

ARTICLES

INTERTEMPORAL STATUTORY INTERPRETATION AND THE EVOLUTION OF LEGISLATIVE DRAFTING

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All theories of statutory interpretation rely on an idea of how Congress operates. A commonly held supposition among scholars is that the procedures used in the creation of legislation are unsophisticated and almost anarchic. This supposition exists because scholars generally give little consideration to the underlying actors and their evolving roles in the drafting process. This Article deconstructs the many steps of, and actors involved in, the statutory-drafting process. It reveals an evolving process that is the opposite of what scholars generally believe: While Congress historically did not have the capacity or resources to draft statutes well, it has evolved through the last forty years to arrive at a point where modern statutes are carefully researched by professional researchers and clearly drafted by nonpartisan professional legislative drafters, with the entire process overseen by hundreds of specialized committee staff and countless lobbyists.

This Article uses this better understanding of the evolution of Congress's institutional competence to explain how the rise of judicial textualism over the last few decades should be viewed at least partially as a response to Congress's improved drafting process. And not only do these practical findings provide a descriptive account of judicial behavior, they also provide a basis from which to make normative judgments about how to undertake statutory interpretation based on the era in which a statute was drafted, a method that this Article terms "inter-temporal statutory interpretation." This Article demonstrates how consideration of the evolution of the real-world legislative process can allow for more fully developed theories of statutory interpretation.

* Thanks to Ruth Mason and Nicholas Parrillo for their insightful comments on an earlier draft of this Article and to the congressional staff who were willing to speak with me candidly about their experiences in the drafting process. Also, thanks to the editors of the *Columbia Law Review*—especially Jessica Lutkenhaus—for terrific editorial work. I am particularly indebted to William N. Eskridge, Jr. for his guidance and encouragement on this project.

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INTRODUCTION

Legal scholars and judges believe that Congress and the courts have communication problems.¹ Because these groups view the judicial deci-

1. Abner J. Mikva, former Chief Judge of the U.S. Court of Appeals for the D.C. Circuit, has stated that confusion is caused by "the unawareness that the legislative branch

sionmaking process as organized and well reasoned, these communication problems are frequently attributed to the messy and political nature of congressional behavior. As Professors Sunstein and Vermeule have written, legislation scholars generally “work with an idealized, even heroic picture of judicial capacities and, as a corollary, a jaundiced view of the capacities of other lawmakers and interpreters, such as agencies and legislatures.”² This view persists because legal scholars have historically left the analysis of Congress to political scientists³ and focused primarily on judges, which is unsurprising given the legal academy’s relative inexperience in the area of congressional lawmaking.⁴

This emphasis on courts leaves the statutory-interpretation literature with a decidedly underdeveloped and ungrounded understanding of what Congress is and how it works.⁵ This incomplete understanding of Congress leaves many open questions in the world of statutory interpretation.⁶ Is Congress, despite its political nature, capable of producing clear

and the judicial branch have of each other’s game rules.” Abner J. Mikva, *Reading and Writing Statutes*, 28 S. Tex. L. Rev. 181, 183 (1986). Judge James L. Buckley commented that “[i]t is self-evident that these two institutions will impact on one another in a dozen different ways. Yet for whatever strange reason, each institution tends to be miserably unacquainted with the problems faced by the other.” James L. Buckley, *Introduction of Discussion Subject and Panelists, in Proceedings of the Forty-Ninth Judicial Conference of the District of Columbia Circuit*, 124 F.R.D. 241, 313 (1989). Judge Frank M. Coffin, then Chair of the U.S. Judicial Conference Committee on the Judicial Branch, noted that “[t]he judiciary and Congress not only do not communicate with each other on their most basic concerns; they do not know how they may properly do so.” Frank M. Coffin, *The Federalist Number 86: On Relations Between the Judiciary and Congress, in Judges and Legislatures: Toward Institutional Comity* 21, 22 (Robert A. Katzmann ed., 1988).

2. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 Mich. L. Rev. 885, 886 (2003).

3. For prominent examples of political scientists analyzing the operations and motivations of Congress, see generally Sarah A. Binder, *Minority Rights, Majority Rule: Partisanship and Development of Congress* (1997) (analyzing through historical perspective on procedural rights why majority party is consistently powerful in House while minority party often prevails in Senate); David Mayhew, *Congress: The Electoral Connection* (2d ed. 2004) (exploring expected behavior of theoretical member of Congress single-mindedly focused on winning reelection); and Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress* (4th ed. 1997) (using case studies to show modern difficulties in passing legislation).

4. Very few legal academics have spent time in the legislative branch, while many of them have spent time working as judicial clerks or as litigators. See Dakota S. Rudesill, *Closing the Legislative Experience Gap: How a Legislative Law Clerk Program Will Benefit the Legal Profession and Congress*, 87 Wash. U. L. Rev. 699, 702 (2010) (“On the most prestigious law faculties, only 5 percent of professors have worked for a legislative institution—local, state, federal, or international.”).

5. See William N. Eskridge, Jr., *No Frills Textualism*, 119 Harv. L. Rev. 2041, 2073 (2006) (reviewing Adrian Vermeule, *Judging Under Uncertainty* (2006)) (“Younger scholars have introduced interesting new ideas, but ideas without a deep grounding in the legislative and administrative processes may not be the best way to develop this field.”).

6. Professor Victoria Nourse recently wrote an article about how courts and scholars “misunderstand” Congress. Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 Geo.

and coherent statutes? Can Congress change and evolve? Scholars have only recently begun to explore these questions. The most prominent recent examples are two articles by Professors Gluck and Bressman that provide much-needed empirical evidence of drafters' awareness of canons of construction and their views of the drafting process.⁷

This Article examines the evolution of the drafting process by considering how the roles of key actors have changed over the last forty years to arrive at the practice of modern drafting, and how those changes have affected the creation of statutes. This Article argues that these changes bear on how statutes should be interpreted. This Article also provides the first in-depth institutional archaeology of these key institutions, which are primarily responsible for the words contained in the Statutes at Large.⁸ This Article reveals a changing and evolving drafting process that has allowed the modern Congress to begin to close the communication gap between itself and the courts by hiring thousands of experts in various

L.J. 1119, 1145 (2011). The focus of her article, broadly speaking, is how Congress, unlike the courts, is shaped by political pressures. *Id.* at 1123–25. As this Article will show, her focus on politics is helpful but already well understood, even by those in the legal academy. For example, Professor Nourse argues that when members of Congress speak, they have a different target audience than the Supreme Court. *Id.* at 1127. But that is clear to anyone who observes these two branches. What is not clear is how the informal ideas and speeches of members of Congress become relatively detailed and precise statutory language. The focus of this Article is not on political pressures but on the actual procedures Congress follows in creating statutes.

7. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 *Stan. L. Rev.* 901, 905–06 (2013) [hereinafter Gluck & Bressman, Part I] (reporting results of interviews with “137 congressional counsels with responsibilities over drafting legislation” regarding role of canons of statutory interpretation and delegation doctrines); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 *Stan. L. Rev.* (forthcoming Apr. 2014) (manuscript at 3) [hereinafter Gluck & Bressman, Part II], available at <http://ssrn.com/abstract=2358074> (on file with the *Columbia Law Review*) (exploring influences on statutory-drafting process beyond judicial interpretive rules). Because of the nature of their empirical research, Professors Gluck and Bressman were only able to provide a current snapshot of drafters' awareness, without considering how Congress has changed and evolved and how that evolution should affect the way judges interpret statutes.

An earlier article by Professors Nourse and Schacter took a similar approach to Professors Gluck and Bressman's except that they considered only the work of the Senate Judiciary Committee, focusing mostly on committee staff. Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 *N.Y.U. L. Rev.* 575, 576 (2002). This primary focus on committee staff, and not on other actors like legislative counsel, was likely due to the fact that the Judiciary Committee is atypical: It is staffed predominantly with lawyers who have a greater understanding of the legal and judicial context of legislation than staff of other committees. *Id.* at 581. This Article also takes a broader view of the legislative process than Professors Nourse and Schacter's article by considering the evolution of committees in general, along with a deeper discussion of legislative counsel, the Congressional Research Service, and lobbyists—topics that Professors Nourse and Schacter did not focus on.

8. See *infra* Part I (discussing historical evolution of role of key actors in drafting).

substantive areas whose jobs are to ensure that statutes are fully vetted and clearly drafted.⁹

Because legal scholars do not fully understand the realities and complexities of the legislative process, they have underdeveloped or incorrect theories about legislatures.¹⁰ To the extent academics focus on Congress, they generally look at only the most obvious steps of the legislative process: how the debates proceed, how the votes are garnered, and how the statute is interpreted by courts. They take the research and drafting process for granted and move straight to the political process and the many stages that an already-drafted bill must pass through. Paying scant attention to the drafting process is a problem: Scholars must first understand the institutional realities of how Congress works before they can create fully developed theories of statutory interpretation and fully informed prescriptive recommendations for how courts and Congress could and should interact.

This Article's insight into the legislative process is drawn partly from a period the author spent working as a professional legislative drafter in the Office of the Legislative Counsel in the House of Representatives. To supplement this personal experience, the author conducted a series of in-person interviews with prominent actors in the three institutions most responsible for researching and drafting statutes: the Offices of the Legislative Counsel, the Congressional Research Service, and committee staff.¹¹ In each of these interviews, the author discussed the role of a fourth important outside group: lobbyists.¹² The author also researched

9. The public-choice-theory debate is outside the scope of this Article. Public choice theory characterizes Congress as unduly influenced by private, rather than public, interests that pay rents in return for legislation. See generally Daniel A. Farber & Philip P. Frickey, *Law and Public Choice: A Critical Introduction* 1 (1991) (introducing public choice theory and exploring its application to legal issues). This Article shows that regardless of who controls Congress, understanding how Congress works is crucial to understanding whether Congress is able to convey its meaning clearly. Whether or not Congress pursues its agenda in a normatively desirable manner is a separate issue from whether or not Congress can clearly convey meaning.

10. See, e.g., William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 14 (1994) [hereinafter Eskridge, *Dynamic*] ("Traditional legal writers have no theory of legislatures in general . . .").

11. The author interviewed lawyers in the House Office of the Legislative Counsel, lawyers in the Congressional Research Service, and committee staffers. Because of the sensitive nature of their positions, the author assured those interviewed that he would not directly attribute their quotes. This anonymity requires some sacrifice in terms of precision and direct quotes, but it is necessary to protect those interviewed.

12. These are not the only support groups within Congress, but they are the most significant to the drafting process. Other groups that have a role in congressional policymaking include the Government Accountability Office (GAO) and the Congressional Budget Office (CBO). The CBO deals mostly with determining costs of programs and budgetary issues, which are less directly related to developing statutory policy or language. See Cong. Budget Office, *An Introduction to the Congressional Budget Office* 1–3 (2012), available at <http://cbo.gov/sites/default/files/cbofiles/attachments/2012-IntroToCBO.pdf> (on file with the *Columbia Law Review*) (describing projects

primary documents to unearth the organizational history and modern practice of these institutions.

Part I provides a description of these four groups. First are the Offices of the Legislative Counsel, a group of career legislative drafters whose work has gone virtually unnoticed by academics until very recently.¹³ These offices were historically small with a narrow focus, but over the last few decades have experienced a dramatic expansion that has allowed professional drafters to be involved in virtually every legislative project. Second is the Congressional Research Service (CRS), an organization of over 600 specialists housed inside the Library of Congress.¹⁴ This Article focuses on one division of CRS in particular, the American Law Division (ALD), which is staffed almost entirely with lawyers who specialize in complex statutory and constitutional research in support of the drafting process. This group plays an essential part in creating clear and coherent statutes, yet the role it plays has never been discussed in a law review article.¹⁵ Third are committee staffers, who have the closest connections with the members of Congress and have significant authority to influence the final statutory product.¹⁶ A fourth group that plays an important role in the statutory-drafting process is lobbyists. Lobbyists are rarely acknowledged in the judicial story of legislative drafting, yet they

CBO undertakes to analyze financial impact of various budgetary proposals and legislative initiatives). The GAO advises Congress on how to improve tax expenditures and government accountability, for example by auditing agencies. See U.S. Gov't Accountability Office, About GAO (2011), available at http://gao.gov/about/gao_at_a_glance_2010_english.pdf (on file with the *Columbia Law Review*). Since these offices have little influence on the drafting of statutes, they will not be discussed in depth here.

13. See *infra* Part I.A (describing role and evolution of Offices of the Legislative Counsel).

14. See *infra* Part I.B (describing role of CRS).

15. An article by Professors Garrett and Vermeule briefly mentions ALD and its role researching constitutional issues and providing testimony and written analysis, but their article provides no further detail on the scope of the office's work or its various functions. Elizabeth Garrett & Adrian Vermeule, Institutional Design of a Thayerian Congress, 50 *Duke L.J.* 1277, 1317 (2001) (proposing expansion of ALD or creation of new congressional office to provide Congress with more information on constitutional issues). A number of other articles briefly mention ALD without providing any substantive discussion of the role the office plays in the research and drafting process. See, e.g., Paul Brest, Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine, 21 *Ga. L. Rev.* 57, 98 (1986) (noting, in one sentence, ALD assists Congress in understanding constitutional questions); James Cole, Kate Seikaly & P.J. Meitl, Exploring Every Avenue: The Dilemma Posed by Attorney-Client Privilege Assertions in Congress, 8 *Appalachian J.L.* 157, 166–67 (2009) (calling ALD "Congress's public policy research arm" and quoting document produced by ALD). The other articles that mention ALD do so only in reference to a document produced by the office. Search Results, WestlawNext, <http://westlawnext.com> (go to Secondary Sources; go to Law Reviews & Journals; search "American Law Division") (on file with the *Columbia Law Review*) (last visited Mar. 29, 2014).

16. See *infra* Part I.C (explaining role of congressional committees).

bring substantial private resources and expertise to the drafting process.¹⁷

While the explanation of how the drafting process has evolved is primarily descriptive, the process uncovered has strong normative implications for statutory interpretation, as discussed in Parts II and III. Few would disagree that it is better for Congress to write unambiguous statutes. Indeed, it could be argued that one purpose of judicial review is to ensure a certain level of rationality and deliberation in the legislative process.¹⁸ However, this line of reasoning presumes that Congress is capable of improving its processes and drafting clearer statutes, a proposition that scholars generally doubt.¹⁹ This Article questions that conventional wisdom. It shows that the drafting process is not perfect, but it has evolved and significantly improved over the last few decades. These changes prove that improving the legislative process, and resulting statutory language, is within Congress's means. Today, statutes are thoroughly researched and written by large groups of experts who are more aware of what courts and agencies are doing than ever before, resulting in more precise and detailed statutes replete with complex definitions and exceptions.

The Article then explains how a greater understanding of the evolution of drafting may provide a novel descriptive explanation for the trend toward textualist interpretation in the Supreme Court and other courts, which became especially apparent beginning in the 1980s.²⁰ While scholars generally attribute this trend to the influence of a few prominent jurists, this Article argues that there is a supplementary explanation for

17. For an interesting example of a Supreme Court Justice acknowledging, and deriding, the role of a lobbyist, see *Kosak v. United States*, 465 U.S. 848, 863 (1984) (Stevens, J., dissenting) (“The intent of a lobbyist—no matter how public spirited he may have been—should not be attributed to the Congress without positive evidence that elected legislators were aware of and shared the lobbyist’s intent.”).

18. See Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary’s Structural Role*, 53 *Stan. L. Rev.* 1, 7 (2000) (arguing Founders believed judicial review could serve as moderating influence on legislative process and help legislators to “internalize the judicial perspective—a politically insulated outlook on law—and formulate and articulate statutory goals with that perspective in mind”).

19. In their textbook, Professors Eskridge, Frickey, and Garrett directly challenge textualist interpretation on this point: “[I]t cannot be accurately characterized as a humble procedural decision designed to improve the legislative process if empirical research demonstrates that such improvements are unlikely.” William N. Eskridge, Philip P. Frickey & Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 437 (4th ed. 2007). That is a big “if,” and, while scholars may believe that such improvements are indeed unlikely, they have not shown any empirical research to support such a conclusion.

20. See, e.g., Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 *Tex. L. Rev.* 1073, 1105 (1992) [hereinafter Zeppos, *Empirical Analysis*] (showing use of nontextual sources increased regularly until 1980s, when it suffered dramatic drop to levels not seen since 1930s).

why textualism rose in prominence during this era: Statutes became clearer and more detailed due to Congress's increased institutional capacity, and courts responded to this change in the quality of statutes. Scholars have failed to make this connection because they have not sufficiently inquired into how the drafting process and statutory product have evolved and improved.

While this Article provides a descriptive explanation of why judicial interpretive behavior has changed, it also explains how the process by which a statute was drafted should normatively affect how the statute is interpreted. This Article develops a method of statutory interpretation called "intertemporal statutory interpretation," which provides a pragmatic explanation of how interpretation can be approached based on the evolving quality of the drafting process. Intertemporal statutory interpretation is based on the idea that the generally improving statutory-drafting process has made it so that the methods of interpretation used to interpret older statutes should be different from those used to interpret modern statutes.

How intertemporal statutory interpretation could be applied becomes clearer when looked at in the context of certain judicial doctrines and prominent statutory-interpretation debates. A number of important judicial doctrines rely on untested assumptions about how Congress creates statutes. For example, when interpreting a provision of a statute, courts commonly use similar statutes or other provisions of the same statute as interpretive tools. When viewed in light of Congress's empirical realities, and consistent with intertemporal statutory interpretation, judges should apply these doctrines more confidently to modern statutes that were drafted in a way that is much more likely to account for the broader statutory landscape, and courts should be more skeptical when applying them to older statutes that were drafted in a less expert manner.

Intertemporal statutory interpretation also can help resolve the issue of whether legislative history should be used to clarify statutory ambiguity, which is a fierce point of contention among both judges and academics.²¹ Scholars and judges generally debate whether to use legislative history as an all-or-nothing matter. This debate is missing a contextual and temporal perspective on Congress, which, when considered, shows that the proper question is whether, because of the quality of the

21. See, e.g., Frank H. Easterbrook, Text, History, and Structure in Statutory Interpretation, 17 *Harv. J.L. & Pub. Pol'y* 61, 61-62 (1994) (advocating use of legislative history only in limited circumstances); William N. Eskridge, Jr., The New Textualism, 37 *UCLA L. Rev.* 621, 623 (1990) [hereinafter Eskridge, *New Textualism*] ("The new textualism posits that once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant."); Eric Schnapper, Statutory Misinterpretations: A Legal Autopsy, 68 *Notre Dame L. Rev.* 1095, 1114, 1117-18 (1993) (describing disagreement over interaction between legislative history and plain meaning of statute).

congressional process generating the statute, legislative history should be considered in that particular circumstance. Legislative history undoubtedly serves a role in Congress's internal processes and will continue to be created whether or not courts use it.²² This does not mean, however, that it is necessarily helpful to the judicial process.

To demonstrate how a consideration of Congress's institutional process affects this debate, Part III delineates the three distinct types of ambiguity that arise in statutes. It then uses these categories to make novel arguments about the use of legislative history. First, ambiguity may be the result of unintentional oversight. Second, ambiguity may be the result of a strategic bargain necessary to secure passage of the statute. Third, ambiguity may be dynamic, resulting from changing societal or legal circumstances that Congress could not realistically have foreseen.

This Article's showing that Congress's drafting process has become increasingly sophisticated over the last forty years leads to the conclusion that it is less likely today that a statute will contain unintentional ambiguity than it would have been even just a few decades ago. Strategic ambiguity, however, continues, and will continue, to exist because politics will always be contentious. Similarly, dynamic ambiguity is unavoidable because statutes are generally long-lasting, and the circumstances to which the statutes are applied change and evolve. This Article shows why the strongest arguments in favor of legislative history are in the context of unintentional ambiguity, while the strongest arguments against legislative history apply when ambiguity is strategic or dynamic. If statutes today are less likely to contain unintentional ambiguity than in the past, then courts should be more skeptical of using legislative history to interpret modern statutes and, conversely, should be less hesitant to use legislative history to interpret older statutes.

This Article proceeds in three Parts. Part I provides a description of the history and evolution of the drafting process, focusing on the four main actors described above. Part II applies the discussion in Part I to draw conclusions about the rise of textualism as it relates to congressional procedure, and it then introduces the idea of intertemporal statutory interpretation, explaining how it applies to various judicial doctrines. Part III goes a step further by explaining how intertemporal statutory interpretation helps shed new light on the contentious legislative-history debate.

I. THE DRAFTING PROCESS

Congress has not always been good at its job. In the 1940s, Second Circuit Judge Jerome Frank complained that "[t]he legislatures do their

22. Gluck & Bressman, Part I, *supra* note 7, at 970 ("[L]egislative history serves a wide variety of roles in addition to guiding judicial interpretation, an observation that strongly suggests that legislative history would be utilized by drafters regardless of judicial consideration or criticism of it.").

work capriciously, superficially, on the basis of the limited subjective impressions of a few members of a legislative committee. Why should we greatly respect such shoddy products?"²³ These strong words sum up the feelings of many judges and scholars in that era, and in many ways this sentiment continues today.

Although this assessment may have been correct in the 1940s, Congress has since undergone dramatic changes that have fundamentally altered the way that Congress creates legislation. Few changes have had more impact than the Legislative Reorganization Act of 1970, which paved the way for the modernization of legislative drafting.²⁴ This Act impacted the way legislation is created in three important ways.²⁵ First, Congress provided a separate legislative charter for the House Office of the Legislative Counsel with expanded statutory authority.²⁶ Although the Senate office continued to operate under the original statutory mandate, both offices increased in size and influence substantially over subsequent decades,²⁷ which significantly increased the professionalism and consistency of legislative drafting.

Second, the Act abolished Congress's prior research unit, the Legislative Reference Service of the Library of Congress, and created a

23. Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* 292 (1949).

24. Pub. L. No. 91-510, 84 Stat. 1140 (codified as amended in scattered sections of 2 U.S.C.). An earlier bill, the Legislative Reorganization Act of 1946, radically restructured the organization of Congress and in many ways was the precursor to the modern Congress. Pub. L. No. 79-601, 60 Stat. 812. It overhauled the committee system and began the process of professionalizing the legislative process. *Id.* §§ 133–137, 201–207, 60 Stat. at 831–32, 834–37. So in many ways, the Legislative Reorganization Act of 1970 was merely a continuation of what began in 1946, although on a much larger scale.

25. The 1970 Act also made other important changes to the structure of Congress. For example, it expanded the responsibilities of the GAO, which had previously performed only fiscal auditing services, to conducting cost-benefit studies of government programs. Legislative Reorganization Act of 1970 § 204(a), 84 Stat. at 1168. Another important change that came after the 1970 Act was the creation of the CBO, which was founded in 1974 with the enactment of the Congressional Budget and Impoundment Control Act, Pub. L. No. 93-344, §§ 201–203, 88 Stat. 297, 302–05 (1974). Although this office does not play a direct role in creating legislation, it employs economists and policy specialists to analyze the costs of federal programs and economic projections. See *supra* note 12 (describing role of CBO). Because this office focuses only on creating projections, and does not affect legislation more generally, it is not included in the analysis of this Article.

26. Legislative Reorganization Act of 1970 §§ 501–503, 521–526, 84 Stat. at 1201–03 (codified at 2 U.S.C. §§ 281–282 (2012)) (establishing and outlining duties of modern House Office of the Legislative Counsel). The Senate Office of the Legislative Counsel continues to operate under the authority of the original statutory mandate from the Revenue Act of 1918. Matthew E. Glassman, Cong. Research Serv., RS20856, Office of Legislative Counsel: Senate 1 (2008), available at <http://www.senate.gov/reference/resources/pdf/RS20856.pdf> (on file with the *Columbia Law Review*); see also Revenue Act of 1918, ch. 18, § 1303, 50 Stat. 1057, 1141–42 (1919) (codified as amended at 2 U.S.C. §§ 271–272) (establishing Senate office).

27. See *infra* Table 1 (counting number of attorneys in House and Senate Offices of the Legislative Counsel after 1975).

new office, CRS.²⁸ Although this office remained part of the Library of Congress to keep it insulated from political pressures, it was granted substantial autonomy, and Congress expected it to triple its size within five years to allow for an expanded role in legislative research.²⁹ Third, Congress made changes to the committee system and increased pay for many staffers,³⁰ which set the stage for a flurry of bills to increase committee staffing throughout the 1970s.³¹ This Part will consider these three important structural changes. This Part will also consider a fourth change, the rise of lobbying, which happened outside of Congress but impacts the drafting process.

The author conducted a series of interviews in early 2011 with three committee staff,³² two attorneys in the House Office of the Legislative Counsel,³³ and two members of ALD.³⁴ The interviews focused on the procedural aspects of the drafting process rather than an in-depth inquiry into the particular actors' knowledge or impressions of the process. The author focused on open-ended interview questions targeted at understanding the role that the particular actor and his or her peers play in the drafting process rather than a standardized format for all of the interviews.³⁵ The author's goal in these interviews was to delineate who

28. Legislative Reorganization Act of 1970 § 321(a), 84 Stat. at 1181–85.

29. H.R. Rep. No. 91-1215, at 19–20 (1970), reprinted in 1970 U.S.C.C.A.N. 4417, 4435–36. Congress had considered removing CRS from the Library of Congress altogether, but it decided that “the Library serves as a useful mantle for protecting the Service from partisan pressures. Furthermore, the effectiveness of CRS will be enhanced by its continued instant access to the Library’s collections and administrative support services.” *Id.* at 20. However, Congress made it clear that it wanted CRS to be as independent as possible from the Library of Congress:

[T]he statutory language directing the Librarian to grant the Service complete research independence and the maximum practicable administrative independence is meant to make the CRS as autonomous within the Library as is possible. That autonomy is to extend most particularly to the preparation of the Service’s budget and to the appointment of its staff. . . . In addition, the Director of the Service is given free hand to reorganize both the structure and the procedures of the CRS to improve its efficiency and effectiveness.

Id.

30. See Legislative Reorganization Act of 1970 §§ 101–132, 305, 84 Stat. at 1143–67, 1181 (outlining revisions to committee structure and prescribing pay for staffers).

31. See *infra* Table 3 (tracking increase in number of committee staff over time).

32. Interview with Members of Comm. Staff in Washington, D.C. (May 18, 2011) [hereinafter Committee Staff Interview] (on file with the *Columbia Law Review*).

33. Interview with Members of the House Office of the Legislative Counsel in Washington, D.C. (Apr. 16, 2011) [hereinafter Legislative Counsel Interview] (on file with the *Columbia Law Review*).

34. Interview with Members of the Am. Law Div. in Washington, D.C. (May 19, 2011) [hereinafter ALD Interview] (on file with the *Columbia Law Review*).

35. There are unavoidable dangers and biases with this format, as there are with any format of interviews. See generally Gary King et al., *Designing Social Inquiry: Scientific Inference in Qualitative Research* 6–7 (1994) (advocating improving quality of qualitative interviews by incorporating “scientific inference”); Helen Metzner & Floyd Mann, A

does what in the drafting process and to gain a greater understanding of how the process has evolved over the last four decades. This interview format did not allow for the collection of quantitative data, and, given the anonymous nature of the interviews, the author sought to confirm the information provided by the various interviewees through publicly available sources to the extent possible. The author also relied on his own observations and experiences drafting bills during a period in 2010 as a legislative intern in the House Office of the Legislative Counsel. Working in this office, even for a brief period, provided unique insights about the drafting process and interactions between various actors throughout it.

A. The Offices of the Legislative Counsel

The Offices of the Legislative Counsel are some of the most important and underappreciated actors in the statutory-drafting process. Each house of Congress has its own Office of the Legislative Counsel.³⁶ These nonpartisan offices are staffed with attorneys who work as professional statutory drafters. These offices have existed for almost one hundred years, although their size and influence has grown considerably in recent decades.³⁷ Outside of Congress, little is known about the Offices of the Legislative Counsel. Legal scholarship has only recently begun to consider the role these offices play in the legislative process after a period in which scholars almost entirely ignored them. Indeed, just over a decade ago two prominent legal scholars claimed that no such offices exist.³⁸ To

Limited Comparison of Two Methods of Data Collection: The Fixed Alternative Questionnaire and the Open-Ended Interview, 17 *Am. Soc. Rev.* 486 (1952) (comparing differences in response between interviews conducted in person and those conducted anonymously via questionnaire).

36. Legislative Reorganization Act of 1970, Pub. L. No. 91-510, §§ 501–503, 84 Stat. 1140, 1201–02 (codified at 2 U.S.C. §§ 281–282 (2012)) (establishing modern House office). The Senate office operates under the original statutory mandate. Glassman, *supra* note 26, at 1.

37. See Frederic P. Lee, *The Office of the Legislative Counsel*, 29 *Colum. L. Rev.* 381, 387 (1929) (describing creation of predecessors to Offices of the Legislative Counsel under Revenue Act of 1918); *infra* Table 1 (demonstrating increases in counsel numbers in both House and Senate offices).

38. Professors Sunstein and Vermeule contrast the United States' alleged lack of a "centralized drafting body" with the United Kingdom's Office of Parliamentary Counsel, which serves the same role that the Offices of the Legislative Counsel do in the United States. Sunstein & Vermeule, *supra* note 2, at 924–25. They attempt to use this juxtaposition to demonstrate why more-rigid interpretive methods are applied by judges in the United Kingdom than in the United States. *Id.* Their argument may have some merit—the role of legislative counsel in the United States has not always been as prominent as it is in the United Kingdom. Indeed, part of the goal of this Article is to show that drafting capacity in the United States has only recently risen to a level where one can expect a certain level of clarity and uniformity in statutes. So it is perhaps still understandable that in past times, which is likely what Professors Sunstein and Vermeule were considering, something akin to textualism took stronger hold in the United

supplement the nascent literature on these offices, this Part provides a background on how and why the offices began, along with a more detailed explanation of the offices' current institutional role and capacity than exists in the current literature.

1. *History.* — The idea for the current version of the Offices of the Legislative Counsel was first formulated at Columbia University in the early 1900s.³⁹ The University received a grant to research ways to draft better statutes.⁴⁰ This research led to the conclusion that Congress should establish professional legislative-drafting offices.⁴¹ The idea of permanent drafting staff was not new; at that time many states already had “legislative reference bureaus,” and the United Kingdom had the Parliamentary Counsel of Great Britain.⁴² However, earlier proposals to establish such an office were met with great skepticism by certain members of Congress. Senator Bacon of Georgia scoffed at the idea of letting someone else do Congress’s job for it: “[L]et the gentlemen who are so deficient in the ordinary rudiments of the English language and who are so ignorant of law . . . in the statute books and as well in the decisions of the courts, go home, and let this schoolmaster . . . perform our functions for us.”⁴³ Other senators supported the establishment of a drafting office, emphasizing that the office would only act on request and that its work would not have any binding effect absent affirmative congressional action.⁴⁴ Many of the arguments made in favor of such an office are perhaps even more relevant today than they were then. One senator argued that:

The idea is to have a more or less permanent officer who is familiar with existing legislation and with the decisions of the courts, who can take a measure that has been drafted with the slender opportunity for examination and research which we have here and see how it fits into the existing laws of the country and what its effect will be under the existing decisions of the courts and suggest better, clearer, more unambiguous, and more effective forms of expression.

. . . .
 . . . A very large part of the litigation and the miscarriages of intention on the part of the lawmakers of the country . . . comes from the fact that laws are carelessly drawn . . .⁴⁵

Kingdom than in the United States even though both countries had centralized drafting bodies with varying degrees of influence.

39. Lee, *supra* note 37, at 381.

40. *Id.*

41. *Id.*

42. *Id.* at 382.

43. 50 Cong. Rec. 2375–79 (1913) (statement of Sen. Augustus Bacon).

44. See, e.g., *id.* at 2376 (statement of Sen. Elihu Root) (“The work that is [to be] done [would have] no legal or binding effect whatever.”).

45. *Id.*

At first these arguments in favor of using professional legislative drafters did not produce an agreement. The idea was dropped for a few years, until Middleton Beaman, who at the time was a law librarian of the Library of Congress, obtained funding from Columbia University to provide a “demonstration” of the drafting services that he could offer.⁴⁶ He acted as an aide to the House Ways and Means Committee and, in that role, drafted revenue bills and tax legislation.⁴⁷ Mr. Beaman made a positive impression, and Congress decided to make his position permanent.⁴⁸ The law creating the office originally imagined a single office serving both the House and Senate.⁴⁹ However, members of the House, fearing Senate usurpation, successfully argued for two separate offices.⁵⁰

The law establishing the offices, the Revenue Act of 1918, was vague and left much to congressional discretion.⁵¹ The law simply stated that the offices would “aid in drafting public bills and resolutions or amendments thereto on the request of any committee of either House of Congress.”⁵² At first the offices were used primarily by the Committee on Ways and Means,⁵³ likely due to the complicated and technical nature of the tax statutes drafted by that committee.⁵⁴ Over the following decades, the offices expanded to serve all committees and congresspersons, in every area of federal law, although the offices, in terms of number of drafters, remained relatively small throughout their first sixty years.⁵⁵

2. *Increasing Influence on the Legislative Process.* — The modernization of the Offices of the Legislative Counsel began with the Legislative

46. Lee, *supra* note 37, at 381–82.

47. *Id.* at 385–86.

48. *Id.* at 386.

49. *Id.* at 387.

50. *Id.*; see also 56 Cong. Rec. 10,523–25, 10,527 (1918) (debating benefits of creating legislative-drafting office).

51. Revenue Act of 1918, ch. 18, § 1303, 40 Stat. 1057, 1141–42 (1919) (codified as amended at 2 U.S.C. §§ 271–272, 281–282 (2012)).

52. *Id.* at 1141.

53. Office of the Legislative Counsel, History and Charter, U.S. House of Representatives, http://house.gov/legcoun/HOLC/About_Our_Office/History_and_Charter.html (on file with the *Columbia Law Review*) (last visited Mar. 4, 2014) [hereinafter House Legislative Counsel, History] (“[T]he early work of the Office of the Legislative Counsel was focused primarily on projects for the Committee on Ways and Means . . .”).

54. Comm. on Ways and Means, Committee History, U.S. House of Representatives, <http://waysandmeans.house.gov/about/history.htm> (on file with the *Columbia Law Review*) (last visited Mar. 4, 2014) (“The Committee on Ways and Means is the oldest committee of the United States Congress, and is the chief tax-writing committee in the House of Representatives. The Committee derives a large share of its jurisdiction from Article I, Section VII of the U.S. Constitution . . .”).

55. House Legislative Counsel, History, *supra* note 53 (“The Office now works for all of the committees and Members of the House in every area of Federal law.”); *infra* Table 1 (noting House Office of the Legislative Counsel had only fourteen attorneys in 1975).

Reorganization Act of 1970.⁵⁶ This bill formalized many of the norms that the offices had established over their first fifty years of existence. The use of the offices remains entirely optional, although requests for assistance have dramatically increased in recent years, with the Senate office reporting that requests have nearly doubled over the last five Congresses.⁵⁷ House legislative counsel said that “essentially all” legislation passes through the offices.⁵⁸

Part of the modernization of the offices has been the adoption of specialized legislative-drafting software.⁵⁹ Statutes are not required to be written in any particular form (one attorney joked that Congress could write a poem on a napkin and vote it into law) but legislative counsel helped develop software that provides a template and automatically formats bills in what drafters call “revenue style” or “tax style.”⁶⁰ The introduction of this software increased the appeal of using legislative counsel because other legislative drafters for committees and individual members do not always have access to the software or the expertise to use it as well as legislative counsel do. The development of this software helped expand the role of legislative counsel because staff want to use the software to ensure the bill looks “right.”

56. Pub. L. No. 91-510, §§ 501–503, 84 Stat. 1140, 1201–02 (codified at 2 U.S.C. §§ 281–282).

57. Office of the Legislative Counsel, Responsibilities of the Legislative Drafter, U.S. Senate, <http://www.sl.c.senate.gov/Drafting/drafting.htm> (on file with the *Columbia Law Review*) (last visited Mar. 27, 2014) [hereinafter Senate Legislative Counsel, Responsibilities] (reporting number of requests in last five Congresses rose from 20,757 to 40,079).

58. The counsel interviewed for this Article used the “essentially all” language. Legislative Counsel Interview, *supra* note 33. On a previous version of the House office’s website, it said “most.” See Office of the Legislative Counsel, About Us, U.S. House of Representatives, <http://web.archive.org/web/20120928130909/http://www.house.gov/legcoun/about.shtml> (on file with the *Columbia Law Review*) (accessed Sept. 28, 2012 version of page in Internet Archive index) (“Although the Members and committees are not required to use the Office, most legislation in the House is worked on by attorneys in the Office.”). Professors Gluck and Bressman’s interviews confirm this claim. See Gluck & Bressman, Part I, *supra* note 7, at 968 (“[O]ur respondents repeatedly suggested . . . that a great deal of actual statutory language is drafted by the professional, nonpartisan drafters in the Offices of Legislative Counsel . . .”); Gluck & Bressman, Part II, *supra* note 7 (manuscript at 10–11) (“One of our most important findings is the centrality of the role the nonpartisan drafters inside Congress—the Offices of the House and Senate Legislative Counsel—have in the drafting of statutory text.”).

59. The offices use a customized version of Just System’s XMetaL software to create legislative documents in Extensible Markup Language (commonly referred to as “XML”) format. See Kirsten Gullickson, Powerpoint: XML in Process (2012), available at <http://xml.house.gov/2012/WePC2012-Presentation.zip> (on file with the *Columbia Law Review*) (presenting on adoption of XML software in U.S. House of Representatives to World e-Parliament Conference).

60. See, e.g., Tobias A. Dorsey, Legislative Drafter’s Deskbook: A Practical Guide 238 (2006). It is called tax style because it was first developed to deal with the complexity specific to tax laws. *Id.* It is widely used today as a way to break up large chunks of text and provide better organization for the reader. *Id.*

Perhaps the most dramatic change in the offices in the recent past is their increasing size, as illustrated in Table 1. The House office increased from fourteen legislative counsel in 1975 to forty-seven in 2011.⁶¹ The Senate office increased from eleven legislative counsel to thirty-five over the same period.⁶² These offices increased in size even during the staffing cuts of the 1990s when the Republicans regained control of Congress. Interestingly, both offices have expanded at a similarly rapid rate even though each house of Congress determines staffing levels according to its needs.⁶³

This increase in size has changed the dynamics of these offices. Whereas historically each counsel worked on a wide range of statutory matters to ensure that all substantive areas were covered, today counsel are more specialized.⁶⁴ For example, one drafter used to be in charge of drafting all defense bills, while today there are eight attorneys working in that area, each with certain subspecialties.⁶⁵ This specialization allows professional drafters to have a firm grasp of the drafting problems that are specific to certain substantive areas, including how new statutes fit with previous judicial decisions and the existing statutory scheme. Increased numbers also allow drafters to work in groups on important bills, providing a redundancy that did not exist before. While in earlier eras, when legislative counsel were relatively few in number, they were viewed predominantly as mere formatters, today they are an integral part of creating the substantive language of statutes.⁶⁶

61. See Staff of J. Comm. on Printing, 112th Cong., 2011–2012 Official Cong. Directory, S. Pub. No. 112-12, at 460–61 (2011) [hereinafter 2011 Congressional Directory]; Staff of J. Comm. on Printing, 94th Cong., Official Cong. Directory 430 (1975) [hereinafter 1975 Congressional Directory].

62. See 2011 Congressional Directory, *supra* note 61, at 392–93; 1975 Congressional Directory, *supra* note 61, at 422–23.

63. The fact that the Senate was slower to increase its reliance on legislative counsel is unsurprising given the dynamics of that organization. The Senate generally has more professional staff and is more protective of its territory, so it is more reluctant to rely on outsiders. But even the Senate realized that it needed the help of drafting experts. See *infra* Part I.A.6 (discussing differences between House and Senate offices).

64. See Legislative Counsel Interview, *supra* note 33 (noting attorneys say they work in more discrete areas today than thirty years ago).

65. Legislative Counsel Interview, *supra* note 33.

66. Some vestiges of this perception still exist today, although, given the increase in numbers and specialization of legislative counsel, most staff look to legislative counsel for substantive input on all issues. This may be somewhat less true in the Senate, and especially the Judiciary Committee. See Nourse & Schacter, *supra* note 7, at 588–89 (quoting staff member of Senate Judiciary Committee saying, “I use Legislative Counsel to format, not so much for substantive purposes”).

TABLE 1: THE OFFICES OF THE LEGISLATIVE COUNSEL⁶⁷

Year	Number of Legislative Counsel	
	House	Senate
1975	14	11
1979	25	14
1983	28	15
1987	31	16
1991	33	20
1995	30	22
1999	36	23
2003	35	27
2007	36	31
2011	47	35

3. *Hiring and Training of Legislative Counsel.* — The members of the Offices of the Legislative Counsel are different from other congressional staff for various reasons. First, legislative counsel must have a law degree, whereas committee and individual-member staff are hired at the discretion of the congressperson and therefore are not required to have a law degree.⁶⁸ A law graduate's exposure to various areas of law and familiarity with judicial reasoning and statutory interpretation are valuable assets when it comes to legislative drafting.

A second distinction between legislative counsel and other congressional staff is that the Offices of the Legislative Counsel hire only individuals looking to be career legislative drafters, and they have largely been successful in finding and retaining career employees.⁶⁹ A likely rea-

67. See 2011 Congressional Directory, *supra* note 61, at 392–93, 460–61; Staff of J. Comm. on Printing, 110th Cong., Official Cong. Directory 384–85, 454 (2007); Staff of J. Comm. on Printing, 108th Cong., Official Cong. Directory 381, 451 (2003); Staff of J. Comm. on Printing, 106th Cong., Official Cong. Directory 385, 443 (1999); Staff of J. Comm. on Printing, 104th Cong., Official Cong. Directory 539, 544 (1995); Staff of J. Comm. on Printing, 102d Cong., Official Cong. Directory 619, 626–27 (1991); Staff of J. Comm. on Printing, 100th Cong., Official Cong. Directory 708–09, 717–18 (1987); Staff of J. Comm. on Printing, 98th Cong., Official Cong. Directory 447, 455 (1983); Staff of J. Comm. on Printing, 96th Cong., Official Cong. Directory 402, 408–09 (1979); 1975 Congressional Directory, *supra* note 61, at 422–23, 430.

68. Gluck & Bressman, Part II, *supra* note 7 (manuscript at 24) (noting some committees “prefer not to have lawyers working for them at all”).

69. This was a point of emphasis by legislative counsel and was something this author experienced first-hand as an intern in the office. This was not new, however. See, e.g., Hearings Before the J. Comm. on the Org. of the Cong., 89th Cong. 1182 (1965) (statement of John H. Simms, Senate Legislative Counsel) (“Because of the specialized nature of the work, a new member of the staff is of little value to the office until he has

son for why legislative counsel stay in the offices for their careers is that their pay is excellent for public employees. Publicly available data reveal that legislative counsel make approximately \$75,000 a year when they are hired, and they receive frequent raises thereafter.⁷⁰ An assistant legislative counsel in the House that has been working for a few years can make more than \$125,000 a year, and senior counsel can make over \$170,000 a year, which is nearly identical to the pay of a congressperson.⁷¹

The training process for legislative counsel is akin to an apprenticeship, in which senior counsel closely supervise junior counsel throughout their formative years of learning the art of legislative drafting and researching.⁷² Although the Offices of the Legislative Counsel have drafting manuals, these manuals are not regularly updated and are not regularly referred to by senior drafters, so they do not reflect the complexity of drafting practice and instead serve as introductory reading material for new drafters.⁷³ The House office also maintains an online drafting guide⁷⁴ and an Introduction to Legislative Drafting directed at congres-

served in it for 2 or 3 years. Consequently, we have no interest in young lawyers who desire to work for [only] a few years . . .”).

70. These salaries are regularly published online, most prominently at Legistorm, <http://www.legistorm.com/salaries.html> (on file with the *Columbia Law Review*) (last visited Apr. 2, 2014). An examination of a sample of assistant legislative counsel hired in the last five years reveals starting salaries between \$72,000 and \$76,000. *Id.* Their salary data and that of a sample of counsel who had worked for over five years show almost yearly pay raises. *Id.*

71. *Id.*; cf. Ida A. Brudnick, Cong. Research Serv., RL30064, Congressional Salaries and Allowances 10 tbl.2 (2014), available at [http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270E,*PL\[%3D%23P++%0A](http://www.senate.gov/CRSReports/crs-publish.cfm?pid=%270E,*PL[%3D%23P++%0A) (on file with the *Columbia Law Review*) (explaining legislative counsel make \$172,500 per year, while most House Representatives make \$174,000 per year).

72. Sandra Strokoff, Office of the Legislative Counsel, How Our Laws Are Made: A Ghost Writer's View, U.S. House of Representatives, http://house.gov/legcoun/HOLC/Before_Drafting/Ghost_Writer.html (on file with the *Columbia Law Review*) (last visited Mar. 3, 2014) (“[D]rafting legislation is without question a matter of on-the-job training. For up to two years, a new attorney . . . works under the tutelage of a senior attorney in preparing for introduction a wide variety of bills to gain as much experience as possible in developing drafting skills . . .”).

73. Both manuals are brief and clearly do not intend to cover the depth and breadth of the drafting process; they instead focus on the style aspects of drafting. The Senate drafting manual was published in 1997, see Office of the Legislative Counsel, U.S. Senate, Legislative Drafting Manual (1997), available at http://www.law.yale.edu/documents/pdf/Faculty/SenateOfficeoftheLegislativeCouncil_LegislativeDraftingManual%281997%29.pdf (on file with the *Columbia Law Review*), and the House drafting manual was written in 1995, see Office of the Legislative Counsel, U.S. House of Representatives, House Legislative Counsel's Manual on Drafting Style (1995), available at <http://house.gov/legcoun/pdf/draftstyle.pdf> (on file with the *Columbia Law Review*).

74. Office of the Legislative Counsel, HOLC Guide to Legislative Drafting, U.S. House of Representatives, http://house.gov/legcoun/HOLC/Drafting_Legislation/Drafting_Guide.html (on file with the *Columbia Law Review*) (last visited Mar. 3, 2014).

sional staff,⁷⁵ neither of which could be considered comprehensive. Instead, the drafters themselves hold the offices' expertise, which they pass on as part of a long training process. This practice is part of why the Offices of the Legislative Counsel only recruit students directly out of law school; they are the ones who have the most time to gain the necessary expertise and then apply that expertise over many years.⁷⁶

The Offices of the Legislative Counsel have very low turnover, with almost all attorneys staying with the offices for more than twenty-five years.⁷⁷ This type of continuity is uncommon in a political institution like Congress where turnover of staff is high.⁷⁸ Legislative counsel provide stability and continuity to statutory drafting, and because of that continuity, even prominent members of Congress say that they serve as the "institutional memory" of all of Congress when it comes to statutory drafting.⁷⁹ For example, almost no one outside of the drafting office is aware of the fact that the same legislative counsel who was the primary drafter of President Obama's healthcare bill, the Patient Protection and Affordable Care Act,⁸⁰ was also in charge of drafting the failed Clinton healthcare bill almost two decades earlier.⁸¹ This type of institutional continuity is

75. Office of the Legislative Counsel, U.S. House of Representatives, Introduction to Legislative Drafting (2013), available at http://house.gov/legcoun/HOLC/Drafting_Legislation/intro_to_drafting.pdf (on file with the *Columbia Law Review*).

76. Office of the Legislative Counsel, Career Opportunities, U.S. House of Representatives, <http://house.gov/legcoun/HOLC/Careers/Careers.html> (on file with the *Columbia Law Review*) (last visited Mar. 4, 2013) ("Positions on the legal staff of the Office are filled by appointing attorneys who are recent law school graduates.").

77. Legislative Counsel Interview, *supra* note 33.

78. Gluck & Bressman, Part I, *supra* note 7, at 973 (quoting concerns of congressional staffers about high turnover and loss of institutional memory of past legislative efforts). For a year-by-year breakdown of turnover of each congressperson's staff, see Luke Rosiak, Congressional Staff Turnover by Year, Wash. Times, <http://www.washingtontimes.com/interactive/congressional-staff-turnover/> (on file with the *Columbia Law Review*) (last visited Mar. 3, 2014).

79. Senator Byrd acknowledged legislative counsel's importance in his statement expressing gratitude to Arthur Rynearson, who spent twenty-six years in the Senate Office of the Legislative Counsel, including four years as the Deputy Legislative Counsel. See 149 Cong. Rec. 2155 (2003) (statement of Sen. Robert C. Byrd) ("I appreciated the great dedication and professionalism Art Rynearson displayed in carrying out his duties and responsibilities. I know that his departure will leave a void that is difficult to fill as he is truly a part of the institutional memory of the Senate."). Legislative counsel also used the term "institutional memory" in discussions with the author to describe the continuity that they provide. Legislative Counsel Interview, *supra* note 33.

80. Pub. L. No. 111-148, 124 Stat. 119 (2010).

81. Compare Robert Pear, It Should Be Called the Grossman Health Care Bill, N.Y. Times (Nov. 26, 1993), <http://www.nytimes.com/1993/11/26/health/it-should-be-called-the-grossman-health-care-bill.html> (on file with the *Columbia Law Review*) (revealing Ed Grossman was intimately involved in writing Clinton healthcare bill), with 155 Cong. Rec. 27,576 (2009) (statement of Rep. Henry A. Waxman) (thanking legislative counsel "who worked under the tireless direction of Deputy Legislative Counsel Ed Grossman" in drafting Patient Protection and Affordable Care Act).

what makes legislative counsel uniquely positioned to draft statutes that appropriately account for the statutory landscape.

4. *Legislative Counsel's Role in Drafting.* — Legislative counsel's role in the drafting process generally begins with a request from member staff or a committee.⁸² The offices do not provide drafting services for anyone outside Congress, including administrative agencies, although they do recommend that staff talk with affected agencies.⁸³ A request can come in many forms; it can range from a telephone call⁸⁴ to an emailed set of bullet points⁸⁵ to a well-developed draft statute that a lobbyist has sent to the staff member.⁸⁶ The drafter will usually request a face-to-face meeting to discuss the congressperson's objectives before beginning to draft the statutory language.⁸⁷ The drafter conducts this meeting with staff members and many times will include a lobbyist either in person or by conference call. While legislative counsel do interact with lobbyists, they will only do so in the presence of a staff member.⁸⁸ These meetings happen in the legislative counsel offices; the legislative drafters never go to a congressperson's office to discuss bills.

The purpose of this initial meeting is to probe for what the congressperson wants the bill to do and what problem she or he is looking to solve. The questions legislative counsel ask include: "What is the scope of the policy—[t]o whom or what does it apply?"; "Who will be responsible for carrying out the policy?"; "What if the policy is not followed?"; and "What is the relation between the policy and existing law—[m]ust existing law be amended . . . ?"⁸⁹ Legislative counsel said that this initial meeting is the most important step of the drafting process because if they do not get a clear understanding of the exact purpose and scope of what they are supposed to be drafting, the drafting process can become protracted and the statutory language is likely to suffer.⁹⁰ They also said that an important part of this initial meeting is ensuring that the staffer understands the scope and implications of what he or she

82. Office of the Legislative Counsel, Requesting Assistance, U.S. Senate, <http://www.slc.senate.gov/Requests/requests.htm> (on file with the *Columbia Law Review*) (last visited Mar. 3, 2014) [hereinafter Senate Legislative Counsel, Assistance].

83. Legislative Counsel Interview, *supra* note 33; Senate Legislative Counsel, Assistance, *supra* note 82.

84. Senate Legislative Counsel, Assistance, *supra* note 82.

85. See Gluck & Bressman, Part II, *supra* note 7 (manuscript at 13) ("[S]taffers who work directly for members or committees provide Legislative Counsel with policy 'bullet points' . . .").

86. Legislative Counsel Interview, *supra* note 33.

87. *Id.*

88. *Id.*

89. Office of the Legislative Counsel, Approaching a Problem, U.S. House of Representatives, http://house.gov/legcoun/HOLC/Before_Drafting/Approaching_a_Problem.html (on file with the *Columbia Law Review*) (last visited Mar. 3, 2014) [hereinafter House Legislative Counsel, Approaching].

90. Legislative Counsel Interview, *supra* note 33.

is proposing.⁹¹ Many staff, especially individual-member staff, do not have a good understanding of the existing law in the area in which they are attempting to legislate. Legislative counsel view part of their role as helping staff to understand the existing statutory framework and how a new bill will fit into that framework.⁹²

While legislative counsel are usually most heavily involved very early in the drafting process, they play a role in each aspect of the legislative process. Legislative counsel draft amendments for committee markups and attend the markups to ensure that any doubts as to the legislative language can be resolved.⁹³ They also attend floor debates to ensure that they are aware of any last-minute drafting issues that may arise. Their involvement from the beginning through the end of the drafting process is important because it reduces the likelihood that unintended ambiguity creeps into a bill because of the time pressures of the different stages of the political process.

Legislative counsel also notify congressional staff if a provision of an existing law needs to be repealed or amended to effectuate the new law's purpose. Legislative counsel said that many times there is already a law or proposed bill that does exactly what the staff member is trying to do, and they strongly discourage the creation of a new bill in such situations.⁹⁴ They are usually successful, although sometimes politics win out. A recent example of a redundant bill created for political expediency came out of a scandal surrounding in-kind gifts received by Minerals Management Service (MMS) employees from the energy companies that they were regulating.⁹⁵ In response to the public outcry following the 2010 oil spill in the Gulf of Mexico, Congress wanted to pass a law to disallow MMS employees from receiving gifts from those they regulate. The problem, as legislative counsel pointed out to those staff working on the bill, was that this practice was already disallowed by other statutes, so cre-

91. *Id.*

92. House Legislative Counsel, *Approaching*, *supra* note 89 (explaining questions to staff “will help to produce a draft that accomplishes the intended policy and avoids unintended consequences”).

93. Strokoff, *supra* note 72 (“Frequently, we draft while debate is going on—both during committee consideration and on the House Floor, and may be asked to explain the meaning or effect of legislative language.”).

94. Legislative Counsel Interview, *supra* note 33.

95. Ian Urbina, *Inspector General's Inquiry Faults Regulators*, *N.Y. Times* (May 24, 2010), <http://www.nytimes.com/2010/05/25/us/25mms.html> (on file with the *Columbia Law Review*). In the same month that the Office of the Inspector General released a report on the gift scandal, the Department of the Interior announced that MMS would be restructured to ensure independent operation of its inspectors and its revenue-collection agents. Press Release, U.S. Dep't of the Interior, *Salazar Launches Safety and Environmental Protection Reforms to Toughen Oversight of Offshore Oil and Gas Operations* (May 11, 2010), <http://www.doi.gov/news/pressreleases/Salazar-Launches-Safety-and-Environmental-Protection-Reforms-to-Toughen-Oversight-of-Offshore-Oil-and-Gas-Operations.cfm> (on file with the *Columbia Law Review*).

ating another law would serve no purpose.⁹⁶ Congress, however, was not deterred. As a show of political action, Congress introduced a bill to specifically disallow MMS employees from receiving gifts from a company engaged in the business of mineral mining.⁹⁷

The offices maintain complete neutrality on political issues and serve all members of Congress without preference.⁹⁸ The offices do give preference according to the urgency of the work: Bills that are in conference committee get first priority, committee requests get preference over individual member requests, and amendments to bills that are on the floor get preference over bills that are still in the preliminary drafting stages.⁹⁹ The result can be a slight preference in favor of the majority party because it controls the committees.

Legislative counsel also maintain strict attorney-client relationships with the congresspersons for whom they work.¹⁰⁰ They do not divulge any information about their work unless they have express permission to do so. This confidentiality can be frustrating at times for drafters because they may be aware of two members of Congress who are working on similar bills and could save considerable time by consolidating the work.¹⁰¹

96. See Legislative Counsel Interview, *supra* note 33 (describing legislative counsel's characterization of bill as unnecessary but politically motivated).

97. See Stop Cozy Relationships with Big Oil Act of 2010, S. 3431, 111th Cong. § 3 (2010).

98. For an example of praise for the work and neutrality of legislative counsel, see 149 Cong. Rec. 2155 (2003) (statement of Sen. Joseph Biden, Jr.) (praising Arthur Rynearson, former Deputy Legislative Counsel in Senate, for ensuring "our legislation clearly expressed the intent of the committee and that it meshed properly with existing law," and explaining "[h]e accomplished that through marvelous attention to detail and a complete absence of partisanship"); see also Press Release, House Speaker Nancy Pelosi, Pelosi Remarks Presenting John W. McCormack Awards of Excellence to Pope Barrow and Paula Nowakowski (Apr. 15, 2010), <http://pelosi.house.gov/news/press-releases/pelosi-remarks-presenting-john-w-mccormack-awards-of-excellence-to-pope-barrow> (on file with the *Columbia Law Review*) ("Over the decades that Pope served as the House Legislative Counsel, he wrote bills that affected every American He always did so with the utmost impartiality, with the closest attention to ensuring that the laws that we passed here perform as Congress intended.").

99. See Office of the Legislative Counsel, Policies Governing the Performance of Duties, U.S. Senate, <http://www.sl.c.senate.gov/Policies/policies.htm> (on file with the *Columbia Law Review*) (last visited Mar. 4, 2014) [hereinafter Senate Legislative Counsel, Policies] ("The order of priority currently in effect is as follows: (1) measures in conference; (2) amendments to measures pending on the floor of the Senate; (3) amendments to measures pending before committees; and (4) preparation of measures for introduction in the Senate.").

100. See *id.* ("All service is provided on a confidential basis"); Strokoff, *supra* note 72 ("[W]e are strictly bound by the rules of attorney-client confidentiality.").

101. Strokoff, *supra* note 72 ("At times, it would be much more efficient to be able to hook up several different clients who want to do roughly the same thing at the same time, instead of having to produce multiple documents with enough modifications to make them look different.").

However, strict propriety is what allows the offices to operate successfully in a heavily political atmosphere.

The offices' political neutrality allows the political actors to be political with the assurance that someone is maintaining order in the statutory language. Indeed, legislative counsel report that many congressional staffers do not focus on the details of statutory language at the initial drafting stage and are happy to leave the initial drafting to others.¹⁰² At the same time, legislative counsel are careful to note that their role is not to make policy decisions, which are left to the members of Congress or their staff.¹⁰³ Legislative counsel also view their role as providing a clear statutory product that is of a proper scope given Congress's desired policy. To ensure that a statute is both clear and not over- or underinclusive, legislative counsel are strong advocates of providing definitions and exceptions within each statute.¹⁰⁴ Legislative counsel are aware of the potential issue of leaving words to be defined by courts, where dictionaries may provide conflicting or unclear definitions. To avoid this problem, they regularly probe as to what a staff member is trying to accomplish with a potentially ambiguous word and then encourage him or her to provide a definition in the statute that ensures the word will be interpreted properly.¹⁰⁵ Likely in large part due to the influence of legislative counsel, the use of defined terms and exceptions has significantly increased in recent years, as illustrated in Table 2.¹⁰⁶ One example that legislative counsel provided of failing to define terms was a recent safe-haven law in Nebraska that allowed parents to abandon their "child" at a hospital without fear of prosecution.¹⁰⁷ Obviously the purpose of the law was to allow parents to abandon newborn children, but because the word "child" was not defined, parents from around the country went to Nebraska to abandon children of all ages, including teenagers.¹⁰⁸

102. See Legislative Counsel Interview, *supra* note 33 (relaying view of counsel that member staff spend more time on day-to-day affairs of member's office and less time drafting statutes).

103. A mantra that was repeated frequently by legislative counsel is that they "do not participate in the formulation of legislative policy" and only "draft a bill or amendment that is effective to carry out the intended policy." Senate Legislative Counsel, *Policies*, *supra* note 99.

104. Cf., e.g., Stop Cozy Relationships with Big Oil Act of 2010, S. 3431, 111th Cong. §§ 2, 3(B) (2010) (providing definitions and exceptions in proposed statute).

105. See Legislative Counsel Interview, *supra* note 33.

106. The respondents to Professors Gluck and Bressman's survey also regularly mentioned the importance of definition sections. See Gluck & Bressman, Part I, *supra* note 7, at 939 ("We did not inquire about definition sections directly; their importance was volunteered seventy times by forty-six different respondents in response to numerous different questions throughout the survey.").

107. Karen Ball, *The Abandoned Children of Nebraska*, *Time* (Nov. 18, 2008), <http://content.time.com/time/nation/article/0,8599,1859405,00.html> (on file with the *Columbia Law Review*).

108. *Id.*

TABLE 2: U.S. STATUTES AT LARGE¹⁰⁹

Year	Pages of Public Laws	Number of Public Laws	Defined Terms	Exception Sections
1973	1,086	245	285	9
1981	1,730	145	542	12
1989	2,524	240	841	110
1997	2,692	153	1,074	139
2005	3,620	173	1,601	116
2009	3,496	137	1,435	126

Legislative counsel are also proponents of using exceptions to ensure that a bill is not unintentionally broad. Legislative counsel provided an example of the kind of creative thinking that they apply when considering exceptions.¹¹⁰ Members of Congress wanted to draft a law to assess a penalty against any person who imported dog- or cat-fur products. As legislative counsel drafted a statute, they recognized a potential problem with the law: What if someone was living or vacationing abroad with a dog or cat and that pet died?¹¹¹ Some pet owners might want to bring their pets back to the United States to be buried or preserved through taxidermy services, and this law would penalize them for bringing their pets back with them. This realization by legislative counsel resulted in an unusual exception in the United States Code that demonstrates the level of detail that legislative counsel provide:

(2) Exception

This subsection shall not apply to the importation, exportation, or transportation, for noncommercial purposes, of a per-

109. See 123 Stat. (2009); 119 Stat. (2005); 115 Stat. (2001); 111 Stat. (1997); 107 Stat. (1993); 103 Stat. (1989); 99 Stat. (1985); 95 Stat. (1981); 91 Stat. (1977); 87 Stat. (1974). The author determined the number of defined terms by searching PDF versions of the Statutes at Large. The first search term used was “mean,” which also captured “means” and “meaning.” This term caught the vast majority of defined terms in each year. This search was supplemented with two other terms. First was “defin,” which captured “define,” “defining,” “defined,” “definition,” and “definitions.” Second was “for purposes,” which is a phrase commonly used immediately before a term is defined and which served as a catchall for terms not captured by “mean” and “defin.” The defined terms do not include terms where the definition did not appear to be a complete definition (for example, where the definition said that the term “includes” things that did not appear to encompass the full definition of the term). The defined terms also do not include instances when it was clear that an already-existing defined term was being amended. To arrive at the number of exception sections the search term “exception” was used, which also captured “exceptions.” The exception sections do not include instances where it was clear that an already-existing exception section was being amended.

110. See Legislative Counsel Interview, *supra* note 33.

111. See *id.* (describing counsel’s concerns with statute).

sonal pet that is deceased, including a pet preserved through taxidermy.¹¹²

5. *Awareness of Judicial Methods.* — Although awareness of judicial methods among legislative counsel has increased in recent years with the rise of legislation as a field of study in law schools, drafting in accordance with judicial methods is not always a point of emphasis among legislative counsel.¹¹³ Legislative counsel are generally aware of many of the canons, but they view their role as ensuring clarity, continuity, and coherency within the statutory scheme rather than adhering to any specific canon.¹¹⁴ There is, however, evidence that awareness of canons of construction and other methods of statutory interpretation has increased recently. For example, a senior legislative counsel wrote a statutory drafting reference book in the early 1990s that heavily emphasized clarity and organization but devoted a mere two pages to the rules of statutory interpretation.¹¹⁵ The current head of the House Office of the Legislative Counsel updated this book in 2008, and the main substantive change was an added chapter on statutory construction and important interpretive case law, including a discussion of the textual and substantive canons of construction.¹¹⁶ A former legislative counsel also wrote a drafting book in 2006 that includes a forty-eight-page chapter detailing the methods and tools of statutory construction.¹¹⁷

These changes are emblematic of the overall increase in congressional awareness of judicial interpretation. Younger legislative counsel, most of whom, unlike more senior counsel, took a legislation course in law school, are especially aware of issues relating to judicial interpretation.¹¹⁸ In the interviews for this Article, legislative counsel admitted that

112. 19 U.S.C. § 1308(b)(2) (2012).

113. Legislative Counsel Interview, *supra* note 33. Similarly, Professors Nourse and Schacter explained:

While staffers are well aware of the general principles of statutory interpretation and do have in mind generally how a court would interpret language they are writing, in the ordinary course of drafting they do not spend substantial time anticipating or attempting to research the judicial application of particular interpretive law to the bill being drafted . . . [D]elving deeply into interpretive law as a way to maximize clarity does not seem to be part of what staffers do on a regular basis.

Nourse & Schacter, *supra* note 7, at 600.

114. Legislative Counsel Interview, *supra* note 33.

115. Lawrence E. Filson, *The Legislative Drafter's Desk Reference* 217–18 (1992).

116. Lawrence E. Filson & Sandra L. Strokoff, *The Legislative Drafter's Desk Reference* 367–85 (2d ed. 2008).

117. Dorsey, *supra* note 60, at 61–108. In comparison to Filson and Strokoff's guide, Dorsey's book is more comprehensive in its coverage of statutory interpretation, and it contains a more detailed discussion of the congressional process in general.

118. Legislative Counsel Interview, *supra* note 33. Statutory interpretation as a field of academic inquiry was mostly dormant prior to the 1980s, when a number of prominent publications began what became a torrent of scholarly writings on the subject. Perhaps most important was the introduction in 1988 of the widely used textbook *Cases and*

statutory construction had not always been a focus of their work but that more recently, and especially over the last ten years, it has become a more important consideration to the extent that they feel a doctrine is being applied consistently and that accounting for it will not compromise the drafting.¹¹⁹ This increased awareness of statutory interpretation is unsurprising given that legislation has only recently become a field of sustained inquiry.¹²⁰

Professors Gluck and Bressman's articles demonstrate that drafters are aware of certain canons and judicial methods and are not aware of many others.¹²¹ This Article emphasizes that what congressional drafters, both partisan and nonpartisan, generally focus on is clarity and consistency above compliance with any particular canon or judicial doctrine. The interviews and experiences detailed here confirm that drafters focus on how to clearly express Congress's policy goals in statutory language, and, in doing so, take into account the existing statutory landscape; they do not, however, always draft with courts' behavior specifically in mind.¹²² Justice Scalia has argued that courts should operate such that Congress is "able to legislate against a background of clear interpretive rules."¹²³ However, although Congress generally does not want to leave it to courts to decide what a law means,¹²⁴ many times those courts do not apply interpretive rules consistently enough to provide sufficient guidance to drafters,¹²⁵ so it is unsurprising that drafters generally focus on clarity rather than drafting in a way that adheres to particular judicial doctrines. Canons are therefore more likely to comport with legislative-drafting behavior to the extent that they intuitively follow the way a drafter would attempt to draft unambiguous language.¹²⁶

Materials on Legislation: Statutes and the Creation of Public Policy, first written by Professors William Eskridge and Philip Frickey. Eskridge, Frickey & Garrett, *supra* note 19.

119. See Legislative Counsel Interview, *supra* note 33 (noting counsel do consider statutory canons now, but primary focus remains on clarity and continuity of language).

120. Gluck & Bressman, Part I, *supra* note 7, at 911 (explaining legislation is a "field that is still in its relative infancy").

121. *Id.* at 949 tbl.2 (summarizing survey results regarding legislative drafters' awareness and use of particular canons).

122. See, e.g., *id.* at 943 (explaining legislative drafters indicated "knowledge of these canons encouraged more specificity once pen was put to paper").

123. *Finley v. United States*, 490 U.S. 545, 556 (1989), superseded by statute, Judicial Improvements Act of 1990, Pub. L. No. 101-650, sec. 310(a), § 1367, 104 Stat. 5113, as recognized in *Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 545 U.S. 546 (2005).

124. See Gluck & Bressman, Part II, *supra* note 7 (manuscript at 44–45) (reporting one survey respondent as saying, "The last thing we want is for courts to decide what your law means").

125. See *id.* (manuscript at 44) ("[E]ighty-one percent of our respondents said that it would or does affect the way they draft if they knew that the Court applies certain interpretive rules consistently.").

126. Gluck & Bressman, Part I, *supra* note 7, at 933 (indicating survey respondent stated, "We consider [canons] not expressly but intuitively: how does this legislation

6. *Differences Between Senate and House Legislative Counsel.* — While the two Offices of the Legislative Counsel are more similar than they are different, there are a few important differences between the jobs they do and how they are used. The Senate, due to its prestige and longer election cycles, is able to attract and maintain committee and individual-member staff in a way that the larger House of Representatives cannot.¹²⁷ Because Senate staffers are more likely to have the experience and knowledge to draft statutory language, Senate legislative counsel are used somewhat more sparingly.¹²⁸ House legislative counsel, on the other hand, report being more heavily involved in the drafting process and are more likely to provide substantive input in every step of the process.¹²⁹

Because the Senate relies somewhat less on legislative counsel, after the Legislative Reorganization Act of 1970¹³⁰ the Senate Office of the Legislative Counsel increased in size at a slower pace than the House office.¹³¹ Throughout the 1980s and early 1990s, the Senate office was roughly half the size of the House office.¹³² The Senate office remains smaller, although in recent years it has grown closer in size to the House

interact with existing code? Is it inclusive, exclusive, are like things treated alike—those values are thought about here”).

127. Cf. Rosiak, *supra* note 78 (showing turnover for staff of members of House of Representatives is generally higher than for staff of Senators).

128. Professors Nourse and Schacter provide quotes that characterize how certain Senate staffers feel about legislative counsel:

“Legislative Counsel does things like check cross-references, check subsection references, etc.”

“I use Legislative Counsel to format, not so much for substantive purposes.”

“Legislative Counsel gets involved in almost all cases. They put [drafts of the statute] in the proper form. You need Legislative Counsel input to be sure about the form, conventions of drafting, etc.”

Nourse & Schacter, *supra* note 7, at 589 (alteration in original). These quotes probably unfairly deemphasize the role of legislative counsel even in the Senate because they come from Senate Judiciary Committee staffers, who are perhaps the group least likely to use legislative counsel (for better or for worse). These statements were also made over ten years ago, when the Senate Office of the Legislative Counsel was much smaller than it is today. See *supra* Table 1. In interviews with legislative counsel, they explicitly mentioned the tension that exists with the Senate Judiciary Committee because the lawyers there feel that they are experts and can draft their own language without help from professional drafters. Legislative counsel found this approach problematic. Legislative Counsel Interview, *supra* note 33.

129. Strokoff, *supra* note 72 (“We participate in all stages of the legislative process, be it preparing a bill for introduction, drafting amendments, participating in any conference of the two Houses of Congress to resolve differences between the two versions of the bill, or incorporating changes in the bill at each stage for publication . . .”).

130. Pub. L. No. 91-510, 84 Stat. 1140 (codified as amended in scattered sections of 2 U.S.C.).

131. See *supra* Table 1 (showing yearly staff figures for House and Senate Offices of the Legislative Counsel).

132. See *supra* Table 1.

office.¹³³ Given its recent increase in size, the Senate office has taken on a more prominent drafting role only in recent years.¹³⁴

B. *Congressional Research Service*

The Congressional Research Service is the nonpartisan research arm of Congress, commonly referred to as Congress's "think tank."¹³⁵ Congress created CRS in response to its members' complaints that they did not have sufficient resources to create comprehensive legislation while also keeping abreast of changes in the law.¹³⁶ The predecessor to CRS, the Legislative Reference Service, was established in 1914.¹³⁷ The modern version of the office was established under the Legislative Reorganization Act of 1970, which significantly expanded CRS's statutory responsibilities, including granting authority to review federal programs, conduct studies bearing on legislation, and present lists of policy areas in which Congress should consider pursuing legislation.¹³⁸

Also, whereas CRS had always provided research and support to individual members, for the first time it was responsible for providing research and support to congressional committees.¹³⁹ CRS required expanded resources to fulfill its new statutory mandate, and it responded quickly by increasing staffing from 323 employees in 1970 to 868 in 1980.¹⁴⁰ Requests for CRS assistance from individual members of Congress increased by 260% between 1972 and 1988, and committee requests increased by significantly more.¹⁴¹ In 2012, CRS responded to more than 71,000 requests for custom analysis, information, and research from congressional staff, and it presented seminars and training sessions to more than 9,000 congressional participants.¹⁴² CRS provided custom service to 100% of member offices and 96% of committees.¹⁴³

133. See *supra* Table 1.

134. Senate Legislative Counsel, Responsibilities, *supra* note 57 ("The volume of work of the Office has dramatically increased in recent years.").

135. E.g., Elizabeth Williamson, You'd Know if You Were Congressional, Wash. Post (Mar. 22, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/21/AR2007032102043.html> (on file with the *Columbia Law Review*).

136. Walter Kravitz, The Advent of the Modern Congress: The Legislative Reorganization Act of 1970, 15 Leg. Stud. Q. 375, 383 (1990).

137. Cong. Research Serv., History and Mission, Library of Cong., <http://loc.gov/crs/info/about/history.html> (on file with the *Columbia Law Review*) (last visited Mar. 3, 2014).

138. Legislative Reorganization Act of 1970, Pub. L. No. 91-510, sec. 321(a), § 203, 84 Stat. 1140, 1181-85 (codified at 2 U.S.C. § 166 (2012)); see also Kravitz, *supra* note 136, at 383 (discussing new role of CRS under Legislative Reorganization Act of 1970).

139. Daniel P. Mulhollan, Cong. Research Serv., Annual Report of the Congressional Research Service of the Library of Congress for Fiscal Year 2010, at 2 (2011), available at http://loc.gov/crsinfo/about/crs10_annrpt.pdf (on file with the *Columbia Law Review*).

140. Kravitz, *supra* note 136, at 395.

141. *Id.*

142. Mary B. Mazanec, Cong. Research Serv., Annual Report of the Congressional Research Service of the Library of Congress for Fiscal Year 2012, at 1 (2013) [hereinafter

CRS's role in the legislative process is underappreciated by scholars and courts, likely because it operates behind the scenes of the political process and does not play a direct role in creating statutory language. However, it is the group that Congress has tasked to conduct the thorough background research and analysis necessary to create effective legislation in complex areas. CRS is involved in every major legislative project and provides a variety of support throughout the legislative process by conducting confidential legislative research and analysis.¹⁴⁴ Its involvement can arise in a variety of ways: conducting background research, reviewing pending legislation, providing in-person consultations and briefings on public policy issues, providing analysts who can deliver expert testimony before congressional committees, supporting hearings and investigations, preparing general reports on current legislative issues, and drafting memos in response to specific requests from staff.¹⁴⁵ CRS is both proactive, by drafting and updating general reports on issues that it perceives will be of interest to many members of Congress, and reactive, by responding to direct requests from staff.

CRS is perhaps the most specialized group serving Congress, largely due to its size. CRS today has over 600 employees, 400 of whom are highly trained lawyers, policy analysts, or information specialists.¹⁴⁶ The work is divided into five research divisions: American Law; Domestic Social Policy; Foreign Affairs, Defense, and Trade; Government and Finance; and Resources, Science, and Industry.¹⁴⁷ Within these divisions

CRS Annual Report 2012], available at http://loc.gov/crsinfo/about/crs12_annrpt.pdf (on file with the *Columbia Law Review*).

143. *Id.* at 1–2. The only committees that did not request custom work were the Joint Committee on the Library and the Joint Committee on Printing. *Id.* at 2 n.6.

144. The CRS annual report for fiscal year 2012 highlights CRS's varied involvement in the major issues of the year, including "The Budget, Debt, and Deficit"; "Financial Regulation and Rulemaking"; "Health Reform"; "The Farm Bill"; "The Keystone XL Pipeline"; "Hydraulic Fracturing"; "Drought"; "Immigration"; "Surface and Air Transportation"; "Housing Finance"; "FDA User Fee Reauthorization"; "Administrative Law"; "Congressional Oversight and Investigation"; "Ethics"; "Transition in the Middle East"; "Rebalancing Foreign Policy Priorities Toward Asia"; "Global Economic and Trade Challenges"; "Emerging Threats and New Strategies"; and "Violence and Political Change in Mexico." *Id.* at 4–8. The report also includes a long list of more specific involvement relating to topics in "Foreign Relations, Defense, and Trade"; "Domestic Social Policy"; "Government and the Economy"; "Resources, Industry, and the Environment"; and "Law and Justice." *Id.* at 8–23.

145. *Id.* at 1.

146. Cong. Research Serv., Organizational Structure, Library of Cong., <http://loc.gov/crsinfo/about/structure.html> (on file with the *Columbia Law Review*) (last updated Nov. 20, 2012).

147. Cong. Research Serv., Areas of Research, Library of Cong., <http://loc.gov/crsinfo/research/> (on file with the *Columbia Law Review*) (last updated Nov. 20, 2012).

are numerous subdivisions that allow for greater coordination and specialization.¹⁴⁸

The use of any division of CRS is entirely optional, and because of this, CRS must actively promote its services to members and staff to ensure that they are aware of the resources available to them.¹⁴⁹ A common frustration inside CRS is that congressional staff, especially individual-member staff, are not aware of the types of research that CRS can do or they wait until late in the legislative process to consult CRS.¹⁵⁰ To remedy this, CRS runs a seminar for newly elected members of Congress to inform them about the legislative process and how CRS can assist them.¹⁵¹ CRS also has regular seminars for staffers that provide updates on important political and legal changes.¹⁵² On its website and by email subscription, CRS provides a weekly compendium of links to CRS products relevant to scheduled or expected floor action in the

148. ALD is divided into four research sections that each have broad responsibilities: Administrative Law, Business, Congress, and Natural Resources. Cong. Research Serv., American Law Division, Library of Cong., <http://loc.gov/crsinfo/research/div-ald.html> (on file with the *Columbia Law Review*) (last updated Feb. 12, 2013) [hereinafter Cong. Research Serv., American Law Division]. The Domestic Social Policy Division is subdivided into six research sections: Children and Families, Domestic Security and Immigration, Education and Labor, Health Insurance and Financing, Health Services and Research, and Income Security. Cong. Research Serv., Domestic Social Policy Division, Library of Cong., <http://loc.gov/crsinfo/research/div-dsp.html> (on file with the *Columbia Law Review*) (last updated Feb. 12, 2013). The Foreign Affairs, Defense, and Trade Division covers seven areas: Asia; Defense Policy and Arms Control; Defense Budget, Manpower, and Management; Europe and the Americas; Foreign Policy Management and Global Issues; International Trade and Finance; and Middle East/Africa. Cong. Research Serv., Foreign Affairs, Defense and Trade Division, Library of Cong., <http://loc.gov/crsinfo/research/div-fdt.html> (on file with the *Columbia Law Review*) (last updated Feb. 12, 2013). The Government and Finance Division is divided into six research groups: Banking, Insurance, Securities, and Macroeconomic Policy; Congress and Judiciary; Executive Branch Operations; Federalism and Emergency Management; Government Finance and Taxation; and Legislative and Budget Process. Cong. Research Serv., Government and Finance Division, Library of Cong., <http://loc.gov/crsinfo/research/div-gf.html> (on file with the *Columbia Law Review*) (last updated Feb. 12, 2013). And finally, the Resources, Science, and Industry Division has six subdivisions: Agriculture and Food Supply; Energy and Minerals; Environmental Policy; Natural Resources and Earth Sciences; Science and Technology Policy; and Transportation and Industry Analysis. Cong. Research Serv., Resources, Science and Industry Division, Library of Cong., <http://loc.gov/crsinfo/research/div-rsi.html> (on file with the *Columbia Law Review*) (last updated Feb. 12, 2013).

149. This promotion includes creating an Outreach Advisory Committee “to ensure that both new and returning Members of Congress, as well as new committee chairs and ranking Members, are aware of the full range of CRS products and services.” CRS Annual Report 2012, *supra* note 142, at 25.

150. ALD Interview, *supra* note 34.

151. Ida A. Brudnick, Cong. Research Serv., RL33471, The Congressional Research Service and the American Legislative Process 9 (2011) [hereinafter CRS Legislative Process Report], available at <http://www.fas.org/sgp/crs/misc/RL33471.pdf> (on file with the *Columbia Law Review*).

152. *Id.*

House and Senate called “On the Floor.”¹⁵³ The goal is for members and staff to get CRS involved early in the legislative process when the statute is easier to modify and improve.

Although all of CRS plays an important role in the legislative process, the division of CRS of most interest for the purposes of this Article is the American Law Division. The work of this division has never been discussed in a law review article despite the fact that the division is responsible for much of the substantive legal research required to draft complex statutes.¹⁵⁴ This division is unique because it “addresses all legal questions that arise in a legislative context,”¹⁵⁵ unlike other divisions of CRS, which generally focus on policy issues.¹⁵⁶ ALD consists of specialized groups of lawyers, with experts in many of the most obscure or difficult areas of law. Professional legislative drafters from the Office of the Legislative Counsel, whom many in Congress consider to be legal experts, said that ALD attorneys are Congress’s “real experts.”¹⁵⁷

ALD has a staff of forty-five attorneys and associated staff who are divided into four sections focusing on different substantive areas.¹⁵⁸ This number represents a significant increase over previous eras, which has allowed for greater specialization, with each attorney working in just a few legislative areas throughout his or her career.¹⁵⁹ ALD attorneys, much like legislative counsel, are career bureaucrats who are hired out of law school with the expectation that they will spend their entire career as congressional researchers.¹⁶⁰ Because of this emphasis on the career nature of the job, ALD attorneys report extremely low turnover, with

153. CRS Annual Report 2012, *supra* note 142, at 34.

154. See *supra* note 15 and accompanying text (showing results of WestlawNext search of law review articles for “American Law Division”).

155. Cong. Research Serv., American Law Division, *supra* note 148.

156. ALD Interview, *supra* note 34.

157. Legislative Counsel Interview, *supra* note 33.

158. Cong. Research Serv., ALD Profile 1 (2012) [hereinafter ALD Profile], available at https://www.flmd.uscourts.gov/CareerOps/ALD_Profile-07-2012.pdf (on file with the *Columbia Law Review*).

159. ALD Interview, *supra* note 34. According to the attorneys in ALD, the size of the office increased rapidly between 1970 and 1984, after which growth continued but at a much slower pace. *Id.* Interestingly, the number of attorneys in ALD was not cut, as the number of other staff in Congress was, when the Republicans took control of Congress in the mid-1990s. *Id.* The same is true of attorneys in the Offices of the Legislative Counsel, whose numbers have grown almost continuously since the 1970s. See *supra* Table 1 (listing number of staff in Offices of the Legislative Counsel). This growth shows the importance that Congress places on neutral and informed input even when the political environment leads it to cut other government positions.

160. See Jody Feder, Library of Congress, Congressional Research Service—American Law Division, *in* Career Dev. Office, Yale Law Sch., Working on Capitol Hill 24, 25 (2012), available at http://www.law.yale.edu/documents/pdf/CDO_Public/2012_Guide_Body_Public.pdf (on file with the *Columbia Law Review*) (“Typically, the law division has the authority to hire between one and four new lawyers each year, and they tend to hire only recent graduates (i.e., third-year law students) . . .”).

over two-thirds of the office having been with ALD for ten years or more.¹⁶¹ ALD has a formal mentoring system where the first few years of the job function as an apprenticeship with a young attorney working closely with a senior attorney, usually someone with thirty or more years on the job.¹⁶² The goal of this formalized system is to ensure that the organization is able to retain and build on the collective experience of its attorneys. Much like legislative counsel, part of ALD's role is to serve as Congress's institutional memory.¹⁶³

ALD is involved very early in the legislative process by providing background training and seminars for congressional staff on issues of interest to Congress, including a twelve-session program focusing on current issues in law relating to the legislative agenda, taught by ALD attorneys, for which members and congressional staff can receive continuing legal education credits.¹⁶⁴ One example of the types of seminars ALD attorneys run is a recent seminar for congressional staff on the regulatory and statutory rules that make up the U.S. food safety system, including background on the fifteen federal agencies and thirty statutes that govern food safety.¹⁶⁵ ALD attorneys also help Congress respond to recent court decisions. For example, ALD attorneys provided support and written legal analysis to Congress as it considered potential responses to the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*,¹⁶⁶ including an analysis of a bill that would overturn the ruling.¹⁶⁷

ALD responds to requests from congressional staff relating to a wide range of legal issues, including issues relating to judicial decisions, administrative law, constitutional law, education, criminal law, and national security.¹⁶⁸ Common questions that congressional staff might ask of ALD attorneys include: "How would a court interpret the legislative language in our proposed bill?"; "Are there any constitutional problems with this legislation?"; or, "What does this Supreme Court decision

161. ALD Profile, *supra* note 158, at 2.

162. ALD Interview, *supra* note 34.

163. Feder, *supra* note 160, at 25 ("Ultimately, we serve as a sort of institutional memory for Congress . . .").

164. CRS Annual Report 2012, *supra* note 142, at 36.

165. *Id.* at 20.

166. 131 S. Ct. 2541 (2011).

167. CRS Annual Report 2012, *supra* note 142, at 21 (highlighting CRS attorneys' analysis of "proposed Equal Employment Opportunity Restoration Act of 2012 (H.R. 5978 and S. 3317), which would overturn the ruling" of *Wal-Mart*).

168. *Id.* at 38. A sampling of the topics on which ALD has recently been consulted includes "Law Pertaining to Food Safety," "Law Pertaining to Education," "Constitutional Law," "Gun Control and the Second Amendment," "Civil Rights," "Family Law," "Criminal Law," "Indian Law," "Legal Issues in Emergency Preparedness," "Cybersecurity Legal Issues," "Privacy and Surveillance," "Religious Freedom and Contraception," "Legal Issues in Government Procurement," "Legal Issues in Nuclear Energy," "Legal Issues in National Security," "Legal Issues in International Trade," and "Legal Issues in International Relations." *Id.* at 20–23.

mean?”¹⁶⁹ ALD attorneys respond to these requests in the initial stages of the legislative process by providing background information and analysis,¹⁷⁰ but also remain involved throughout the legislative process, including testifying during committee hearings and participating in markups.¹⁷¹ ALD attorneys frequently attend markups and floor debates to provide research support for potential amendments and also provide support during conference committee discussions to help resolve differences between the two chambers of Congress.¹⁷²

ALD’s input is especially important to ensure that hectic last-minute amendments are phrased to achieve their intended results and that potential legal issues are anticipated and resolved.¹⁷³ For example, ALD attorneys (along with legislative counsel) worked through the night in the days leading up to the final vote on President Obama’s healthcare bill, providing reports to Congress about potential legal issues in the bill up to the day that the bill was voted on.¹⁷⁴ ALD was acutely aware of potential constitutional challenges to the individual mandate and wrote a comprehensive report for Congress about the constitutional issues before the bill was passed.¹⁷⁵ Lower-court decisions regarding the constitutionality of the individual mandate all cited that report, with the Northern District of Florida court citing it as evidence that Congress and its “attorneys” knew that the law might be unconstitutional.¹⁷⁶

169. Feder, *supra* note 160, at 25 (internal quotation marks omitted).

170. CRS describes the types of background information that it makes available: “This assistance may be a summary and explanation of the scientific evidence on a technically complex matter, for example, or it may be a collection of newspaper and journal articles discussing an issue from different perspectives, or a comparative analysis of several explanations . . . for a generally recognized problem.” CRS Legislative Process Report, *supra* note 151, at 7.

171. Cong. Research Serv., About CRS, Library of Cong., <http://loc.gov/crsinfo/about/> (on file with the *Columbia Law Review*) (last updated May 1, 2013). For an example of the type of testimony that ALD attorneys provide, see Why Should U.S. Citizens Have to Comply with Foreign Laws: Hearing Before the Subcomm. on Fisheries, Wildlife, Oceans & Insular Affairs of the H. Comm. on Natural Res., 113th Cong. (2013) (statement of Kristina Alexander, Legislative Attorney, American Law Division, Congressional Research Service), available at <http://docs.house.gov/meetings/II/II22/20130717/101133/HHRG-113-II22-Wstate-AlexanderK-20130717.pdf> (on file with the *Columbia Law Review*).

172. CRS Legislative Process Report, *supra* note 151, at 7–8.

173. ALD Interview, *supra* note 34.

174. *Id.*

175. Jennifer Staman & Cynthia Brougher, Cong. Research Serv., R40725, *Requiring Individuals to Obtain Health Insurance: A Constitutional Analysis* (2009) [hereinafter CRS Health Report], available at http://assets.opencrs.com/rpts/R40725_20090724.pdf (on file with the *Columbia Law Review*).

176. *Florida v. Dep’t of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1284 (N.D. Fla. 2011) (“[W]hether Congress can use its Commerce Clause authority to require a person to buy a good or service’ raises a ‘novel’ issue and ‘most challenging question.’” (quoting CRS Health Report, *supra* note 175, at 3, 6)), *aff’d in part, rev’d in part sub nom. Florida ex rel. Att’y Gen. v. U.S. Dep’t of Health & Human Servs.*, 648 F.3d 1235 (11th Cir.

ALD attorneys also indicated that they are acutely aware of statutory-interpretation methods, including substantive and textual canons of construction. ALD publishes a frequently updated guide on trends in statutory interpretation that all attorneys in the office are expected to be familiar with.¹⁷⁷ ALD attorneys also apply this knowledge in practice. For example, ALD lawyers report having to explain to less-experienced staff in an individual congressperson's office something as simple as the fact that it is better to put language in the statute than the committee report whenever possible because courts will consider the text first.¹⁷⁸

Like the use of other divisions in CRS, the use of ALD is entirely optional. This structure requires ALD to promote its services to ensure that constantly changing congressional staff are aware of the support that it provides.¹⁷⁹ ALD attorneys report making progress on this front, in part because legislative counsel, which are almost always consulted when a bill is drafted, are advocates of ALD's services. Legislative counsel regularly recommend that staff talk with ALD before they begin to draft legislative language, especially those staff members whose legislative ideas are not yet fully formed.¹⁸⁰ Although it is more common for legislative counsel to refer staff directly to ALD, when a particularly difficult issue arises legislative counsel work directly with attorneys at ALD to develop statutory language.¹⁸¹

While ALD attorneys generally do not draft legislative language, they do play a role in ensuring that the language is precise and reflects Congress's policy decisions.¹⁸² ALD attorneys report that congressional staff who are working to create a bill will usually go "back and forth" between ALD and legislative counsel.¹⁸³ They note that the process usually begins with these congressional staff talking with ALD attorneys to fully develop their ideas.¹⁸⁴ The staff next go to legislative counsel to draft those ideas into statutory form, and they then take the drafted bill back to ALD to ensure that it does what the staff intend and that there

2011), *aff'd in part, rev'd in part sub nom. Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

177. Larry M. Eig, Cong. Research Serv., 97-589, *Statutory Interpretation: General Principles and Recent Trends* (2011), available at <http://mspbwatch.files.wordpress.com/2013/02/statutory-interpretation-general-principles-and-recent-trends.pdf> (on file with the *Columbia Law Review*); ALD Interview, *supra* note 34. Open CRS maintains a database of older versions of the guide, including versions from 2008, 2006, and 2001. See Open CRS, <https://opencrs.com/document/97-589/> (on file with the *Columbia Law Review*).

178. ALD Interview, *supra* note 34.

179. See CRS Annual Report 2012, *supra* note 142, at 25 (describing "comprehensive outreach plan . . . to ensure . . . aware[ness] of the full range of CRS products and services").

180. Legislative Counsel Interview, *supra* note 33; ALD Interview, *supra* note 34.

181. ALD Interview, *supra* note 34.

182. *Id.*

183. *Id.*

184. *Id.*

are no potential legal issues that need to be addressed.¹⁸⁵ This continuous feedback from ALD and legislative counsel to other congressional staff ensures that the ideas are fully formed, that the language is properly drafted, and that potential judicial or statutory conflicts are considered.

Like CRS generally, ALD also provides formal memos or reports at the request of Congress and is directly accessible to congressional staff by phone or email to provide informal advice on minor issues or issues that need a quick resolution.¹⁸⁶ Any advice or reports created for members of Congress are strictly confidential unless a member of Congress decides to make the information public.¹⁸⁷ ALD attorneys' work is cumulative because the same issues frequently arise, and they keep records of every memo or report that they submit. In the committee staff interview for this Article, the staff said that they frequently look at previous ALD memos or reports before they talk to ALD; in this way, ALD attorneys affect legislation even when they are not contacted directly on a particular bill. Recent examples of the types of reports written by ALD include an analysis of proposed changes to criminal laws, an analysis of a recent Supreme Court case regarding civil rights, and broader reports like the status of current environmental law.¹⁸⁸ The ALD attorneys that the author interviewed also said that they regularly consult administrative-agency documents and that they consider administrative-law research to be one of the most important aspects of their work.¹⁸⁹

ALD's formal work product is subject to a rigorous peer-review process to minimize legal errors and partisan conclusions.¹⁹⁰ ALD attorneys prefer a long lead time to ensure every issue is fully vetted, but in interviews for this Article, they also reported being able to research and draft

185. *Id.*

186. See CRS Annual Report 2012, *supra* note 142, at 34–35 (explaining how CRS responds to requests from Congress).

187. Some have cried foul over the confidential nature of CRS's work, especially given the huge budget that it consumes. See, e.g., Williamson, *supra* note 135 (criticizing CRS decision requiring supervisor approval before giving CRS reports to “non-congressionals”). In response to this criticism, certain groups have tried to prod members of Congress to reveal CRS reports, with mixed success. See Open CRS, <http://opencrs.com/> (on file with the *Columbia Law Review*) (last visited Mar. 3, 2014) (creating database of available CRS reports).

188. Cong. Research Serv., American Law Division (ALD) (Apr. 2011) [hereinafter ALD Pamphlet] (on file with the *Columbia Law Review*). ALD publishes reports on virtually every area in which Congress legislates. For example, a list of subject areas and reports covered by ALD, provided by the office, includes Agriculture, Campaign Finance, Communications, Constitution, Criminal Law, Energy, Environment, Health, Intellectual Property, Lobbying, Military, Nuclear Energy, Procurement, Social Security, Terrorism, Tort Reform, and Trade. *Id.*

189. ALD Interview, *supra* note 34.

190. Peer review is common to CRS in general. CRS Annual Report 2012, *supra* note 142, at 25 (“Peer review, a necessary component of the professional writing process, is one of the central ways CRS ensures the breadth of perspective, objectivity, technical accuracy, nonpartisanship, and clear, concise writing in its work for Congress.”).

a report in one day without having to sacrifice quality, as long as they are not overwhelmed with rush requests, which rarely happens.¹⁹¹ For example, they were able to publish an analysis of the legal issues relating to Bush administration wiretapping very soon after the *New York Times* broke the story¹⁹²—responding before the Justice Department or any other agency. While much of ALD’s work is reactive, it is also proactive in searching out issues that Congress may want to consider or issues that are likely to become politically salient. For example, the office drafted a detailed report on the constitutional issues relating to indefinite detention of prisoners at Guantanamo Bay immediately after President Obama was elected, in anticipation of upcoming congressional movement on the issue.¹⁹³ ALD also issues reports on frequently arising legislative topics, which it regularly updates and distributes.¹⁹⁴

ALD is also constantly seeking ways to reach a broader congressional audience, and its latest development, in 2012, is an online product called Legal Sidebar. This tool provides daily legal analyses of issues relevant to the current legislative agenda.¹⁹⁵ In the last six months of 2012, over 200 original works by legislative attorneys were posted, covering seventy-two different topics.¹⁹⁶

There is no sharp dividing line between the expertise of legislative counsel and ALD. While attorneys in both groups have varying knowledge of important case law and current statutory law, attorneys in ALD are especially responsible for providing analysis of case law and constitutional issues, while legislative counsel are especially attuned to how laws fit in to the current statutory scheme.¹⁹⁷ ALD has many experts in constitutional issues and is acutely concerned with Supreme Court decisions. ALD attorneys also reported an awareness of lower-court decisions. For example, one attorney in the office has spent his entire career reviewing lower federal-court cases for potential issues of interest to Congress.¹⁹⁸ While legislative counsel also have a general awareness of

191. ALD Interview, *supra* note 34.

192. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, *N.Y. Times* (Dec. 16, 2005), <http://www.nytimes.com/2005/12/16/politics/16program.html> (on file with the *Columbia Law Review*).

193. Michael John Garcia et al., *Cong. Research Serv., R40139, Closing the Guantanamo Detention Center: Legal Issues* (2009), available at http://assets.opencrs.com/rpts/R40139_20090115.pdf (on file with the *Columbia Law Review*); ALD Interview, *supra* note 34.

194. For example, ALD publishes a comprehensive report on constitutional issues that it regularly updates according to recent cases, commonly known as the *Constitution Annotated*. *Cong. Research Serv., The Constitution of the United States of America: Analysis and Interpretation*, S. Doc. No. 112-9 (2013), available at <http://beta.congress.gov/content/conan/pdf/GPO-CONAN-2013.pdf> (on file with the *Columbia Law Review*).

195. CRS Annual Report 2012, *supra* note 142, at 26.

196. *Id.*

197. ALD Pamphlet, *supra* note 188.

198. ALD Interview, *supra* note 34.

important judicial decisions in their areas of expertise, they are less likely than ALD attorneys to do significant background research, especially regarding less-salient sources like lower-court decisions and administrative law.¹⁹⁹ ALD's role is to understand and inform Congress about the legal background in which it is legislating, something ALD is uniquely placed to do because it does not have to expend resources dealing with the details of the actual statutory language (which is the purview of legislative counsel).²⁰⁰

C. Congressional Committees

This section addresses congressional committees only briefly because committees are more prominently profiled in the political science and legal literature than the two groups described previously. The bulk of congressional staff consists of individual-member staff and committee staff. Individual-member staff work directly for an individual member of Congress and generally focus on the day-to-day operations of the office and constituent communications, with fewer staff having involvement in the drafting process.²⁰¹ Committee staff are more specialized than individual-member staff, working on substantive issues relating to the scope of their committees, including participating closely in the drafting process for bills within their substantive area.²⁰² The focus of this Article is on committee staff because they are the staff most relevant to drafting.

Historically, members of Congress were reluctant to rely too heavily on committee staff, with prominent senators fearing that overreliance on staff might be interpreted as an inability to do their jobs, or worse, create competition for their jobs from their staff.²⁰³ Because of this concern, committee staff remained small in number and influence throughout the first half of the twentieth century. In 1935, House committees employed only 122 staff; Senate committees employed 172.²⁰⁴ Eventually the frustra-

199. *Id.*

200. *Id.*

201. Legislative Counsel Interview, *supra* note 33.

202. *Id.*

203. Senator Robert C. Byrd expressed the concern of congresspersons that hiring too many staff would make it look like they were unable "to carry traditional legislative burdens." 1 Robert C. Byrd, *The Senate, 1789–1989: Addresses on the History of the United States Senate* 538 (1988); cf. Richard Allan Baker, *The Senate of the United States: A Bicentennial History 89–90* (1988) (expressing concern of senior congresspersons over creation of political class capable of competing for their jobs). William L. Morrow gave this explanation in his book about the evolution of congressional committees in the late 1960s: "Legislators were considered more erudite than most citizens and they believed any suggestion for staff assistance might be interpreted as a lack of confidence in their ability to master their jobs." William L. Morrow, *Congressional Committees* 52 (1969). Staff initially provided only clerical assistance while the substantive work was left to the congressperson. See, e.g., Harrison W. Fox, Jr. & Susan Webb Hammond, *Congressional Staffs: The Invisible Force in American Lawmaking* 15 (1977).

204. See *infra* Table 3 (tracking number of congressional committee staff over time).

tion with the workload seems to have surpassed members' concerns, and Congress passed the Legislative Reorganization Act of 1946.²⁰⁵ This was a first step in the creation of the modern Congress because it increased the power of committees, most importantly by expanding staff levels.²⁰⁶

Even more dramatic changes came in the wake of the Legislative Reorganization Act of 1970. As illustrated by Table 3 below, House standing committee staff nearly tripled in size from 1970 to 1980, while Senate staff nearly doubled. This expansion continued throughout the 1980s when staff levels increased to a total of around 3,000 before tailing off after the Republican takeover of Congress in the 1990s.²⁰⁷ Staff levels remain high compared to historic numbers, with 2,237 committee staff as of 2009, more than a 500% increase over 1935 staffing levels.

TABLE 3: HOUSE AND SENATE COMMITTEE STAFFING²⁰⁸

Year	Number of Committee Staff	
	House	Senate
1935	122	172
1947	167	232
1950	246	300
1955	329	386
1960	440	470
1965	571	509
1970	702	635

205. Pub. L. No. 79-601, 60 Stat. 812.

206. George B. Galloway, *The Operation of the Legislative Reorganization Act of 1946*, 45 *Am. Pol. Sci. Rev.* 41, 54 (1951).

207. In 1995, Republicans revised House rules to restructure the operations of committees. They directed that all committee staff be cut by one-third and reduced the reliance on subcommittees. See *Contract with America: A Bill of Accountability*, H.R. Res. 6, 104th Cong. (1995).

208. Norman J. Ornstein, Thomas E. Mann, Michael J. Malbin & Andrew Rugg, *Vital Statistics on Congress 172 tbl.5-5* (2013), available at <http://www.brookings.edu/~media/Research/Files/Reports/2013/07/vital%20statistics%20congress%20mann%20ornstein/Vital%20Statistics%20Full%20Data%20Set.pdf> (on file with the *Columbia Law Review*). Many of the most important committees increased by even larger numbers. For example, between the 91st Congress (1969 to 1970) and the 97th Congress (1981 to 1982), the House Foreign Affairs Committee increased from twenty staff to eighty-four staff, and the House Ways and Means Committee went from twenty-one staff to seventy-nine staff. See *Staff of J. Comm. on Printing, 97th Cong., Official Cong. Directory* 290–91, 312–13 (1981) [hereinafter *1981 Congressional Directory*]; *Staff of J. Comm. on Printing, 91st Cong., Official Cong. Directory* 277, 280 (1970). During the same period on the Senate side, the Appropriations Committee staff increased from thirty-eight to seventy-five, and the Judiciary Committee staff went from twelve to twenty-eight. See *id.* at 259, 261; *1981 Congressional Directory, supra*, at 249–50, 262.

Year	Number of Committee Staff	
	House	Senate
1975	1,460	1,277
1980	1,917	1,191
1985	2,009	1,080
1990	1,993	1,090
1995	1,246	732
2000	1,176	762
2005	1,272	887
2009	1,324	913

Another important change in the way Congress operates compared to the mid-1900s is the specialization of committee staff.²⁰⁹ Increased staffing has allowed for increased specialization within committees so that a staff member now may work only on patent statutes or certain kinds of tax statutes, whereas before he or she would have been responsible for a broader set of statutes.²¹⁰

Turnover is much higher for committee staff than for legislative counsel and ALD attorneys.²¹¹ Many politically affiliated congressional staff positions serve as stepping stones to other opportunities rather than places to make a career.²¹² Also, because committee staff are generally politically affiliated, when one party loses control of a house of Congress many staff are forced out of their jobs, although some remain as minority staff.²¹³ Committee staff are also generally attached to a particular mem-

209. See Gluck & Bressman, Part I, *supra* note 7, at 947 (suggesting survey results support “idea that canon knowledge is subject-area specific, and thus perhaps congressional-committee specific”).

210. Barbara Sinclair, *An Effective Congress and Effective Members: What Does It Take?*, 29 *PS: Pol. Sci. & Pol.* 435, 438 (1996) (“To some extent, senators can substitute staff expertise for personal expertise, and in both chambers the increase in staff has made it possible for members to involve themselves effectively in more issues than used to be possible.”).

211. See *supra* notes 77–79 and accompanying text (discussing low turnover for legislative counsel); *supra* notes 160–163 and accompanying text (highlighting low turnover for ALD attorneys); *infra* notes 212–213 and accompanying text (noting higher turnover for committee staff).

212. See *supra* note 78 (pointing out high turnover of congressional staff); see also T.W. Farnam, *Revolving Door of Employment Between Congress, Lobbying Firms, Study Shows*, *Wash. Post* (Sept. 13, 2011), http://www.washingtonpost.com/politics/study-shows-revolving-door-of-employment-between-congress-lobbying-firms/2011/09/12/gIQAxPYROK_story.html (on file with the *Columbia Law Review*) (“Nearly 5,400 former congressional staffers have left Capitol Hill to become federal lobbyists in the past 10 years . . .”).

213. Lee Drutman, *Turnover in the House: Who Keeps—and Who Loses—the Most Staff*, *Sunlight Found.* (Feb. 6, 2012, 12:01 AM), <http://sunlightfoundation.com/blog/2012/02/06/turnover-in-the-house/> (on file with the *Columbia Law Review*) (noting “[committee] staff are generally partisan” and predicting “higher rates of turnover on

ber of Congress,²¹⁴ so if their member loses an election, they are no longer guaranteed jobs even if their party is in the majority. Committee staff are also subject to Congress's budgetary whims. After the increases in congressional staffing that occurred through the 1970s, numbers of committee staff have fluctuated up and down significantly.²¹⁵ All of these factors lead to very high turnover. For example, all except for two House committees had staff retention rates below 60% in the period between 2009 and 2011, a period in which control of the House passed from Democrats to Republicans.²¹⁶

The political nature of committee and individual-member staff positions makes it difficult for these staff to focus on the technical language of statutes. The initial hope of some members of Congress in drafting the Legislative Reorganization Act of 1946 was that the increase in committee staff would serve nonpartisan ends.²¹⁷ Of course, this did not happen.²¹⁸ Staffers increasingly view issues through the prism of politics given Congress's increasing polarization,²¹⁹ which naturally makes them skeptical of opposing sides' proposed textual changes. One committee staffer reported that both sides are more willing to accept changes when they are proposed by legislative counsel, saying that "nine times out of ten" they would accept suggestions from legislative counsel even if the language was already considered closed.²²⁰ There is an understandable skepticism of changes to statutory language, so having a neutral arbiter facilitates the clarifying process.²²¹ It is likely that in the era before legislative counsel and ALD took a prominent role in the drafting and research process, politically affiliated congressional staff were more likely to allow ambiguous language into a statute to avoid the political nego-

committees, since the majority turned over from Democrats to Republicans in January 2011, and the majority party typically gets two-thirds of the staff on House committees").

214. Working on Capitol Hill, *supra* note 160, at 5 ("Committee counsel are commonly hired by and work for particular committee members. Most are hired by the chair of the committee . . . for the majority side and the ranking member (leader of the minority party on the committee) for the minority side.").

215. See *supra* Table 3 (tracking number of committee staff over time).

216. Drutman, *supra* note 213.

217. See Fox & Hammond, *supra* note 203, at 20–22 (describing debates over Act and focus on need for efficient, competent office staff).

218. See *id.* at 152–53 (describing staff's role in furthering their member's interests, not those of public or Congress in general); Michael J. Malbin, *Unelected Representatives* 12 (1980) (noting control committee chairs exert over committee staff).

219. See Richard L. Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 *S. Cal. L. Rev.* 205, 233–37 (2013) (presenting data on increased political polarization of Congress).

220. Committee Staff Interview, *supra* note 32.

221. For an example of this argument presented by the current Deputy Legislative Counsel of the House, see M. Douglass Bellis, *Drafting in the U.S. Congress*, 22 *Statute L. Rev.* 38, 42–44 (2001) ("Another function of the legislative drafter in the United States is to provide a sort of neutral mediation service among the various political factions.").

tiation that would have been required to amend language, even if just for clarifying purposes.

D. Lobbyists

The rise of lobbying is difficult to quantify. This is partly because lobbyist registration is notoriously uncertain and changes in law have reduced the number of lobbyists choosing to register.²²² It is also difficult to quantify because there is little historical data on spending on lobbying, likely due to the fact that lobbyist reporting has only recently become required and what exactly qualifies as lobbying is difficult to ascertain.²²³ Recent reports show that spending on lobbying has more than doubled in the last fifteen years, from \$1.45 billion in 1998 to \$3.3 billion in 2012.²²⁴ Long-serving committee staff and legislative counsel anecdotally report that lobbyist involvement in the drafting process has increased significantly over the last twenty years.²²⁵ Independent lobbying firms, along with prominent D.C. law firms and think tanks, now play an active role in lobbying Congress, including creating first drafts of entire statutes for members of Congress. Although difficult to quantify, there has clearly been a rise in involvement by private-sector third parties in the drafting process.

Legislative counsel and committee staff offered qualified praise for the role that lobbyists play in bringing clarity to legislative language.²²⁶

222. See 1 CQ Press, *Guide to Congress* 836–37 (7th ed. 2013) (noting many who seek to influence Congress do not fit legal definition of “lobbyist”).

223. Modern lobbyist reporting began with the Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 (codified as amended in scattered sections of 2, 5, 18, and 22 U.S.C.). This law was created because at that time existing lobbying disclosure statutes were “ineffective because of unclear statutory language, weak administrative and enforcement provisions, and an absence of clear guidance as to who is required to register and what they are required to disclose” *Id.* § 2, 109 Stat. at 691. This Act was subsequently updated by the Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735 (codified in scattered sections of 2, 18, 22, and 25 U.S.C.).

224. See Ctr. for Responsive Politics, Lobbying Database, OpenSecrets.org, <http://www.opensecrets.org/lobby/index.php> (on file with the *Columbia Law Review*) (last visited Mar. 9, 2014) (collecting data on spending on lobbying). The Center for Responsive Politics, a nonprofit organization that tracks lobbying in Congress, uses documents from the Senate Office of Public Records, see *id.*, which is the office responsible for compiling and making available data collected under the reporting requirements of the Lobbying Disclosure Act of 1995. See LDA Reports, U.S. Senate, https://www.senate.gov/legislative/Public_Disclosure/LDA_reports.htm (on file with the *Columbia Law Review*) (last visited Mar. 9, 2014).

225. Committee Staff Interview, *supra* note 32; Legislative Counsel Interview, *supra* note 33.

226. Committee Staff Interview, *supra* note 32 (highlighting helpful role and different perspective of lobbyists); Legislative Counsel Interview, *supra* note 33 (reporting counsel find lobbyists helpful resource with good idea of what they want bill to do); see also Nourse & Schacter, *supra* note 7, at 583 (reporting staff they interviewed “generally thought that lobbyists provided valuable information and that the risks could be addressed with appropriate safeguards”).

Legislative counsel and committee staff acknowledged that even the considerable number of professional staff in the modern Congress is not enough to recognize and resolve every potential issue in a bill and that lobbyists often provide a different perspective on how a law will be applied.²²⁷ Lobbyists supplement the work of committee staff, legislative counsel, and ALD attorneys by offering detailed analysis of potential legislation, including potential ambiguities or unforeseen results.²²⁸ Legislative counsel may work directly with lobbyists to ensure that the statutory language accurately reflects the intended policy, but they do not speak to lobbyists without a staff member present in order to ensure that the member of Congress is aware of exactly what the lobbyist is proposing.²²⁹

Legislative counsel report that lobbyists are often able to clearly articulate their policy goals in a way that individual members of Congress and their staff often cannot, thereby allowing drafters to create clearer and more comprehensive statutes.²³⁰ Lobbyists also notify drafters of potential areas of legislative need, including significant judicial decisions that Congress may want to respond to.²³¹ Lobbyists can also offer technical reports and potential witnesses for congressional hearings.²³² Lobbyists have unique knowledge of how statutes will affect their clients and the resources to closely follow how court cases affect statutes.²³³ They have a strong incentive to avoid ambiguous language if at all possible, because their clients are the ones who will pay a high price to litigate the language and likely a higher price if they lose.

Legislative counsel said that in recent years it has become much more common for lobbyists, especially big law firms, to present drafts of a potential bill or amendment to a bill.²³⁴ Committee staff said that they do not uncritically accept a lobbyist's draft but instead use it as a starting

227. Committee Staff Interview, *supra* note 32; Legislative Counsel Interview, *supra* note 33.

228. See 1 CQ Press, *supra* note 222, at 840 (noting lobbyists will alert legislators to negative consequences of legislation).

229. Legislative Counsel Interview, *supra* note 33.

230. *Id.*

231. *Id.*

232. See 1 CQ Press, *supra* note 222, at 841 (“A thorough lobbyist provides extensive background and technical information on the issue of interest . . .”). The creation of sunshine laws and rules opened up the legislative process to the public and lobbyists and thus allowed lobbyists to closely monitor and provide input at each stage of the drafting process. *Cf. id.* (noting “sunshine laws and rules opened markup sessions, hearings, and conferences to the public”).

233. See Nourse & Schacter, *supra* note 7, at 611 (“Lobbyists are the closest to the people who will be affected by the bill . . .”); Committee Staff Interview, *supra* note 32; Legislative Counsel Interview, *supra* note 33.

234. Legislative Counsel Interview, *supra* note 33; see also Eric Lipton & Ben Protess, Banks’ Lobbyists Help in Drafting Financial Bills, *N.Y. Times: Dealbook* (May 23, 2013, 9:44 PM), <http://dealbook.nytimes.com/2013/05/23/banks-lobbyists-help-in-drafting-financial-bills/> (on file with the *Columbia Law Review*) (describing role lobbyists play in drafting and amending statutory language).

point and almost always pass these lobbyist bills on to legislative counsel, who refine the language and bring potential issues to light. While legislative counsel report generally positive interactions with lobbyists, they noted that lobbyists are not always particularly good statutory drafters.²³⁵ Lobbyists know what they want but do not always know how to express it in appropriate and clear statutory language. However, the fact that in many instances lobbyists are able to articulate their goals and purposes for particular legislation in a clearer way than many congressional staff enables legislative counsel to draft clearer language. This contribution means that even when lobbyists are present, professional drafters play an important role in implementing a lobbyist's expertise through precise and effective statutory language. Legislative counsel can provide an unbiased review of, and elucidate potential issues raised by, lobbyists' proposals. In this way, legislative counsel serve as an important check on lobbyists.²³⁶

Interviewed committee staff did not seem to be concerned about lobbyists having undue influence on the statutory-drafting process.²³⁷ According to these staff, lobbyists build their reputations by providing accurate and thorough information, and those lobbyists who try to deceive or exaggerate bear the risk of being discovered and suffering great reputational harm.²³⁸ There are many arguments that can be made against the effects of the dramatic growth of the lobbying industry; when it comes to drafting unambiguous statutes, however, those involved in the drafting process acknowledged that lobbyists do more good than harm. This increased role of lobbyists adds to the recent trend of increased expertise and professionalism involved in statutory drafting.

E. *Summary: The Evolution of Drafting*

This Part has described an evolution in statutory drafting. As Table 3 shows, the number of congressional committee staff increased dramatically in the 1970s and has fluctuated in the decades since, with numbers dropping significantly after the Republican takeover of Congress in the 1990s, and with smaller fluctuations up and down thereafter.²³⁹ The number of legislative counsel, however, has consistently increased over the last three decades, with the total number of House and Senate legislative

235. See Legislative Counsel Interview, *supra* note 33 (explaining counsel view that lobbyists do not always understand scale of project or how bill interacts with current law).

236. See *id.* (highlighting how legislative counsel view themselves as unbiased line of protection against lobbyists).

237. Committee Staff Interview, *supra* note 32.

238. *Id.* A former member of Congress put it best: "The greatest mistake a lobbyist can make is to mislead a member of Congress." 1 CQ Press, *supra* note 222, at 812 (quoting Rep. Charles O. Whitley).

239. See *supra* Table 3 (tracing change in number of House and Senate staff since 1935).

counsel nearly tripling over that period.²⁴⁰ This implies that legislative counsel's breadth and depth of influence on statutory drafting has increased significantly over the last few decades, and there is good reason to believe that statutory quality has increased along with this increase in legislative-counsel involvement, as reflected in the changes in statutes illustrated in Table 2.²⁴¹ Further, research support has improved with the rise of ALD. Overall, the professionalism and sophistication of drafting has improved.

The increased sophistication with which legislation is drafted affects not only current legislation but also future legislation. Legislation is cumulative. Congress does not rewrite the entire United States Code; it simply adds onto (and takes away from) the existing Code. Although each Congress creates entirely new programs, much of what happens is a refinement, meaning that each year's Code is likely an improvement in terms of precision and comprehensiveness. All of those interviewed who were involved in the drafting process agreed that, except for the rare situation when a bill is completely different from any other bill ever drafted, no one writes a bill from scratch; they search previous bills and then use the same structure, wording, and definitions from previous law. So even in the unusual case where legislative counsel and CRS are not consulted by members of Congress on a particular bill, the model that congressional staff or lobbyists will use is a previous bill that legislative counsel and CRS likely had a hand in improving if it was drafted or amended recently. Therefore, as statutes become more refined and unambiguous, so will future legislation and the Code generally.

While the drafting process is constantly evolving, there is a trend toward a more consistent, expert, and thorough process that began with the Legislative Reorganization Act of 1946, accelerated with the Legislative Reorganization Act of 1970, and continues today. Congress today hires large groups of nonpartisan experts to conduct research; it uses specialized political staff to deal with the political issues of creating statutes; and it uses neutral professional drafters to rigorously develop clear statutory language and to ensure the statute is of the proper scope and is consistent with the overall statutory scheme. These structural changes in Congress have allowed for a much more sophisticated process and more deliberation to go into each statute. Congress has created huge institutional capacity to research and draft effective statutes, yet it has done so mostly outside the recognition of legal academics. Congress is a much more robust and capable place than it was even twenty years ago, and the remainder of this Article will consider what these changes in

240. See *supra* Table 1 (tracing change in number of House and Senate legislative counsel since 1975).

241. See *supra* Table 2 (noting increases in page length and number of definition and exception sections in Statutes at Large, which is used as proxy for increased sophistication of drafting).

Congress mean for many of the foundational debates in statutory interpretation.

II. INTERTEMPORAL STATUTORY INTERPRETATION AND TEXTUALISM

The discussion in Part I has important implications for describing why judges approach interpretation the way that they do and how they should interpret statutes, which will be the focus of Parts II and III. This Part describes these implications in two subsections. The first explains how the modernization of Congress correlates with the rise of textualism, something that this Article argues was not mere coincidence. The second provides an introduction to the idea of “intertemporal statutory interpretation,” an approach to interpretation that argues that the evolution of congressional drafting toward a more professionalized process should affect how judges approach the interpretation of modern statutes as compared to statutes from prior eras. The balance of this Article expands on this idea by considering how the use of various interpretive tools could be affected by the evolution of the drafting process.

A word of caution: The discussion in Part I does not allow for definitive answers—each statute is unique and Congress has the ability to choose any method it wants when drafting a statute, including not using professional researchers or drafters at all (even if that is much less likely to be true in recent decades). While it may be possible in many instances to tell which groups were involved in drafting a statutory provision, in other instances it is impossible to know based on information available to courts, or the information to make the determination would require significant resources to obtain and interpret. This is why it is useful to explore trends in the process more generally, and the resulting understanding can prove useful to judges when determining how to approach interpretation, as Parts II and III show.

A. *The Rise of Textualism and the Evolution of Statutory Drafting*

An enhanced understanding of the evolving legislative-drafting process provides a novel explanation for the evolution of judicial interpretive behavior. There has been a generally acknowledged trend toward textualist interpretation in the Supreme Court and other courts over the last fifty years.²⁴² In recent years, the Court has become more likely to

242. See, e.g., Easterbrook, *supra* note 21, at 67 (noting shift away from intent-driven interpretation and toward textualist interpretation); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 *Colum. L. Rev.* 1, 43 (2006) (“[W]e are all textualists in an important sense.”); Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 *B.U. L. Rev.* 1023, 1057 (1998) (“[W]e are all textualists now.”). This does not mean, of course, that significant variance in the application of nontextual methods does not exist. See David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 *Wm. & Mary L. Rev.* 1653, 1659 (2010) (“[T]he propensity of

narrow its interpretive focus to analyzing individual statutory terms rather than using a broad contextual analysis.²⁴³ This initial shift toward textualism became most acutely apparent beginning in the 1980s, although it accelerated through the 1990s.²⁴⁴ When attempting to answer the question of why this change has occurred, scholars have focused on the internal operations and ideological makeup of courts and especially the ideology of Justices of the Supreme Court. The commonly held supposition is that influential textualists, primarily Justice Scalia, are responsible for this shift.²⁴⁵ The literature almost entirely ignores other factors.²⁴⁶

Justices to cite legislative history is significantly correlated with the ideology of the Justices themselves . . .”).

243. See Gluck & Bressman, Part II, *supra* note 7 (manuscript at 55 n.225) (citing cases focused on individual statutory terms from 2013 Supreme Court term); see also James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 *Wm. & Mary L. Rev.* 483, 495–96 (2013) (describing Court's increased practice of using dictionary definitions of specific statutory terms).

244. See, e.g., Zeppos, *Empirical Analysis*, *supra* note 20, at 1105 (showing use of nontextual sources increased regularly until 1980s, when it suffered dramatic drop to levels not seen since 1930s).

245. See, e.g., Eskridge, *Dynamic*, *supra* note 10, at 227 fig.7.2 (comparing use of legislative history and plain meaning to interpret statutes from 1986 through 1991 and concluding Court has become more likely to use textualist methods since appointment of Justice Scalia); James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 *Judicature* 220, 229 (2006) (“Justice Scalia has played an important role in the Court's declining use of this resource—both through high profile resistance and criticism expressed in his own opinions, and through the influence he seems to have had on the writings of his colleagues.”); James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 *Berkeley J. Emp. & Lab. L.* 117, 122 (2008) (discussing effects of Justice Scalia's opposition to legislative history on Court colleagues); Gluck & Bressman, Part II, *supra* note 7 (manuscript at 55) (“We attribute this shared premise to Justice Scalia's influence: textualism has been remarkably successful in narrowing the terms of the interpretive debate to this narrow question . . .”); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 *Harv. J. on Legis.* 369, 386–87 (1999) (identifying decline in use of legislative history since Justice Scalia's appointment to Court).

246. See, e.g., Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 *Duke L.J.* 1895, 1904–07 (2009) (urging scholars to design empirical studies considering factors other than politics); Mark Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 *Am. Pol. Sci. Rev.* 305, 305 (2002) (noting “[s]cholars have marshaled impressive evidence that the justices and lower court judges seek to advance their own policy preferences” but “lost in these developments is . . . jurisprudence”); Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 *B.C. L. Rev.* 685, 687–89 (2009) (“The judicial politics field was born in a congeries of false beliefs, and those false beliefs warped its orientation and development.”).

While ideology undoubtedly played a role in expanding the application of textualist methodologies over the last thirty years, this Article provides a supplementary explanation for this expansion: Textualism rose in prominence during this era because statutes became clearer and more detailed due to Congress's increased institutional capacity. Even judges who are willing to use purposivist modes of interpretation are rarely willing to go beyond the meaning the words will bear.²⁴⁷ Therefore, as statutes become clearer and the words able to bear fewer plausible interpretations, judges of all stripes are more likely to be constrained by the text, and therefore appear to be more textualist.

The failure to make this connection between the evolution of the operations of Congress and the evolution of interpretive methodology is perhaps unsurprising given the general lack of understanding of the congressional process noted throughout this Article. It is, however, an important connection to make, because the trend toward textualism did not arise inside a vacuum. It arose at precisely the time that Congress began to improve its legislative-drafting process, a connection that is unlikely mere coincidence.

While textualism is generally acknowledged to have made significant inroads with judges of all types,²⁴⁸ textualism in its strongest form has never taken hold beyond a few judges,²⁴⁹ and interpretation methods continue to be confoundingly variable. This Article's perspective on drafting also provides potential explanations for why this variability is so. First, because Congress, even with its increased drafting capacity, is unable to continually rewrite the Code, many poorly drafted statutes remain on the books and will for many years to come. Second, while there may be a trend toward improved drafting, the process continues to be imperfect, and always will be, given the potential for human error and the pressures of legislating in a politically contentious group. So while the general rise in textualist interpretation is in line with increased institutional capacity in Congress, these findings are also consistent with the fact that most judges continue to see poorly drafted statutes with some

247. Aharon Barak, *Purposive Interpretation in Law* 20 (2010) ("Constitutional considerations of democracy, rule of law, and separation of powers bar judges from conferring on the language of a statute a meaning that it cannot bear."); Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1375 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) ("The proposition that a court ought never to give the words of a statute a meaning they will not bear is a corollary of the proposition[] that courts are bound to respect the constitutional position of the legislature . . .").

248. See *supra* notes 242–244 and accompanying text (discussing increased use of textualism over last fifty years).

249. See John F. Manning, *Second-Generation Textualism*, 98 *Calif. L. Rev.* 1287, 1307 (2010) (describing equilibrium reached by Supreme Court whereby justices pay close attention to text but are unwilling to exclude use of legislative history).

regularity, which could explain why almost all judges resist applying textualism dogmatically.²⁵⁰

Statutory interpretation is by its nature a reactive exercise. Courts must take the text at hand and respond to it in a way that gives effect to the language, whether through textual or extratextual sources. Statutes are clearer today than they ever have been, and therefore they are more likely to warrant textualist-style interpretation. But there is still a large degree of variability in statutes depending on when they were written and who drafted them. Indeed, differentiating between clear and unclear statutes has become a judge's main job in the statutory-interpretation realm. That is why a judge may rightly appear to be a textualist when interpreting certain statutes and a purposivist when interpreting others. This shows that judges may not be as incoherent in their use of statutory-interpretation methodology as many scholars believe²⁵¹ and that the continued variability in interpretation methods is at least in part describable by changes in Congress. Scholars have failed to recognize that textualism did not arise solely as the result of a few outspoken members of the judiciary because they have not perceived the incremental changes in Congress's institutional capacity and the resulting statutory product.

B. *Intertemporal Statutory Interpretation*

While the previous section gave a descriptive explanation of how congressional process may interact with statutory interpretation, this section introduces the idea that changes in the process by which statutes are drafted should normatively affect how they are interpreted. This section describes a type of interpretation that this Article terms "intertemporal statutory interpretation," which takes into account, when deciding how to interpret a statute, the context in which the statute was written. Because this context has changed significantly over the last forty years, courts should be cognizant of when a statute was written when determining which interpretive methods to apply. While intertemporal statutory interpretation does not provide perfect answers given Congress's continually evolving drafting process, it accounts for institutional realities in a way that goes beyond previous scholarly work, allowing for a more pragmatic application of the variously available interpretive tools in a way that matches up with the evolution of drafting and interpretation.

Intertemporal statutory interpretation is a practical explanation of how interpretation should be done based on the empirical reality of how statutory drafting has evolved. While scholars have acknowledged that subsequent changes in societal circumstances may require judges to

250. *Id.*

251. See *infra* note 323 and accompanying text (describing common criticisms of statutory-interpretation methods that use legislative history).

approach interpretation differently,²⁵² they have failed to apply this same logic to changes in Congress. As this Article has shown, Congress also evolves, and the quality of statutory drafting evolves along with it. A static mode of interpretation is unable to capture the nuance of changes in Congress's institutional capabilities, and this Article therefore expresses skepticism about the recent calls from prominent scholars in favor of creating stable methods of statutory interpretation.²⁵³ Scholars and judges should acknowledge that one method will never be the single "best" method for all circumstances and that what is appropriate for one era might be less appropriate for another.

When viewed from the perspective of intertemporal statutory interpretation, it is puzzling that judges and legislation scholars continue to argue over century-old Supreme Court statutory-interpretation decisions like *Holy Trinity Church v. United States*,²⁵⁴ which is used as the prototypical example of a court relying on the intent of a statute rather than its text.²⁵⁵ *Holy Trinity* was decided in 1892, during an era in which congressional drafting was still in its relative infancy and statutes were brief and perfunctory. While today's textualists view *Holy Trinity* as a terrible judicial usurpation of legislative power,²⁵⁶ it is likely that the Justices who decided the case were merely responding to the statutory cues that they received from Congress. Put plainly, the statute at issue in *Holy Trinity* was ambiguously drafted in a way that would be unimaginable in the modern Congress. One need only compare the loose and vague language in the contested immigration statute to modern immigration law to see the different types of interpretation that they would require.²⁵⁷

The remainder of this Article frequently refers to the idea of a "modern" statute. Although the Legislative Reorganization Act of 1970 set the stage for the modern Congress, the modernization did not happen overnight, but instead was a gradual process of increased staffing

252. Cf. *infra* note 331 and accompanying text (explaining changes in society lead to gaps and ambiguities in statutes).

253. See, e.g., Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 *Geo. L.J.* 1863, 1884–99 (2008) (arguing stare decisis should be accorded to methods of statutory interpretation); Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 *Yale L.J.* 1898, 1905 (2011) (arguing federal courts should treat state statutory-interpretation methodology as "law").

254. 143 U.S. 457 (1892).

255. See *infra* Part III.B.2 for further discussion of this case.

256. Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 *Stan. L. Rev.* 1833, 1837–39 (1998) (providing negative view of decision in *Holy Trinity* and of legislative history as interpretative source).

257. Chapter 12 of title 8 of the U.S. Code contains the modern laws relating to immigration and nationality. 8 U.S.C. §§ 1101–1537 (2012). This 480-page chapter contains over thirteen pages of detailed definitions. *Id.* § 1101.

and sophistication.²⁵⁸ While the definition of “modern” could more accurately be made along a continuum from the 1970s through the 2000s, for purposes of this Article, a “modern” statute is one that was drafted in the late 1990s or later, which is the period in which, among other things, the Offices of the Legislative Counsel became more fully staffed and congressional drafting therefore likely reached a reliably high level of institutional competency.

The application of intertemporal statutory interpretation is best demonstrated in the context of specific interpretive methods. The following section and Part III provide further elaboration and support for why considering the era in which a statute was drafted can improve interpretation and how it could be applied in various interpretive situations based on the findings of this Article.

C. *Intertemporal Statutory Interpretation and Judicial Doctrines*

This section provides a first look at how intertemporal statutory interpretation could be applied to a number of judicial doctrines that courts use as an important and influential part of their interpretive process. Examples abound of the Supreme Court imputing sophisticated and detailed knowledge to Congress. For example, the Court recently stated that “[w]e normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent.”²⁵⁹ Congress is also expected to have knowledge of common law principles,²⁶⁰ administrative interpretation,²⁶¹ and detailed facts of current events in a broad variety of areas.²⁶²

258. See *supra* Tables 1–3 (tracing increase in staff for congressional committees and Offices of the Legislative Counsel, and increased number of definition and exception sections in laws).

259. *Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1795 (2010). Numerous examples exist in just the last few years where the Court has claimed that Congress must have been aware of one of its decisions. See, e.g., *Milner v. Dep’t of Navy*, 131 S. Ct. 1259, 1274 (2011) (Breyer, J., dissenting) (“Congress, moreover, well aware of *Crooker*, left Exemption 2, 5 U.S.C. § 552(b)(2), untouched . . .”); *Holland v. Florida*, 130 S. Ct. 2549, 2561 (2010) (“Congress enacted AEDPA after *Irwin* and therefore was likely aware that courts, when interpreting AEDPA’s timing provisions, would apply the presumption.”); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1626 (2010) (Scalia, J., concurring in part and concurring in the judgment) (noting “it may be reasonable to assume that Congress was aware of those holdings, took them to be correct, and intended the same meaning in adopting that text” but asserting assumption unreasonable in this case); *Mac’s Shell Serv., Inc. v. Shell Oil Prods. Co.*, 130 S. Ct. 1251, 1259 (2010) (“At the time when it enacted the statute, Congress presumably was aware of how courts applied the doctrine of constructive termination in these analogous legal contexts.”); *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2492 (2009) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.” (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978))).

260. *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 108 (1991).

261. *Lorillard*, 434 U.S. at 580–81.

In addition to assumptions regarding substantive knowledge of the law, the Court also assumes that Congress understands the Court's different methods of statutory interpretation, including textual and substantive canons of construction.²⁶³ Courts seem to assume either that Congress is aware of these doctrines or that these doctrines reflect Congress's drafting procedure. This Part briefly tests the assumptions behind some of these judicial doctrines in light of intertemporal statutory interpretation, providing novel insight into how the doctrines should be applied.

1. *Interpretation in Light of Other Statutes.* — When interpreting a statute, courts commonly reference other similar types of legislation in an effort to clarify ambiguous language.²⁶⁴ A first approach that courts take is to refer to other statutes that use the same or similar terminology or address similar issues. In *Lorillard v. Pons*, the Supreme Court said that when “Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.”²⁶⁵ As Part I demonstrated, legislative drafters commonly use earlier statutes as a precedent when drafting, and modern drafters, along with CRS, frequently research prior judicial interpretation and apply it when drafting statutes.²⁶⁶ It is therefore appropriate, and likely anticipated, for a court to use the interpretation of a similar prior statute to help interpret a modern statute.

Consistent with intertemporal statutory interpretation, unless there is evidence to indicate otherwise, courts should be skeptical when applying this doctrine to older statutes because the drafting procedure that created those statutes was much less likely to account for previous judicial

262. *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 337 n.7 (2008) (Ginsburg, J., dissenting) (“If Congress intended such a result, its failure even to hint at it is spectacularly odd, particularly since Members of both Houses were acutely aware of ongoing product liability litigation.” (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 491 (1996)) (internal quotation marks omitted)); *United States v. Booker*, 543 U.S. 220, 287 n.10 (2005) (Stevens, J., dissenting in part) (“[T]he fact that Congress is presumably aware of the Government’s practices in light of *Apprendi*, yet has not condemned the practices or taken any actions to reform them, indicates that limited jury factfinding is, contrary to the majority’s assertion, compatible with the legislative intent.”).

263. See *supra* note 7 and accompanying text (discussing drafters’ understanding of judicial canons).

264. See *United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988) (“Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear”); see also *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 88–92 (1991) (interpreting one statute authorizing prevailing parties to recover attorney’s fees by examining text of other such statutes), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, as recognized in *Langraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994).

265. 434 U.S. at 581.

266. See *supra* Part I.E (summarizing development and improvement of drafting process).

interpretation of similar statutes, a task that requires significant time and expertise on the part of the drafter. However, even when used to interpret modern statutes, this doctrine should have limits. Because drafters specialize within certain substantive areas of law, they are less likely to be familiar with interpretations of similar statutes in areas outside of their expertise. Courts should therefore be skeptical when applying this doctrine when the similar statutes are not within the same substantive area of law.²⁶⁷

A related judicial doctrine arises when two statutes conflict and the more recent statute does not expressly provide that it controls. Courts have created a rule against implied repeals in this circumstance.²⁶⁸ The use of this doctrine has been criticized for assuming an unrealistic legislative omniscience.²⁶⁹ This criticism is well founded in the context of older statutes written in an era in which congressional drafting was less likely to account for prior statutes. This doctrine, however, is realistic as applied to modern statutes because legislative drafters and other congressional staff focus directly on how other statutes will be affected by a proposed bill.²⁷⁰ For that reason, if a modern statute is intended to overturn prior legislation, it is more likely to explicitly do so.

2. *The Whole Act Rule.* — The “whole act” rule, which the Supreme Court applies frequently, states that each part of a statute should be interpreted in light of the other parts of that statute.²⁷¹ The key assumption of this rule is statutory coherence. Courts assume that a statute is drafted so that the language used is internally consistent and that the various parts of the statutes were written in a way such that they do not conflict.²⁷²

267. It may also be possible, although less likely, that a new statute that uses borrowed language embodies policies or compromises different from those in the earlier statutes. Professional drafters would likely be aware of any such differences and strive to draft the statute in a way that distinguishes the new statute from the old where appropriate.

268. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (ruling, absent affirmative statement from Congress, Equal Employment Opportunity Act of 1972 did not reverse portions of Indian Reorganization Act of 1934 that grant hiring preferences to Native Americans in Bureau of Indian Affairs).

269. Eskridge, Frickey & Garrett, *supra* note 19, at 1088.

270. See *supra* Part I (delineating drafting process).

271. See, e.g., *Doe v. Chao*, 540 U.S. 614, 620 (2004) (interpreting statutory provision by looking to immediately preceding provision); *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974) (“When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute” (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1857) (internal quotation marks omitted))); *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805) (noting whole act should be “critically examined”).

272. See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 654 (2007) (Ginsburg, J., dissenting) (using Title VII’s backpay provision to interpret time limits on filing), superseded by statute, *Lilly Ledbetter Fair Pay Act of 2009*, Pub. L. No. 111-2, 123 Stat. 5; *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006) (finding interpretation of “drug abuse” discordant with “phrase’s consistent use throughout the statute”); *Conroy v.*

Scholars have labeled this assumption “unrealistic” in the face of the “willy nilly” drafting process.²⁷³ Once again, the answer to whether this doctrine should be used is not a simple yes-or-no proposition, and intertemporal statutory interpretation can help to guide whether it should be applied. The “whole act” assumption may indeed have been unrealistic in previous eras. A modern statute, however, is generally drafted by a group of drafters who are aware of the contents of the entire statute, and internal coherence is an important focus in the drafting process, especially for legislative counsel.²⁷⁴ It is obviously impossible to be perfect in this regard, especially for very long bills that cover multiple topics, but modern drafters put an emphasis on statutory coherence. It is not an unrealistic assumption for courts to make with modern statutes, although it may be unrealistic as applied to older statutes.

Omnibus bills are one area where statutory coherence appears to fall apart. Omnibus bills are generally a conglomeration of bills combined together into a single bill for political purposes, which avoids an individual vote on each bill.²⁷⁵ Different drafters compose the various “bills” that make up the larger bill, so internal coherence is unlikely to exist. This does not mean that courts must entirely disregard the “whole act” rule when interpreting an omnibus bill, as many of the respondents in Professors Gluck and Bressman’s study believe.²⁷⁶ Internal consistency is still very likely to exist within each separate substantive portion of the bill that was drafted by one set of drafters. Courts can therefore apply the “whole act” rule to each separate bill contained within the omnibus bill (or separate substantive area if it is not clear where one bill ends and the next begins) but not across unrelated substantive areas within the omnibus bill. So long as courts are able to differentiate between the various pieces and subjects of an omnibus bill, there is good reason to believe that the “whole act” rule should continue to serve as a valuable tool to courts even when interpreting modern omnibus bills.

3. *Other Canons.* — While it is a difficult proposition to prove empirically, there is at least strong anecdotal evidence, as discussed in Part I,

Aniskoff, 507 U.S. 511, 516 (1993) (finding “comprehensive character of the entire statute” indicates congressional intent); *King v. St. Vincent’s Hosp.*, 502 U.S. 215, 220–21 (1991) (“Given the examples of affirmative limitations on reemployment benefits conferred by neighboring provisions, we infer that the simplicity of subsection (d) was deliberate.”).

273. Eskridge, Frickey & Garrett, *supra* note 19, at 862–63.

274. See *supra* Part I (discussing various actors in drafting process); see also Gluck & Bressman, Part I, *supra* note 7, at 937 (“Almost all of our respondents told us that consistent term usage was the ‘goal’ or what ‘should be’ . . .”).

275. See Gluck & Bressman, Part II, *supra* note 7 (manuscript at 31) (finding over half of survey respondents believe “whole code” rule does not apply to omnibus statutes because they contain provisions by many different drafters).

276. See Gluck & Bressman, Part II, *supra* note 7 (manuscript at 21) (noting fifteen percent of respondents believe “whole act” rule does not apply when different committees have inserted language into bill).

that congressional drafters' and researchers' awareness of judicial methods and canons has increased with the modernization of the legislative-drafting process over the last thirty to forty years,²⁷⁷ along with the rise of the field of legislation as a field of study over that same period. This increased awareness is likely to be applied to the drafting of statutes not only because individual drafters' knowledge has increased, but because the modern process surrounding statutes has made it so that more professional drafters are reviewing statutory language.²⁷⁸ This increased awareness also supports the idea that Congress has the capability to adapt its drafting process in ways that would seem likely to improve the statutory product, although it is certainly an imperfect adaptation and one that occurred over many years.²⁷⁹

It is clear from Professors Gluck and Bressman's articles that drafters have a high level of awareness of certain canons.²⁸⁰ However, it is likely that this awareness is a recent phenomenon that resulted from the changes to Congress described in Part I. Therefore, while judges should use these canons with greater confidence when interpreting modern statutes, drafters of older statutes were less likely to have been aware of these canons, and so these canons should be applied more skeptically to older statutes.

III. RESOLVING AMBIGUITY THROUGH LEGISLATIVE HISTORY

The previous Part discussed the idea of intertemporal statutory interpretation in the context of judicial doctrines. This Part provides further justification for intertemporal statutory interpretation by demonstrating how it could be applied to help resolve the most important and controversial modern statutory-interpretation debate: whether and how to use legislative history.²⁸¹ First, this Part describes why legislative counsel's increased role in statutory drafting, but not legislative-history

277. See *supra* Part I.A.5 (providing evidence of why it is likely awareness of methods of interpretation has increased among legislative counsel); *supra* Part I.B (describing ALD attorneys' awareness of methods of interpretation).

278. See *supra* notes 240–241 and accompanying text (noting increase in number of legislative counsel and complexity of statutory language over time).

279. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 51, 61 (2012) (“The canons influence not just how courts approach texts but also the techniques that legal drafters follow in preparing those texts.”).

280. See Gluck & Bressman, Part I, *supra* note 7, at 926–28 (summarizing survey results showing knowledge of canons).

281. See Easterbrook, *supra* note 21, at 61–62 (advocating use of legislative history only in limited circumstances); Eskridge, *New Textualism*, *supra* note 21, at 623 (“The new textualism posits that once the Court has ascertained a statute’s plain meaning, consideration of legislative history becomes irrelevant.”); Gluck & Bressman, Part I, *supra* note 7, at 964 (“The other primary interpretive source that courts consider—and the one whose use is most hotly contested—is legislative history.”); Schnapper, *supra* note 21, at 1114, 1117–18 (noting plain-meaning doctrine is often used to preclude consideration of other factors, including legislative history).

drafting, provides an argument in favor of the quality and reliability of modern statutory text as compared to legislative history. Second, it describes how changes in the way that statutes are drafted affect the types of ambiguity likely to appear in statutory language and uses this analysis to provide a novel argument against the use of legislative history.

A. Divergent Roles in Drafting of Statutes and Legislative History

As described above in Part I, one important area in which committee-staff and legislative-counsel responsibilities diverge is the drafting of legislative history. The increased involvement of legislative counsel in the drafting process described in Part I has only influenced the drafting of statutory text and not legislative history. This is important because a common refrain from textualist-minded scholars and judges is that legislative history is easily manipulable by political actors or interest groups.²⁸² As Justice Scalia proclaimed in a famous opinion:

As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction.²⁸³

A common, and generally well-received, scholarly response to this claim is that because members of Congress are not actually involved in creating the statutory language or the legislative history, both of which are left to staff (and lobbyists), there is no reason to distinguish between the two.²⁸⁴ However, as Professors Gluck and Bressman note in their

282. See, e.g., *FEC v. Rose*, 806 F.2d 1081, 1090 (D.C. Cir. 1986) (claiming “well-recognized phenomenon of deliberate manipulation of legislative history at the committee level [can] achieve what likely cannot be won before Congress as a whole”); *Wallace v. Christensen*, 802 F.2d 1539, 1560 (9th Cir. 1986) (en banc) (Kozinski, J., concurring in the judgment) (“Reports are usually written by staff or lobbyists, not legislators; few if any legislators read the reports . . .”); Easterbrook, *supra* note 21, at 61 (“These clues are slanted, drafted by the staff and perhaps by private interest groups.”); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 *Duke L.J.* 371, 376 (“Lobbyists maneuver to get their clients’ opinions into the mass of legislative materials . . .”).

283. *Blanchard v. Bergeron*, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring in part and concurring in the judgment); cf. Michael Sinclair, *The Proper Treatment of “Interpretive Choice” in Statutory Decision-Making*, 45 *N.Y.L. Sch. L. Rev.* 389, 405 n.73 (2002) (calling Justice Scalia’s concurrence in *Blanchard* “justifiably famous”).

284. See James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 *Mich. L. Rev.* 1, 53–54 (1994) (“Accordingly, there is no reason to conclude that committee-drafted legislative history is significantly less imputable to Congress than committee-drafted text. The same actors who draft legislative history are involved in drafting statutory language, monitoring the amendment process, and advising legislators about which way to vote.”); Nourse & Schacter, *supra* note 7, at 621 (“[L]egislators have a sharply limited role in drafting *both*

recent survey of legislative drafting, and as this author's interviews and experience confirm, there is a significant difference between statutory language and legislative history: Legislative history is generally drafted only by staff with no input from legislative counsel.²⁸⁵ This distinction is important because legislative counsel exist primarily to give structure and clarity to legislation and to ensure that it is coherent within the current system of laws. Importantly, legislative counsel are nonpartisan, so their absence from the drafting of legislative history removes the neutral arbiter that guides the statutory-drafting process, leaving legislative history drafting entirely to partisan staff and lobbyists.

It is often difficult and expensive for partisan staff or lobbyists to get their desired language into the statute, so they instead opt for the "cheaper" route of getting language into the committee report or other legislative history.²⁸⁶ One of the reasons this route is cheaper is that legislative counsel are not involved in creating committee reports or other legislative history and therefore cannot scrutinize it. Because there is less policing of legislative history than statutory language, language that goes against the negotiated deal is less likely to be detected in legislative history. While the purposivist claim that the process of creating text is indistinguishable from the process of creating legislative history is one of the strongest and most well-accepted arguments in favor of using legislative history, it is plainly wrong.

Professors Gluck and Bressman use the fact that legislative counsel play a primary role only in drafting statutory text, and not in drafting

text and legislative history. In sum, if our findings are generalized to other legislative settings, they will pose significant challenges for the textualist argument that presumes legislators have a distinct role in drafting text as opposed to legislative history."); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 Va. L. Rev. 1295, 1312-13 (1990) [hereinafter Zeppos, *Legislative History*] ("The same staff/lobbyist involvement that the textualist decries in the drafting of legislative history occurs in creating the text of a bill. Virtually no members of Congress draft their own legislation.").

285. See Gluck & Bressman, Part I, *supra* note 7, at 980 (noting "almost all" legislative counsel reported not drafting legislative history); Legislative Counsel Interview, *supra* note 33. One exception is for appropriations bills, where legislative counsel are involved. Gluck & Bressman, Part I, *supra* note 7, at 980.

286. See, e.g., Eskridge, Frickey & Garrett, *supra* note 19, at 983 ("Lobbyists and lawyers maneuver endlessly to persuade staff members . . . to throw in helpful language in the reports when insertion of similar language would be inappropriate or infeasible for the statute itself. 'Smuggling in' helpful language through the legislative history is a time-tested practice."); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673, 687-88 (1997) ("Actual statutory language is the dearest legislative commodity, and so once legislators become aware that legislative history influences courts, they and their agents (the staff) will try to achieve desired outcomes through the lower-cost mechanism of legislative history." (citation omitted)); Zeppos, *Legislative History*, *supra* note 284, at 1305 ("Once a court goes beyond the statutory text to look at the legislative history, it allows the interest group to expand the deal struck in the original statute. Moreover, legislative history allows the interest group to buy protection on the cheap . . ." (citation omitted)).

legislative history, as an argument against focusing on statutory text and in favor of using legislative history when interpreting a statute. Their argument is based on two claims: First, legislative counsel are less expert, and second, politically affiliated congressional staff are more accountable to members of Congress,²⁸⁷ since individual members cannot fire legislative counsel.²⁸⁸ However, as the following paragraphs argue, these claims do not fully account for how the statutory-drafting process works.

It is not necessarily true that committee staff are more expert in the areas in which they legislate. As discussed in Part I, turnover of committee staff is high, resulting in relative inexperience among many staffers.²⁸⁹ In contrast, legislative counsel generally spend their entire careers drafting statutes within a few substantive areas. However, even if committee staff are more expert, their expertise is not absent from the statutory-drafting process. As Professors Gluck and Bressman confirm,²⁹⁰ most congressional staff—especially committee staff working on the most important bills—are aware of the central importance of the text, and to claim that they are willing to entirely farm out the drafting and reviewing of the text of the bill to legislative counsel does not comport with the reality of the process by which text is created.

Legislative counsel have in-person meetings and calls with staff to discuss each bill's objectives and regularly follow up with staff to confirm that the language of the statute carries out the intended policy.²⁹¹ Staff, lobbyists, and the executive branch all work with legislative counsel to draft and revise language throughout the legislative process. Legislative

287. Gluck & Bressman, Part II, *supra* note 7 (manuscript at 14) (“And the kind of legislative history that courts do fight over, such as committee reports, as the first Article detailed, is drafted by those staff with more policy expertise and greater direct accountability to the members than the staff who may draft the text.”); *id.* (manuscript at 13) (“Our non-Legislative Counsel respondents underscored that they rarely draft statutes from ‘scratch’ and most told us that the drafting of statutory text is often done by Legislative Counsel.”).

288. *Id.* (manuscript at 14) (“Unlike ordinary staff (who told us ‘staffers don’t keep their jobs if they disagree with members’), Legislative Counsels (who also viewed themselves as accountable, telling us, ‘if you’re not elected, you’re replaceable’) cannot be fired by individual members, and do not lose their jobs when control over Congress changes.”).

289. See *supra* notes 77–81 and accompanying text (discussing low turnover for legislative counsel); *supra* note 161 and accompanying text (highlighting low turnover for ALD attorneys); *supra* notes 211–213 and accompanying text (noting higher turnover for committee staff).

290. Gluck & Bressman, Part I, *supra* note 7, at 965 (noting survey respondents viewed legislative history “as the most important drafting and interpretive tool apart from text” (emphasis omitted)).

291. See Strokoff, *supra* note 72 (“[Legislative counsel’s] responsibility is to reflect the ideas of Members of Congress accurately in legislative language. That isn’t to say that we can’t affect policy by pointing out the consequences or meanings of the printed word”); *supra* notes 87–90 and accompanying text (describing initial meeting between counsel and staff to discuss goals of bill).

counsel take the primary drafting role at the initial stages, but that does not mean that other actors are not intimately involved with the text as it develops. Professors Gluck and Bressman note that committee staff work with legislative counsel on statutory text and quote one drafter as saying that “[t]he version introduced is wildly different than the one passed because there is rarely a bill that isn’t amended.”²⁹² The need for amendments generally arises because staff, who are closely reviewing the statutory language in relation to the political deal, want the changes and work in conjunction with legislative counsel to implement them. So while it is worthwhile to note that text is primarily drafted by legislative counsel in the first instance, this observation must be tempered by an emphasis on the close supervisory role played by staff at every step of the drafting process.²⁹³ Committee staff believe that “‘more process’ leads to a better final product,”²⁹⁴ and it is undoubtedly true that the statutory text undergoes a significantly more extensive process and review than legislative history.

Accountability concerns also do not necessarily favor reliance upon legislative history. First, as described above, legislative counsel are closely accountable to committee staff, who are then accountable to members of Congress. The primary evidence presented to substantiate a supposed accountability divide is the fact that committee staff can be fired by individual members.²⁹⁵ There is no evidence, however, that the inability to be directly fired affects legislative counsel’s performance as compared to other politically affiliated congressional staff, and, as Professors Gluck and Bressman note, legislative counsel certainly view themselves as accountable.²⁹⁶ It would be a scandal if a legislative counsel were to manipulate statutory language for political or ideological reasons, and it would certainly result in his or her dismissal. Legislative counsel may even be more accountable and loyal to Congress than committee staff because of the career nature of their positions, their specialized skills, and their lack of political connections that would be useful outside of Congress. For committee staff, on the other hand, there is a well-documented “revolving door” between Congress and lobbying firms, with lobbyists frequently joining congressional staffs²⁹⁷ and congressional staffers regularly leaving Congress to join lobbying firms.²⁹⁸ The reality of

292. Gluck & Bressman, Part I, *supra* note 7, at 984.

293. *Id.* at 969 (“Our respondents made clear that committees play a central role not only in drafting legislative history, but also in formulating statutory policy and, along with the Offices of Legislative Counsel, in drafting most statutory text.”).

294. Gluck & Bressman, Part II, *supra* note 7 (manuscript at 33).

295. *Id.* (manuscript at 14).

296. *Id.*

297. Lee Fang, Lobbyists Snag Top Staff Positions on Capitol Hill, *Nation* (May 9, 2013, 11:52 AM), <http://www.thenation.com/blog/174257/lobbyists-snag-top-staff-positions-capitol-hill> (on file with the *Columbia Law Review*).

298. Farnam, *supra* note 212.

these positions arguably gives greater reason to question committee staffers' loyalty and accountability to Congress.

The intertemporal element of the drafting process strengthens arguments favoring statutory text over legislative history. Whereas in previous eras committee staff were predominantly responsible for drafting both statutory text and legislative history, the modern statutory-drafting process has evolved such that statutory text today has the added benefit of significant legislative-counsel involvement. The process by which legislative history is drafted has remained comparatively unchanged.

It is clear that statutory text and legislative history do have important differences due to how they are drafted. As this section argues, there are many reasons to believe that these differences strengthen the argument in favor of the quality and faithfulness of modern statutory text as compared to modern legislative history.

B. *Legislative History and Ambiguity*

Intertemporal statutory interpretation could simply be applied to say that legislative history, because it is an extratextual tool of interpretation, should not be used to interpret ambiguity in clear modern statutes. This argument, however, would not account for the nuance involved with the types of statutory ambiguity. This Article does not claim that ambiguity has ceased to exist in statutes. Instead it argues that changes in the institutional competency of Congress have changed the types of ambiguities most likely to exist in statutes, and that this development has caused legislative history to become less useful when interpreting modern statutes. While this argument is not quite as simple as just saying that legislative history should not be used because statutes are better drafted, it more fully captures how changes in Congress should affect interpretation, thereby providing a much stronger normative argument both for and against the use of legislative history, depending on the era in which a statute was drafted.

One of textualism's most strongly held tenets is that legislative history should not be used to interpret language even when it is ambiguous. Many scholars decry the textualist shunning of legislative history by arguing that Congress has limited resources and cannot draft statutes without ambiguities, so courts should do their best to resolve the ambiguities through legislative history.²⁹⁹ To do otherwise, they claim, would be "autistic,"³⁰⁰ or at the very least "unrealistic."³⁰¹ Intertemporal statutory

299. See, e.g., Brudney, *supra* note 284, at 57 ("It is doubtful that Congress would be able to add to text the details and explanations now included in legislative history. The ambiguities and incompleteness of legislative language reflect an appreciation for both the need to draft rules of sufficient generality . . . and . . . to conserve scarce institutional resources.").

300. See Richard A. Posner, *How Judges Think* 194 (2008) ("Some strict constructionists argue that imaginative reconstruction of a legislature's purposes is

interpretation shows that these scholars are both right and wrong. Legislative history continues to be a useful tool, but, as will be described in greater detail in this Part, it is most useful for older statutes that were drafted in an era in which statutes were not drafted with the care and precision that they are today.

1. *Types of Ambiguity.* — In spite of the sophisticated and relatively thorough approach to legislative drafting that this Article illuminates, ambiguity still exists. Many scholars and most judges speak of ambiguity as a single phenomenon, and even if they acknowledge different types of ambiguity, they treat them all the same when it comes to interpretation.³⁰² This section deconstructs the various reasons why statutory ambiguity exists. It explains which types of ambiguity are more likely to exist in modern statutes than in older statutes, demonstrates how recognizing and understanding the different types of ambiguity has important implications for debates over statutory interpretation, and shows how the strength of arguments in favor of different methods of interpretation depends on the type of ambiguity in a statute. This section then explains how this understanding can be applied in the context of intertemporal statutory interpretation.

This section helps clarify the types of ambiguity by providing a nomenclature for them. The first type of ambiguity is strategic ambiguity, which arises when Congress deliberately leaves statutory language ambiguous.³⁰³ The second type of ambiguity is avoidable unintentional ambiguity, which is the result of mere oversight, stemming from carelessness or time pressures.³⁰⁴ The third type of ambiguity is dynamic, which is also unintentional but which results from changing conditions that render the application of the statutory language to current circumstances unclear.³⁰⁵ This section will briefly describe each type of ambiguity.

Strategic ambiguity and dynamic ambiguity are more common than avoidable unintentional ambiguity in modern statutes, which helps explain why legislative history has become less useful. The connection may not be apparent at first, so this section will explain why legislative history is most valuable when resolving unintentional ambiguity and least valuable when interpreting strategic and dynamic ambiguity. The knowledge that unintentional ambiguity is less common therefore provides a

impossible because there is no such thing as ‘collective intent’; there is just the intent of the individual legislators who vote for or against a statute. That is the autistic theory of interpretation.”).

301. Eskridge, Frickey & Garrett, *supra* note 19, at 437 (“[O]ne suspects that those who adopt such strategies [e.g., pure textualism] have unrealistically high hopes.”).

302. See, e.g., *infra* note 344 and accompanying text (noting Supreme Court identified types of ambiguity in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), but held they made no difference for interpretation).

303. See *infra* Part III.B.1.a.

304. See *infra* Part III.B.1.b.

305. See *infra* Part III.B.1.c.

novel argument for why judges should be wary of using legislative history to resolve ambiguity in modern statutes and, conversely, should more frequently use legislative history when interpreting older statutes.

a. *Strategic Ambiguity*. — Strategic ambiguity arises when Congress is unable or unwilling to resolve an issue in the text of the legislation and instead decides to leave the statute ambiguous to placate conflicting parties and achieve consensus. That this type of ambiguity exists is unsurprising for such a large group with diverse interests.³⁰⁶ This phenomenon in Congress is very real and acknowledged by actors at all stages of the legislative process.³⁰⁷

An example of a statute left ambiguous for strategic reasons is the Private Securities Litigation Reform Act of 1995 (PSLRA).³⁰⁸ Under the PSLRA, the pleading standard to bring a securities suit for money damages requires the plaintiff to “state with particularity facts giving rise to a *strong inference* that the defendant acted with the required state of mind.”³⁰⁹ The issue of what pleading standard to apply was a significant point of contention between those in favor of (generally Democrats) and against (generally Republicans) stricter enforcement of securities laws.³¹⁰ Earlier versions of the statute contained pleading standards that would have made it more difficult for a plaintiff to show scienter than the “strong inference” standard.³¹¹ The final statutory language, however,

306. Indeed, even the Supreme Court, a small and relatively homogenous group, must use ambiguity or avoid critical issues in order to gain the necessary votes to create a majority opinion. See, e.g., Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* 3–74 (2000) (arguing Supreme Court is minimalist and leaves many issues undecided). Justice Scalia articulated this view well when he stated that the Supreme Court is able to resolve a difficult case with a decision “that . . . says almost nothing.” Transcript of Oral Argument at 23, *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001) (No. 99-2036), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/99-2036.pdf (on file with the *Columbia Law Review*).

307. See Committee Staff Interview, *supra* note 32 (attributing some ambiguity to political disagreement); Legislative Counsel Interview, *supra* note 33 (acknowledging deliberate ambiguity); see also Nourse & Schacter, *supra* note 7, at 596 (“Deliberate ambiguity was seen by staffers as a second, equally powerful force working against statutory clarity. With virtual unanimity, staffers confirmed this phenomenon.”).

308. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.); see also Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 *Stan. L. Rev.* 627, 650–66 (2002) (contending PSLRA “would not have been enacted but for the legislative agreement to disagree over the interpretation of the ‘strong inference’ standard”).

309. § 101, 109 Stat. at 747 (emphasis added).

310. See *infra* notes 313–316 and accompanying text (describing debate over pleading standard, including veto by Democratic president).

311. H.R. 10, 104th Cong. § 204 (1995) (requiring plaintiff to show defendant “knew [the] statement was misleading at the time . . . made, or intentionally omitted to state a fact knowing that such omission would render [it] misleading”).

came from a Senate bill that used the Second Circuit pleading standard as the basis for the “strong inference” language.³¹²

In the discussions surrounding the bill, Republicans went back and forth between claiming that the language would only codify the weaker Second Circuit standard and also, behind the scenes, trying to sneak language into the legislative history that showed that the intention of the bill was to create a more stringent standard.³¹³ The bill passed both the House and Senate by significant margins in spite of the ambiguity—only to be vetoed by President Clinton, who explained that he thought the ambiguous language was an attempt by Congress to create a stricter pleading standard than the Second Circuit standard.³¹⁴ Republicans were able to override the veto by calming the concern of those who believed that the President’s interpretation of the bill was correct.³¹⁵ Republicans emphasized that the pleading standard in the PSLRA “is the Second Circuit’s pleading standard.”³¹⁶

The contention surrounding the PSLRA is a good example of why strategic ambiguity arises. A large majority of Congress wanted to pass a bill to reform securities litigation, but there was significant disagreement as to how defendant-friendly to make the bill.³¹⁷ Because the ambiguity was apparent to both sides, if there had been an agreement in Congress, then resolution of the statutory ambiguity would have been simple. However, while Republicans had a majority in both the House and Senate, they needed support of Democrats to override the veto of a Democratic president, so they were forced to soften their demands. The resolution

312. See S. Rep. No. 104-98, at 15 (1995), reprinted in 1995 U.S.C.C.A.N. 679, 694 (“[T]he Committee chose a uniform standard modeled upon the pleading standard of the Second Circuit.”).

313. The Statement of Managers in the Conference Report, drafted and controlled by the Republicans, stated that “[b]ecause the Conference Committee intends to strengthen existing pleading requirements, it does not intend to codify the Second Circuit’s case law interpreting this pleading standard.” H.R. Rep. No. 104-369, at 41 (1995) (Conf. Rep.). However, floor statements from the bill’s sponsors made clear that the intention of the bill was to “adopt[] the pleading standard utilized by the second circuit court of appeals.” 141 Cong. Rec. 35,275 (1995) (statement of Sen. Pete V. Domenici); see id. at 35,265 (statement of Sen. Christopher J. Dodd) (stating conference committee “adopt[ed] the Second Circuit Court of Appeals standard”).

314. See 141 Cong. Rec. at 38,354 (overriding President Clinton’s veto of PSLRA in Senate); id. at 37,797 (transmitting presidential veto of PSLRA to House of Representatives).

315. Senator Domenici, a Republican and one of the sponsors of the bill, stated, “[T]he conference report adopts the pleading standard utilized by the second circuit court of appeals.” Id. at 35,275 (statement of Sen. Pete V. Domenici).

316. Id. at 38,323 (statement of Sen. Pete V. Domenici).

317. The PSLRA passed the House by a vote of 320 to 102 and the Senate by a vote of 65 to 30. Grundfest & Pritchard, *supra* note 308, at 658. This vote was only obtained by maintaining ambiguity in the statutory language. Id. at 658 (“This formulation has the air of a compromise, suggesting that neither proponents nor opponents of recklessness were capable of garnering a majority (much less a supermajority) for their view.”).

that appeared to work best for both sides was to include the ambiguous language and then go about trying to manipulate the legislative history.

Unsurprisingly, the ambiguous language in the PSLRA caused confusion and disagreement in lower courts.³¹⁸ The ambiguous text finally reached the Supreme Court in a 2007 case that attempted to define what “strong inference” means in the context of securities litigation. In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, the Court acknowledged that Congress had adopted the “strong inference” language from the Second Circuit pleading standard, but relied on the Statement of Managers to determine that Congress “did not codify that Circuit’s case law interpreting the standard.”³¹⁹ The Court also quoted from the House of Representatives Conference Report to demonstrate Congress’s intention “to strengthen existing pleading requirements.”³²⁰ Relying on the text of the statute and legislative history, along with citations to multiple dictionaries and a bit of deductive reasoning, the Court went on to construe the language to create a stricter pleading standard than the one used by the Second Circuit.³²¹ The result of the decision was that the ambiguity was resolved in a way that the Republicans who sponsored the bill would have wanted, even though the decision went directly against many of the statements that they made during the process of negotiating the statute and overriding the veto. In the end, the sponsors of the bill effectively used strategic ambiguity to get their desired result, even if it took twelve years and many conflicting judicial decisions to arrive there.

The example of the PSLRA shows why, when it comes to interpreting strategically ambiguous language, legislative history is unlikely to clarify Congress’s intended meaning: The ambiguity signals that Congress was unable to generate a coherent meaning on that issue. While both

318. In *Johnson v. Tellabs, Inc.*, a district court interpreted the pleading standard as being extremely strict and dismissed the complaint. 262 F. Supp. 2d 937, 945 (N.D. Ill. 2003). On appeal, before the Supreme Court ultimately decided the case, the Seventh Circuit disagreed and construed the pleading standard more leniently for the plaintiff. See *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 588, 602 (7th Cir. 2006) (“[W]e will allow the complaint to survive if it alleges facts from which, if true, a reasonable person could infer that the defendant acted with the required intent If a reasonable person could not draw such an inference from the alleged facts, the defendants are entitled to dismissal”). In construing the pleading standard of the PSLRA to be more plaintiff-friendly, the Seventh Circuit explicitly rejected the stricter standard previously adopted by the Sixth Circuit. See *id.*; cf. *Fidel v. Farley*, 392 F.3d 220, 227 (6th Cir. 2004) (“[P]laintiffs are entitled only to the most plausible of competing inferences” (quoting *Helwig v. Vencor, Inc.*, 251 F.3d 540, 553 (6th Cir. 2001))).

319. 551 U.S. 308, 321–22 (2007) (citing Brief for the United States as Amicus Curiae Supporting Petitioners at 18, *Tellabs*, 551 U.S. 308 (No. 06-484), 2007 WL 460606, at *18). That part of the United States’ amicus brief explicitly cited to the Statement of Managers for the proposition that Congress was not intending to codify the Second Circuit standard. Brief for the United States as Amicus Curiae Supporting Petitioners, *supra*, at 18 n.5 (quoting H.R. Rep. No. 104-369, at 41 (1995) (Conf. Rep.)).

320. *Tellabs*, 551 U.S. at 322 (quoting H.R. Rep. No. 104-369, at 41).

321. *Id.* at 320–24.

sides may have hoped that a court would interpret the language to mean what they wanted it to mean, the ambiguity indicates a lack of “intent” that can be imputed to a majority of Congress, especially an intent that was able to pass through the Article I, Section 7 requirements.³²²

One common argument against the use of legislative history is that it has something for everyone, which creates the problem of “‘looking over a crowd and picking out your friends.’”³²³ This issue is especially likely to arise in the context of strategic ambiguity. When two sides cannot come to an agreement and instead agree to leave statutory language ambiguous, both sides have an incentive to try to sneak their preferred interpretation into the legislative history. Committee staffers admitted that at times they leave a statute intentionally ambiguous and then attempt to draft legislative history in a way that will influence judicial opinion toward their preferred interpretation of contested terms.³²⁴ This is problematic because one party, the majority party, has control of the drafting of the committee report, which is commonly viewed as the most authoritative legislative-history source. This puts the majority party in a position to be able to use their control of the legislative history to sneak in their preferred interpretation even if it goes against the bargains that they made with the minority party to achieve passage.³²⁵ While their duplicity could cost them credibility, it will often not be revealed until many years later—if at all—when the case is litigated. At that point, it is

322. U.S. Const. art. I, § 7, cl. 2 (requiring bicameralism and presentment for laws).

323. This quote was attributed to Judge Harold Leventhal by Judge Patricia Wald. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 *Iowa L. Rev.* 195, 214 (1983). Justice Scalia has carried this phrase on in a slightly modified form: “Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends.” *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment).

324. Professors Nourse and Schacter confirm that staffers are aware that if they fail to win the argument when drafting the statute, they have a second shot in the courts. See Nourse & Schacter, *supra* note 7, at 596 (“On the whole, staffers seemed quite aware that the principal effect of deliberate ambiguity was to leave it to the courts to decide.”). Professors Gluck and Bressman’s respondents also admitted that legislative history is used as a tool to try to “influence judicial interpretation of statutory ambiguities and contested terms” and call attention to “‘something we couldn’t get in the statute.’” Gluck & Bressman, Part I, *supra* note 7, at 970, 973.

325. It is possible for the minority to contest the language of a committee report if it thinks that the report mischaracterizes the statute. This challenge could potentially avoid problems by indicating to the courts which language is strategically ambiguous. But contesting a committee report requires committee staff to use significant resources policing each other on something that courts may or may not use. It is unrealistic to expect minority staff to spend hours poring through the majority’s work, constantly looking for any attempt to game the legislative history. Also, the “looking out over the crowd to find your friends” problem would still exist, because courts could use the majority language in the committee report as their guide, claiming that it represents what the majority thought the statute should mean even though it could not get sufficient support to pass the language through the Article I, Section 7 requirements.

unlikely that other members of Congress or their staff will be paying attention unless it is a particularly important issue, and many of the staff responsible for drafting the legislative history will likely have left Congress. So any reputational punishment would be minimal. This analysis should lead to the conclusion that when statutory language is strategically ambiguous, the likelihood of both sides trying to manipulate the legislative history is at its highest and the benefit of relying on legislative history is at its lowest.

b. *Avoidable Unintentional Ambiguity.* — Avoidable unintentional ambiguity results from a lack of attention to detail or a lack of time or resources to resolve ambiguity. One of the most prominent examples of an avoidably, but unintentionally, vague statute is the Alien Contract Labor Law that was the focus of the seminal *Holy Trinity* Supreme Court case.³²⁶ This case, decided in 1892, is still cited and extensively debated for its use of legislative history and overall congressional purpose to explain and amplify statutory text.³²⁷ The statute at issue was created to make it unlawful to assist or encourage “the importation or migration of any [foreigner] into the United States . . . to perform labor or service of any kind . . .”³²⁸ The statute covered an important area of immigration law but ran just over one page long, with broad, ambiguous language and no definitions or exceptions.³²⁹ There was no apparent conflict within Congress over the statutory language that would have required strategic ambiguity to attain a majority coalition. The ambiguity appears to have been the result of a simple inattention to detail, likely caused by insufficient congressional resources.

The statute left many open questions that were difficult for the Court to answer. For example, what does “labor” or “service” include? It is apparent from the circumstances surrounding the passage of the bill that Congress likely did not intend the statute to encompass as many workers as it appears to on its face, so the broad and ambiguous language of the statute made it impossible for the Court to follow the intent of Congress while taking the text literally. These are the types of questions that Congress regularly addresses in modern statutes by providing defini-

326. *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

327. A WestlawNext search on March 5, 2014 of the law reviews and journals citing *Holy Trinity* reveals 952 law review publications citing to this decision, with 328 of those publications coming in the last ten years. Search Results, WestlawNext, <http://westlawnext.com> (search “143 U.S. 457”; go to “Citing References” tab; filter by “Secondary Sources”; filter by “Law Reviews & Journals”) (on file with the *Columbia Law Review*) (last visited Mar. 5, 2014). Recent examples include Carlos E. González, Turning Unambiguous Statutory Materials into Ambiguous Statutes: Ordering Principles, Avoidance, and Transparent Justification in Cases of Interpretive Choice, 61 *Duke L.J.* 583, 587 n.14 (2011); John F. Manning, Separation of Powers as Ordinary Interpretation, 124 *Harv. L. Rev.* 1939, 1946 & n.27 (2011); and Peter J. Smith, Textualism and Jurisdiction, 108 *Colum. L. Rev.* 1883, 1899 & n.66 (2008).

328. Alien Contract Labor Law, ch. 164, 23 Stat. 332, 332 (1885).

329. *Id.*

tions that clarify to whom the law applies along with exceptions to ensure the scope of the law is appropriately narrow.

When avoidable unintentional ambiguity exists in a statute, the risk of political maneuvering is at its lowest and the value of legislative history is at its highest. If neither side realized the ambiguity that they were creating, then they would have had no reason to try to sneak information into the legislative history that did not reflect the intention of those voting on the statute, and the legislative history would be more likely to be reliable and helpful. This, of course, assumes that the oversight or time pressure that caused the ambiguity in the statute did not also afflict the legislative history, which is a significant assumption to make, especially for the type of contemporaneous legislative history that legislative drafters view as most reliable.³³⁰ In the case of an unintentionally ambiguous statute with accompanying unambiguous legislative history, it would seem perfectly reasonable for a court to use legislative history instead of creating its own meaning or forcing Congress to use its resources to reconsider the issue.

c. *Dynamic Ambiguity*. — Dynamic ambiguity is an inevitable consequence of changed circumstances. As Professor Eskridge wrote in his seminal book on the topic, “Over time, the gaps and ambiguities proliferate as society changes, adapts to the statute, and generates new variations on the problem initially targeted by the statute.”³³¹ When a statute is passed, it is difficult or impossible to predict how future legislation, constitutional issues, or societal circumstances might affect the legislation, so it may not be realistic or even possible for the enacting Congress to properly resolve the ambiguity *ex ante*. Although this type of ambiguity is unavoidable, once the ambiguity becomes apparent, Congress can choose either to do nothing and allow courts or agencies to resolve the ambiguity or to resolve the ambiguity itself by passing a clarifying bill. Given the size and permanence of the United States Code, Congress is only likely to address the most important statutory ambiguities, and even then only if clarification serves the purposes of that Congress. So, while Congress has the tools to reduce dynamic ambiguity, it is probable that this type of ambiguity will always exist.

State statutes from the late 1800s establishing the qualifications for service as a juror provide an example of how dynamic ambiguity arises.³³² These statutes commonly provided that potential jurors would be sel-

330. Gluck & Bressman, Part I, *supra* note 7, at 984 (“[Sixty-five percent] of our respondents told us that there is a period of time around passage—both before *and after* passage—during which legislative history is most reliable because it reflects the version actually passed.”).

331. Eskridge, *Dynamic*, *supra* note 10, at 9–10.

332. Professors Hart and Sacks discuss cases dealing with challenges to these statutes in detail in their textbook. See Hart & Sacks, *supra* note 247, at 1172–85.

ected from the state's list of registered voters.³³³ When the Nineteenth Amendment was passed, allowing women the right to vote, it created a possible ambiguity in the previously clear statute: Should the statute that previously precluded women from serving on juries now make them eligible to do so? The supreme courts of two states with such statutes, Illinois and Pennsylvania, came out differently on this question. In *Commonwealth v. Maxwell*, the Pennsylvania Supreme Court held that Pennsylvania's statutes qualified women to serve as jurors.³³⁴ The court gave the language its broadest reading, without resorting to legislative history to interpret what was meant by the term "qualified electors."³³⁵ The court reiterated:

"Statutes framed in general terms apply to new cases that arise, and to new subjects that are created from time to time, and which come within their general scope and policy. It is a rule of statutory construction that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects, and business within their general purview and scope coming into existence subsequent to their passage."³³⁶

In *People ex rel. Fyfe v. Barnett*, the Supreme Court of Illinois took a different approach by looking to the legislative intent at the time the statute was passed, well before women had the right to vote.³³⁷ The court reasoned that "[t]he word 'electors,' in the statute here in question, meant male persons, only, to the legislators who used it," and therefore held "the word 'electors,' as used in the statute, means male persons, only."³³⁸ The court's reasoning here required a logical leap: Because the legislators who created the statute knew it would only apply to men, the legislature must have therefore intended that the statute would always only apply to men, even if women became "electors." What the court got wrong by trying to resort to legislative intent was that the legislature in 1874 had simply never considered the question of whether women should be allowed to serve as jurors should they become qualified to vote at a future time. This lack of consideration is why the ambiguity was dynamic: Language that was perfectly clear in 1874 became ambiguous due to changes in circumstances that may have been difficult to anticipate fifty years earlier.

333. *Id.*; see also Eskridge, Frickey & Garrett, *supra* note 19, at 741 (discussing cases involving female jurors).

334. 114 A. 825, 829 (Pa. 1921) (holding decision applied only to right of women to serve as jurors in counties covered by act of 1867, but stating "[w]e entertain no doubt however that women are eligible to serve as jurors in all the commonwealth's courts").

335. *Id.*

336. *Id.* (quoting 25 Ruling Case Law § 24, at 778 (William M. McKinney & Burdett A. Rich eds., 1919)).

337. 150 N.E. 290, 292 (Ill. 1925).

338. *Id.*

Legislative history is likely of little value when ambiguity is dynamic in nature. Scholars, in the context of arguing in favor of the judicial use of legislative history, have claimed that it might be wise for Congress to leave statutes somewhat ambiguous so that Congress does not overly confine future judicial or agency interpretations of unforeseen developments.³³⁹ One problem with leaving the statutory language vague and the legislative history clear is that the legislative history would then simply fill in the gaps left by the vague language, and the clear legislative history would thereby constrain future interpretive flexibility.

While it is certainly debatable whether Congress should intentionally leave a statute vague to allow for judicial and administrative flexibility, arguments favoring the use of legislative history to resolve dynamic ambiguity are puzzling. If Congress leaves the language of a statute vague but makes the legislative history sufficiently detailed to confront the issue, then the ambiguity was not truly dynamic. If the issue is truly unforeseen, then it makes no difference whether the statute is more or less specific or how much detail is left to the legislative history, because Congress cannot respond to an issue that it did not foresee. When attempting to resolve dynamic ambiguity, there is little benefit in looking to legislative history because it will not shed light on the question at hand, and instead can confuse or mislead judges into trying to answer the wrong question. Legislative history is very unlikely to resolve dynamic ambiguity, and it certainly does not have any inherent benefits over the actual statutory language.

2. *Resolving Ambiguity Through Intertemporal Statutory Interpretation.* — Intertemporal statutory interpretation can help scholars and judges understand and clarify the various types of ambiguity. As Part II described, intertemporal statutory interpretation is based on the idea that modern statutes, because of significant improvements in Congress's institutional capacity over the last forty years, should be interpreted differently from older statutes that were written in an era in which Congress lacked the expertise to consistently draft unambiguous statutes. The most prominent and controversial purposivist tool is legislative history, and the previous section explained how legislative history is least helpful when resolving strategic ambiguity or dynamic ambiguity, but can be very helpful when resolving avoidable unintentional ambiguity. A better understanding of the evolution of the drafting process makes it possible to

339. Professor James Brudney makes the strongest version of this claim, saying:

In the real world, categorical rules end up covering more or less than their authors sought to address—and sometimes more or less than makes sense. After all, statutes ordinarily must be applied to unanticipated circumstances affecting unidentifiable entities in the indefinite future. If legislative rules are too specific or exhaustive, they will unduly constrain agencies, courts, and private parties in their ability to adapt to situations that were unforeseen and even unforeseeable at the time a statute was enacted.

Brudney, *supra* note 284, at 29.

discern which types of ambiguity are likely to be more common in modern statutes as compared to older statutes. Understanding which type of ambiguity is present can, in turn, provide clarity on the issue of whether legislative history should be used to interpret statutes.

Strategic ambiguity will always exist given the politically contentious nature of Congress, and indeed, it may have become more common in recent years given the increasing polarization of the political process.³⁴⁰ Legislative counsel are constrained in their ability to reduce strategic ambiguity because they can only draft clear language to the extent that members of Congress and their staffs allow them to. ALD can provide the relevant background information and analysis so that Congress understands the context in which it is legislating, but it will not help the statutory language if Congress reaches a political impasse and needs to use ambiguity to resolve it. The various actors involved in the drafting process agree that strategic ambiguity is the byproduct of a political system, and therefore will exist as long as Congress does.³⁴¹

Dynamic ambiguity, like strategic ambiguity, is impossible to eradicate. Statutes are generally permanent in nature, yet the circumstances in which they apply change. While good drafting may narrow the scope of dynamic ambiguity by anticipating changed circumstances, there will always be unanticipated circumstances to which a statute must be applied.

The evolution of the drafting process suggests that unintentional ambiguity, which is the most avoidable of the three types of ambiguity, has become less prevalent in the modern era of statutory drafting. As illustrated throughout this Article, Congress has a strong incentive to avoid this type of ambiguity and has developed a sophisticated legislative-drafting process precisely to avoid it. While there are still time pressures that may create unintentional ambiguity, the scope of this problem has narrowed with the increased use of committee staff, legislative counsel, ALD, and lobbyists, all of whom are involved in drafting and clarifying statutory language throughout the legislative process, including last-minute amendments. Congress's many institutional changes in the last forty years have been targeted directly at reducing unintentional statutory ambiguity by adding many layers of redundancy and expertise. The many stages of, and actors in, the drafting process are less likely to allow unintentional ambiguity to sneak into modern statutory language, especially for important language.

340. See Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today's Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 *Willamette L. Rev.* 395, 408 fig.1 (2009) (showing general increase in political polarization over last sixty years); Hasen, *supra* note 219, at 207 (“[L]egal doctrine has not expressly recognized the defining feature of modern American politics: deep political polarization along party lines.”).

341. See *supra* note 307 and accompanying text (noting strategic ambiguity is acknowledged by actors at all stages of legislative process).

The example of the unintentionally ambiguous immigration statute in *Holy Trinity* provides an important contrast with modern statutes. While the statute at issue in that case was short and broad, with no definitions or limiting exceptions,³⁴² a modern immigration statute would span tens or even hundreds of pages and include a detailed list of definitions and exceptions.³⁴³ Table 2 illustrates this point more broadly by showing the changes that statutes have undergone over the last forty years. Whereas interpreting the statute in *Holy Trinity* may have required the use of legislative history simply because it was too vague for a court to properly interpret on its text alone, a modern statute would be much more likely to provide sufficient detail for a court to be able to divine the legislature's intent from the text of the statute.

Because unintentional ambiguity is the only type of ambiguity that has significantly decreased as a result of Congress's increased capabilities, and because, as described in the previous section, legislative history is helpful primarily to resolve unintentional ambiguity, this Article provides important and novel arguments both for and against the use of legislative history. As the Supreme Court has admitted, it is difficult to differentiate among the various types of statutory ambiguity.³⁴⁴ Because it is difficult for judges to tell why a particular ambiguity exists, judges should pause before giving too much weight to legislative history when interpreting modern statutes unless it is clear that an ambiguity was unintentional. Conversely, this Article also shows why, when interpreting older statutes, unintentional ambiguity is a real and more common phenomenon, so judges should have less hesitation when applying legislative history to those statutes. This analysis demonstrates the usefulness of intertemporal statutory interpretation. While the legislative-history debate rages on, it is important to take a step back and realize that most of these arguments are happening in a vacuum that does not consider the realities of how Congress has changed over the past forty years. When empirical realities

342. See *supra* notes 328–329 and accompanying text (noting *Holy Trinity* statute was just over one page long and had broad, ambiguous language).

343. See *supra* note 257 (discussing length and detail of Immigration and Nationality Act).

344. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984). In *Chevron*, the Court gave three potential reasons for statutory ambiguity, two of them being types of strategic ambiguity and the other being avoidable unintentional ambiguity. The Court said:

[P]erhaps [Congress] consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so; perhaps it simply did not consider the question at this level; and perhaps Congress was unable to forge a coalition on either side of the question, and those on each side decided to take their chances with the scheme devised by the agency.

Id. The Court went on to say that “[f]or judicial purposes, it matters not which of these occurred.” *Id.*

are considered, it becomes clearer when legislative history is useful and when it is not.

CONCLUSION

This Article deconstructs the many steps of, and actors involved in, the statutory-drafting process to reveal a process that has significantly improved in recent decades. Yet this change has gone virtually unnoticed by scholars of statutory interpretation. Because scholars do not understand the evolution of the complex statutory-drafting process, their assumptions about, and theories of, Congress suffer. A better understanding of the evolving statutory-drafting process shows why statutes should be interpreted in the context of the era in which they were drafted, which leads to novel perspectives on many debates surrounding methods of statutory interpretation.

