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The Reconceptualization of Legislative History in the Supreme Court

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ARTICLES

THE RECONCEPTUALIZATION OF LEGISLATIVE HISTORY IN THE SUPREME COURT

CHARLES TIEFER

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I. INTRODUCTION: THE SUPREME COURT TURNAROUND IN THE LATE 1990s

Beginning in 1995, a new concept of using legislative history emerged in the Supreme Court. Pioneered by Justices Breyer and Stevens, this new concept, called here "institutional legislative history," arose in the wake of the previous intense debate between critics and proponents of textualism. Led by Justice Scalia, textualists fought reliance by the Court on legislative history, and by the early 1990s achieved significant success. In recent Terms, however, Justices Breyer and Stevens have assembled a majority on the Court for selective use of


legislative history, notwithstanding Justice Scalia’s continuing, sharply worded opinions in opposition. Although a few quick observers noted textualism’s lack of success in recent Terms, Justices Breyer and Stevens’s distinctive and successful reconceptualization of the basis for using legislative history has gone largely unnoticed.

Justices Breyer and Stevens largely eschew the old-fashioned use of legislative history, in which congressional majorities are presumed to share the same general purpose in enacting a statute, and these shared sentiments are made to answer focused statutory questions. Rather, the Justices use congressional report details, preferably tied to bill drafting choices, to interpret the particular issue before the Court. In addition, each Justice has made one helpful discursive pronouncement: Justice Breyer’s seminal 1992 article *On the Uses of Legislative History in Interpreting Statutes*, and Justice Stevens’s key 1995 concurring opinion in *Bank One Chicago v. Midwest Bank & Trust Co.*

The Justices’ late-1990s success relies upon a reconceptualization of legislative history, namely, a new resolution of the fundamental conceptual problem that over the past sixty years bedeviled its use. The legal realist Max Radin in 1930, in one of the most universally cited


conceptual insights\(^8\) in the history of legislation, first seriously crystallized the problem. With powerful logic, Radin assailed the validity of generalizing from items of legislative history to what a majority of voting Members have in their diverse and largely unfathomable subjective thoughts. Radin critiqued efforts to infer the intent of the Members as a group through legislative history as not only an improbably large inductive leap, but also an anthropomorphic fiction and a metaphysical nightmare.\(^9\)

As Judge Easterbrook\(^{10}\) and Justice Scalia developed a theory of textualism in the 1980s and ultimately in Justice Scalia’s well-reasoned 1997 essay, *A Matter of Interpretation*,\(^{11}\) they reinforced Radin’s critique with arguments from public choice analysis,\(^{12}\) stating that the voting majority of Congress agrees formally on the text of an enactment and likely on nothing else. Textualism drew on an array of theories and

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9. Radin’s realist critique observed that while Members of the whole House and Senate as bodies must vote to enact bills, legislative history rarely records the actual thoughts of those numerous Members. Radin wrote:

A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs. . . .

Even if the contents of the minds of the legislature were uniform, we have no means of knowing that context except by the external utterances or behavior of these hundreds of men, and in almost every case the only external act is the extremely ambiguous one of acquiescence . . .

Radin, *supra* note 7, at 870.


observations, summarizable as the "interest group critique," for viewing committee reports as deceptive shilling for special interests.

Textualists thus reasoned that committee reports did not reveal the institution's intent. True originalist legitimacy belongs only to text, they argued, and judges should not be deceived by the alluring salience of on-point report details. Using such reports wrongfully recognized the supplemental, non-textual lawmaking power of committees. Courts faced with opaque enactments should stick to indicia of what Justice Scalia called "objectified" intent, such as canons, dictionaries, grammatical implications, and the "whole code" rule, rather than trafficking even in pertinent committee reports.

Faced with the persuasive success Justice Scalia had achieved with the other Justices by 1993-94 and his sharply worded concurring or dissenting textualist opinions, Justices Breyer and Stevens developed a distinctive and more persuasive conceptualization. Their own articulation relies on what may be referred to as the "busy Congress" model. They concede frankly the difficulty of showing, and often even the absence of, wide consensus in Congress on purposes sufficiently focused to help with the Court's issues. Where text alone does not tell the answer, the "busy Congress" model assumes that committee reports contain matters that most Members, lacking the time to do otherwise, accepted in enacting bills. The Justices view committees whose reports explain details unknown to their chambers as serving their chambers rather than, as Justice Scalia would have it, strategically securing advantages for interest groups by distorted reporting.

Under the apparent paradox embraced by Justices Breyer and Stevens, such institutional legislative history carries all the more


14. The salience critique is particularly developed in Vermeule, supra note 2. The short answer from the Breyer-Stevens approach to the salience critique is that Justices Breyer and Stevens are citing only the limited high-quality legislative history (e.g., the short description in a conference report for the particular statutory section being interpreted), not looking over masses of material for what they like as in the kind of hunting through the Congressional Record or congressional hearings for citable material that went into opinions twenty years ago.

15. The delegation critique is particularly developed in Manning, supra note 4.

persuasive an originalist warrant for shedding light on aspects few Members attend, such as drafting history details for noncontroversial legislation set out in conference reports. Of course, Justices Breyer and Stevens do not tap a source unknown before them, or supplant the other interpretive approaches that are so often vital when no on-point legislative history helpfully resolves issues. Rather, their reconceptualization matters because, in the most prominent debate over legislation in the late-1990s Court, by dint of their tackling head-on the Radin conundrum in a new way, Justices Breyer and Stevens have won sufficient support from the uncommitted Justices to turn the tide.

This Article seeks to show why this head-on confrontation of the Radin problem has succeeded in the Court, and to delve into philosophy and political science of the 1990s to find deeper groundings for that success. Part II of this Article briefly traces the pre-1995 background for the rise of the textualist challenge to legislative history use. Part III starts with the developments in 1992-94 that influenced and foreshadowed the Court’s turnaround. This Part describes seventeen opinions of the Court between 1995-99, first chronologically and then thematically, to show how they carried out Justices Breyer and Stevens’s “busy Congress” model.

These seventeen opinions, among others, show the Court applying institutional legislative history in specialized situations ideal for it. Such situations and the associated principles include (1) how reporting of details of text’s writing, pedigree, and concrete illustrations answer the Radin “group mind” conundrum; (2) how even such criticizable bases as

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19. To deal with the Radin “group mind” critique, past approaches used an “agency” model in purposivism, which assumed that legislative voting majorities delegated the responsibility of filling in statutory details to committee chairs, judges, and agency administrators. See Gerald C. MacCallum, Jr., Legislative Intent, 75 Yale L.J. 754 (1966), reprinted in part in William D. Popkin, Materials On Legislation: Political Language and the Political Process 418-19 (2d ed. 1997) [hereinafter Popkin, Materials On Legislation]. As a practical matter, the “agency” model gave a place of honor to high-quality legislative history. But the textualist critique focused on the conceptual world of difference between the legitimacy of Congress delegating authority to later judges and agencies, and the illegitimacy of supposing the same kind of delegation of supplemental lawmaking power to a few Members and staff in a committee. The “agency” model required the considerable advances of the Breyer-Stevens approach (and, jurisprudentially, the kinds of advances discussed in this Article’s Part IV) to serve fully as a response to textualism.
legislative silence and inaction can persuade better than the alternatives of "objectified" intent; and (3) the Court's appreciation in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*\(^{20}\) and other canon cases for a valued originalist warrant. In most of these seventeen cases, Justice Scalia either wrote or joined a concurring or dissenting textualist opinion that unsuccessfully opposed the use of legislative history and tested the persuasiveness of the Breyer-Stevens concept.

Part IV delves deeper than Justice Breyer and Stevens's "busy Congress" model, drawing on mid- and late-1990s analytic philosophy and political theory to determine how the Court may answer both the Radin "group mind" conundrum and the interest group critique. This Part develops the philosophy of intent in legal commands from John L. Austin and H. L. A. Hart to John Searle,\(^{21}\) one of America's leading contemporary analytical philosophers. In particular, it applies Searle's remarkable late-1990s works on how today's society organizes itself by collective intent developed by procedural stages in institutional processes.

This Part also turns to Congress and political science in the 1990s for answers. The congressional election of 1994, and the unique legislating effort of 1995,\(^{22}\) undermined the textualism-favoring conservative populist fervor against "entrenched" congressional committees. In the same decade, political scientists accepted the new "informational" theory of congressional committees, which viewed them as a resource of valuable and accurate political information for their chambers. This view undermined the previous textualism-favoring "distributional" theory of committees as a cartel for obtaining special interest advantages.

The discussion to some extent employs the understanding of institutional intent I developed in my fifteen years (1979-95) as assistant Senate legal counsel and Solicitor and Deputy General Counsel of the House of Representatives, and in my treatise, *Congressional Practice and*
But more important, this Article draws on analytic philosophy and recent political history to contribute a deeper understanding of what it means for an institution to have intent. Increasingly, we all live with public institutions in general, and a Congress in particular, whose elaborate, step-wise formulating processes necessitate a new view of institutional intent. In past eras, legislative assemblies, like other group bodies in the organizational life of those times, depended more on assembling in the same place and time to develop a generally shared, if vague, group intent. In today's world, organizations from corporations to Congress develop plans not in unifying group assemblages, but by complex institutional processes in which specialized, preparatory subgroups formulate the technical details of the institution's intent. Neither Justice Scalia nor academic textualists dispute Congress's constitutional and historical authority to delegate the drafting of statutory text to its chambers, its conferences, and its committees. Today, institutional intent formulation occurs by those stages, without needing either awareness by the whole body or any delegation of special or supplemental powers, and legislative history today reports it.

The conclusion of this Article asks whether, in the long run, the uncommitted Justices will continue to go along with this approach, and suggests further study by philosophers and political scientists that would inform the Court's new, unfinished vision of the intent of Congress.

II. The Court's Pre-1995 Groundwork for Institutional Legislative History

A. The Peak of Textualist Antipathy for Legislative History: 1987-94

The Supreme Court began using legislative history in 1860. It was


Commentators have recently debated whether Church of the Holy Trinity v. United States, 143 U.S. 457 (1892), misuses legislative history in a discrediting way. Compare Vermeule, supra note 2, with William N. Eskridge, Jr., Textualism, The Unknown Ideal?, 96 MICH. L. REV. 1509, 1537 (1998) (reviewing SCALIA, A MATTER OF INTERPRETATION, supra note 11). In any event, Professor Baade's monumental study gives Holy Trinity one paragraph out of its 106 pages. As Professor Popkin analyzes, the Court was
not until the New Deal Court and its overthrow of the "plain meaning rule" in 1940, however, that the modern era of fuller, more accurate use of legislative history began.

Initially, from the late 1930s to the early 1960s, the Court's legislative history use focused in large measure on clues about what the majority of Members thought about the specific issues coming before the Court to reconstruct specific intent, with committee reports taken as authoritative indicators of what most Members thought. The Court also developed an approach called "purposivism," identified with the famous and influential text by Hart and Sacks, which determined from an array of contextual sources the purposes of a statute. Purposivism somewhat comfortable using drafting history and committee reports before Holy Trinity, and had doubts about unreliable floor debates even after Holy Trinity, see Popkin, Materials on Legislation, supra note 19, at 411, all of which limits how much one learns from debating one 1892 case.

25. See United States v. American Trucking Ass'n., 310 U.S. 534, 543-44 (1940) ("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.'"); see also Note, Learned Hand, supra note 2, at 1011 (1992).

26. Justice Scalia acutely observes that the movement to use legislative history "gained momentum in the late 1920s and 1930s, driven, believe it or not, by frustration with common-law judges' use of 'legislative intent' and phonied-up canons to impose their own views—in those days views opposed to progressive social legislation." Scalia, A Matter of Interpretation, supra note 11, at 30. Within a few years of American Trucking, Justice Frankfurter published a memorandum listing eighteen Supreme Court cases in the two years before American Trucking relying on legislative history, and no less than 112 in the six years after. See Commissioner v. Estate of Church, 335 U.S. 632, app. A at 687-89 (1949) (Frankfurter, J., dissenting).


28. Some prominent Court debates of the 1950s set Justice Frankfurter's fidelity to specific intent against the broader use of legislative history by more liberal brethren:

Quite otherwise has been the process of statutory construction practiced by this Court over the decades in scores and scores of cases. Congress can be the glossator of the words it legislatively uses ... by a contemporaneously authoritative explanation ... . The most authoritative report is a Conference Report acted upon by both Houses and therefore unequivocally representing the will of both Houses as the joint legislative body.

Commissioner of Internal Revenue v. Acker, 361 U.S. 87, 94 (1959) (Frankfurter, Clark & Harlan, JJ., dissenting); see also Schwegmann v. Calvert Distillers Corp., 341 U.S. 384, 399 (1951).
accepted the Radin critique of the difficulty of ascertaining the thinking of the majority of enacting Members.\(^{29}\) Instead of viewing this critique as a reason to disregard legislative history, however, the purposivist Court merely saw a need to add context. The Court then interpreted the statute by presuming that the enacting Congress consisted of "reasonable persons" sharing "reasonable" purposes, and analyzed these purposes as reflected in the new context.\(^{30}\) In hindsight after textualism, we may say the purposivist Court adopted an "objectifying" fiction.

Opinions of the Warren Court in the 1960s and early 1970s, particularly those by Justices Douglas, Marshall, and Brennan, justified liberal readings of statutes, such as finding implied private causes of action in regulatory statutes, with a purposivist use of legislative history.\(^{31}\) In turn, this drew a conservative reaction from the 1970s into the 1980s led by Chief Justice Burger, Justice Powell, and Justice (later Chief Justice) Rehnquist.\(^{32}\) The famous Weber case of 1979 reflects this era, with Justice Brennan debating Justice Rehnquist about the legislative history of the 1964 Civil Rights Act in impressive detail as to Congress's intent regarding affirmative action by employers.\(^{33}\) Although the Court's conservatives urged more attention to statutory text and revived more use of interpretive canons,\(^{34}\) ironically, legislative history received even more extensive use on their watch in the 1970-1980s than had occurred in the

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29. Professor Dickerson, in his comprehensive 1975 book on theories of statutory interpretation, developed the differences between reconstructing specific original intent, and the approach of purposivism, summing up the literature: "Whereas the concept of 'legislative intent' is in disfavor with many legal writers, that of 'legislative purpose' enjoys not only favor but preeminence." Reed Dickerson, The Interpretation and Application of Statutes 87 (1975).

30. See Hart & Sacks, supra note 18, at 1374-80.

31. Although the Court had already manifested some purposivist tendencies by the time of the publication of the Hart and Sacks materials, its fullest move to purposivism dates to a swing left by the Warren Court beginning in the early 1960s. The Court exemplified its approach in its cases, starting with J. I. Case Co. v. Borak, 377 U.S. 426 (1964), liberally finding implied causes of action in statutes. For a treatment of the sharp shift after 1962 in statutory cases, see Eskridge, Dynamic Statutory Interpretation, supra note 8, at 218-19, 397-98 nn.49-63.


34. In 1974, the Court revived the textual canon, "expressio unius est exclusio alterius canon," i.e., to express one thing (or a list of things) is to exclude everything else. National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers (Amtrak), 414 U.S. 453, 458 (1974). The formalist Court of the pre-New Deal era so tainted the use of such canons as part of an unrealistic refusal to credit more real evidence of legislative intent, the canons was shelved during subsequent eras. The Amtrak Court had to cite an obscure 1929 case, Botany Worsted Mills v. United States, 278 U.S. 282, 289 (1929), to support the canons's revival.
1960-1970s. By the 1980s, opinions from all points on the ideological spectrum cited legislative history freely and generously, both as support for the controversial proposition of how to implement a mix of broad congressional purposes absent specific intent, and as routinely cited support for noncontroversial propositions.\(^{35}\)

Textualism then arose, which rapidly reduced the use of legislative history. The first major articulations of textualism came in a breakthrough article by then-Professor Easterbrook of the University of Chicago Law School in 1983,\(^ {36}\) shortly followed with the start of opinions\(^ {37}\) and speeches\(^ {38}\) of then-Judge Scalia, formerly of the University of Chicago Law School. Other new Reagan-appointed judges, such as Judges Starr,\(^ {39}\) Kosinski,\(^ {40}\) and Buckley,\(^ {41}\) expanded on the new approach in opinions and off the bench in the late 1980s,\(^ {42}\) as did the Department of Justice.\(^ {43}\)

Textualism criticized many weaknesses in the previous use of legislative history.\(^ {44}\) It drew upon the Chicago School of public choice

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38. Judge Scalia followed his opinions with a speech delivered in 1985-86 at various law schools regarding the use of legislative history. See id. at 651 n.115. I emphasize the Chicago academic origin to bring out the intellectual source of the new critique. I might add that Justice Scalia gave the lecture subsequently at my own school, the University of Baltimore Law School, and that it was a genuine honor and pleasure to hear him give it. In one stroke he raised the school’s respect for the debated issues of the subject of legislation far above previous levels.


40. See Wallace v. Christensen, 802 F.2d 1539, 1559 (9th Cir. 1986) (Kozinski, J., concurring).


44. Philosophically, textualists started with the Wittgensteinian critique of subjective meaning. As Professor Easterbrook commented: “The philosophy of language, and most particularly the work of Ludwig Wittgenstein, has established that sets of words
theory to show that Congress, as a diverse body of nonaggregable preferences, could not have a determinable group intent other than the formal one of enacted text. Professor Easterbrook's initiating article cited "the discoveries of public choice theory," specifically, Arrow's Theorem, for the proposition that "[a]lthough 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." Hence, "[b]ecause legislatures comprise many members, they do not have 'intents' or 'designs,' hidden yet discoverable." The textualist critique added a strong interest group critique, namely, that committee reports lent themselves to interest group manipulation due to committee and staff partiality; that statutes deserved narrow construction principles for reasons resembling Willistonian contract doctrine; and that judges decided worse, and lawyers functioned worse, from resort to legislative history. The elements come together, as Judge Easterbrook pithily commented, in that "[e]ach member may or may not have a design. The body as a whole, however, has only outcomes." Justice Scalia's elevation to the Supreme Court initiated a period of impressive success for textualism's opposition to legislative history. By 1990, Judge Wald described "a fully articulated and quite aggressive

do not possess intrinsic meanings and cannot be given them; to make matters worse, speakers do not even have determinative intents about the meanings of their own words." Easterbrook, Statutes' Domains, supra note 10, at 536.

45. Id. at 547 & n.20.
46. Id.
48. For example, judges cite and lawyers argue particular comments not because of their appropriate (small) weights, but because something on point for the case jumped out of voluminous legislative histories as salient. See Vermeule, supra note 2, at 1874. Many aspects of textualism's critique are omitted; there is simply not room for them all. Conceptually, the heart of textualism's critique lies in two prongs, one from philosophical theory and the other from public choice or political theory, which break down the notion that a statute had an intent expressed in legislative history. Since linguistic meaning in general did not depend on individuals' subjective states of mind, and since a political group such as Congress did not have determinable aggregate preferences, meaning could not be found in legislative history. For a balanced early reaction to textualism, see Orrin Hatch, Legislative History: Tool of Construction or Destruction, 11 HARV. J.L. & PUB. POL'Y 43 (1988).
49. Easterbrook, Statutes' Domains, supra note 10, at 547.
assault in the Supreme Court on the use of legislative history in construing statutes.\textsuperscript{51} She counted Justice Kennedy (somewhat debatably) as a "true believer"\textsuperscript{52} in Justice Scalia's cause, and Justice Thomas's appointment added someone more clearly fitting that title. By the early 1990s, control of the Court's opinions on the issue depended upon the positions of Justice O'Connor and Chief Justice Rehnquist, who previously showed either an indifference to textualism's anti-legislative history thrust or, in the Chief Justice's case,\textsuperscript{53} had a record of employing legislative history with zest and sophistication.\textsuperscript{54} Even these Justices enlisted as "at least some-of-the-time"\textsuperscript{55} textualists.

\textbf{B. Justice Scalia's A Matter of Interpretation: "Objectified" Intent}

Textualism could not succeed solely by critiquing the faults of what the Court had done before; it had to produce a viable alternative. In his 1997 essay, Justice Scalia described how "[w]e look for a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris."\textsuperscript{56} During 1987-94, Justice Scalia and his textualist colleagues tried several alternatives to legislative history for finding this "objectified" intent. These warrant a summary, for the contest in the Court came to turn on the relative attractiveness of these ideas to centrist or uncommitted Justices, in cases offering both indicia of "objectified" intent, and on-point legislative history intent.

First, textualists' focus upon "the text of the law, placed alongside the remainder of the corpus juris," retained the linguistically fundamental\textsuperscript{57} search for intent, and, specifically, the search for intent by comparison of the statutory text under interpretation with other legislative language. However, textualists ruled out comparison with preliminary

\begin{itemize}
\item \textsuperscript{51} Wald, \textit{Sizzling Sleeper}, supra note 50, at 281.
\item \textsuperscript{52} \textit{See id.} at 300; \textit{see also} Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 472-78 (1989) (Kennedy, J., concurring). After initially being Justice Scalia's closest ally on the Court, even in this early period Justice Kennedy joined some opinions relying upon legislative history. \textit{See} Daniel A. Farber, \textit{The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law}, 45 VAND. L. REV. 533, 546 n.76 (1992).
\item \textsuperscript{53} For a sympathetic study of Chief Justice Rehnquist's statutory interpretation, see Merrill, \textit{supra} note 50.
\item \textsuperscript{54} Professor Merrill notes that Chief Justice Rehnquist received two masters degrees in political science. \textit{See id.} at 633 n.32.
\item \textsuperscript{55} Wald, \textit{Sizzling Sleeper}, supra note 50, at 300.
\item \textsuperscript{56} \textsuperscript{SCALIA, A MATTER OF INTERPRETATION, supra note 11, at 17.}
\item \textsuperscript{57} \textit{Id.} Part IV discusses how analytical philosophers locate the need to search for intent of statutes (whether Justice Scalia's "objectified" intent, or the kind revealed by legislative history) in the linguistic form of the statute, namely, in a command by the sovereign in the form of a performative utterance or speech act.
\end{itemize}
versions of the bill depicted in the legislative history, and elevated the concept of comparing the text with other, more remote enacted texts. The so-called "whole code" rule meant that although the textualists opposed comparing the final law with the initial version reported or adopted by the House or Senate, they could interpret its words from similarities with those in some other law on a totally different subject.58

Second, the reign began of the king of "objective" guides: the dictionary.59 In the six terms after 1987,60 the Court never cited dictionaries fewer than fifteen times, going up to a peak of thirty-two references in 1992.61 As a marker of this pendulum swing, the Court, per Justice O'Connor, made distinctive use of the dictionary in the first of its two 1990s cases interpreting statutes that referenced "use" of a gun during a crime.62 Justice O'Connor's dictionary approach seemed so extreme that Justice Scalia himself dissented,63 and his 1997 book picked the case as an exemplar of an overly literal interpretation of statutes.64

Textualists also revived and defended the old "grammatical" or "textual" canons, which operate on certain patterns of word order rather than on subject-matter categories of statute the way their cousins, the "substantive canons" (e.g., the rule of lenity) operate.65 Justice Scalia defended "expressio unius est exclusio alterius,"66 "noscitur a sociis,"67

58. See, e.g., West Virginia Univ. Hosps. Inc. v. Casey, 499 U.S. 83, 85 n.2 (1991) (interpreting "reasonable attorney's fee" in civil rights statute based upon phrase's meaning in statutes such as the Toxic Substance Control Act, and rejecting the argument of Justice Stevens's dissent that the provision's legislative history indicated otherwise).


60. In the quarter-century before 1983, the Court cited dictionaries only an average of five times per term. See Note, Looking It Up, supra note 59, at 1438.

61. See id. Moreover, the Court employed dictionaries as the focal point of the interpretive inquiry, with dictionary definitions sometimes the primary determinant of the ultimate outcome. Of the thirty-two references in 1992, twenty-seven came in majority opinions. See id. at 1440.

62. See Smith v. United States, 508 U.S. 223, 225 (1993). Justice O'Connor interpreted the statute to apply to a defendant who offered to barter a gun for drugs, following a dictionary definition of "'use' as 'to convert to one's service' or 'to employ.'" Id. at 229.

63. See id. at 241.

64. See SCALIA, A MATTER OF INTERPRETATION, supra note 11, at 23-24.


66. SCALIA, A MATTER OF INTERPRETATION, supra note 11, at 25. The canon suggests the express mention of something means the exclusion of something else. See id.
and “ejusdem generis,” which the Court put to use. The reliance on canons during the era of “spurious interpretation” had rendered them noxious to the New Deal intentionalists. Their use diminished after Llewellyn’s 1950 article purporting to show each canon had an equal and opposite canon available whichever way a lawyer or judge wished to go. Justice Scalia disputed Llewellyn’s article, contending that judges could still use some of these canons with “discernment,” and “[t]hrow out the bad ones and retain the good.”

During 1993-94, Justice Scalia wrote a series of opinions for the Court portending a general implementation of textualist rules. In BFP v. Resolution Trust Corp., his opinion for the Court interpreted a provision of the Bankruptcy Code to accept foreclosure sale prices, however minimal, so long as state foreclosure law requirements were met. He did so by the potentially sweeping notion that “[t]o displace traditional state regulation . . . the federal statutory purpose must be ‘clear and manifest,’” portending a major textualist shifting of lawmaking from finding congressional intent to adhering to state law. His opinion for the Court in Mertens v. Hewitt Associates narrowly construed a statutory remedies provision, over a dissent as to the unfairness of such a reading; his opinion for the Court in Bray v. Alexandria Women’s Health Clinic narrowly construed a civil rights statute over Justice Stevens’s dissent; his opinion for the Court in Deal v. United States strained a penalty enhancement provision by a similar approach.

67. Id. at 26. The canon suggests that a word is known by the company it keeps, i.e., the parallel terms around it. See id.
68. Id. The canon suggests generalizing from what a whole list means to the meaning of one particular term on that list. See id.
71. One canon Justice Scalia would discard: “Remedial statutes are to be liberally construed,” which he calls “surely among the prime examples of lego-babble.” Antonin Scalia, Assorted Canards of Contemporary Legal Analysis, 40 Case W. Res. L. Rev. 581, 581 (1989-90).
72. Scalia, A Matter of Interpretation, supra note 11, at 27.
73. For a discussion of Justice Scalia’s opinions in those years, see Karkkainen, supra note 1, at 445-47.
74. 511 U.S. 531 (1994).
75. Id. at 544 (quoting English v. General Elec. Co., 496 U.S. 72, 79 (1990)).
Moreover, in 1993-94, a half-dozen cases implemented *Chevron* along textualist lines. Given the importance of *Chevron*-type cases on the Court's docket, this amounted to a major blow against legislative history. Even commentators who had some sympathy for the new approach described it as "hypertextualism" that was "producing a major transformation in the way the Supreme Court approaches statutory interpretation cases." The textualists also sparked a movement that endured in the late 1990s for the creation or strengthening of substantive canons along grounds of dispensing with legislative history. Justice Scalia created a strong clear-statement approach to waiver of federal sovereign immunity in a series of opinions, refusing to consider even clear evidence of waiver in the statute's legislative history. Similarly, the Court adopted one federalism canon and strengthened another by attracting the enthusiastic support of Justice O'Connor. At the end of the 1993-94 Term, textualism seemed to have the upper hand in the Court, even in cases where the dissent could cite legislative history directly on point.

79. See, e.g., City of Chicago v. Environmental Defense Fund, 511 U.S. 328 (1994). In this striking case, Justice Scalia, for the Court, upheld the environmentalist's argument for a narrow interpretation of a municipal exemption. He found the text unambiguous and rejected the Clinton Administration's call for *Chevron* deference to the EPA's view. See id. at 339. Justice Stevens, in dissent, cited at length from the Senate Committee and Conference Committee reports, which persuaded him against the environmentalists' arguments. See id. at 344-45 & nn. 6, 7 (Stevens & O'Connor, JJ., dissenting).

80. See Pierce, supra note 1, at 754-62.

81. See id. at 752 (terming the move "new hypertextualism" even though he saw "great value in the use of textualist tools").


83. This had particular power because the policy content of the canons attracted the swing Justices, Justice O'Connor and Chief Justice Rehnquist, who respectively showed either indifference to textualism's anti-legislative history thrust or, in the Chief Justice's case, a leading, even ideologically convinced, willingness to employ legislative history.


86. See Nordic Village, 503 U.S. at 40-45 (Stevens, J., dissenting).


III. THE COURT 1995-PRESENT: INSTITUTIONAL LEGISLATIVE HISTORY

A. The Turnaround

1. 1992-94: DEVELOPMENTS INFLUENCING THE TURNAROUND

After its peak in Justice Scalia's early 1990s success, textualism ran into developments presaging its own limits and the succession of a new approach. First, political developments blunted textualism's forward thrust. The 1992 election of President Clinton changed the stream of judicial appointments. Textualism on the Court had drawn its momentum from the dozen years of Reagan-Bush appointments; above all, the appointments of Justices Scalia, Kennedy, and Thomas. After the 1992 election, further textualist reinforcements would not come.

The mere fact that new appointees came from a Democratic president instead of a Republican only began to measure the effect, for textualism's prospects depended not only on the general ideological balance in the Court's outcomes, but also on a generational shift. The pre-1992 pro-textualist appointees, Justices Scalia, Kennedy, and Thomas, not only moved the Court in terms of outcomes on ideological issues, but also opened the way generationally for the ascension of the new theory of textualism building on the Chicago School. The situation resembled that created by the new appointments to the Court after President Franklin Roosevelt's 1936 re-election. New appointments in both the late 1930s and the early 1990s opened the way to new theories of statutory interpretation, not only because of an ideological shift in the Court's outcomes, but also because the new appointees came with eagerness, or at least receptivity, to the new interpretative approach of their generation. The landmark *American Trucking Association* decision of 1940 split 5-4 in overthrowing the "plain meaning" rule, both on ideological and on generational divisions.
textualists could no longer depict their approach as a fresh advance beyond played-out approaches dating back to the Warren Court. Justice Breyer's appointment in 1994 presented them with a vigorous challenge from their own generation. The critiquers became the critiqued; the new arrival's view of legislative history was not an old one formed before the textualist challenge, but a new one reconceptualized during years of prime post-textualist intellectual development.

Moreover, the 1992 and 1994 elections each brought on novel party flips in the political branches, altering a static terrain upon which textualism had developed its forward drive. Textualism reacted against the confrontation of an entrenched Democratic House of Representatives with a Republican president. Democrats had held the House, uninterrupted, since the 1954 election. Republicans had held the presidency since the 1968 election with only a one-term interruption for President Carter. Those decades of static confrontation had energized textualism through "entrenchment" and "interest group" critiques of the committees of the Democratic Congress that had been writing most legislative history. In a different mode, the party flips also changed the landscape of Chevron deference, shifting the balance in the writing of the Court's Chevron opinions away from Justice Scalia, as described later in this Section.

2. THE TURNAROUND FORESHADOWED: JUSTICE BREYER'S ON THE USES OF LEGISLATIVE HISTORY IN INTERPRETING STATUTES

Doctrinally, the marker foreshadowing reconceptualization of legislative history as institutional intent came in then-Judge Breyer's seminal 1991 lecture published in 1992 as a law review article, On the Uses of Legislative History in Interpreting Statutes. The article bears the same intellectual stamps as Justice Scalia's own opposing 1997 essay, A Matter of Interpretation. Both Justices display in their writings an elaborate theory about legislative history, combining the maturity of their judicial roles with the intellectual vigor of their professorial backgrounds. Both Justices' writings espouse distinctive theories about legislative history set forth with the excitement of unmistakable personal conviction, as when they debated in person; a wide familiarity with both the judicial and academic background of the issue; and a full awareness of the other side's position with evident eagerness to debate it.  

94. They actually did debate in person. See Michael D. Sherman, The Use of Legislative History: A Debate Between Justice Scalia and Judge Breyer, ADMIN. L. NEWS, Summer 1991, at 1. The two have been contrasted before. See Kenneth R. Dortzbach,
Justice Breyer makes his most personal contribution with a description of the institutional role of legislative history from his own experience as Judiciary Committee Chief Counsel.\(^95\) He grounds the use of legislative history in a request to "consider, for a moment, how Congress actually works\(^96\) and "how Congress works as an institution.\(^97\) "Congress," he explains, "is a bureaucratic organization with twenty thousand employees, working full-time, generating legislation through complicated, but organized, processes of interaction with other institutions ....\(^98\)

Justice Breyer's view of the legislative process looks up from committees actively engaged in an intense, specialized effort, not down from a House and Senate that possesses little or no knowledge of the contents of committee reports, as Justice Scalia does.\(^99\) The role of Justice Breyer's legislators in enactment consists of specialized participation in supervising and handling active discussions on the controversial subjects of proposed bills, with legislative history recording the details of real choices and decisions, analogous to other institutions.\(^100\)

After reviewing his approach through personal experiences and examples of recent cases,\(^101\) Justice Breyer then delves into "The Problem

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95. While the Chicago School nurtured its textualists from an outsider's market-oriented critique of governmental processes, Justice Breyer's legislative background sustained his opposing position from an insider's institutionally oriented approval of governmental processes. This includes his authorship of a leading book on the law of regulatory statutes, and his significant position as Chief Counsel of the Senate Judiciary Committee in which he professionally assisted the enactment of the major Airline Deregulatory Act.


97. *Id.* at 863.

98. *Id.* at 858.

99. To the textualist argument that legislative history is forbidden delegation, Justice Breyer counters, "[T]his argument misunderstands how Congress works as an institution." *Id.* at 863.

100. "Significant matters will again be brought to the attention of the legislators for development of their individual positions, and for them to discuss and resolve with other legislators .... This institutional process, in which the legislator serves as a kind of manager, should seem familiar to those who manage other large institutions such as businesses, labor unions, and government departments ... [as] [m]any, if not most, institutions work ...." *Id.* at 859.

101. Just as this Article's next Part describes the 1990s Supreme Court cases carrying forward a new approach to legislative history, Justice Breyer couches his article's opening part as a tour of then-recent opinions of the 1980s showing legislative history in use. He picked his five examples from three recent cases on his own court and two recent opinions of Justice Scalia. This section he closes: "It is not obvious that in the late twentieth century there is some better way to organize Congress's work. But regardless of
of Congressional 'Intent,' exploring in succession the philosophical and political science issues that this Article will discuss in Part IV. In each instance Justice Breyer provides a terse expression of the basis of the institutional view. He starts with the philosophical problem, which dates back to Radin’s classic 1930 article: "How can a document written by a committee staffer indicate the inner workings of the mind of even one legislator, let alone the several hundred who voted for the law, perhaps each for different individual reasons?" Justice Breyer employs examples to analogize the institution of Congress to other organizations in which an observer discerns a collective intent without looking for a "group mind" or for identical participants’ thoughts. Each model he cites—law school faculty setting tuition levels, a basketball team making a play, and a tank corps implementing a battle plan—consists of a group engaged in coordinated action with a collective intent, though the individuals may not have identical subjective awareness.

Justice Breyer then applies these characteristics: "A legislator may vote for technical language that the legislator does not understand, knowing that committee members believe (perhaps because of their faith in the drafting process) that it has a proper function." Justice Breyer’s *Uses* makes the parallel between a “group’s internal rules and practices” in general and “the institutional workings, internal understandings, and societal role of Congress” in particular. Then, he concludes: “If I am correct in believing that ascribing a purpose to a human institution is an activity related to, but different from, ascribing a purpose to an individual, then I do not see how one can criticize courts that use legislative history on conceptual grounds.”

Justice Breyer then addresses the political science issue. He notes the “public choice theory arguments against the use of legislative history,” concedes that they “are more substantial,” and discusses how they undermine intent-based accounts “as mere window-dressing.” He rejects these arguments based upon his own experience, and similar experience in Congress by Chief Judge (formerly Representative) Mikva,
who, he quoted, never found that legislators "fit the 'rent-seeking' egoist model that the public choice theorists offer..."\textsuperscript{109}

B. The Rise of Institutional Legislative History: 1995-Present

When Judge Breyer joined the Court, his perspective, fueled with personal experience and a vision of the larger implications, influenced the Court's turnaround from the peak of textualism. The Court did not pick a new direction by a single landmark doctrinal pronouncement the way, say, \textit{Chevron} announced in 1986 a new doctrinal direction in administrative law. Rather, the Court turned in a series of cases developing the new concept.

1. SEVENTEEN OPINIONS OF THE COURT SHOWING THE WAY

This Section begins by surveying seventeen cases of 1995-99 that share a number of characteristics that mark the development of the new approach. In each of these cases, the opinion for the Court made significant use of legislative history in a way that fits the "institutional" theory enunciated below, and in a way that textualists usually oppose. As for the other characteristics, not all of the cases share them, but because most share most and the exceptions do not undermine the pattern, at this point we may speak of the characteristics as if all seventeen held them in common.

First, in all of these cases, Justices Stevens and Breyer join the opinion for the Court, often writing it. Usually, the legislative history used by the Court's opinion consists of some relatively short items in committee reports (including conference committee reports) directly on point. The concentrated aptness and respectability of the source of the cited legislative history would make it fairly persuasive. But typically the offeror of the legislative history would have to admit that it does not prove any subjective awareness or knowing agreement by the majority of Members; in fact, it may be evident that most Members, even the overwhelming majority, would not have known of the source, especially as the statements rarely occurred on the floor in the live presence of the rest of the body. In other words, the legislative history frontally raises the Radin conundrum about Members unaware of their body's intent.

\textsuperscript{109} \textit{Id.} at 867 (quoting Abner J. Mikva, \textit{Foreword}, 74 VA. L. REV. 167, 167 (1988)). He points out the special aspects of Congress, such as its reliance upon committees as the drafters and reporters of legislation, by contrast with foreign countries. England and France "have developed other institutions to bring about and maintain necessary interpretive consistency and coherence." \textit{Id.} at 868 (section entitled "Experience Elsewhere"). Hence "[e]xperience abroad does not argue for abandonment of legislative history at home." \textit{Id.}
A second characteristic common to these cases is that Justice Scalia does not join the opinion for the Court. He usually concurs or dissents with an opinion aimed against the use of legislative history that is mostly a textualist critique, often also with a spicy rhetorical comment on the Court’s folly. Only on rare occasion does the opinion for the Court reply to Justice Scalia’s critique with any theoretical defense of legislative history. Much more often, the opinion relies for justification on the particular directness with which the legislative history speaks to the point at issue and implicitly on its origins in an institutional enactment process.

This series of opinions begins with the signal statutory interpretation case of the Court’s 1994 Term, Babbitt v. Sweet Home Chapter of Communities for a Great Oregon. Justice Stevens’s majority opinion in this environmental law case employed a range of interpretive tools, including Chevron. Sweet Home brings together many complex themes; it can be read many ways, and does not simply turn the Court toward legislative history. However, the opinion did provide Justice Stevens with the occasion for Chevron deference to uphold the administrative “construction of the [statute] [because it] gains further support from the legislative history of the statute.” This rhetorical nod signaled that in the competition between Justice Stevens’s way and Justice Scalia’s way of writing Chevron opinions, Justice Stevens’s way—using legislative history—was about to retake the pre-eminence that had previously been Justice Scalia’s. Justice Scalia’s dissent critiqued the majority for using legislative history, and ended this part with a flourish. Alluding to the unlikelihood that Members of Congress have actual awareness of the content of legislative history, Scalia cautioned: If Members actually “read and relied on such tedious detail on
such an obscure point” in committee and conference reports, “the Republic would be in grave peril.”

In the same term, a securities law case, *Gustafson v. Alloyd Co.*, produced a three-way duel. The majority opinion by Justice Kennedy used the legislative history of the 1933 Securities Act and a canon of construction to counter the definitional provision that posed a problem for the majority’s outcome. Justice Thomas wrote one dissent, from a textualist perspective, disputing the handling of the textual definitional provision. Justice Ginsburg (with Justice Breyer), although they joined Justice Thomas’s dissent, wrote another dissent, debating the legislative history. *Gustafson* signaled that Justice Kennedy had moved toward a pragmatic center of the Court that was comfortable with its use of legislative history, even under fire by dissents from the Court’s two poles.

The following term, a case about the bank deposits availability statute, *Bank One Chicago v. Midwest Bank & Trust Co.*, provoked a prominent debate over the use of legislative history. Justice Ginsburg’s opinion for the Court used the drafting history of the banking statute, particularly a conference report. A solitary dissent by Justice Scalia lambasted that use of legislative history, with a textualist critique that ranged from John Locke and Article I, to calling such use “fanciful,” “fairyland,” and “psychoanalyzing those who enacted it.”

In response, Justice Stevens, joined by Justice Breyer, delivered as a concurring opinion one of their leading explanations of the new “institutional” legislative history. This opinion differentiated the new theory from those of the past by accepting at the outset the premise of Justice Scalia’s challenge: “Justice Scalia is quite right that it is unlikely that more than a handful of legislators were aware of the Act’s drafting history.” Nevertheless, the opinion asserted that Congress, as an institution, could express an intent in legislative history notwithstanding that few individual Members knew it. Three other cases that term—on options trading law, labor law, and an appropriations rider about

118. See id. at 576-78.
119. See id. at 575 (using noscitur a sociis).
120. See id. at 586-97 (Thomas, Scalia, Ginsburg, & Breyer, JJ., dissenting).
121. See id. at 599-600 (Ginsburg & Breyer, JJ., dissenting).
123. Id. at 280, 281, & 279 (Scalia, J., concurring).
124. Id. at 276 (Stevens & Breyer, JJ, concurring).
125. In *Dunn v. Commodity Futures Trading Comm’n*, 519 U.S. 465 (1997), Justice Stevens construed a statutory exemption of a kind of option trading, tracing the construction in a letter from the Treasury Department to the bill’s Senate Committee, the bill’s committee report, and its conference report. See id. at 473-74. Justice Scalia wrote...
labor law—consolidated the Bank One Chicago use of legislative history in cases involving administrative agencies.

The following 1996 Term, three cases firmed up the institutional approach. In a leading statutory interpretation case that term, *Lindh v. Murphy,* the Court declined to apply the new habeas corpus statute to a pending case. A dissenting opinion by four Justices (including Justice Scalia) would have applied the recent decision about the canonical presumptions concerning retroactivity, *Landgraf v. USI Film Products.* Instead, Justice Souter’s opinion for the Court reasoned from a detailed tracing of the drafting history, during enactment, of two contrasted provisions. Two financially oriented cases that same term, a tax case and a banking case, displayed a similar pattern: In one, Justice Breyer relied upon what he regarded as a powerful House Committee Report comment, while Justice Scalia impugned that comment, in a long challenge to the majority, as a “snippet.”

Three Breyer-Stevens opinions the following 1997 Term citing committee reports drew rejoinders by Justice Scalia underlining their differences. In *United States v. Estate of Romani,* a tax case, Justice Stevens, writing for the Court, discussed in some detail the House Ways and Means Committee’s studied inaction on an American Bar Association proposal during passage of the act in question. Justice Scalia’s concurring opinion denounced the Court’s use of legislative history as something “that should be laughed out of court,” with “utterly no place in a serious discussion of the law,” “a new silly extreme,” and

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126. In *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85 (1995), Justice Breyer spoke for a unanimous Court. Before discussing the legislative history, the Court’s opinion prefaxes: “And, insofar as one can infer purpose from congressional reports and floor statements, those sources too are consistent with the Board’s broad interpretation of the word.” *Id.* at 91. That may explain why Justice Scalia did not feel a need to concur separately.


129. 511 U.S. 244 (1994).
133. *See O’Gilvie,* 519 U.S. at 97 (Scalia, J., dissenting).
"the history of legislation-that-never-was," and "beyond all reason."135 None of the Justices who had supported him in 1993-94 joined. Two opinions that term by Justice Breyer also drew fire. His opinion for the Court construing the Assimilative Crimes Act used a short quote from a House Committee Report directly on point.136 Justice Scalia’s separate concurrence opposed the use of legislative history.137 Also, Justice Breyer’s opinion for the Court finding that a criminal statute imposed a new penalty but did not define a separate offense relied on both statements and silence in legislative history to escape the dissent’s reading of the text.138 Justice Scalia’s dissent scorned "the mistaken assumption that statutory changes or clarifications unconfirmed by legislative history are inoperative."139 In the 1998 term, one of the Court’s most momentous statutory decisions brought forth another revealing configuration. In Department of Commerce v. United States House of Representatives,140 the plurality opinion by Justice O’Connor interpreted the Census Act as precluding sampling for apportionment purposes based on congressional floor silence on the apportionment issue during the Act’s amendment.141 Justice O’Connor plainly selected this approach for strong reasons even though it isolated her. Justices Scalia and Thomas refused to join Justice O’Connor precisely on her use of "what was said by individual legislators and committees of legislators—or more precisely (and worse yet), what was not said by individual legislators and committees of legislators."142 Four dissenting Justices led by Justice Stevens read the legislative history differently.143 Justice O’Connor’s approach, joined by Chief Justice Rehnquist and Justice Kennedy, demonstrated the interpretive uses of congressional silence and epitomized the revived acceptability of such use in the Court’s moderately conservative wing.

135. Id. at 535-37 (Scalia, J., dissenting).
137. See id. (Scalia & Thomas, JJ., concurring). Justice Thomas’s joining may well owe more to their shared view of the applicability of a relevant double jeopardy analysis, see id. at 176, than to the matter of legislative history. Justice Kennedy dissented. See id. at 180.
139. Almendarez-Torres, 523 U.S. at 266 n.6 (Scalia, Stevens, Souter, & Ginsburg, JJ., dissenting).
141. See id. at 342-43.
142. Id. at 344.
143. Justice Stevens wrote a dissenting opinion, joined in relevant part by Justices Souter, Ginsburg, and Breyer, analyzing the legislative history at some length. See id. at 359-62 & nn. 1-6. Justice Breyer wrote a separate dissenting opinion, also analyzing the legislative history. See id. at 351-52.
The same Term, Justice Breyer wrote two opinions for the Court using legislative history in the face of textualist dissents. Justice Breyer managed to find a waiver of sovereign immunity for a gender discrimination cause of action by reasoning from the “language, purposes, and [legislative] history” of the provisions. The textualist dissent, joined by Justice Scalia, complained that “before today it was well settled that ‘[a] statute’s legislative history cannot supply a waiver [of sovereign immunity] that does not appear clearly in any statutory text.’” Justice Breyer also handled a federal labor law case by a Chevron analysis, delicately dissecting an unhelpful Senate report on the statute in question, over a textualist dissent.

Justice Souter wrote two opinions for the Court that term discussing legislative history. In one, he discussed in detail “some [legislative] history [that] is helpful,” specifically, some congressional inaction on proposals, in the face of a separate concurrence by Justice Thomas (joined by Justice Scalia) that “such history is irrelevant for the simple reason that Congress enacted the Code, not the legislative history predating it.”

2. THE BREYER-STEVENS CONCEPT: APPLYING THE “BUSY CONGRESS” MODEL

To understand the underlying concept in these cases, we may start with Justice Stevens’s most developed statement, which complements Breyer’s Uses of Legislative History. In Bank One Chicago, Justice Stevens began his concurring opinion, joined by Justice Breyer, with a sentence confronting head-on the Radin conundrum: “Justice Scalia is quite right that it is unlikely that more than a handful of legislators were aware of the Act’s drafting history.” Justice Stevens then sketches his

145. Id. at 1915 (Kennedy, Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting) (quotation omitted).
147. See id. at 96.
148. The dissent, joined by Justice Scalia, argued in the textualist style as to Chevron, namely, analyzing the statute’s debated clarity without touching any legislative history. See id. at 101 (O’Connor, Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting).
149. In the other, he relied on legislative history, see Jones v. United States, 526 U.S. 227, 235-39 & n.4 (1999), in the face of Justice Scalia’s separate concurrence, as in the Census Act case, and reached the Court’s outcome by the “constitutional doubts” canon instead. See id. at 253 (Scalia, J., concurring).
151. Id. at 1426 n.2 (Thomas & Scalia, JJ., dissenting).
Reconceptualization of Legislative History

theory of institutional intent. Congress's members, being "busy," and therefore lacking subjective familiarity with the details of legislation, "trust[]" and "endorse" the views of congressional committees by their vote on final passage: "Legislators, like other busy people, often depend on the judgment of trusted colleagues when discharging their official responsibilities."153 Hence, "since most Members are content to endorse the views of the responsible committees, the intent of those involved in the drafting process is properly regarded as the intent of the entire Congress."154

Justice Stevens's common-sense political science analysis encompasses the idea that conference reports reflect original intent notwithstanding how little they receive in Member attention. He notes the votes on final adoption of the conference report, namely, that "the Expedited Funds Availability Act was a measure that easily passed both Houses of Congress."155 He analyzes from this outcome to the relationship it indicates between the committees and all the Members: "If a statute such as the Expedited Funds Availability Act has bipartisan support and has been carefully considered by committees familiar with the subject matter, Representatives and Senators may appropriately rely on the views of the committee members in casting their votes."156 This matches a discussion in Breyer's Uses157 of how reporting makes what

153. Id. Recall that Justice Breyer, in his article, also analogized legislators to other busy people at top institutional levels. See supra notes 96-98 and accompanying text.

154. Bank One Chicago, 516 U.S. at 276-77 (Stevens, J., concurring). Recall that Justice Breyer, in his article, also analogized legislators to individuals who play a part involving greater drafting-related knowledge in an institution or other structured group. "A legislator may vote for technical language that the legislator does not understand, knowing that committee members believe (perhaps because of their faith in the drafting process) that it has a proper function." Breyer, supra note 5, at 866.

155. Bank One Chicago, 516 U.S. at 276 (Stevens, J., concurring). "The House passed the Act by a vote of 381 to 12. The Senate approved the measure 96 to 2." Id. at 276 n.1 (internal citations omitted).

156. Id. at 276.

157. Justice Breyer explained why his court had given credence to legislative history by the key committee spokespersons for the Bankruptcy Act of 1984. "[F]loor statements made by the bill's sponsors, [Subcommittee Chair] Democratic Representative Kastenmeier, and [Ranking] Republican Representative Kindness, clarified the relation of the word 'core' in the statute . . . ." Breyer, supra note 5, at 855. Those statements on behalf of the bipartisan committee leadership, for a bill approved by the full chamber, constituted the means by which larger technical input flowed along with the bill: the value of the legislative history consists, not simply of the fact that Representatives Kastenmeier and Kindness were democratically elected, but also . . . . all the representatives of the bankruptcy community involved in the [committee-level] legislative process that produced the bankruptcy bill . . . . [provide] knowledge and experience . . . embodied both in particular statutory phrases and in [committee] reports and floor statement language. To take from the courts the power to refer to
political scientists might call an "informational" contribution, not just the kind of interest-favoring but distorted function that political scientists might denigrate as a "distributional" role.158

Apart from Uses of Legislative History and Bank One Chicago, the seventeen opinions from 1995-99 provide little express theoretical grounds for the Justices' use of legislative history. Rather, the opinions demonstrate the institutional concept in practice, by contrast to the legislative history arguments grounded in broad, vague statements of statutory purpose that were so common before textualists attacked them.159

C. Application to Specific Situations

1. TEXT'S WRITING AND PEDIGREE

a. Drafting History, Conference Reports

With the exception of the textualist purists, the whole Court, in addition to Justices Breyer and Stevens, now readily relies on drafting history and conference reports as guides to Congress's intent. Let us clarify these terms before turning to examples. Conference committees consist of delegations from the House and the Senate that work out differences between bills approved by each chamber. They have enormous significance in congressional procedure, earning their nickname of the "third house of Congress."160 Although the House and Senate resolve their differences over minor bills without conferences, the seventy or so bills that go through conference committees each two-year session overwhelmingly constitute the most important of Congress's bills. Thus, what the conference committees do dominates the law.161

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158. The "informational" and "distributional" theories of committee roles are discussed in Part IV.

159. "Deduction from the 'broad purpose' of a statute begs the question if it is used to decide by what means (and hence to what length) Congress pursued that purpose . . . ." Babbitt v. Sweet Home Chapter of Communities for a Greater Or., 515 U.S. 687, 726 (1995) (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting). Such opinions, from the Warren Court through Weber, are noted in the historical review above.


161. Moreover, while in theory the House and Senate may reject, or otherwise force changes in, what the conference committee does, in practice conference committees have an extraordinary record of success. My surveys for my own treatise, which fit with others' conclusions, showed that to a very large degree, what a conference committee produces becomes the law. See TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE, supra note 23, at 767-847 (1989) (citing relevant sources).
A conference committee produces a report in two parts: bill language, typically a compromise between the bill language passed by the House and that passed by the Senate, submitted to the House and Senate for final passage; and a "joint explanatory statement of the managers" that explains what the conference committee did. Drafting history consists of the record of when changes occurred in a bill's language, from introduction to final passage. It is distinct from explanations along the way of why those changes occur, or other explanations along the way of the bill.

A textualist purist such as Justice Scalia disdains use of drafting history or conference reports. The final text of the law matters—not drafting history as mere preliminary action on texts, let alone what the conference committee writes by way of explanation. Drafting history does not matter because of the unlikelihood that the Members voting on final passage know of it. Justice Scalia requires "genuine knowledge" by the voting Members to constitute intent, and the majority of Members do not follow the details of drafting history in their own chamber, let alone those in the other chamber; nor do the majority of Members follow the details explained in a conference report. One of the handful of Judge Easterbrook's most important textualist opinions centers exactly on

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162. For example, if the House-passed bill has provisions A, B, and C, and the Senate-passed bill has corresponding but differing provisions A+, B-, and CC, the bill language in the conference report might simply have provisions A+, B, and 1½ C. The explanatory statement would then explain the plan of compromise, say, that the House and Senate conferees compromised in one package on their A and B versions, and separately compromised on their C versions.

163. For example, the drafting history of a bill may show a court with an interest in the meaning of a particular provision that the bill as introduced in the House did not include that provision, nor did the House committee or the House floor add it, but rather the Senate added it in committee and thereafter the Senate, and subsequently the House, accepted it in the form added in Senate committee. Drafting history differs from the explanations along the way, such as passages in the Senate committee report explaining why the Senate committee added it.

164. His "central point [is] that genuine knowledge is a precondition for the supposed authoritativeness of a committee report ... . The committee report has no claim to our attention except on the assumption that it was the basis for the house's vote and thus represents the house's 'intent' ... ." SCALIA, A MATTER OF INTERPRETATION, supra note 11, at 34-35.

165. For example, few House Members voting on a bill know or care whether any of its provisions got drafted on the Senate floor or in the conference with the Senate, let alone what this signifies for interpreting the text, absent the rare major controversy over removing Senate-drafted provisions. However, it could be argued that while most Members do not follow this, the same mixture of trust and scrutiny applies to this as to other significant legislative aspects. For example, if the Senate slipped something partisanly controversial in before or during conference, the Members or staff of the aggrieved party who watch for such matters would attract others' attention.
his pejorative rejection of an explanation in a conference report.\textsuperscript{166} He deems a conference report just one more form of "losers' history" that "staff write."\textsuperscript{167}

Notably, however, only the textualist purists take such a stance about drafting history; even some of the heartiest skeptics of legislative history generally recognize drafting history as hard to resist.\textsuperscript{168} Even before the current phase of institutional legislative history, the Court appreciated how drafting history and conference reports express congressional intent meaningfully, without regard to whether any significant number of the Members voting for enactment follow the details. Justice O'Connor's 1984 opinion for a unanimous Court in Secretary of the Interior v. California\textsuperscript{169} epitomizes such an appreciation. She shows that the language at issue in the case did not appear in the House or Senate versions, but only in the conference version, and that "[b]oth chambers then passed the conference bill without discussing or even mentioning the change."\textsuperscript{170} Moreover, the "language was not deemed worthy of note by any member of Congress in the subsequent floor debates."\textsuperscript{171} The only indicator of the plan or idea behind the conference compromise consisted of a statement in the joint explanatory statement which, "[t]hough cryptic

\textsuperscript{166}. In In Re Sinclair, 870 F.2d 1340 (7th Cir. 1989), Judge Easterbrook lays out one of his classic full-scale arguments for rejecting legislative history, and treats the fact that the legislative history in question consists of language in a conference report as no occasion whatsoever for the smallest concession about it having interpretive weight. The case concerned whether family farmers with a bankruptcy petition pending at the date of enactment of a 1986 statutory change could take advantage of its provision for converting cases from Chapter 11 to Chapter 12. "The statute says conversion is impossible; the [conference] report says that conversion is possible and describes the circumstances under which it should occur. Which prevails in the event of conflict, the statute or its legislative history? The statute was enacted, the report just the staff's explanation." \textit{Id.} at 1341.

\textsuperscript{167}. See \textit{id.} at 1343. But see ESKRIDGE & FRICKLEY, CASES AND MATERIALS ON LEGISLATION, supra note 7, at 757-58 (noting the indications that staff slipped in the statutory provision read that Judge Easterbrook reads, perhaps excessively, as determinative, while the conference report more accurately described what the enacting Congress intended in the way of immediate relief for pending farmer bankruptcy cases).

\textsuperscript{168}. For example, Radin's own 1930 article acknowledges the persuasive power of drafting history. John Manning, see supra note 4, defers judgment about whether his textualist critique of legislative history as delegation extends to drafting history. Nineteenth-century courts accepted drafting history well before their general acceptance of legislative history. See POPKIN, MATERIALS ON LEGISLATION, supra note 19, at 410-11. This included the Supreme Court. See Blake v. National Banks, 90 U.S. (23 Wall.) 307, 317-19 (1874), discussed in Baade, supra note 24, at 1080.


\textsuperscript{170}. \textit{Id.} at 322. Like Justice Stevens in his concurrence in Chicago Bank One, Justice O'Connor evinces the institutional perspective in justifying her resort to committee language by commenting about whether the full Congress paid attention; specifically, by honoring the committee language not because it was likely, but rather because it was unlikely, that the full Congress paid attention.

\textsuperscript{171}. \textit{Id.} at 324.
Because the explanation “seems clear” and “[t]he legislative history strongly suggests” the interpretation, the Court upheld it.

In a 1997 case, the Court placed weight on drafting history in reversing Judge Easterbrook, the leading textualist, over a textualist dissent. The case of *Lindh v. Murphy* interpreted the 1996 statute restricting habeas corpus petitions not to apply to a pending noncapital case. In the 1996 Act, Congress created Chapter 154 for capital cases, which expressly applied to pending cases. Congress also amended Chapter 153, which applies to all cases including noncapital ones, without enacting express language for application to pending cases. Justice Souter, for the Court, recognized that both the court below and the petitioner himself noted that “chapters 153 and 154 may have begun life independently and in different Houses of Congress . . . .” However, only after the joining of the two chapters as a single bill in the Senate was the provision making chapter 154 applicable to pending cases added as a Senate floor amendment. As a result, the Court quoted and relied upon a maxim for giving weight to comparison when the relevant “portions of a statute . . . had already been joined together” in the drafting process.

Like other aspects of the persuasiveness of the new institutional approach to uncommitted centrist Justices, the persuasive power of conference reports and drafting history depends heavily upon their acceptability in light of the Radin “group mind” conundrum. In cases of this variety, Justice Scalia bears down on the indisputable point that

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172. *Id.* at 323.
173. *Id.* at 324.
175. *See id.* at 326.
176. The Court carefully traces the path of both chapters to enactment, recognizing that it should not rely overmuch on comparisons between the new language of Chapters 153 and 154 if, for example, the two chapters “had evolved separately.” *Id.* at 329.
177. *Id.* at 330 & n.5.
178. *See id.* at 330.
179. *See id.* at 330 & n.6.
180. *Id.* at 330.
181. In effect, the Court distills from the drafting history that when Senate Majority Leader Dole chose in the drafting of his amendment to make the capital case provision applicable to pending cases, he could have made, but chose not to make, the same happen to the noncapital provision. *See id.* at 330 & n.6. Intriguingly, the dissenting opinion written by Chief Justice Rehnquist, but joined by Justices Scalia, Kennedy, and Thomas, walked a fine line. *See id.* at 337. In solidarity with Justice Scalia, it made purely textualist arguments rather than arguing back about the drafting history; on the other hand, Chief Justice Rehnquist would not upbraid the majority for tracing the drafting history, consistent with the Chief Justice’s own past use of that approach. *See id.* at 340.
majories of voting Members are not aware of the details being cited by
the majority. In 1996, Justice Ginsburg carried along the whole Court,
except Justice Scalia, on use of legislative history in Bank One
Chicago. She cited evidence that the conference committee had
created the new subsection being interpreted, and argued that this
"drafting history . . . casts some light on the discrete composition and
separate placement" of the subsections. Justice Scalia began his
concurrence by stating "I agree with the Court's opinion, except that
portion of it which enters into a discussion of '[t]he drafting history of §
4010," proceeding with a full-length counterargument to the use of
legislative history. As previously discussed, Justice Stevens, in his own
concurrence, used the occasion to provide his full-length defense of such
use. He conceded "that it is unlikely that more than a handful of
legislators were aware of the Act's drafting history"; but he contended
that Justice Scalia was "quite wrong, however to conclude" that therefore
"the drafting history is not useful . . . ."n

This debate developed into an unusually heated exchange. Justice
Scalia termed legislative history "in any event a make weight; the Court
really makes up its mind on the basis of other factors," rather than
depending on an inquiry about "the fairyland in which legislative history
reflects what was in 'the Congress's mind.'" Justice Stevens took
umbrage: "I must also take exception to Justice Scalia's psychoanalysis
of judges who examine legislative history when construing statutes. He
confidently asserts that we use such history as a make weight . . . . "n
Justice Stevens responds: "I have been performing this type of work for
more than 25 years and have never proceeded in the manner Justice
Scalia suggests," while "Justice Scalia may be guilty of the transgression
that he ascribes to the Court," because "his zealous opposition to any
reliance on legislative history in any case" makes his opinion "the work

183. Id. at 273.
184. Specifically, the drafting history in conference renders implausible the
notion that Congress intended in that subsection to work the peculiar change in the law
found erroneously by the court below. See id. at 273-274.
185. Id. at 279 (Scalia, J., concurring).
186. Id. at 276 (Scalia, J., concurring). How these Justices line up regarding
drafting history tells how this particular type of legislative history fractures the Court's
fault lines. Justice Scalia feels strongly the unworthiness of drafting history as proof of
intent, and Justice Stevens and Breyer feels strongly the opposite, precisely because it
involves the least demonstration of subjective awareness on the part of the Members and
the greatest demonstration of pure institutional workings. While the other six Justices, led
by Justice Ginsburg in this instance, do not expound theories, they come out on the side of
institutional intent, namely, they accept the drafting history and the conference report as
expressing congressional intent.
187. Id. at 280-81.
188. Id. at 277 (Stevens, J., concurring).
product of a brilliant advocate" (something different from a neutral adjudicator). One learns from this exchange that when a conference report reflects drafting history without Member awareness, the two sides on the Court question not just each other's correctness in believing or disbelieving in institutional intent; they publicly air their doubts about whether the other is even engaging in the profession of judging.

b. Text's Pedigree: Antecedents of Texts Recorded in Committee Reports

Another situation in which Justices Breyer and Stevens have persuaded the Court to use legislative history consists of mentions of some highly legally persuasive point in committee reports or their equivalent. Examples include the speeches of floor managers who typically serve as committee or subcommittee chairs, or certain kinds of Senate colloquies. A prime illustration consists of a report's mention of the text's pedigree, i.e., the text's antecedents, such as prior statutes or other prior public law, which the bill purports to codify or use as a guide for subsequent legal interpreters. Justice Scalia's own analysis honors resort to prior statutes and other public law, for these are included in his search for "objectified" indicia of legislative intent. The difference is that Justice Scalia makes the connection by what he himself calls a "fiction," insisting that while such antecedents provide a valuable base for assessing the compatibility of new interpretations, the Court must blindly guess what to consider "antecedent," not check what the committees said of this. Justice Scalia's A Matter of Interpretation sets forth that "ambiguities in a newly enacted statute are to be resolved in such fashion as to make the statute . . . compatible with previously enacted laws. We simply assume, for purposes of our search for 'intent,'

189. Id. at 278 (Stevens, J., concurring).
190. Occasionally the statutory language in question did not go through a committee. In Holly Farms Corp. v. NLRB, the House adopted and the Senate refined an appropriation rider on the floor. See 517 U.S. 392, 399 n.6, 402 n.8 (1996).
191. See Babbitt v. Sweet Home Chapter of Communities for a Greater Or., 515 U.S. 687, 706 n.19 (1995) (floor manager statements quoted at length). When the Court does cite a floor statement, it does not use it as a stand-in for a widely held congressional opinion; rather, the Court typically cites it because of something unique and special about it as a lone floor comment. In Lewis v. United States, the Court reached back to a single 1825 floor statement. See 523 U.S. 155, 170 (1998). But it did so because it was Daniel Webster who made the floor statement "explaining [the] original assimilation provision," under circumstances and by words enlisting Webster on the specific issue that was before the Court, namely, the assimilation of homicide. Id. It has been suggested that there could be a separate category of legislative history cited for the sheer celebrity value of the person speaking, like John Marshall on the House floor in 1798 or Abraham Lincoln on the House floor in 1848.
192. For the best treatment of the dialogue between court and legislature over time about whether the legislative view of court or agency decisions since enactment of an earlier provision is incorporated in a later enactment, see Brudney, supra note 1.
that the enacting legislature was aware of all those other laws. *Well of course that is a fiction . . . ."*

Justice Souter's 1999 opinion for the Court in *Jones v. United States* shows the Court's full acceptance (excluding the purist textualists) of resort to committee reports for an enactment’s antecedents. To analyze a 1992 criminal statute creating the federal carjacking offense, Justice Souter started just with text (that is, with "clues derived from attention to structure and parsing of wording . . . .") but found that these "turn out to move us only so far in our effort to infer congressional intent." The Court needed to know the antecedent statutes that constituted Congress's "past practice." Accordingly, he reviewed the House Report for the provision to show that "[l]egislative history identifies three such models." Of all the Justices, only Justice Scalia disdained discussion of that report. The dissenting Justices quite agreed with the approach of looking at the House Report's identification of statutory models. Other opinions of the seventeen, such as *Dunn v. Commodity Futures Trading Commission*, reflect a similar use of committee reports to ascertain the pedigree of statutory language.

The Court also relies on committee reports for specific, illustrative examples of the operation of the selected text. In *Lewis v. United States*, the Court faced once again the old conundrum of the Assimilative Crimes Act, with its uniquely puzzling question of how Congress intends partly to borrow the criminal law for federal enclaves from the states. Specifically, the Court had to decide whether Congress considered homicide one of the crimes for which borrowing from the states may occur, or whether Congress intended solely to adhere in

195. *Id.* at 234.
196. *Id.* "The text alone does not justify any confident inference. But statutory drafting occurs against a backdrop . . . [so] it makes sense to look at what other statutes have done . . . . Congress is unlikely to intend any radical departures from prior practice without making a point of saying so." *Id.*
197. *Id.* at 235 n.4.
198. See *id.* at 253 (Scalia, J., concurring). Justice Stevens also wrote a concurrence, but he did not separate himself from the Court's statutory interpretation method, and thus did not, as Justice Scalia did, find a way to the result without the use of the committee report. He wrote separately just to note his constitutional position. *See id.* at 252-53 (Stevens, J., concurring).
199. The dissent generously described the Court's arguments as "deserving of consideration and response." *Id.* at 259 (Kennedy, O'Connor & Breyer, JJ., & Rehnquist, C.J., dissenting).
200. They simply debated the inferences yielded by that approach. *See id.*
federal enclaves to its own homicide enactments. Following the institutionalist approach, the Court cited at a key juncture in its opinion the few words from a 1940 House Report in which it noted "murder" as a crime that is "expressly defined" by Congress and hence requires no state borrowing.\(^{203}\) By citing that report, the Court attempted nothing in the way of demonstrating what most Members voting for the Act said or thought about the issue; likely Members did not know what the report said. Nor did the Court attempt to link broad, vague purposes in the bill's floor statements to the issue at hand. Rather, the Court employed one concentrated committee report statement to confirm the rest of its reasoning from a source with originalist legitimacy.

The same approach played repeatedly throughout the seventeen late-1990s opinions. In *Dunn v. CFTC*, Justice Stevens wrote the opinion for the Court on why a statutory provision exempts off-exchange trading in certain options from CFTC regulation.\(^{204}\) He placed weight on a few sentences from the Senate Committee Report and the Conference Committee Report that expressly relegated "this market" to "the bank regulatory agencies" rather than the CFTC.\(^{205}\) In *Atherton v. FDIC*,\(^{206}\) Justice Breyer wrote the opinion for the Court on why a federal provision on bank officer liability does not stand in the way of state standards with a lower threshold standard of care. He placed weight on a short quote in which "[t]he relevant Senate Report addresses the point specifically."\(^{207}\) In *O'Gilvie v. United States*,\(^{208}\) Justice Breyer wrote the opinion for the Court on the taxability of punitive damages received in personal injury suits. He placed weight on the legislative history of the first predecessor of the relevant tax provision, in which "[a] contemporaneous House Report . . . confirms [the] similarity of approach"\(^{209}\) of a certain early Treasury ruling directly establishing taxability.

Justices Stevens and Breyer wrote these opinions for the Court along institutionalist lines even though, in each of the three cases, a separate opinion written or joined by Justice Scalia scorned the Court's resort to legislative history. In two other cases,\(^{210}\) Justices Breyer and Stevens

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203. See id. at 170 (quoting H.R. Rep. No. 76-1584, at 1 (1940)).
204. See Dunn, 519 U.S. at 466.
205. Id. at 473-74 (citation omitted).
207. Id. at 229. The quote does indeed address the point specifically: "This subsection does not prevent the FDIC from pursuing claims under State law . . . for violating a lower standard of care." Id. (citation omitted).
209. Id. at 85.
further demonstrated sensitivity to the possibility that legislative history established specific intent by analyzing the legislative history before ultimately concluding it was nonprobative. In those two cases, Justices Breyer’s and Stevens’s consideration of the legislative history indicated respect for the Solicitor General who presented it, while Justice Scalia pointedly, but futilely, criticized the Solicitor General for doing so. Each time, Justice Breyer’s and Stevens’s opinion for the Court carried with it Chief Justice Rehnquist and Justice Kennedy, who, earlier in the decade, had leaned toward Justice Scalia’s camp.

Thus, not only does the Stevens-Breyer “institutionalist wing” of the Court feel strongly about addressing arguments based on committee reports, but that wing’s gains in the late 1990s register in their winning tacit support from Justices who had gone the other way a few years before. Given a choice between joining in such institutionalist originalism and splitting off to go with Justice Scalia in separate textualism, even moderately conservative Justices with varying previous textualist sympathies now go along with institutionalist originalism.

2. SILENCE AND INACTION: WHEN THE DOG DOES NOTHING IN THE NIGHT

Uncommitted Justices like Justice O’Connor have relied on silence as a guide to Congress’s original intent, in circumstances affording these otherwise diluted sources of insight some greater persuasiveness than the textualist alternatives. Let us clarify these terms before turning to examples. “Silence” here deals specifically with a situation where the legislative history, or part of it, says nothing on a subject.211 By the institutional intent theory, the courts may doubt important changes in the law by a statute when, during its enactment, those in Congress likely to note important statutory changes maintain silence.

“Inaction” here deals specifically with a situation where a legislative proposal, like an alternative bill or amendment, is defeated, is bottled up in committee, or otherwise fails to receive congressional action.212 As with silence, so with inaction: The textualist wishes to claim the justification of originalist legitimacy “objectified” by sometimes-strained alternatives to legislative history; the institutionalist successfully asserts that the institutional inaction—the defeat of a significant proposal at a significant point in the institutional process—may sometimes betoken original intent.


The 1999 case of *Department of Commerce v. United States House of Representatives*\(^{213}\) reflects an extreme level to which uncommitted Justices may positively rate the use of silence. As mentioned, Justice O'Connor, joined only by Chief Justice Rehnquist and Justice Kennedy, wrote the plurality opinion interpreting the Census Act as precluding sampling for apportionment purposes.\(^{214}\) Justice O'Connor based her chief argument on silence, stating that “[a]t no point during” the “debate and discussions surrounding the 1976 revisions to the Census Act” did “a single Member of Congress suggest that the amendments would so fundamentally change the manner in which the Bureau could calculate the population for purposes of apportionment.”\(^{215}\) She put weight on the silence since “a change would profoundly affect Congress by likely shifting the number of seats apportioned to some States and altering district lines in many others.”\(^{216}\) Voicing her faith in legislative history silence as an indicator, Justice O'Connor said that “it tests the limits of reason to suggest that despite such silence, Members of Congress voting for those amendments intended to enact”\(^{217}\) the asserted change in the law. Justice Scalia’s concurrence objected to her use of “what was said by individual legislators and committees of legislators—or more precisely (and worse yet), what was not said by individual legislators and committees of legislators.”\(^{218}\)

As for inaction, in *United States v. Estate of Romani*,\(^{219}\) Justice Stevens’s opinion for the Court analyzed two bills that died: one was urged without success by the American Bar Association in committee hearings during enactment of the tax lien before the Court; and the other, later bill died when not reported out of committee. In a concurring opinion Justice Scalia detailed his condemnation of the Solicitor General\(^{220}\) for even suggesting such a review of pre-enactment committee

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214. See id. at 343.
215. Id. at 342 (plurality opinion by O'Connor, J).
216. Id. at 343. Four dissenting Justices led by Justice Stevens read the legislative history differently. Justice Stevens wrote a dissenting opinion, joined in relevant part by Justices Souter, Ginsburg, and Breyer, analyzing the legislative history at some length. See id. at 357-60 & nn. 1-6 (Stevens, J., dissenting). Justice Breyer wrote a separate dissenting opinion, also analyzing the legislative history. See id. at 349.
217. Id. at 343 (Breyer, J., concurring in part and dissenting in part).
218. Id. at 344.
220. The Court’s opinion dissected the committee-level consideration in response to the Solicitor General’s different reading of that consideration. See id. at 533 (“The Government emphasizes . . . .”). Justice Scalia not only takes issue with considering the argument, but sharply criticizes the United States for even making it. See id. at 536-37 (citing “Brief for United States”), 536-37 (that the legislative history means nothing “should go without saying, and it should go without argu[ment] as well . . . . This is beyond all reason, and we should say so.”).
steps, deeming them mere "prelude or internal organization." Speaking just for himself, Justice Scalia opined: "The act of refusing to enact a law (if that can be called an act) has utterly no legal effect, and thus has utterly no place in a serious discussion of the law . . . . Congress can no more express its will by not legislating than an individual Member can express his will by not voting." Apparently the Court did not agree; or, at least, no other Justices felt critical enough of the institutional approach to join Scalia's approach.

Similarly, in 1999 Justice Souter's opinion for the Court in Bank of America National Trust and Savings Association v. 203 North LaSalle Street Partnership paid close attention to several proposals that died during Congress's enactment of the Bankruptcy Code. Congress enacted an unclear phrase suggesting that while it had not enacted the proposals, it had not clearly "discarded" them. Rather than total inaction, Congress had struck an "equivocal note." So the Court decided the case by an approach assuming the proposals' possible incorporation in some form.

Much more than with drafting history or a text's pedigree, interpreting a statute using silence and inaction in the legislative history requires the Court to make an array of debatable assumptions and follow extended chains of inferences. In a word, when the Court interprets silence or inaction, textualists can attack. Hence, Justice Scalia could, and did, attack the citing of inaction in Estate of Romani as "a new silly

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221. Id. at 536 (Scalia, J., concurring in part and concurring in the result).
222. Id. at 535-36.
224. Under those proposals, Congress would have explicitly expanded a doctrine in corporate reorganizations, namely, the "new value exception" to the loss by prebankruptcy shareholders of their interests. Ordinarily, prebankruptcy equity holders cannot receive shares of the reorganized entity over the objection of a senior class of impaired creditors. The "new value exception" concerns whether or under what circumstances those equity holders, if they supply "new value" (e.g., an infusion of new capital), can receive shares of the reorganized entity. See id. at 437, 445-46.
225. The enacted provision did not allow the old (prebankruptcy) shareholders to receive shares in the reorganized entity "on account of" their old interest, see id. at 449 (quoting 11 U.S.C. sec. 1129(b)(2)(B)(ii)), and the phrase "on account of" seemed vague about what it would take for them to receive shares partly because of their being old shareholders and partly because of their supplying new value.
226. See id. at 448 (contrasting the "equivocal note of this drafting history" with other cases in which "hornbook law has it that 'Congress does not intend sub silentio to enact statutory language that it has earlier discarded . . . .'," see INS v. Cardoza-Fonseca, 480 U.S. 421, 442-443 (1987)). Justice Souter's calling any line of reasoning regarding unenacted statutory language "hornbook law" would affront textualists; Justice Scalia wrote separately and strongly on this point in Cardoza-Fonseca.
227. "The upshot is that this [legislative] history does nothing to disparage the possibility apparent in the statutory text, that the . . . rule now on the books as subsection (b)(2)(B)(ii) may carry a [doctrinal incorporation]." Id. at 449.
extreme” and “beyond all reason” for providing “the history of legislation-that-never-was.”228

What led the Court to use silence and inaction anyway, notwithstanding vigorous protest from textualists, consists in large measure of the even greater unattractiveness of the textualist alternatives. In the Census Act case, Department of Commerce v. United States, Justice O’Connor accomplished something additional and special in taking this approach, which may explain why Chief Justice Rehnquist and Justice Kennedy joined her in a plurality opinion. They could have joined instead the opinion of Justices Scalia and Thomas and produced a five-Justice majority, but Justice Scalia’s textualist approach involved construing the statute to avoid a constitutional doubt—specifically, Justice Scalia’s extensively described doubt of the constitutionality of apportionment census sampling.229 Justice Scalia’s approach filled the pages of the U.S. Reports with thinly veiled constitutional views that would have permanently pitted the Court against any future census sampling by Congress.

In contrast, by placing her faith this time in the interpretive significance of legislative silence, Justice O’Connor kept the constitutional question undiscussed and thereby consciously230 achieved the high goals of deciding the statutory case while deferring the constitutional issue. Moreover, by joining Justice O’Connor rather than Justice Scalia,231 Chief Justice Rehnquist adhered, in a general way, to his own long-standing position that significant silence in the legislative history resembles the Sherlock Holmes story of the dog that did not bark in the night.232 Likewise, in Bank of America, Justice Souter’s parsing of the inaction in the legislative history spared the Court from the unappealing alternatives proposed by the textualist Justices: detaching the Bankruptcy Code from how it responded to prior practice and instead

228. Estate of Romani, 523 U.S. at 536-37.
229. See Department of Commerce, 525 U.S. at 348.
230. See id. at 343-44 (quoting two classic opinions, including one by Justice Brandeis, about why not to pass on questions of constitutionality).
231. As to non-barking dogs, Chief Justice Rehnquist has drawn a learned rejoinder on this point from Justice Scalia. See Chisom v. Roemer, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting) (“Apart from the questionable wisdom of assuming that dogs will bark when something important is happening . . . ”). There is something to be said for the Chief Justice other than the well-known problem of senior canines and their disabilities as to learning new tricks; there may be more truth in the frankly fictitious Sherlock Holmes than in the notoriously if unadmittedly fictitious accounts of Livy.
232. The story is “Silver Blaze.” See Harrison v. PPG Indus., Inc., 446 U.S. 578, 592 n.8 (1980) (Rehnquist, J., dissenting) (quoted in Chisom, 501 U.S. at 396 n.23) (“In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.”).
relying upon dictionaries.\textsuperscript{233} It is not that silence and inaction carry general persuasive force; it is that selective resort to them provides more often originalist warrant than some of the least "original" textualist alternatives.

3. \textit{CHEVRON} AND OTHER SUBSTANTIVE CANONS\textsuperscript{234}

The contest between textualism and the institutional intent approach in the late-1990s Supreme Court involved quite a lot of cases invoking \textit{Chevron} and other substantive canons. Substantive canons present a complex topic because the canons themselves diverge so much, and each canon involves such distinctive considerations as to preclude easy generalization. Some substantive canons, like \textit{Chevron}, appeal broadly to most of the Justices, though proponents and critics of textualism apply it differently; other canons divide the Court along diverse fault lines.\textsuperscript{235}

Recalling this Article's chronology of textualism's peak in the early 1990s, Justice Scalia led a textualist wing of the Court toward the goal of substituting "objectified" intent methodology—including canons—for legislative history. By holding together a majority on the Court, this approach harnessed the textualist Justices to the Justices who favored the substantive policies behind the various canons enough to reaffirm them. The goal: to reach the outcome toward which the canon pushes once legislative history is disregarded.\textsuperscript{236} To oversimplify, Justice Scalia could hope in a textualist approach to have the support of Justices Thomas and Kennedy. If he could regularly attract Chief Justice Rehnquist and Justice O'Connor to make a five-Justice majority for reaffirming canons they favored, and sometimes attract one or more additional uncommitted Justices, then the Court would move toward reliance on substantive canons rather than legislative history in canon-susceptible cases.

When the Court's enthusiasm for textualism passed its peak, however, a combined textualist/canon approach could no longer generally command a majority. Justice Kennedy no longer routinely joined

\begin{footnotes}
\item[233] 526 U.S. at 460 (Thomas, J., concurring) (citing two dictionaries), 462 (opposing the majority's line of reasoning from pre-Code practice, through legislative history, to the meaning of the ambiguous Code provision).
\item[234] See Bernard W. Bell, \textit{Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-Chevron Era?}, J.L. & POL. 105, 159-60 (1997).
\item[236] See supra notes 79-88 and accompanying text; \textit{see also} Thomas W. Merrill, \textit{Textualism and the Future of the Chevron Doctrine}, 72 WASH. U. L.Q. 351 (1994).
\end{footnotes}
textualist opinions, and Justice O'Connor and Chief Justice Rehnquist would not regularly decline to join opinions using legislative history. At this point, the canon-applicable cases fractured into a variety of streams, and that fracturing created an opening in which the concepts of Justices Breyer and Stevens would often prevail. The focus in these various streams became the special nature of the particular applicable substantive canon. 237

First, just a few statist and federalist canons, those heavily favored by Chief Justice Rehnquist and Justices O'Connor and Kennedy and disfavored by Justices Stevens and Breyer, hardened to become "super-strong," 238 with Congress able to express a contrary intention only "by making its intention unmistakably clear in the language of the statute." 239 In 1992, the Court hardened its canon against waivers of the United States' sovereign immunity. Similarly, the Court hardened its canon against implying congressional overcoming of states' Eleventh Amendment immunity. Chief Justice Rehnquist and Justice O'Connor strongly favored these canons, not from textualist inclinations but from how the substantive aspects of the canons carried out their own larger jurisprudence. In the late 1990s they tried to hold the line against efforts, by the use of Breyer-Stevens institutional intent, to overcome either federal 240 or state immunity-favoring canons.

While these areas of the law matter considerably in the late 1990s, they had sharply defined limits. Even rejecting legislative history in those particular areas, which the swing Justices did not consistently do, 241 did not mean rejecting it elsewhere. 242

237. Uncommitted Justices might well favor an analysis in a canon case that used legislative history because of the originalist warrant it provided, i.e., the confirmation (or disconfirmation) that the outcome toward which the canon pushed accorded with the intent held by the legislature as registered in legislative history.

238. See Eskridge & Frickey, Cases and Materials on Legislation, supra note 7, at 702.


241. In West v. Gibson, 119 S. Ct. 1906 (1999), Justice Breyer's opinion for a five-Judge majority found a waiver of sovereign immunity in a gender discrimination cause of action against the federal government from a combination of inference from the text and legislative history. Alluding to the standard for finding such a waiver, the majority wrote, "We believe that the statutory language, taken together with statutory purposes, [legislative] history, and the absence of any convincing reason for denying the EEOC the relevant power, produce evidence of a waiver that satisfies the stricter standard." Id. at 1912. Perhaps the fifth Justice in the majority, Justice O'Connor, relented in her usual position on super-strong canons because of the persuasive background of the gender discrimination provisions in the 1991 Civil Rights Act.

242. On the contrary, sharply splitting those particular areas off as distinctive relieved the Chief Justice, Justice Kennedy, and Justice O'Connor, as well as other uncommitted Justices, of a pressure to adhere to textualism, for the sake of general consistency, in cases outside those particular areas.
We may separately analyze *Chevron*, and then, the canon for avoiding constructions of statutes raising constitutional doubts.


*Chevron* itself is the subject of many major law review analyses,\(^{244}\) which requires compression and tailoring for inclusion in this Article. In *Chevron* cases, the Court reviews agency interpretations of statutes in ways that diverged both as to ideology (conservative vs. progressive) and methodology (textualist vs. intentionalist). Ideology matters for *Chevron* because the agency interpretations sometimes, though not always, carry the political overtones of the contemporary Administration. Speaking loosely, a debatable Reagan (or Bush) Administration interpretation might get upheld by the votes of centrists who followed *Chevron*'s reasons for deference, counted with the votes of conservatives who actually agree with the goals of the Administration; while when the next Democratic administration came along, that administration's interpretations might get upheld by the contrasting mix of the same centrists now linked with progressives.\(^ {245}\)

Methodologically, when Justice Stevens wrote *Chevron*, he anticipated full use of legislative history in determining statutory intent; in 1984, the opposing textualist view had not yet much been heard. In “step one” of *Chevron*'s 1984 analysis, the court should ask “whether Congress has directly spoken to the precise question at issue,” i.e., whether the agency's construction differs from “the unambiguously expressed intent of Congress.” In *Chevron* itself, the Court decided in the agency’s favor by analyzing the committee reports and bill manager's statements in the legislative history, among other matters, in a section of the opinion entitled “Legislative History.”\(^ {246}\)

Later in the 1980s, Justice Scalia arrived on the Court, and with textualist allies launched a different, textualist form of *Chevron* opinions,


\(^{244}\) For recent analyses, see *supra* note 20. For analyses some years ago, see, e.g., Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969 (1992); Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071 (1990).

\(^{245}\) These generalizations are to be taken with a grain of salt and not as a basis for wagering anything irreplaceable. Of course, the Court’s outcome and divisions in each individual *Chevron* case has more to do with the variations in the statutes and the support for the proffered agency interpretations than to do with loose generalizations about judicial ideology.

\(^{246}\) Justice Stevens describes the reports and other legislative history, see *Chevron*, 467 U.S. at 851-53, and analyzes them in the “Legislative History” section. See *id.* at 862-63.
which he helpfully foreshadowed in an article. Justice Scalia supported *Chevron* generally, but noted that how freely, and by what methods, a judge interpreted a statute as having that *Chevron* “step one” ambiguity depends on whether the judge was a “strict constructionist” of statutes like himself, or “is willing to permit the apparent meaning of a statute to be impeached by the legislative history.” This set the stage for two competing *Chevron* methodologies, Justice Stevens’s with legislative history, and his own without it. In fact, commentators compared and debated the two methodologies on such questions as which one favored environmental values.

Up to the peak in the 1993 Term, with the Court still processing interpretations of the Reagan-Bush administrations, the *Chevron* majorities on the Court that deferred to agency interpretations tended to include the conservative wing. Hence, as previously noted, as late as 1993-94 textualist opinions predominated. However, the switch from a Republican to a Democratic administration in 1993 began a changed dynamic as to which wings of the Court tended to come together to uphold agency interpretations under *Chevron*. The decisive turn came in the 1994 Term, with perhaps the most striking *Chevron* decision of the decade, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*. When the Clinton Administration favored a broad, habitat-protecting interpretation and invoked *Chevron* deference, it had support in institutional legislative history. The Court’s 6-3 split, with Chief Justice Rehnquist in dissent, allowed Justice Stevens to wield his power to choose himself to write the Court’s opinion, ensuring use of

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248. Id. at 521.
250. Thus, with some frequency, either a textualist would write the majority opinion, or if an uncommitted but conservative Justice wrote the opinion, the Justice might yet take into account the textualist methodology rather than drive Justice Scalia into writing separately and critically.
253. As Justice Scalia, in dissent, forthrightly conceded, “I must acknowledge that the Senate Committee Report on this provision, and the House Conference Committee Report, clearly contemplate that it will enable the Secretary,” id. at 703 (Scalia & Thomas, JJ., & Rehnquist, C.J., dissenting), to take the position argued in the case.
institutional intent. Justice Stevens's majority opinion adapts *Chevron* to uphold an administrative "construction of the [statute] [because it] gains further support from the legislative history of the statute." 254

As previously noted, *Sweet Home* is a rich opinion, and reducing it simply to a question of using legislative history does not capture much of that richness, but it does line the opinion up with others to show the shift that developed in the Court's *Chevron* opinions. Until then, in 1993-94, Justice Scalia had appeared to gain the upper hand in having *Chevron* opinions written on textualist grounds. Thereafter in the late 1990s, sometimes Justice Scalia wrote an opinion for the Court employing his previously dominant textualist version of *Chevron*. 255 However, if the agency interpretation of the Clinton Administration interpretation won over a majority of the Court but left Chief Justice Rehnquist in dissent, as could happen, Justice Stevens could and would assign the writing of the opinion to a Justice who would cite institutional legislative history. And, even if Chief Justice Rehnquist did not dissent, he also no longer undertook the early 1990s task of holding together a predominantly textualist conservative judicial group. Rather, it turned out that neither the Chief Justice nor Justice Kennedy 256 had irrevocably accepted textualism, and they proved willing to stay on board to join opinions citing legislative history in a *Chevron* context written by Justices Stevens 257 or Breyer. 258

It might be suggested that this particular aspect of the Court's swing toward institutional legislative history, on the basis presented, has no stability in the face of changes of the ideology of the Administration. Staying in this loose way of characterizing matters, if a subsequent Administration's agency interpretations had a conservative ideology like that of the Reagan Administration, then once again conservative Justices might predominate in *Chevron*-deferring Court majorities, and Justice Scalia's *Chevron* opinion-writing methodology would return to fashion. That may be. However, after what would be almost a decade or more of nontextualist *Chevron* opinions, the momentum of the early 1990s in the

254. Id. at 707.
direction of a super-strong *Chevron* principle has dissipated.\(^{259}\)

Therefore, this is an area in which the pendulum may continue to swing back and forth, but not wildly.

**b. Avoiding Constitutional Doubts**

Turning to an entirely different substantive canon, Justice Scalia sets great store by the canon of construing statutes to avoid constitutional doubts.\(^{260}\) It answers for him many questions of statutory interpretation with no resort to legislative history. But in 1998-99, the Court would not follow Justice Scalia in this. In *Almendarez-Torres v. United States*,\(^ {261}\) the Court instead made use of silence in the legislative history. The case concerned the ticklish problem of whether a statute that premised a sentencing increase\(^ {262}\) on recidivism created a new offense with a new element that the indictment must include, or simply altered an existing offense’s sentencing.\(^ {263}\) Justice Breyer analyzed the text of the 1988 statute at issue, its 1990 revision, and their legislative histories.\(^ {264}\) He relied on the pertinent silence in the legislative history both in 1988\(^ {265}\) and in 1990\(^ {266}\) about anything that would support the petitioner’s argument that Congress intended to create a new offense.\(^ {267}\) Justice Scalia’s dissenting opinion chides the majority unsuccessfully for its “mistaken assumption that statutory changes or clarifications unconfirmed by legislative history are inoperative.”\(^ {268}\) The lineup of Justices in the majority and dissent suggests that an inference from

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\(^{259}\) *Chevron* would have to change—not merely back to a frequent textualist tool, which could well occur, but much further—and surrender its flexibility to become something only usable by textualists. After all these years of Justices comfortably using, or foregoing, legislative history in *Chevron* opinions according to their lights, that kind of hardening appears improbable.


\(^{263}\) *See Almendarez-Torres*, 523 U.S. at 226-27.

\(^{264}\) *See id.* at 231-35.

\(^{265}\) The legislative “history, to our knowledge, contains no language at all that indicates Congress intended to create a new substantive crime.” *Id.* at 234.

\(^{266}\) The Court observes: “N[or] [does] the legislative history of the 1990 Act, suggest[,] that in this housekeeping measure, Congress intended to change, or to clarify, the fundamental relationship between the two subsections,” *id.*; that is, the one at issue and the other penalty provision.

\(^{267}\) *See id.* at 266 n.6 (Scalia, Stevens, Souter & Ginsburg, JJ., dissenting).

\(^{268}\) *Id.*
silence now receives debate but, from all but textualists writing for themselves, no shrill denunciation.\textsuperscript{269}

Similarly, in \textit{Department of Commerce v. United States House of Representatives}, Justice Scalia’s concurrence relied on the avoid-constitutional-doubts canon,\textsuperscript{270} while Justice O’Connor’s plurality opinion relied on silence and inaction. And in \textit{Jones v. United States},\textsuperscript{271} the majority looked to legislative history in deciding whether a criminal procedure required jury safeguards, while Justice Scalia, concurring, decided it by the canon that it was “necessary to resolve all ambiguities . . .”\textsuperscript{272}

Looking at the \textit{Chevron} and canon cases together, after acknowledging all the divergent factors in such cases, the Court did substantially part from textualism in these cases and instead used legislative history. It did so because these cases inspired the Court with a desire for the originalist warrant of legislative history. In cases involving a substantive canon, the canon constitutes a factor in the Justices’ thinking that does not derive closely from original congressional intent, however defined. An element of \textit{Chevron} deference, of construing to avoid constitutional doubts, and of other substantive canons consists of the Court leaning in a particular direction for reasons independent of the original intent behind the statute. Textualist eschewing of legislative history in a substantive canon case pushes the opinion even further away from deferring to the enactment-time views expressed in Congress—further than the Court wishes to go, except for the small and circumscribed number of super-strong canons. By contrast, citing institutional legislative history counterbalances the nondeferential substantive principle in the canon, with a check that the Court stay closer to what Congress originally intended.

\textbf{IV. INSTITUTIONAL LEGISLATIVE HISTORY IN THE 1990s}

Part IV advances deeper accounts of the concepts involved in institutional intent. Previously described academic writings of Justices Breyer, Scalia, and their academic supporters provide a good basis for first unpacking the Court’s turn. However, the deeper implications take

\textsuperscript{269} On both sides, the opinions had an unusual lineup. The relatively conservative majority that allowed Justice Breyer to write the Court’s opinion included the Justices who embraced reasoning from silence in the Census Act case. The relatively progressive group of dissenters that allowed Justice Scalia to write the dissenting opinion secured from him a milder rejection of legislative silence than he characteristically expresses when opining for himself.

\textsuperscript{270} 528 U.S. 316 (1998).

\textsuperscript{271} 119 S. Ct. 1215 (1999).

\textsuperscript{272} Id. at 1229 (Scalia, J., concurring).
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us outside legal academia, in some multidisciplinary forays to the allied fields of analytic philosophy and political science in the 1990s.

The first Section seeks in analytic philosophy a deeper understanding of what it means for an institution to have intent. An unforgettable 1992 public choice argument by Kenneth Shepsle, Congress is a “They,” Not an “It”: Legislative Intent as Oxymoron, epitomizes the challenge. This Section builds toward, and then applies, the 1995-1998 writings of John Searle, perhaps America’s leading analytical philosopher interested in this field. The second Section seeks in political science a deeper understanding of why, in the 1990s, this conceptual approach has appeal.

A. Concepts from Analytical Philosophy in the 1990s: The Intent of Institutions

1. WHY CONCEPTUALIZE ANEW THE INTENT OF INSTITUTIONS?

Why conceptualize anew the original intent of the institution of Congress? For the past sixty years, while statutory interpretation has passed through successive approaches, a powerful critique has challenged conceptually whether legislative history records the intent of the enacting Members of Congress. The legal realist critique by Radin of the myth of the group legislative mind connects academic analysis all the way from his publication in 1930 to the academic writings of the late 1990s. However, textualists employ an updated, conceptually stronger version of the Radin critique, crystallized in Professor Shepsle’s famous 1992 article, Congress is a “They,” Not an “It.”

Shepsle uses public choice analysis, identified with Kenneth Arrow’s Indeterminacy Principle (Arrow’s Theorem), to argue that a body whose members have complex voting preferences will not have a determinate intent. Hence, legislative outcomes, such as what an enactment says and what it omits, depend not on simply aggregating (counting up) the individual legislators’ preferences, but on the

273. Kenneth A. Shepsle, Congress is a “They,” Not an “It”: Legislative Intent as Oxymoron, 12 INT’L REV. L. & ECON. 239 (1992) [hereinafter Shepsle, Congress is a “They”].
274. For the textualist connection between Radin in 1930 and public choice theory in the 1990s, see Manning, supra note 4, at 684-87.
275. Shepsle, Congress is a “They”, supra note 273.
276. See ARRow, supra note 12. More precisely, if the members have nontransitive preferences (that is, the preferences do not line up so that one preference for A over B, and another for B over C, add up to a preference for A over C) then the body as a whole will come to varying outcomes depending on the method of voting.
procedural sequence, such as what alternatives they have. Accepting legislative history amounts to accepting something beyond the enacted text of the bill, but Arrow’s Theorem suggests that regardless of how much we know about the expressed views of the Members, we cannot always know what they would choose other than what they did choose—the enacted text.

The Breyer-Stevens approach in the Supreme Court of the 1990s comes with a partly reconceptualized model of how committee reporting can express intent—the “busy Congress” model—but this has drawn, in response, a critique from textualists including Justice Scalia. It is this advanced conceptual debate that provides the first, and chief, reason to seek a deeper conceptual analysis of institutional intent.

The “busy Congress” model explains why Members let specialists (typically, committees) express congressional intent about details; the Members themselves lack the time and motivation to become individually aware of the detailed points. However, the “busy Congress” model elicited in response a terse critique from Justice Scalia, more fully developed by academic textualists, that what a busy Congress does this way is not formulate intent but rather delegate impermissibly a supplemental power of lawmaking. Justice Scalia characterizes the “busy Congress” proponents as saying the following: “Committee reports are not authoritative because the full house presumably knows and agrees with them, but rather because the full house wants them to be authoritative—that is, leaves to its committees the details of its

277. See Shepsle, Congress is a “They”, supra note 273, at 244-48. In a simple illustration, even for three people whose preference orderings of three choices do not line up nicely (Able prefers 1, 2, and 3 in that order; Baker prefers 3, 1, and 2; Charlie prefers 2, 3, and 1), what they choose depends on how they go about voting, not on a determinate outcome like the price set in a perfect market. See id.

278. Given Arrow’s Theorem, as Professor Manning put this in 1997, judges should not use legislative history to attempt to reconstruct legislative intent. When “legislative outcomes turn on procedural maneuvers and strategic behavior, judges cannot reconstruct what a legislature would have ‘intended’ to achieve if it had explicitly settled a point that was not clearly resolved in the statutory text (the only text that a requisite majority of legislators voted to enact).” Manning, supra note 4, at 686 (citing Easterbrook, Statutes’ Domains, supra note 10, at 547-48).

279. Members of Congress, as busy figures in a busy institution, cannot themselves follow large numbers of such points, particularly because they concern themselves with the politically big controversies. These may not include details that get dealt with during enactment without major attention, but which later become the focus of interest in judicial cases. Members pay the least attention to the details of even-handed compromises in conference reports, or the descriptions of a statute’s pedigree in committee reports, but courts later may care the most for such details in the issues before them. For a different perspective on the issues raised by Congress’s being busy when enacting, see John Copeland Nagle, Direct Democracy and Hastily Enacted Statutes, 1996 ANN. SURV. AM. L. 535.
In other words, Justice Scalia views the “busy Congress” not as a model of intent, but rather a delegation to committees of lawmaking power—a transfer of power similar to a congressional delegation of rulemaking power to a regulatory agency. Then, as a lawmaking power divorced from the process of expressing intent, legislative history falls. Justice Scalia declares that “[t]he legislative power . . . 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.”

The dialogue between Justices Breyer and Stevens and Justice Scalia underlies the Court’s turn toward the Breyer-Stevens approach, but the Court has only gone part-way in articulating what the Breyer-Stevens approach embraces as a new concept of intent. Justice Scalia charges that legislative history is a delegation of supplemental lawmaking power to committees, like a delegation of rulemaking power to agencies. A fully realized reconceptualization must answer Justice Scalia’s charge. How does an institution that develops an intent expressed in a committee report differ from an institution that, in Justice Scalia’s contention, “authorize[s] a committee to ‘fill in the details’ of a particular law in a binding fashion?” Justices Breyer and Stevens’s analogies to other structured group processes that develop collective intents fairly begin the answer, while still leaving it to others to spell out the new concept more.

An effort to draw on the allied fields of philosophy and political science to help us with their most developed thinking ought not count as a horror to shun. Institutions in general, and Congress in particular, present problems and opportunities both for the field that legal scholars study, and for scholars in allied fields. Philosophy and political science have to grapple with institutions and Congress; this is how public life works today and they, too, notice this. In fact, the problem of communicative intent looms large for philosophy in the 1990s, and congressional processes loom large for political science in the 1990s. Since both fields work on these issues, as those in law do, we might as well look at what they have come up with.

There is another dimension, having to do with the change in the activity of social institutions generally and Congress in particular over the past half-century, with which this debate over congressional intent is catching up. Long ago, the House and Senate did more of their work as

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280. SCALIA, A MATTER OF INTERPRETATION, supra note 11, at 35 (presented in the book in quotation marks, as a characterization attributed to an unnamed proponent of legislative history).

281. Id.

282. Compare the following personal speculations of the author: A century or perhaps fifty years ago, the predominant method of presenting a group performance of a literary work, namely, a theatrical company, involved having all the players perform the play together from beginning to end. That produced a performance in front of a live
groups meeting together on the floor, listening together to debates and developing together in the course of enactment more of a “group state of mind” about a bill. As Justice Scalia wrote, “In earlier days, when Congress had a smaller staff and enacted less legislation, it might have been possible to believe that a significant number of senators or representatives were present for the floor debate . . . .” But in the twentieth century, to cope with the larger demands on the institution, Congress had to reserve group time just for the comparatively compressed activity of recording votes, and spend discussion time meeting in subcommittees or other small groups, returning to their states, working in their offices, or engaging with the broadcast media. Now, as Justice Scalia says, “The floor is rarely crowded for a debate, the members generally being occupied with committee business and reporting to the floor only when a quorum call is demanded or a vote is to be taken.” In past times, the concept of group intent recorded in legislative history corresponded to the institution that met together and developed together as a group at least a general state of mind about a bill’s purposes.

That picture no longer matches Congress. But neither is Congress an atomized, unstructured set of Members with no collective intent, like individuals in a dispersed market. The picture drawn in Breyer’s Uses or in Justice Stevens’s Chicago Bank One concurrence, or in my own treatise on congressional procedure, consists of a decentralized institution with specialist groups, not an atomized, unstructured market. Congress audience that gave them real-time group feedback on their straightforward performance “intent.” Today the predominant method of presenting a performance of a literary work is a movie or television show. This gets produced; that is, cut up by a shooting schedule into specialized bits and pieces only later edited together, in which neither the performers nor the ultimate audience come together in one space or time to form even the vaguest collective sense. Yet, the performers’ specialized work, held together by the step-wise leadership of scriptwriter, director, and film editor, comes together in a thematically unified (“intentioned”) movie. A statute is like a movie: The committees that express their intent on details are like the director and film editor. For an elaborate argument connecting the postmodern systems of social organization and advances in communication media with postmodern social concepts, see David Harvey, The Condition of Postmodernity (1990).

283. Scalia, A Matter of Interpretation, supra note 11, at 32.

284. In the Senate, something of a transition occurred in the 1950s, with the Senate considerably reducing the time it listened together, as a body, to debates. Majority Leader Lyndon Johnson increased the use of unanimous consent agreements to organize the floor, encouraging Senators not to stay on the floor at times when they could be sure no actions of interest to them would occur. See Tiefer, Congressional Practice and Procedure, supra note 23, at 463 n.1 (citing relevant sources). In the House, the process may have been gradual; the absence of recorded votes (before 1970) during the large fraction of its time that the House functioned in the procedural mode known as “Committee of the Whole” meant that Members could leave the floor without being recorded as absent. See id at 339 n.1 (citing relevant sources).

285. Scalia, A Matter of Interpretation, supra note 11, at 32.
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resembles other institutions like decentralized corporations, whose management coordinates by conference call and by reporting systems rather than by mass group meetings. Philosophers and political scientists can help us understand whether the conditions of modern life, in rendering obsolete the older concepts of the intent of a group meeting, have supplied replacement concepts.

This raises a final reason to venture beyond the simple observation that Members of Congress are too “busy” to learn individually and thus accept the details as covered in legislative history. Statutory interpretation in general, and analysis of legislative history in particular, provide valuable occasions for concretely articulating the law’s conception of the legislature.²⁸⁶ In American law, competing theories of legislative interpretation serve as an important arena for competing conceptions of the democratic system, along with such other areas of law as election and campaign finance law, constitutional law, and separation of powers. Textualists like Justice Scalia, Judges Easterbrook and Starr, and Professors Manning and Vermuele expound a theory of democracy with intriguing connections all the way back to Radin, the legal realist, by the way in which they justify their approach. Proponents of legislative history like Justices Breyer and Stevens, Judges Mikva and Wald, and Professors Bell, Brudney, Lane, Ross, Popkin, Schacter, and Strauss expound a competing theory of democracy by arguments accepting the use of legislative history. If a reconceptualization to accord with the Breyer-Stevens approach provides a fresh occasion to reconsider the law’s changing views of the legislature, all the better.

2. FROM AUSTIN/HART TO SEARLE: THE INTENT OF INSTITUTIONAL ACTION

Let us start with a brief tracing of what modern analytic philosophy says pertinently about the intent of legal speech, particularly statutes. The modern analytic philosophy of law begins at Oxford in the 1950s where John L. Austin shared a fruitful approach with H. L. A. Hart.²⁸⁷ Austin worked on the analytic philosophy of ordinary speech, and Hart

²⁸⁶. For example: Does Congress serve as a market for legislators’ preferences, as Arrow asks? Is its structure a matter of dubious legitimacy, as interest-group theory suggests? Does the law’s quest among sources for formality and reliability make it better to stay out of legislative history? Or, on the other hand, does the supreme value placed by the Court in deferring to the sovereign elected law-giving body validate any viable concepts for discerning institutional intent?

²⁸⁷. For the close influence at Oxford in the 1950s of Austin and Hart, see GEORGE C. CHRISTIE & PATRICK H. MARTIN, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 691 & n.135 (2d ed. 1995).
developed in *The Concept of Law* the branch of jurisprudence known as legal positivism.

Austin launched his analysis in his classic *How to Do Things With Words*. Legal speech in general and legislation in particular constitute a variety of speech, and both the analytical philosopher and the jurisprude analyze its particular qualities as a variety of speech. Austin introduces the concept of the particular kind of speech he calls a "performative utterance" because it has, or aims at having, an operative effect. This differs from the kind of speech that merely announces a (perhaps verifiable) descriptive proposition, like a scientific paper or even a description of a legal relation. He explains the concept of performative utterances by examples of legal speech, such as "I give and bequeath my watch to my brother"—as occurring in a will," and "I declare war." The "issuing of the [performative] utterance is the performing of an action—it is not normally thought of as just saying something." Austin divides performative utterances into several categories, one being governmental officials' legally effective commands listed by their particular verb: statements by officials by which they "appoint," "levy," "pardon," and so forth. Such commands include statutes.

In other words, when Congress enacts a law saying "Section 101: At the completion of bankruptcy proceedings, the debtor's debts are

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289. Both Austin the linguistic philosopher, and Hart the legal positivist, analyze enacted statutes as utterances produced by a specialized process (enactment) in a specialized form of speech (statutes), that receive recognition as law. Austin's account of what makes an utterance performative parallels Hart's account of the "rule of recognition" by which a judge or lawyer determines whether to accept a pronouncement as law. Both are positivist in that the effective nature of the utterance or law derives from "what is" (namely, the common recognitional criteria of sovereign and subject) rather than "what ought to be" (normative propositions, such as the utterance or law ought to match up with natural justice or social values). *See Christie & Martin, supra* note 287, at 690-707 (reprinting a section from *The Concept of Law*); *Dennis Patterson, Law and Truth* 6-8 (1996) (how Hart's positivist approach differs from, say, Professor Dworkin's normative one in *Ronald Dworkin, A Matter of Principle* (1985)).

A normative theory can advance many reasons an interpreting judge could do better by tapping normatively justifiable purposes for a statutory interpretation, rather than sticking with interpretations justifiable specifically as the legislature's original intent (expressed in text or legislative history). For an account of the debate, see *Legislative Intent and the Authority of Law*, in *Andrei Marmor, Interpretation and Legal Theory* 155-84 (1992). Justice Scalia willingly agreed with Dworkin and Eskridge in downgrading specific intents expressed in legislative history, but cited their lack of fidelity to original congressional intent as a reason to go much further with his own textualist program rather than their normative ones. *See Scalia, A Matter of Interpretation, supra* note 11, at 22 (discussing Eskridge).


291. *Id.* at 5, 7.

292. *Id.* at 6-7.
discharged” or “A person who is discriminated against has a cause of action for damages,” Congress issues a performative utterance. The sentences in the statute do not just describe legal relations, like a book describing the bankruptcy system. They aim at having, by dint of issuance, an operative legal effect. In the example, the sentences command, under prescribed circumstances, the discharge of debts or the payment of damages for discrimination.

This performative utterance category includes what occurs within and during the legislative process as well as at the end, such as “vote,” “veto,” “repeal,” and “enact.” Austin thus characterizes the enactment process as a succession, not just of statements, but of performative utterances. The steps during enactment do not just describe a situation, like news accounts; they consist of utterances having a legally operative effect. Legislating itself is doing, not describing, on the way to producing a form of speech (statutes) that does, not just describes.

Thus, the Oxford analytic approach takes statutes in a direction that locates their meaning in how this particular kind of speech—the sovereign legislature’s command—differs from mere descriptive propositions. The difference consists in the use of a form that produces an operative effect, and in the sovereign utterer having both the power and the aim to complete the process and to produce that effect. Moreover, although the “sovereign” in Hart’s phrasing was an individual (a monarch) some centuries ago, today the legislature, an institution, gives those sovereign utterances. When Austin explains the verb “enact” or the sentence in which the utterer “declares war,” he treats performative utterances as something that an institution says. When he assimilates individuals and institutions as the utterers of sovereign commands, he invites further systematic thinking about the utterer’s intent when institutions speak.

This may all seem obvious and noncontroversial. Almost everyone—textualists, purposivists, and intentionalists alike—can accept the route so far. However, the more that analytical philosophy treats law as a kind of speech that is the same whether individuals or institutions produce it, the more it opens the way to a viable concept of institutional intent that can get away from old paradoxes about inaccessibly private legislators’ minds or incoherent group minds. And the more analytical philosophy treats the enactment process as composed of intermediate-stage kinds of legally operative speech (“vote,” “report”), the more it opens the way to a viable concept of legislative history expressing an institutional intent.

293. After all, Justice Scalia subscribes fully to this; he simply restricts the indications of what the legislative institution intends to command, to the enacted text and to “objectified” intent indicia.
Beginning in the 1950s, analytic philosophy of language flowered in America as well as at Oxford and Cambridge. America hosted the development of a school of "speech act" (a term much like "performative utterance") analysis led from the 1960s to the 1980s by Paul Grice and John R. Searle. Grice and Searle studied the relation between the meaning of speech and the intentions of speakers. They sought just how a speaker expresses an intention, particularly when the utterer intends to express more than what comes out in a literal reading according to narrow conventions.

This makes Grice's work helpful in statutory interpretation. Justice Scalia finds perfectly admissible the kind of intent analysis put forth by Grice. Justice Scalia, too, argues against merely interpreting a statute by the words' literal meaning in the dictionary when he can infer objectively what Congress intended—a classic Gricean intentionalist reading for utterer's meaning. In his book, Justice Scalia expressed the large difference between "textualism and strict constructionism" and how "so-called strict constructionism [is] a degraded form of textualism that brings the whole philosophy into disrepute. I am not a strict constructionist . . . . A text should not be construed strictly . . . ."

However, Justice Scalia would only make such inferences about Congress's intent from an "objectified" basis. Here, speech act analysis


296. See generally Grice, Studies, supra note 294.

298. For example, a debated issue in the Court's 1990s statutory interpretation concerned statutes that apply if the defendant uses a firearm in the course of some other statutory crime. Initially, in 1993, the Court construed "use" from the dictionary to include a defendant who bartered an unloaded gun for drugs. See Smith v. United States, 508 U.S. 223, 229 (1993).

299. Professor Solan applied Gricean analysis to show how Congress, in promulgating the statute, implied something other than such a literal reading. See Solan, Learning Our Limits, supra note 3, at 270-73.

300. Scalia, A Matter of Interpretation, supra note 11, at 23 (citing Smith v. United States, 508 U.S. 223 (1993)).
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introduces a decisive turn. As linguistic analytic philosophy turned generally in the 1980s to reading for speaker’s intention, Searle took the lead in analyzing the intention of a speaking institution (or similar collective)—so-called “collective intentionality,” or “we-intentions” as distinguished from “I-intentions.” In this way, philosophy began to advance beyond the difficulty posed all the way back in 1930 by Radin and sharpened by Chicago School analysts who analogized legislatures to dispersed markets plainly without a “group mind.”

Searle recognizes, “ Anything we say about collective intentionality . . . must be consistent with the fact that society consists of nothing but individuals. Since society consists entirely of individuals, there cannot be a group mind or group consciousness.” Here, Searle takes analytic philosophy on the same path that Justices Breyer and Stevens take their judicial analysis. Just as the Justices cite examples of other groups that form collective intents, Searle cites examples of individuals who perform an action together—the orchestra playing a piece together, “football games, business competitions, courtroom trials, . . . armed warfare,” or the cooks who together make hollandaise sauce.

Individuals have a collective intention when they act together with an aim, especially in institutions. Using Searle’s examples, so long as the orchestra, team, businesses, trial participants, armies, and cooks cooperate to perform the task, the individuals have a collective intention. They need no group mind, nor do they need identical, fully detailed individual intentions to have a collective intention; they only

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301. Key discussions included Michael E. Bratman, Shared Cooperative Activity, 101 PHIL. REV. 327 (1992), and Raimo Tuomela & Kaarlo Miller, We-Intentions, 53 PHIL. STUD. 367 (1988).
302. See Sinclair, supra note 21, at 308-09 (applying collective intentionality to statutory interpretation).
303. The general “metaphysical controversies . . . over the concept of a group-mind” link with the particular skeptical argument that “legislative intent is a fiction” and that “in the case of legislative bodies, these cannot be said to have any intentions whatsoever . . . .” MARMOR., supra note 289, at 161-62.
304. John R. Searle, Collective Intentions and Actions, in Intentions in Communication 406 (Philip R. Cohen et al. eds., 1990) [hereinafter Searle, Collective Intentions]. Searle knows his “claim that there is a form of collective intentionality that is not the product of some mysterious group mind . . . has plenty of problems . . . .” Id.
305. Contemporary legal philosophers cite examples of corporate bodies, from corporations to cities, to which we attribute intent under certain circumstances. “[W]e attribute intentions to corporate bodies, such as commercial corporations, trade unions, cities, etc., on the basis of what can be called, the concept of representative intentions . . . [R]ules or conventions determine that the intentions of certain individuals are considered—within certain established limits—the intentions of the corporate body itself.” MARMOR, supra note 289, at 159.
306. See Searle, Collective Intentions, supra note 304, at 413.
307. Id. at 414.
308. See id. at 410.
309. See id. at 410-13.
need the shared intention of cooperating toward the goal, plus the unshared, specialized, individual intentions that go with the part assigned each person by the formal or informal institution (a musical part, a part of the military maneuver, a part of the recipe, etc.). And if the goal toward which they cooperate is a performative utterance, then we look for that collective intention in interpreting that utterance.

We see how the philosophical analysis of collective intentions breaks clean of the problem from Radin to Arrow's Theorem. If a legislature exists like an unstructured, atomized market or a group with mere individual preferences and nothing more, as posited by Radin and Arrow, then as the textualist argues, they have no intention together other than the narrow outcome on which they vote. However, when the kind of speech they produce is a statute, i.e., a sovereign command uttered by an institutional process, then, as in all such commands, the form of speech itself implies an aim. If the speech is uttered by an institution, then the aim is an institutional aim devised as a collective intent.

Like other cooperative groups who produce an activity together, particularly a speech act, the collective intent requires only as to all the participants the minimum cooperative intentions required by participation in the institution. A majority must vote in favor of enactment at the moment of final passage. However, also like such other cooperative groups, their collective intent consists of both that shared minimum intent to cooperate and the specialized, individual intentions going with their particular parts in the institution. The army's commanders, the orchestra's soloists, and the cook who adds the spice contribute something special to the collective intention. Though the institution has no "group mind," and though many of the participants lack awareness of many of the aspects, the institution does have a collective intention incorporating the details in specialized contributions.

Only in the late 1990s did Searle take analytic philosophy to the point of further conceptualizing collective intentions, specifically the step-wise origination of those intentions, in institutions like legislatures. Searle published The Construction of Social Reality in 1995 and in 1998, Mind, Language, and Society: Philosophy in the Real World. Both were heralded as important philosophical works accessible to nontechnical audiences. As the titles suggest, Searle's linguistic analysis fits his larger philosophical view of the social world, in which intents shared by individuals using language construct society (hence, "the construction of

310. Judge Easterbrook said it most laconically: "Each member may or may not have a design. The body as a whole, however, has only outcomes." Easterbrook, Statutes' Domains, supra note 10, at 547.

social reality”). For all of Searle’s large aims in these works, he provides concepts pertinently focused on the issue of institutional intent. Searle analyzes as “institutional facts” things “like money, property, governments, and marriages,” that “require human institutions for their existence.” Searle contrasts institutional facts with what he calls “brute facts,” like mountains, animals, or temperatures, that would exist in the absence of cognizant human minds and that do not owe their existence to language or institutions. See id. at 2.

With Grice, Searle distinguishes between “speaker meaning,” reflecting “[t]he original or intrinsic intentionality of a speaker’s thought,” and “sentence meaning,” reflecting the linguistic conventions shared by those who understand a language. “The conventional intentionality of the words and sentences of a language can be used by a speaker to perform a speech act,” or in other words, a speaker uses language according to conventions. Yet, “[i]f uttered meaningfully, those words, sentences, marks, and symbols now have intentionality derived from the speaker’s thoughts.” This is the step that Justice Scalia resists: When Congress enacts, the statute’s intentionality is derived from what happened internally.

For Searle readily resolves the difficulty in finding institutional or collective intention akin to individual intention. Searle uses, as do Justices Breyer and Stevens, analogies to show “that in real life collective intentionality is common, practical, and indeed essential to our very existence. Look at any football game, political rally, concert performance, college classroom, church service, or conversation, and you will see collective intentionality in action.” By providing an elaborate general description for all institutions of what interests us for the


315. He goes back at this point to standard examples of legal speech acts, like “I hereby give and bequeath my car to my nephew,” in an appropriate context,” and “War is declared,” which, said in a certain way, “is creating the institutional fact that a state of war exists . . . .” Id. at 133.

316. Searle, Construction of Social Reality, supra note 313, at 38.

317. Searle, Mind, Language and Society, supra note 314, at 141.

318. Id.

319. Id.

320. Id. at 120.
legislature—namely, how institutions express intent—Searle's analysis lends itself handily to a conceptual understanding of how legislative history expresses intent formulation. In sum, institutions express intent by speech acts that initiate ongoing institutional facts, followed by procedural stages in which conditional rights are conferred before final action. That is what legislative history expresses.

Searle analyzes institutional intent formulation thusly. A speech act initiates the institutional fact. "Typical events that create ongoing institutional facts are... elections, marriage ceremonies... and openings of parliaments... These often, though not always, involve explicit performatives declarations, as, for example, 'I declare the parliament in session,'... [or] 'I pronounce you husband and wife.' "321 Once the institution such as Congress starts by declaring itself in session, it then moves toward producing a final speech act, such as a law, not in one leap, but by "procedural steps" or "procedural stages."322

Searle discusses the stages in a multistage voting process. He does not himself discuss the steps for enacting a bill, namely, committee reporting, passage by each chamber, and conference committee action. But he does provide examples picked from the process of voting in the election of a president. "Within institutions we can assign procedural stages... Here are some examples: Bill voted for Reagan[,] Clinton was nominated the Democratic candidate for President."323

Importantly, procedural stages—like moving a legislative bill out of committee, passing the bill in one chamber, reporting from conference, or nominating a candidate—create "conditional rights."324 Searle uses the example of nomination of a candidate. "[B]ecoming a Democratic [or Republican] nominee gives the person so nominated certain rights and responsibilities... [I]t is a procedural stage on the road to becoming President..."325 Whether the institution is a legislature or a political party "[s]uch conditional rights and obligations are typical of institutional structures."326 In a baseball game, "if a batter has one strike or three balls, that does not so far give him any further rights or obligations, but it establishes conditional rights and obligations: two more strikes and he is out, one more ball and he is walked to first base."327

Drafting history, conference reports, and committee reports fit the same model. Bills moving through these drafting and reporting steps, like batters with one strike or three balls, acquire conditional rights taking them nearer to passage. Procedural stages and conditional rights serve as

322. Id. at 102.
323. Id.
324. See id. at 103.
325. Id. at 102-03.
326. Id. at 103.
327. Id.
the means for institutions to express intent. None of this depends upon a
group mind, or upon all members of the institution having a subjective
awareness of all these aspects. Another leading legal positivist in the
Austin/Hart tradition, Joseph Raz, does discuss the interpretive
expectations of the majority of legislators. While they vote on a bill
without knowledge of details, they do so with a concept of how to
determine the bill’s meaning, and that provides the institution’s own view
of its intention.328

The analytic philosophy of performative utterances, and Searle’s
late-1990s work in particular, have now provided the concepts to describe
the collective intention of Congress in a way that frees us from the
problems of Radin and Arrow’s Theorem without losing us in the
metaphysical wilderness of indeterminate group minds. Note how the
analyst of how institutions produce speech acts, from Austin/Hart329 to
Searle, takes us through the rule-based, structured internal procedural
steps by which drafts acquire what Searle calls “conditional rights.”

These concepts help answer the chief type of counter-example
sometimes used. Some argue against legislative history by pointing out
that there are stages in the drafting of legal pronouncements that have
causational significance but are not given interpretive weight. For
example, lawyers do not seek the drafts of judicial opinions to interpret
them, nor do they take testimony from Members or staff about their
thoughts or what happened during enactment. But using Searle’s
concepts, reporting in Congress has significance as a speech act of its
own as a procedural stage that confers conditional rights on a bill. The
institution recognizes and uses that stage, according it formal significance
and creating an elaborate public documentation process. Thus, unlike the
drafts of an opinion by a clerk or a judge or the mere thoughts of
Members, the procedural stage of reporting has a formal part in the
expression of collective intentions.

In sum, legislative history consists of the step-wise progress of
legislation, in which the text is adjusted by the decisions of a collective
intention. For an individual’s commands, the words of the command
(“sentence meaning”) carry forward the intention of the utterer
(“speaker’s meaning”). For an institutional utterer’s commands, like a
statute, the words carry forward the intention of the institution. That
collective intention does not reside solely, or even mostly, in an
awareness common to all participants. Participants in a preliminary stage

328. See Joseph Raz, Intention in Interpretation, in The Autonomy of Law:
329. Austin took pains to explain that not only the final action, but also the stages
of the process, consisted of performative utterances, such as that we “amend,” “report,”
“pass,” “appoint conferees,” “adopt the conference report,” and “veto.” J.L. AUSTIN,
supra note 290, at 156.
know much in the course of conferring on the bill the conditional right to proceed; nonparticipants may know little. At the moment of the final vote to enact, very few may have in their awareness much of the preliminary plans, rejected choices, pedigrees of text choices, and other components of intent, but that does not deprive those intent-formulating decisions of significance. The interpreting Supreme Court Justices who want to know the original collective intention, without thereby violating Arrow’s Theorem or indulging in metaphysical fictions, can study what happened at those procedural stages the way society in general understands the intent of institutions. Those Justices can read the institutional history and write the seventeen opinions described before.

B. Political Theory: Looking at Congress in the 1990s

Having a viable reconceptualization of collective intention still leaves much conceptual work for understanding the Court’s use of legislative history in the late 1990s. From the analytical philosophy aspect, we proceed to the political science aspect. Justice Scalia and supporting textualists have an additional line of argument that institutional intent amounts to impermissible self-delegation of supplemental lawmakers power rather than intent expression. In particular, they draw on the Chicago School’s critique of legislative history, especially committee reports, as distorted by Members’ shilling for interest groups rather than as fairly reflective of the will of the chambers (or of the indirect decision of the public in elections). Hence, not only does the nature of the legislature (the Radin/Arrow problem) create the possibility that the detailed expressions in committee reports do not reflect any collective intention; the distorting special interest pressures on committees make this a practical and observable likelihood.

Justice Scalia relied heavily on this argument to debate Justice Stevens in Bank One Chicago. Faced with Justice Stevens’s resort to the “busy” institution model, Justice Scalia drew on the example of self-selected congressional committees like the Agriculture Committee fronting for particular interest groups. When Justice Stevens argued that the majorities of Congress choose to trust the details resolved in committee reports, Justice Scalia responded that given the interest group distortions of specialized committees, Congress would not agree to such

330. See Manning, supra note 4, at 685-86.
331. “Many congressional committees tend not to be representative of the full House, but are disproportionately populated by Members whose constituents have a particular stake in the subject matter—agriculture, merchant marine and fisheries, science and technology, etc.” Bank One Chicago v. Midwest Bank & Trust Co., 516 U.S. 264, 279 (1996) (Scalia, J., concurring).
committee's reports as its collective intent when "those views need not be moderated to survive a floor vote."  

However, both the events of the 1990s and the current studies of political scientists took some of the momentum out of the interest group critique of institutional legislative history. In the late 1980s and the beginning of the 1990s during textualism's ascent, the interest group critique's appeal matched the conservative-populist critique of the apparently entrenched majority party of the Congress. Discontent was rife in various quarters, particularly in the House of Representatives, on an array of entrenchment issues such as lack of congressional turnover or term limits, problematic congressional ethics and perquisites, subcommittee power, then-high budget deficits, and congressional refusal to curb regulation or to act on social causes.

In the elections of 1992 and 1994, this discontent changed the face of Congress. Strikingly, the 1994 election not only turned a

332. Id. at 280. I think it quite unlikely that the House of Representatives would be 'content to endorse the views' that its Agriculture Committee would come up with if that committee knew (as it knows in drafting committee reports) that those views need not be moderated to survive a floor vote. And even more unlikely that the Senate would be 'content to endorse the views' of the House Agriculture Committee. Id. at 279-80.


334. It matched a similar critique in administrative law, "capture" theory, which denies deference to administrative agencies because instead of regulating private sectors in the public interest, they become captured by, and serve, those private sectors. As Professor Merrill has tracked, "capture" theory supported various nondeferential approaches for a time, yet, as part of larger movements in public thought, nondeferential approaches to administrative agencies lost sway of late. See Thomas W. Merrill, Capture Theory and the Courts: 1967-1983, 72 CHI.-KENT L. REV. 1039 (1997).

335. In particular, Congress had gone through a reform phase strengthening committees and subcommittees in the 1970s, spawning a new problem of "subcommittee government" that exacerbated the previous discontentment with entrenchment and special interests. See, e.g., LEROY N. RIESELBACH, CONGRESSIONAL REFORM: THE CHANGING MODERN CONGRESS (1994).

336. See, e.g., REMAKING CONGRESS: CHANGE AND STABILITY IN THE 1990s (James A. Thurber & Roger H. Davidson eds., 1995). Whereas late-1930s approval of congressional action on the New Deal supported the Court's deferential acceptance of legislative history, the early-1990s popular discontent with congressional entrenchment fed textualism's urgings to filter statute-reading through an "objectified" judicial interpretive approach. Judge Easterbrook's writings, cited above, express the link between extreme non-romantic views of Congress and an anti-legislative-history interpretive mode.

337. A combination of voluntary retirements in 1992 after the national wave of discontent with the House Bank scandal and re-election defeats for incumbents two elections in a row produced a high turnover in the membership. For the tie between the...
Democratic Senate into a Republican one (like the previous Senate-changing elections of 1980 and 1986); much more notably it ended the marathon record of twenty previous Democratic majorities in the House, one of the longest runs of party success in the nation’s history. But in the play of ideas, even staunch public choice theorists recognize that turnover and change in congressional majority parties and committee chairs undermines the entrenchment aspect of the interest group critique.338 Changing the chairs of the congressional committees changed outcomes, often to a large degree, without any necessary shift in interest groups.339

The limited voting divergence in practice between most committees and their chambers, upon the magnitude of which the interest group critique of legislative history depends, palls into insignificance compared to the startling scale of swings in the chamber—synchronized with swings at the committee level—during majority party flips in the House as in 1994. For example, Professor Shepsle, even when heartily condemning legislative history in writing Congress is a “They,” Not an “It”, scoffed at interest group theory as inadequate “reductionism”340 when viewed in a context of party and chair changes. As an experienced Congress-watcher, he simply pointed to the radical effects of chair changes in the Judiciary Committees.341 In short, as mentioned earlier, House Bank discontent and the changes in the House, see C. LAWRENCE EVANS & WALTER J. OLESZEK, CONGRESS UNDER FIRE: REFORM POLITICS AND THE REPUBLICAN MAJORITY 35-38, 83 (1997).

338. Frankly, a skeptical political scientist might well worry more about the interpretive “gap” between a conservative (or liberal) Justice in, say, the year 1995 and a very different House at an enactment moment long before, rather than between committees moving bills through their contemporaneous parent chambers.

339. Where Justice Scalia chose as his examples committees that do serve particular interests, like the Agriculture Committee, Professor Shepsle noted that party change radically altered other committees of much greater importance to the Supreme Court, like the Judiciary Committee. Professor Shepsle traced the changes in the Senate Judiciary Chair, despite few changes in interest groups, from (conservative) Senator Eastland (D-Miss.) in the 1970s, with an interlude of (liberal) Senator Kennedy (D-Mass.), to (conservative) Senator Thurmond (R-S.C.) in the early 1980s, to (liberal) Senator Biden (D-Del.) in the late 1980s. See Shepsle, Congress is a “They”, supra note 273, at 241 (“And yet, most Chicago School interest group theories would hardly have noticed.”). As the author of the acclaimed statistical study on committee assignment, KENNETH A. SHEPSLE, THE GIANT JIGSAW PUZZLE: DEMOCRATIC COMMITTEE ASSIGNMENTS IN THE MODERN HOUSE (1978), Professor Shepsle’s denigration of interest group theory as inadequate “reductionism” carries weight.

340. Shepsle, Congress is a “They”, supra note 273, at 240.

341. After all, committee membership ratios in the late 1980s and the 1990s reflected the party ratios in the chambers, and the two parties made their committee assignments in entirely independent systems, taking away some of the main potential grounds for divergence. For a discussion of how change in the Congress from the 1970s to the 1990s supported change in the political science theories of Congress, see Morris P. Fiorina, Afterword (But Undoubtedly Not the Last Word), in POSITIVE THEORIES OF CONGRESSIONAL INSTITUTIONS 307-10 (Kenneth A. Shepsle & Barry R. Weingast eds., 1995).
the 1992 and 1994 elections changed the static landscape on which various critiques, including textualism, had developed their forward thrust.

Moreover, political science researchers of the 1990s cast doubt on the existence of a level of interest group distortion sufficient to make legislative history generally misleading and unhelpful, a new understanding that fits well with the Court's acceptance of legislative history when carefully selected under the Breyer-Stevens approach. Political scientists found voting in most congressional committees did not nearly diverge from voting in full chambers to the extent the interest group critique might suggest. Rather, voting in most committees matched, more or less, voting in their chambers; it took one of the committees dealing with intensively regionalized interests (like the one chosen as an illustration by Justice Scalia, the Agriculture Committee) to get significant divergence. 342

Furthermore, the interest group critique of legislative history depended on more than systematic committee divergence in preferences from the chamber. Textualist critics complain that legislative history "bypasses" the Chadha-enforced requirements of full chamber voting, bicameralism, and presentment. 343 But congressional step-wise procedures mean that as in any institution, institutional action routinely "bypasses" (in that sense) idealized versions of the bicameral processes. That is, the full chambers do not, by voting, make the choices, but rather they accept choices about details already made. 344 Courts interpret the choices actually made in Congress, not just the ones made by idealized processes. For legislative history to give a distorted view, committee reporting must diverge not from the idealized chamber, but from the actual enactment process of the text. That level of distortion could occur, but it would be an extreme form of distortion. 345 The question becomes, 342. See Forrest Maltzman & Steven S. Smith, Principals, Goals, Dimensionality, and Congressional Committees, in POSITIVE THEORIES OF CONGRESSIONAL INSTITUTIONS 260 (Kenneth A. Shepsle & Barry R. Weingast eds., 1995).
343. See, e.g., Manning, supra note 4, at 707-26.
344. Notwithstanding bicameralism, congressional procedures allow conference committees and standing committees to influence the enacted text in ways that do not suggest anything distorted about legislative history. "The unrepresentativeness of legislative committees is far less of a concern when committees report legislation than when they kill it." MIKVA & LANE, supra note 4, at 94. Virtually all statutory interpretation (with the exception of the occasional interpretation of congressional inaction, which the courts perform with special care anyway) concerns the situation where the committees did not kill the legislation, and thus their influence over the text was not so noteworthy.
345. For example, in the Bank One Chicago statute, a banking industry component may well have gotten what it wanted out of a banking conference committee that diverged from the ideal attitude of the full chambers. But the full chambers do not make the choices on text; they enact the text as reported by the conference committee. See
both for political science and for the Breyer-Stevens approach: How much distortion comes in by using legislative history to interpret a law when the legislative history was produced by the same institutional process that produced the text? In other words, is legislative history prone to distortion by interest groups, staff, or individual Members?

Political scientists of the 1990s have worked out new theories of the institutional role of committees that downplay concerns about extreme strategic distortion argued by the special interest critique. Of course, political scientists have long discussed the "distributional" purpose: that Members serve on committees, and perform committee activity, in order to reap a benefit of procedurally increased influence over the legislation going through their committee.346

However, Professor Krehbiel's seminal work in 1991 established a second, "informational" purpose in the system of deference to committee reporting, which rapidly won acceptance in the field.347 Each committee influences the chamber's action on legislation, not as its ill-gotten gain in a distributional cartel, but because committees develop, use, and supply superior information.

In this view, committees get influence not as a system of distortion of the chamber's preferences, but as system for providing, by specialized and politically accurate reporting, information the chamber needs to function amid uncertainty. For example, the most important signal during committee reporting comes from the decision by the minority members on whether to file dissenting committee reports. The full chamber views

TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE, supra note 23, at 818 ("all or nothing" rule that conference reports get adopted or rejected as a whole, and are not subject to amendment). The Bank One Chicago Court did not succumb to serious distortion in using the explanatory legislative history to understand the matching text, as Justice Scalia argues, unless the conference committee wrote text that diverged markedly from its explanatory statement. That is the test of whether the explanatory statement is so distorted as not to be used.

346. In this view, committees get influence over the chamber as part of a system for Members collectively to ensure their individual distributional reward from the interest groups interested in individual committees' jurisdictions. See, e.g., DAVID MAYHEW, CONGRESS: THE ELECTORIAL CONNECTION (1974). Looking at that as the only purpose of committees allowed public choice critics of the 1980s to fear committees would strategically use legislative history the way a cartel actively distorts pricing. This led to an inconclusive anecdotal war between textualists and intentionalists, with textualists contending distorted legislative history was rampant as befits the "distributional" purpose of the committee system, and intentionalists citing the regular, nondistorted kind of legislative history.

347. See generally KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION (1991). For an application of informational theory to case studies of legislative enactment, see STEPHEN D. VAN BEEK, POST-PASSAGE POLITICS, BICAMERAL RESOLUTION IN CONGRESS (1995). To see how the political science field generally now effectively balances the informational and distributional theories of committees, see BURDETT LOOMIS, THE CONTEMPORARY CONGRESS 80-83 (1996).
those dissents as a source of politically accurate information leading to amendments and floor fights. 348

For our purposes, the 1990s by-play between the two current political science explanations of the committee system augments the concept of institutional legislative history in several respects. It reinforces the respectful descriptions of legislative history by Justice Breyer and other participants as the product of important, Member-supervised efforts at resolving pertinent issues and narrowing the controversies requiring floor votes. 349 Admittedly, outlier committees potentially make strategic use of legislative history, 350 and Justice Scalia, as a Congress-watcher, appropriately picks the Agriculture Committee to exemplify the existence of outlier committees. Nevertheless, the diverse insights about the committee system as a whole provided by 1990s political science suggest the viability, not the naivété, of the institutional intent theory.

More broadly, the varied 1990s explanations of committee institutional roles reflect contemporary political science’s move away from viewing the legislature as an imperfect marketplace of Member preferences or interest group bidding. The Chicago School concluded from the paradoxes of market models (Arrow’s Theorem) and the potential for crude motivations (interest group critique) that the legislature is too paradoxical or crude for its legislative history to get accepted. In contrast, the post-Chicago School analogizes legislatures to firms—i.e., to large, structured institutions held together in their functioning by reporting systems. 351 The post-Chicago School concludes that the legislature fits more elaborate and sophisticated analytical descriptions. When political scientists depict the Congress as a complex institution that operates by maintaining a committee reporting structure on proposed bills that provides politically accurate information to the

348. A committee considering a bill does the (informational) work to decide whether to report a version with broad bipartisan support in committee, or to report a version that splits the committee on partisan lines; it writes either a relatively unified report or one splitting on partisan lines. The full chamber takes its cue about the bill from that specialized and politically accurate reporting. See GARY W. COX & MATHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE 262-273 (1993). See generally David Epstein, Partisan and Bipartisan Signaling in Congress, 14 J.L. ECON. & ORG. 183 (1998).


350. See, e.g., Manning, supra note 4, at 720-21.

351. Markets of atomized, individual preferences and strategies lack the coordinated, communicated, and reliable expressions of a discernable intent. Firms function internally not as atomized markets, but as institutions that maintain themselves by internally structured information flows, manifesting intent by step-wise decisional processes communicated by reporting.
chamber, they give the legal system confidence that legislative history has much to contribute to interpretation. 352

Another development of the 1990s further distances us from the sense of committee bill processing a decade ago as part of an illegitimate system of interest group entrenchment or strategically distorted reporting. The early 1990s criticism of Congress, particularly of the House, as the seat of entrenched interests fueled an experiment with a way of legislating that would downgrade the committee system. After the 1994 election, the House of Representatives experimented for a year with a major change in operation, one of the biggest experiments in congressional procedure in a generation. 353 The new majority party supported Speaker Gingrich in the 1995 experiment of centralizing much more legislative power in the majority party caucus and the party leadership rather than in committees. 354

Dramatically during 1995, the newly centralized House legislating system sped through its majority party legislative agenda, first the “Contract with America” and then a major budget-linked program. 355 This experiment with the leadership-led caucus handling legislation itself allowed little time for committees to shape or to analyze bills by the usual processes of extensive hearings and committee meetings to “mark up” (amend) bills. Bill amending shifted out of committee markups to occur only on the floor, if at all. Had this experiment persisted, it would have brought the importance of the committee system and the utility of committee reports as legislative history into serious question. 356

The experiment effectively ended in the winter of 1995-96 with the unsuccessful effort of the House majority caucus to overcome presidential vetoes by shutting the government down. 357 Thereafter, the

352. For a major effort by political scientists to sort out the valid occasions for the concept of institutional intent, see Mathew D. McCubbin et al., Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation, 57 L. & CONTEMP. PROBS. 3 (1994); Professor McNollgast, The Theory of Interpretive Canon and Legislative Behavior, 12 INT'L REV. L. & ECON. 235 (1992); Professor McNollgast, Positive Canons: The Role of Legislative Bargains in Statutory Interpretation, 80 GEO. L.J. 705 (1992).


354. See LOOMIS, supra note 347, at 89-90. This occurred in many ways, including displacing several senior members from their expected committee chairs (for the first time in twenty years) and signaling others of their position's insecurity if they failed to serve the caucus. For description, see EVANS & OLESZEK, supra note 337.


356. Caucus and leadership-run legislating, like state legislating through popular adoption of initiatives and referendums, renders legislative history seriously irrelevant and arguably meaningless. With power shifted to the caucus and the leadership, committees cannot rightly claim that their minimal processing of bills represents any particularly large authorial share in the chamber's formulation of intent on the bills. Thus, legislative history at the committee level shrinks in significance.

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House majority caucus once again allowed committees to perform their accustomed role, much as described in Breyer's *Uses*, of developing full information on bills' implications and resolving or narrowing objections before reporting bills for floor consideration. Authorial power over legislation quietly went back in the House to the committee level, where it had largely remained in the Senate.

This did not mean turning legislative authority over to the minority party; it simply meant that the role of committee processes like hearings and mark-up for principal formulation of intent on details of legislation was once again elevated in importance. The party caucus and the floor vote were again reserved for the resolution of only those controversies with chamber-wide political importance. Congress let legislation go deliberatively through the step-wise institutional process and particularly the reporting work of committees. Thus, the 1990s began with textualist-favoring disquietude over a House system that had seen no party change in forty years; and the 1990s ended with a changed Congress and with an institutionalist-favoring national preference for a congressional system of bill consideration that included committee reporting as a useful source of legislative history.

V. CONCLUSIONS

A. Whither the Court?

This Article started with the bold suggestion that the Breyer-Stevens approach had reconceptualized and thereby renewed use of legislative history in the Court. The suggestion is bold because Justices Breyer and Stevens represent the two left-most Justices on the Court—not typically the sources of permanent change on hard-fought issues—and if the pendulum simply had swung one way a little, it could swing back the other way just as easily. New approaches co-pioneered by Justice Stevens, who at age eighty in 2000 may retire soon, cannot count on his long-term protection, especially while the textualist Justices Scalia and Thomas show no signs of giving up the fight either by conversion or retirement.

Previous pages have said enough about the positions of Justices Breyer and Stevens on the one hand, and Justices Scalia and Thomas on the other. For a speculative conclusion, the interest lies in the difficult-to-fathom positions of the uncommitted Justices who have not said much in 1995-99 to cement them into positions: Justices Ginsburg, Souter, O'Conner, and Kennedy, and Chief Justice Rehnquist. In the late 1990s, certainly more than in 1993-94, they have gone along with opinions for the Court using legislative history, and have even penned some themselves. But not a single one of them has written at any length in
these years either to embrace or to reject the theoretical bases behind institutional intent.

Judge Posner has given the best jurisprudential analysis of the middle position of judges who find persuasive arguments both against and for legislative history use. His solution consists of the application to this issue of his overarching revival of pragmatism as a jurisprudential approach. He describes how the pragmatic judge simply does not make a complete and final choice between alternative interpretive approaches to statutes: "The interpretation of statutes is highly sensitive to theories of the legislative process, and these are controversial political theories and hence do not provide sure footing for judicial decisions."

Using Judge Posner as a guide, the pragmatic center of the Supreme Court would not have felt comfortable with the textualist extreme of legislative history rejection that peaked in 1987-94. As Judge Posner explains, as to the alternative positions of either embracing or rejecting legislative history, the pragmatic judge believes that "[t]here is no basis in law—maybe no basis, period, in current political theory—for choosing between these positions. 'Interpretation' is not foundational; it sits uneasily on shifting political foundations." Accordingly, the middle Justices would not want to embrace a textualist system so long as an acceptable theory provides an alternative, for textualism involves choosing sides on a political issue where they see no basis for doing so completely and irrevocably.

Justices Breyer and Stevens may not have persuaded the Court completely to embrace their approach and abjure textualism, but they have not had to. By providing a theory for a defensible use of legislative history, Justices Breyer and Stevens have allowed the middle Justices comfortably to settle into an agnostic position between theories. We might say that the middle Justices have not two opposing theories between which they must accept or reject overall, but rather two competing drafting services for opinions—one textualist, one institutionalist—that allow them to choose which type of opinion they prefer for the particular case. By choosing sound situations for the use of legislative history, Justices Breyer and Stevens have furnished attractive individual occasions for those Justices to implement their pragmatic

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359. Id. at 269-78 (providing a sympathetic account of purposivist and even hermeneutical interpretation).

360. Id. at 291.

361. Id. at 292.
sensibilities by signing on to such use without any complete and irrevocable foundational position.

Two aspects suggest why this reconceptualization of legislative history is likely to last. First, the middle Justices would not want, even after Justice Stevens's retirement and replacement with a textualist, to give up their alternative of legislative history. That would amount, in Judge Posner's terms, to their making an irrevocable one-way political commitment to a controversial political theory. They would much rather prefer to continue to balance between alternative interpretive approaches, especially now that they have proven able to do so, stably, for several years. As described, they have a number of ways to fine-tune the system, even if they wish to lean in a more conservative direction, without wholesale rejection of legislative history.362

Second, and more important, for those occasions when Justices want to cite legislative history, the institutionalist approach has demonstrated an improvement over preceding styles. It is more defensible. The institutional approach uses legislative history that in many ways has higher quality and greater appeal because it originates close to the text and lands dead-on regarding the issue before the Court. This attracts pragmatists. On the other hand, Justices Breyer and Stevens's principles for appraising the legislative history, with their taste for drafting history, conference reports, and explanations of textual drafting and pedigree, defuse criticism that the Court aggrandizes committees engaging in strategic or power-grabbing moves.

The other Justices needed some reason to have confidence in committee report legislative history in the face of the likelihood that, as Justice Scalia never tires of pointing out, few of the enacting Members of Congress had such legislative history in their awareness. In Justices Breyer and Stevens's "busy Congress" model, they provided the moderate Justices with that reason to have confidence in selective, valuable legislative history. The concepts from contemporary analytical philosophy and political science developed in this Article seek to articulate a deeper basis for the concept in which Justices Breyer and Stevens have an enduring commitment. As for the other Justices, the Article has explained some enduring concepts that the ambivalent middle Justices neither embrace nor reject in their delicate quest not to adhere to anything at all permanent on this subject.

362. For example, the Justices can generate some particularized, super-strong canons for areas of legislation in which they do not want to accept legislative history, or they can adhere to Justice Scalia's Chevron approach when they want to make more interpretive calls from their own reading of text rather than deferring to agencies citing legislative history.
B. What More Should Analytical Philosophy and Political Science Provide Us?

While this Article concerns law, it has sought to find the conceptual foundations for the Court's new approach by searching in the allied fields of analytical philosophy and political science in the 1990s. Rather than ending with more answers than I have, I would like to conclude with more questions. The way to formulate those questions is to write as if this were going to our colleagues specializing in analytical philosophy and political science, with the assumption that they have some, but only limited, awareness of what we would like to know from their fields. I would pose some focused and some broader questions.

As a focused matter, we need much further, rigorous pursuit, both on the conceptual (philosophical) and empirical (political science) levels, of the existence and expression of legislative intent and the role of legislative history. Conceptually, although jurisprudences have analyzed statutory interpretation, none of the linguistic philosophers traced from Austin and Hart to Searle actually mentions legislative history. It appears that for them this is too esoteric a point to worry about until someone tells them that, for the law, it matters.

Most, if not all, major statutory interpretive approaches are grounded in philosophy. We can find philosophical groundings for nineteenth-century intentionalism, pre-New Deal formalism, New Deal intentionalism, purposivism, and textualism. Insofar as the Breyer-Stevens approach breaks new ground, it warrants a


364. Early interpretive approaches from the Marshall Court to the late nineteenth century carried forward a political theory debate about the relationship of courts and legislatures. See Yoo, supra note 24, at 1615-30; Baade, supra note 24, at 1079-83.

365. The formalist approach from the late nineteenth century to the New Deal carried out a general formalist jurisprudence. See, e.g., Christie & Martin, supra note 287, at 732-33 (discussing the era of Christopher Columbus Langdell).


367. Purposivism started with the nineteenth-century philosophy of Francois Geny, see Christie & Martin, supra note 287, at 778-96, before it went on to the elaborate bases of Hart and Sacks.

368. Textualism employs the insights of public choice theory of the Chicago School. As a scientifically inclined reductionist theory that slashes through what it sees as mushy mythology such as group minds and speculative public purposes, textualism finds its Chicago philosophical roots in the vigorous positivism of Rudolf Carnap. See Rudolf Carnap, Meaning and Necessity: A Study in Semantics and Model Logic 233-46 (1956).
conceptualization of its own. So let the philosophers and jurisprudes know that this aspect of statutory meaning, and particularly this approach to legislative history, presents a conceptual challenge of importance.  

What remains? The more technical writings of Grice and Searle show that with much philosophical thinking, rigorous concepts and even logical systems of notation have brought order to some of the issues regarding utterer’s meaning. Let linguistic philosophers take current Supreme Court opinions that have interpreted statutes, particularly those using legislative history, and provide a rigorous set of concepts, perhaps even a notational system. The goal would be an analysis of how the Congress, as an institution that enacts statutes with implications, expresses its utterer’s meaning by a system, legislative history, that records procedural steps on the way to final passage.

Besides this relatively narrowly focused question, let us also pose some broader questions. Conceptually, the speech act notion suggests two components. Consider a Congress saying in 1964, “Do not discriminate in employment,” and a person or a court deciding how this applies in 1979 to voluntary affirmative action, or a person or a court deciding how this applies in 1999 to same-sex workplace harassment. This Article has concerned original intent, or utterer’s meaning, the first of the components, and particularly the legislative history aspect. However, for some issues, especially issues that arise, say, thirty-five years after a 1964 enactment, original intent in the narrow sense may not help as much as other approaches backed, philosophically, by hermeneutics.

369. Continental legislatures and even England do not have the elaborate tradition of structured committee reporting, so we can only hope to get the attention of American philosophers and even then, only by making them attend to a uniquely American issue. Linguistically, Congress’s enactment process may be the single most politically important speech-act process in the world; the American judiciary’s process of statutory interpretation may be the single most jurisprudentially interesting process of deciphering utterer’s meaning in the world; and legislative history may constitute the largest flow of institutional reporting on these subjects.

Without taking the time to justify these pro-legislation sentiments, I submit that original intent has a far smaller role in constitutional than in statutory interpretation, and that “utterer’s meaning” matters much less for any text other than that of the sovereign—in America, the legislature.

370. Grice does this for utterer’s meaning expressed in text, particularly what Grice calls “implicature,” but Grice does not worry overmuch about the unique aspects of the institutional utterer. Searle does this for the construction of institutional facts, including the step-wise operation of political systems, but he has other things to do than to work out how implicature occurs in institutional speech acts.

371. These interpretive approaches, from “objectified” intent textualism to purposivism to dynamicism, have more to do with various possibilities for interpreting from within the frame of reference of a much later interpreter, one who is not tightly constrained by utterer’s meaning.
The broader jurisprudential question becomes: What philosophical concepts govern meaning as it mixes, if you will, "utterer's meaning" and "decider's frame of reference"? In law, we discuss this often, albeit not in so many words. We know of factors established at the utterer's end. We also know of factors at the end of the decider's frame of reference.

But the difficult philosophical question is to ask for something spanning between two areas of interpretive philosophy, "ordinary language" analysis that has made progress previously described as to utterer's meaning, and hermeneutics that deals with changed frames of reference. These two areas of interpretive philosophy have not much come together. There is plenty of room for modern linguistic jurisprudence to continue the past epic struggles to bring them together—to connect up Austin's definition of law looking back at the utterer ("law is the command of the sovereign") and Holmes's definition of law looking forward at the decider ("law is what the courts decide").

Similarly, the political science of Congress spans the gamut from case studies through statistical studies to mathematical game theory or other modeling. A fair amount of political science has helped statutory interpretation, first from the Chicago School of public choice and then from the post-Chicago School of positive political theory. This has also occurred in the field of administration, where political science and law, from different perspectives, both discuss the issue of what controls agency action. Posing questions for political scientists in this context is no novelty.

What remains for them to tell us? Political science methodology does not easily focus on the niceties of statutory interpretation or legislative history, which may involve neither controversial issues (at the time of enactment) nor extensive floor voting. I suggest as a problem for political science the study of the various congressional production systems by which particular committees either regularly or sporadically

372. Among the varying mix of factors established at the utterer's end in a *Chevron* or "common law" statute situation, Congress (the utterer) itself confers interpretive discretion on its chosen decider (the court with a common-law type statute, or the agency with a delegation of rulemaking power). The utterer's choice of relatively open-ended text may lend itself to readier relinquishment of utterer's meaning and readier shift to a decider's frame. On the other hand, the utterer's choice of text and legislative history elaborately keyed to an existing legal framework, such as a statute codifying a field of law, may resist such a shift.

373. At the decider's end, the extent of social change from the time of enactment, the degree of pressure (practical or normative) felt by the decider to look at consequences, and the extent of cognitive pull by the changed legal framework in related areas since the time of enactment may encourage the shift.

374. Political scientists naturally but unfortunately care about "politics," namely, the controversial issues in congressional legislating that interest the Members themselves, and "science," which sometimes for political scientists means counting and modeling of floor voting.
produce major enactments with major legislative history that receives relatively prompt implementation and interpretation. The challenge consists of following the process, from the beginning of congressional enactment, all the way through administrative and judicial interpretation. Let us call it a "longitudinal" study of the entire enactment-interpretation process.

Let political scientists who conduct such longitudinal studies tackle the questions about the extent to which Congress pre-considers either in specific or abstract terms of reference the questions that come up in the courts. More broadly, the questions concern the ultimate validity of our intuitions about how much the enactors anticipate, and how much simply occurs downstream in implementation and litigation that ensues unpredictably from changes in forums and circumstances, or even from randomness. In effect, political science might study, looking forward from enactment to interpretation, more or less the same subject that interpreting courts study (from a totally different viewpoint), looking in retrospect from the point of judicial interpretation back to enactment.

With only five years of the Court's new approach to legislative history behind us, we have barely the beginning of an understanding, either of why the Court does what it does, or of how much validity the supporting concepts provide for this approach. The interesting questions lie ahead.

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375. Examples of regular legislating include tax, health care finance, and appropriations, and regular authorization systems such as the annual armed services authorization.

376. Longitudinal studies can also occur of statutes from the various congressional systems for sporadic production of enactments; for example, the Judiciary Committee enactment from time to time of new criminal laws, or the committees that produce regulatory reforms.

377. Some of the questions political science might answer, again depending on the choice of methodology, include: How controlling were the decisions during enactment, as opposed to what happens after enactment, of what ultimately happens? Which enactment-process decisions mattered? How much did legislative history matter? How much do divergences between committees and their parent chambers matter? What do interest groups do in all this? What characterizes the interpretive processes downstream in agencies and courts?