisions” might be “the result of compromise and line-item voting.” Id.

129. Modern textualists start from the premise that while interpretation is not mechanical, legislators can communicate effectively with judges, administrators, and the public because of their common membership in a linguistic community with shared practices for understanding a vast array of words and phrases in context. See, e.g., FREDERICK F. SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 64–68 (1991); Jeremy Waldron, Legislators’ Intentions and Unintentional Legislation, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 329, 339 (Andrei Marmor ed., 1995).


130. Judge Easterbrook thus has written:

A legislature that seeks to achieve Goal X can do so in one of two ways. First, it can identify the goal and instruct courts or agencies to design rules to achieve the goal. The second approach is for the legislature to pick the rules. It pursues Goal X by Rule Y. The selection of Y is a measure of what Goal X was worth to the legislature, of how best to achieve X, and of where to stop in pursuit of X. Like any other rule, Y is bound to be imprecise, to be over- and under-inclusive. This is not a good reason for a court, observing the inevitable imprecision, to add to or subtract from Rule Y on the argument that, by doing so, it can get more of Goal X. The judicial selection of means to pursue X displaces and directly overrides the legislative selection of ways to obtain X. It denies to legislatures the choice of creating or withholding gapfilling authority.

Easterbrook, supra note 11, at 546–47 (footnotes omitted).


Congress and submitted to the President."133 Whether or not one agrees with the foregoing statements, they leave no doubt that the aim of second-generation textualism is to protect, rather than control, Congress's choices.

CONCLUSION

In its early days textualism rested, in important part, on the assumption that interest groups dominate the legislature and attempt to buy legislation on the cheap through the creation of legislative history. It also reflected a deep skepticism of the legislative process, treating it as too chaotic to produce a meaningful legislative intent. Quite apart from the empirical questions that later emerged, those starting premises did not represent an obviously sustainable theory of statutory interpretation. Like most other foundational theories of interpretation in our system of government, textualism presupposes legislative supremacy—that the judge's job is, in some sense, to decipher and enforce Congress's instructions as accurately as possible. Doing so, it is said, implements the very idea of democracy. Premised on an essentially skeptical view of the legislative process, first-generation textualism had the feel to many of resisting rather than enforcing congressional desires.

In contrast, second-generation textualism more consciously embraces the legislative process. It acknowledges the important insight that democracy is not self-defining and that judges must take the rules of legislative procedure as they find them. As Farber and Frickey suggested, perhaps Arrovian cycling requires the legislature to adopt rules of procedure to give agenda control to someone other than the median voter. Perhaps interest groups sometimes dominate a process that is geared to make it much easier to block rather than pass legislation. What is important to second-generation textualists is that the process is designed to give minorities and preference outliers the right to insist on compromise as the price of letting legislation pass. From that starting point, second-generation textualists argue that a judge's task is to ensure that the clear terms of a statute are enforced, lest the process of interpretation dilute or disregard the relevant stakeholders' extraordinary power to demand compromise. Although many disagree with the tenets of second-generation textualism, it is hard to deny that it rests firmly on a meaningful theory of legislative supremacy. To the extent that critics like Farber and Frickey helped to redirect textualist energies away from its early empirical foundations in

133. W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 98 (1991) (citation omitted); see also, e.g., Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (Scalia, J.) ("[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."); Brogan v. United States, 522 U.S. 398, 403 (1998) (Scalia, J.) (recognizing "that the reach of a statute often exceeds the precise evil to be eliminated" and that "it is not, and cannot be, [the Court's] practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself").
public choice theory, they may have done more for textualism than they would care to contemplate.