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## The Staffer's Error Doctrine

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# ARTICLE

## THE STAFFER'S ERROR DOCTRINE

JESSE M. CROSS\*

### ABSTRACT

*Over the last forty years, a new type of legislator has arisen in Congress: one who, rather than drafting statutes, instead manages a staff bureaucracy that produces these statutes. By becoming a manager of bills, not a drafter of them, this new legislator has altered a key relationship in our democracy: that between members of Congress and the laws they enact. Yet no study has documented how this modern relationship works—i.e., has chronicled how today's federal legislators learn the contents of bills—and thereby shown the modern relationship between legislator and law. Nor has any study reflected on whether courts, in light of this altered relationship, need to change the way they interpret federal statutes.*

*This Article takes up these tasks. First, it reports the findings of an original empirical study—one that, through staffer interviews, chronicles the strategies that members of Congress now use to learn a bill's contents. Its findings reveal that, in Congress, legislators' understanding of a bill typically is based on the surprisingly brief memoranda and oral briefings they receive from staff. These sources educate members of Congress on legislative purpose, but they do not address the smaller details of statutory text, which generally are left to staffers.*

*In light of these empirical findings, the Article then argues that courts should adopt a new "staffer's error doctrine." Under this doctrine, before a court applies the plain meaning of a statute, it first confirms that statutory text does not undermine statutory purpose. In the era of managerial legislators, this check provides a useful proxy: it protects legislator decisions from staffer errors. In this way, the doctrine takes a neglected principle from the old scrivener's error doctrine—that courts interpreting statutes should review the work of unelected legislative staffers for mistakes—and updates it to address modern congressional realities.*

*This new doctrine has several merits that the Article highlights. First, it is compatible with a wide range of interpretive theories—not only intentionalism, but also at least four prominent varieties of textualism. Second, the doctrine aligns with—and makes sense of—the Court's recent direction in statutory interpretation. This merit is reflected in *King v. Burwell*, the landmark case interpreting the Affordable Care Act. In *King*, the Court essentially (if unwittingly) performed the exact check required by this new doctrine. In so doing, *King* showed that the staffer's error doctrine is a workable doctrine—and the doctrine, in turn, shows that the interpretive approach in *King* enjoys previously unnoticed claims to methodological legitimacy.*

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## I. INTRODUCTION

Over the last forty years, Congress has undergone a fundamental transformation. Prior to this period, Congress could have been regarded—quite accurately—as a quaint institution populated only by legislators and a small cadre of assistants.<sup>1</sup> That no longer is true, however. Today, thousands of legislative staffers populate the halls of Congress—staffers who perform key legislative tasks. As a result, Congress has been transformed into something that it did not resemble prior to the 1970s: a large, modern bureaucratic institution.<sup>2</sup>

The rise of this bureaucracy has led, among other things, to the emergence of a new type of legislator in Congress. Occupying a position atop an expansive legislative bureaucracy, this new legislator now spends much of her time performing a CEO-like task: namely, the task of managing subordinate staffers.<sup>3</sup> This shift by members into a managerial role has fundamentally altered the way in which Congress drafts its statutes—yet courts

<sup>1</sup> Congressional staffers did not even exist during the first six decades after the ratification of the Constitution. See HARRISON W. FOX, JR. & SUSAN WEBB HAMMOND, CONGRESSIONAL STAFFS: AN INVISIBLE FORCE IN AMERICAN LAWMAKING 15 (1977). For a chronicling of the relatively modest increases in staffing that occurred from the mid-nineteenth century through the mid-twentieth century, see *id.* at 20–32; GLADYS M. KAMMERER, THE STAFFING OF THE COMMITTEES OF CONGRESS 15–23 (1949).

<sup>2</sup> On this transformation, see generally Robert H. Salisbury & Kenneth A. Shepsle, *U.S. Congressman as Enterprise*, 6 LEGIS. STUD. Q. 559 (1981) (arguing that Congress had changed to resemble, in its bureaucracy, a modern business enterprise).

<sup>3</sup> See, e.g., FOX & HAMMOND, *supra* note 1, at 143 (“Senators, indeed, are functioning more and more like the president or chief operating officer of a corporation, giving direction to policy and giving staff the responsibility for details.”); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 858–59 (1992); Salisbury &

continue to use interpretive rules and methods that assume that Congress drafts its statutes the same way it did a century ago.

This Article aims to redress this state of affairs. To accomplish this, it pursues two specific goals. The first is descriptive: namely, to document the relationship that exists between members of Congress and modern statutes. It is a relationship that differs significantly from that which is assumed to exist in much of the legislation scholarship. Here, the Article observes that, as a result of the shift by members of Congress into a managerial role, these members no longer participate in the drafting of statutory text, and they rarely participate in the pre-enactment review of this text. Instead, the Article reveals, their pre-enactment knowledge about the content of bills typically comes from summaries that outline the purpose of statutory provisions—summaries provided either via memoranda or in-person staffer briefings. As such, the staffer-delegation system that prevails in the modern Congress has produced a situation in which members of Congress, as a routine matter, provide direct review only of the purpose of statutory provisions—a purpose that they expect congressional staffers to flesh out through policy development and statutory drafting.

This descriptive portion of the Article draws on the work experience of the author (who worked for six years as a drafter of congressional statutes), and it is supported by an original empirical study conducted for this Article. This study, which consisted of interviews with current and former congressional staffers, documents this modern division of congressional labor—and it sheds light on its inner workings. In so doing, it reveals certain practices that might be surprising—practices such as the “one-page rule,” which provides that bill summaries for some members should not exceed a page in length, and the “vote rec” strategy, which sometimes restricts bill summaries to a vote recommendation that is written on a single notecard. Through an examination of these and other practices (and, it should be noted, the “one-page rule” and the “vote rec” strategy do not operate in a vacuum), this Article reveals and focuses attention upon a central fact about the modern Congress: namely, that many modern drafting and briefing practices are tailored to provide members, in the preponderance of cases, with knowledge only about the outlines of statutory purpose, thereby entrusting to staffers the fine details of statutory text.

As the following pages will explain, this internal division of labor is not merely the result of members of Congress being busy, distracted, or lazy. Rather, it is a result—at least in part—of the fact that members of Congress reside at the intersection of two fundamental and conflicting forces. On the one hand, members are subject to a constitutional mandate that they operate as generalists. They must represent their constituents with respect to a wide variety of topics and issues—and the Constitution provides no requirement

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Shepsle, *supra* note 2, at 559 (“[A]s a consequence of staff expansion each member of Congress has come to operate as the head of an enterprise . . .”).

that they bring anything other than a generalist's knowledge to this position.<sup>4</sup> On the other hand, they are expected to produce legislation that reasonably responds to, and intervenes in, a world of private and governmental institutions that has grown enormously complex. It is a world in which the crafting of legislation, if it is to be done responsibly, requires domain-specific expertise. In response to this conflicting set of imperatives, members of Congress have established a system that makes good sense. Under this system, members typically approve statements of statutory purpose, and they delegate to staffers the task of carrying out this purpose via statutory text.

The first goal of this Article, therefore, is to describe this modern drafting reality. The second goal, meanwhile, is to advance an argument about how courts ought to respond to this new congressional practice. The fundamental change in congressional drafting practice that is documented in this Article gives rise, after all, to an important set of questions in statutory interpretation—questions that the field of legislation largely has failed to confront. Indeed, in the relatively rare instances in which legislation scholars have directed their attention to the increase in delegations to congressional staffers, they have done so simply in order to consider its implications for the debate about whether and how courts should use legislative history in statutory interpretation.<sup>5</sup> Yet this new division of labor has implications that extend well beyond the proper use of legislative history—implications for our basic understanding of how courts should approach statutory text itself. Consequently, in addition to documenting this division of labor, this Article also traces its implications for the ways that courts can, and should, interpret statutes.

In particular, this Article argues that courts ought to adopt a new doctrine—referred to here as the “staffer’s error doctrine”—that acknowledges and addresses this shift in drafting approaches. The Article finds a template for this doctrine in the Court’s opinion in *King v. Burwell*,<sup>6</sup> the 2015 case interpreting a provision of the Patient Protection and Affordable Care Act.<sup>7</sup> In this case, the Court essentially checked to ensure that statutory plain meaning did not undermine statutory purpose. This particular type of review, this Article argues, can be viewed as legitimate—and perhaps even necessary—in light of the way in which Congress now divides its labor when drafting statutes.

In what sense, it might be wondered, does the division of labor in Congress legitimate this interpretive approach? It does so by revealing that the two relevant elements of the statute—statutory purpose and statutory text—

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<sup>4</sup> See *infra* note 137 and accompanying text.

<sup>5</sup> See, e.g., Breyer, *supra* note 3; James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 53–54 (1994).

<sup>6</sup> 135 S. Ct. 2480 (2015).

<sup>7</sup> Patient Protection and Affordable Care Act of 2010 (“Affordable Care Act”), 26 U.S.C. § 36B (2012 & Supp. V 2017).

are managed and reviewed by different actors within Congress. In a world in which statutory purpose is approved by members of Congress and in which statutory text is drafted by staffers, the review found in *King v. Burwell* takes on a new dimension: it operates to ensure that a congressional staffer has not inserted an error into statutory text that undermines a decision made by members of Congress.

Once this interpretive method is viewed as a review of the work product of unelected staffers, it acquires new claims to legitimacy. In statutory interpretation, there is a longstanding tradition which holds that courts can review the drafting work of unelected staffers—a review designed to ensure that this work has not undermined the decisions made by elected representatives. In fact, there exists a doctrine of statutory interpretation that, although often misunderstood, is designed to enable courts to perform this exact review: the scrivener's error doctrine.

As the following pages explain, the scrivener's error doctrine ostensibly was designed to police the work of Congress's internal agents—a policing function designed to ensure that these agents do not exceed or undermine the delegation that members of Congress have entrusted to them. As Congress has delegated an increasing number of lawmaking tasks to staffers in recent decades, however, the scrivener's error doctrine has retained the antiquated assumption that Congress delegates a narrow set of clerical drafting tasks—and only these tasks—to staffers (or “scriveners”). When courts review statutory text to ensure that it accords with legislative purpose, by contrast, they actually do check to ensure that the work of today's staffers accords with the legislative instructions they were given by elected representatives, thereby performing this policing function. In this regard, they effectively create an updated version of this doctrine—a version that this Article refers to as a “staffer's error doctrine.” Under this updated doctrine, the principles that animated the original scrivener's error doctrine are combined with modern congressional realities and, through this combination, are made relevant once again.

By finding this doctrine embedded within the Court's opinion in *King v. Burwell*, this Article reveals that *King* and the staffer's error doctrine each contribute something to the other. On the one hand, *King* illustrates that the “staffer's error doctrine,” as endorsed by this Article, is a workable doctrine. On the other hand, the doctrine provides new theoretical underpinnings that can justify the new approach to statutory interpretation that the Court inaugurated in *King*.

In further defense of the doctrine, this Article argues that, regardless of whether statutory interpreters consider themselves to be intentionalists or textualists, they should be persuaded that the doctrine is consistent with the underpinnings of their preferred interpretive methodology. As part of this defense, this Article observes that the doctrine is compatible with at least four different variants of textualism.

Finally, this Article concludes by suggesting that, in light of this Article's findings, it might be useful for the field of legislation to undergo a shift away from the visions of Congress espoused by textualists and intentionalists—a shift instead toward the competing vision of Congress found in the field of administrative law. In administrative law, it has been widely accepted that delegation is a fundamental quality of modern lawmaking. In response to this fact, administrative law has embraced a core principle: namely, that courts ought to review the work of Executive Branch agents in order to ensure that those agents have not exceeded the scope of their delegations from Congress. Due to fundamental changes that Congress underwent in the 1970s and 1980s, this Article explains, delegation to unelected agents has become a similarly defining feature of lawmaking within Congress. Consequently, federal lawmaking—whether outsourced to agencies or conducted within Congress—is now marked by delegation. Building upon this insight, this Article asserts that courts should be reviewing these two types of lawmaking similarly; in each instance, courts should be ensuring that agents of Congress did not exceed the scope of their delegations. It is an interpretive conclusion that is intelligible only when the delegation-based dimension of the modern Congress is made visible—a dimension that is obscured by the theories of Congress offered by textualists and intentionalists.

This argument is made in five parts. Part II documents the historical rise—and the present necessity—of a congressional lawmaking process that this Article describes as the “staffer-delegation model of lawmaking.” Moreover, it reports the findings of this Article's empirical study, thereby chronicling the processes and documents that, in this staffer-delegation model, are used to educate members of Congress about the contents of bills. In so doing, Part II draws attention to an important consequence of this model of lawmaking: the fact that members of Congress no longer provide, as a routine matter, direct review of statutory text. Part III reviews the Court's opinion in *King v. Burwell*, the case that will provide a template for the “staffer's error doctrine,” and it explains how the Court's ruling takes on a new dimension when viewed in light of the staffer-delegation model of lawmaking. Part IV shows that the review performed by the Court in *King* revives, albeit accidentally, a type of review that traditionally has been embedded in the scrivener's error doctrine—a review that courts have failed to perform effectively, however, as the doctrine has stagnated in the staffer-delegation era. Part IV additionally shows that, once the Court's review in *King* is seen as a revival of the principles embedded in the scrivener's error doctrine, the opinion gains new claims to legitimacy—claims that should appeal to both intentionalists and textualists. Finally, Part V concludes by suggesting that, going forward, the field of legislation may benefit from a shift away from the visions of Congress espoused by textualists and intentionalists—and toward the vision of Congress found in the field of administrative law.

## II. THE STAFFER-DELEGATION MODEL OF LAWMAKING

For the past several decades, Congress has produced statutes through a specific process. Under this process, members of Congress delegate significant lawmaking tasks to staffers within Congress—and these members, rather than being involved in the myriad details of policy development and statutory drafting, instead adopt a managerial role. This role allows members to provide broad policy guidance and oversight throughout the drafting process yet to delegate to staffers (both partisan and nonpartisan) the subordinate tasks of developing policy details and statutory language.

This Part documents the rise, the inner workings, and the necessity of this model of lawmaking—referred to here as the “staffer-delegation model” of lawmaking. In so doing, it highlights the most important consequence of the staffer-delegation model: namely, that most members of Congress are no longer connected, in any direct sense, to statutory text, and instead are engaging with statutes at the level of legislative purpose.

### A. Congress's Models of Delegation

#### 1. Preceding Delegation Models

Congress has not always relied upon the staffer-delegation model of lawmaking. As Section 2 explains, this model did not emerge until the post-New Deal era, and it was not the default method of lawmaking in Congress until at least the 1970s. This does not mean, however, that members of Congress never delegated lawmaking tasks to subordinate entities prior to the 1970s. Rather, there were two models of delegation that preceded the staffer-delegation model.

The first of these models was the committee-delegation model. Under this model, Congress would assign a relatively small number of its members to a committee, and this group would be responsible for performing a variety of lawmaking tasks. In the Founding era, for example, the drafting of statutory text often was assigned to ad hoc drafting committees that were comprised of members of Congress.<sup>8</sup> By the second decade of the 1800s, the House of Representatives had established standing committees that were expected, in addition to drafting statutory text, to perform initial policymaking work on bills.<sup>9</sup> The Senate would mimic this turn to standing committees

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<sup>8</sup> BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 5 (2011) (citing Joseph Cooper & Cheryl D. Young, *Bill Introduction in the Nineteenth Century: A Study of Institutional Change*, 1 LEGIS. STUD. Q. 67 (1989)). See generally Norman K. Risjord, *Congress in the Federalist-Republican Era*, in 1 ENCYCLOPEDIA OF THE AMERICAN LEGISLATIVE SYSTEM (Joel Silbey ed., 1994). This followed the practice used at the Constitutional Convention, where the full membership of the Convention debated and approved constitutional provisions, while a “Committee of Detail” comprised of Convention delegates drafted and assembled these provisions.

<sup>9</sup> SINCLAIR, *supra* note 8, at 5.

soon thereafter.<sup>10</sup> This reliance upon committees persisted throughout the nineteenth century and, by 1885, it had increased to the point where Woodrow Wilson could make his famous statement that “Congress in its committee-rooms is Congress at work.”<sup>11</sup> This reliance would only further increase during the first half of the twentieth century, to the point where committees became vital policymaking engines within Congress.<sup>12</sup>

As the volume and complexity of congressional legislation increased in the New Deal era, meanwhile, a second model of delegation also emerged: the agency-delegation model. Since each executive agency employed a large collection of individuals who were focused upon a single area of legislative activity, the delegation of lawmaking tasks to these agencies allowed Congress to have its legislation shaped, as James Landis famously phrased it, by “men bred to the facts.”<sup>13</sup> It was an option that Congress increasingly utilized as the demands for complex legislation increased up to, and during, the New Deal era.

Throughout the New Deal, Congress used at least two different strategies to accomplish this delegation to agencies. First, Congress enacted a variety of statutes that provided agencies with subordinate rulemaking authority. By the end of the New Deal, this strategy had become fully entrenched, and early debates about its constitutionality had largely been settled.<sup>14</sup> Second, Congress would delegate the initial drafting of statutes—and, in some cases, the pre-enactment review of statutes—to executive agencies. As Nicholas Parrillo has documented, this method of producing statutory text predominated during the period of 1933 to 1945,<sup>15</sup> and it continued to be utilized to some extent in subsequent decades.

<sup>10</sup> *Id.*

<sup>11</sup> WOODROW WILSON, CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS 79 (Houghton Mifflin Co. 1985) (1885).

<sup>12</sup> See STEPHEN S. SMITH ET AL., THE AMERICAN CONGRESS 6 (9th ed. 2015) (detailing the ways in which “[i]n the mid-twentieth century . . . many standing committees and their chairmen were the dominant players in designing legislation”). Acknowledging that this model divorced non-committee members from statutory text, Learned Hand observed:

It is of course true that members who vote upon a bill do not all know, probably very few of them know, what has taken place in committee. . . . [Courts] recognize that while members deliberately express their personal position upon the general purposes of the legislation, as to the details of its articulation they accept the work of the committees; so much they delegate because legislation could not go on in any other way.

Sec. & Exch. Comm’n v. Collier, 76 F.2d 939, 941 (2d Cir. 1935).

<sup>13</sup> JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 58 (Greenwood Press 1974) (1938).

<sup>14</sup> Since the Court’s “switch in time” in 1936, it has upheld every statute that has come before it under the nondelegation doctrine. For a discussion of this post-New Deal history of the doctrine, see, for example, WILLIAM N. ESKRIDGE JR., ABBE R. GLUCK & VICTORIA NOURSE, STATUTES, REGULATION, AND INTERPRETATION 88 (2014) (“No federal statute has been invalidated by the Supreme Court on nondelegation grounds since the 1930s.”).

<sup>15</sup> Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. 266, 339 (2013).

Today, however, it can no longer be said that committees or agencies are the primary drafters of statutory text. Instead, the agency-delegation model has given way to yet another model of statutory production: the staffer-delegation model.

## 2. The Staffer-Delegation Model

*i. The Historical Rise of the Model.* For much of our nation's history, lawmaking was conducted without any significant delegation of lawmaking duties to staffers. Congressional staffers did not even exist during the first six decades after the ratification of the Constitution.<sup>16</sup> Some staff were hired during the period from 1840 to the 1920s, but their numbers were few and their role was marginal.<sup>17</sup> By 1924, the committees of Congress collectively employed a grand total of only 261 committee aides, for example.<sup>18</sup>

The number of congressional staffers would increase only minimally in the following two decades.<sup>19</sup> Moreover, these pre-1940 congressional staffers performed only clerical functions within Congress.<sup>20</sup> Such staffers typically did not possess the legislative expertise needed to assist Congress in its lawmaking duties.<sup>21</sup> It was estimated that, out of seventy-six committees in existence at this time, only four had appointed any experts.<sup>22</sup> In 1941, there were "not more than two hundred persons [employed by Congress] who could be considered legislative professionals."<sup>23</sup> As such, staffers did not perform duties prior to the mid-1940s that could realistically be characterized as lawmaking functions. As one scholar put it, "[u]ntil 1947 the standing committees did not regularly employ professional staffs. When such staff

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<sup>16</sup> FOX & HAMMOND, *supra* note 1, at 15.

<sup>17</sup> See *id.* (describing committees first receiving authorization to hire part-time clerks in the 1840s, two committees receiving authorization to hire full-time clerks in 1856, and senators receiving authorization to hire staffers in 1885); *id.* at 12; see also Printing Reform Act of 1919, Pub. L. No. 65-314, 40 Stat. 1213 (1919) (regularizing employment of member-based staffers).

<sup>18</sup> FOX & HAMMOND, *supra* note 1, at 15 ("By 1924, 120 committee aides were employed in the House and 141 in the Senate.").

<sup>19</sup> *Id.* at 20.

<sup>20</sup> *Id.* at 15; see also *id.* at 21 (quoting Rep. Ramspeck (D-Ga.) stating that, prior to the 1946 Act, the staff on the Agriculture Committee of the House "ha[d] no special training for what they [were] doing, they ha[d] no special knowledge of the problems of agriculture, they [were] merely a clerical staff").

<sup>21</sup> The exception to this was the House and Senate Appropriations Committees and the Joint Committee on Taxation, which had nonpartisan professional staffs as early as the 1920s. See CONG. QUARTERLY PRESS, HOW CONGRESS WORKS 190 (5th ed. 2013); see also FOX & HAMMOND, *supra* note 1, at 15 ("At the time of the Legislative Reorganization Act in 1946, committees such as Appropriations had a history of expert, nonpartisan staff—a tradition which did not extend to most other committees.").

<sup>22</sup> FOX & HAMMOND, *supra* note 1, at 20 (citing *WOL Radio Address by Representative Mike Maroney, April 1943*, in SPECIAL JOINT COMMITTEE ON THE ORGANIZATION OF CONGRESS, 79TH CONGRESS, THE ORGANIZATION OF CONGRESS: SYMPOSIUM ON CONGRESS 148 (Comm. Print 1945)).

<sup>23</sup> CONG. QUARTERLY PRESS, *supra* note 21, at 189 (quoting Lindsay Rogers, *The Staffing of Congress*, 56 POL. SCI. Q. 1, 1-2 (1991)).

assistance was needed, it was borrowed on detail from an executive agency . . . .”<sup>24</sup> Moreover, staffers who worked for nonpartisan offices of Congress similarly were confined to clerical duties during this period.<sup>25</sup>

The result was a Congress that, through the mid-1940s, was still largely dependent upon the agency-delegation model of lawmaking. By the 1940s, however, this dependence began to operate as a source of frustration for some members of Congress. As Fox and Hammond put it, “[t]here was a general feeling by 1946 that the executive branch had increased tremendously, and that the imbalance needed to be corrected.”<sup>26</sup> This need was dramatically articulated by Representative Thomas Lane (D-Mass.), for example, who would lament that:

As regularly as the clock strikes the hour, and enforced by that striking, every Member is reminded every day of two facts, as closely allied as the hands of the clock. The first is that the demands on his time are incessant and even oppressive, and that his sources of information and assistance inadequate. . . . [The second is that we] must rely on the very representatives of the Federal agencies for information when we are trying to exercise our supervision of their carrying out of the policy we have prescribed.<sup>27</sup>

In response to these frustrations, Congress enacted the first of several statutes that would allow for a steady, decades-long increase in the number of (and dependence upon) expert congressional staffers: the Legislative Reorganization Act of 1946.<sup>28</sup> This act provided the first authorization for committees to retain professional staff<sup>29</sup>—an authorization that soon was extended to individual Senators as well.<sup>30</sup> In the wake of the act’s passage, the number of congressional staffers—as well as the expertise of these staffers—increased notably.<sup>31</sup>

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<sup>24</sup> KAMMERER, *supra* note 1, at 3.

<sup>25</sup> See Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807, 822 (2014) (on Legislative Counsel being limited to formatting duties); *id.* at 834 (on Congressional Research Service’s narrow original responsibilities).

<sup>26</sup> FOX & HAMMOND, *supra* note 1, at 20–21; see also *id.* at 21 (“The committee staffing discussion [in Congress] focused on the need for technical competence [and the need for] an information analysis capability independent of the executive branch . . . .”).

<sup>27</sup> See *id.* at 22 (quoting 92 CONG. REC. H10054 (daily ed. July 25, 1946)).

<sup>28</sup> Pub. L. No. 79-601, 60 Stat. 812 (1946).

<sup>29</sup> FOX & HAMMOND, *supra* note 1, at 14 (describing this change and noting that it marked “a watershed in the area of staffing”); see also KAMMERER, *supra* note 1, at 4 (similarly describing this change). Professional aides to representatives would not be recognized until 1970. FOX & HAMMOND, *supra* note 1, at 12.

<sup>30</sup> FOX & HAMMOND, *supra* note 1, at 12.

<sup>31</sup> *Id.* at 22 (citing KAMMERER, *supra* note 1, at 34).

Nonetheless, the 1946 Act was not sufficient, by itself, to cause an immediate shift away from the agency-delegation model of lawmaking.<sup>32</sup> Instead, Congress would need to pass an additional act: the Legislative Reorganization Act of 1970.<sup>33</sup>

As Jarrod Shobe has put it, the Legislative Reorganization Act of 1970 “paved the way for the modernization of legislative drafting.”<sup>34</sup> The act accomplished this in a variety of ways. It provided representatives with statutory recognition of their ability, like their counterparts in the Senate, to retain professional staff.<sup>35</sup> It created the modern Congressional Research Service, granting the research-focused office autonomy and allowing it to increase significantly in size and clout.<sup>36</sup> It expanded the authority of the House Office of the Legislative Counsel, paving the way for notable increases in the size and capacity of this drafting office (and setting the stage for a similar expansion of the office’s Senate counterpart).<sup>37</sup> And it enabled changes to the committee system that empowered Congress to hire, retain, and rely upon committee staffers in the performance of its lawmaking duties.<sup>38</sup>

Throughout the 1970s, Congress would pass a series of measures that would further expand the number of professional staffers working for Congress. The Committee Reform Amendments of 1974 tripled the staffs of most standing committees of the House of Representatives, including with respect to professional staff.<sup>39</sup> Several other measures were passed in the 1970s that allowed for similar staff increases.<sup>40</sup> Meanwhile, the Budget and Impoundment Control Act of 1974 created the Congressional Budget Office (“CBO”), an office that would produce important economic analyses for members—and that eventually would play a central role in the legislative process.<sup>41</sup>

As with the 1946 Act, these new measures were part of a coherent, self-conscious effort in the 1970s to build an internal bureaucracy that would allow Congress to leave behind the agency-delegation model of statutory drafting. The scandals of the Nixon administration had given rise to a new

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<sup>32</sup> See Parrillo, *supra* note 15, at 338 (citing KAMMERER, *supra* note 1, at 41–42); Harry W. Jones, *Drafting of Proposed Legislation by Federal Executive Agencies*, 35 A.B.A. J. 136, 137 (1949).

<sup>33</sup> Pub. L. No. 91-510, 84 Stat. 1140 (1970).

<sup>34</sup> Shobe, *supra* note 25, at 816.

<sup>35</sup> Pub. L. No. 91-510, §§ 301–305, 84 Stat. 1140, 1175–81 (1970; *see also* FOX & HAMMOND, *supra* note 1, at 24).

<sup>36</sup> Pub. L. No. 91-510, § 321; *see also* Shobe, *supra* note 25, at 834–43.

<sup>37</sup> *See* Pub. L. No. 91-510, §§ 501–531; *see also* Shobe, *supra* note 25, at 818–23.

<sup>38</sup> Pub. L. No. 91-510, §§ 301–305; *see also* CONG. QUARTERLY PRESS, *supra* note 21, at 192.

<sup>39</sup> *See* H.R. Res. 988, 93d Cong. (1974); *see also* CONG. QUARTERLY PRESS, *supra* note 21, at 188.

<sup>40</sup> For a detailed accounting of these statutes, *see* CONG. QUARTERLY PRESS, *supra* note 21, at 190.

<sup>41</sup> 2 U.S.C. §§ 601–688 (2012).

wariness of Executive Branch dependence. In response, Congress undertook these efforts to increase congressional staffing—efforts that, as one longtime Beltway journalist has put it, were Congress’s way of “building a bureaucracy to fight a bureaucracy.”<sup>42</sup>

Due to these and other enactments, the number of staffers employed by Congress increased steadily and significantly in the 1970s and 1980s, thereby creating the robust congressional bureaucracy that persists today.<sup>43</sup> The number of subcommittee staffers employed in the House of Representatives increased by 650 percent during the 1970s, for example.<sup>44</sup> Between 1975 and 2011, the number of attorneys employed by the Offices of the Legislative Counsel tripled; by 2011, these offices together employed more than eighty attorneys.<sup>45</sup> The Congressional Research Service would expand into a formidable office that employs more than 400 experts and specialists.<sup>46</sup> The number of committee staffers would more than double between 1965 and 2009, expanding to include over 2200 employees.<sup>47</sup> And the number of personal staffers would nearly double between 1965 and 2009, leaping to over 5800 employees.<sup>48</sup>

The growth of congressional staffs, it should be noted, has not been uniform during these periods; staff numbers for many congressional offices peaked in the mid-1980s, and then subsequently retreated modestly.<sup>49</sup> Nonetheless, as the comparisons to pre-1980s staffing numbers make clear, these

<sup>42</sup> See HEDRICK SMITH, *THE POWER GAME: HOW WASHINGTON WORKS* 281–82 (quoting Sen. Moynihan (D-N.Y.) on this motivation); see also *id.* at 290 (describing CBO as “representing the most important institutional shift of power on domestic issues between the executive branch and Congress in several decades” and quoting a domestic policy chief in the Carter White House on this point).

<sup>43</sup> See FOX & HAMMOND, *supra* note 1, at 13 (“Change has occurred most rapidly in recent years.”); Salisbury & Shepsle, *supra* note 2, at 559 (“[I]n the years between 1967 and 1979 the number of congressional committee staff and personal staff employees grew from 7,014 to 13,276; the total number of employees (staffers and others) [by 1981 was] well over thirty thousand.”).

<sup>44</sup> CONG. QUARTERLY PRESS, *supra* note 21, at 193. The number of Senate subcommittee staffers increased by only 50 percent during the same period. *Id.* at 191. S. Res. 60 provided senators with other ways to access increased professional staffing, however. See S. Res. 60, 93d Cong. (1973).

<sup>45</sup> STAFF OF J. COMM. ON PRINTING, 112TH CONG., CONG. DIRECTORY 392–93, 460–61 (Comm. Print 2011); STAFF OF J. COMM. ON PRINTING, 94TH CONG., CONG. DIRECTORY 422–23, 430 (Comm. Print 1975). This statistic and the statistics cited *infra* notes 46–48 are also reported in Jarrod Shobe’s recent study of the growth of this staffer bureaucracy. See Shobe, *supra* note 25, at 823–45.

<sup>46</sup> *Organizational Structure*, LIBRARY OF CONG. (Nov. 17, 2017), <http://loc.gov/crsinfo/about/structure.html> [<https://perma.cc/24QF-6X4W>].

<sup>47</sup> *Vital Statistics on Congress*, BROOKINGS INST., ch.5, at 10 tbl5-5 (2017), [https://www.brookings.edu/wp-content/uploads/2017/01/vitalstats\\_ch5\\_full.pdf](https://www.brookings.edu/wp-content/uploads/2017/01/vitalstats_ch5_full.pdf) [<https://perma.cc/7C5Z-RGK5>]. On the increase in personal legislative staff of members, albeit during a slightly earlier period, see FOX & HAMMOND, *supra* note 1, at 25 (describing the drastic increase in the number of legislative aides between 1960 and 1975); see also *id.* at 12 (“Sizable staffs, capable of sophisticated services, now exist [in 1977] within Member offices and committees.”).

<sup>48</sup> CONG. QUARTERLY PRESS, *supra* note 21, at 195 (citing *Vital Statistics*, *supra* note 47).

<sup>49</sup> See KATHY GOLDSCHMIDT, CONG. MGMT. FOUND., *STATE OF THE CONGRESS: STAFF PERSPECTIVES ON INSTITUTIONAL CAPACITY IN THE HOUSE AND SENATE* 16–19 (2017), <http://>

recent staff reductions still have left intact a formidable congressional bureaucracy—one that carries the staffer-delegation model of lawmaking into the present day.

ii. *The Consequences of the Staffer-Delegation Model.* As these staffer offices grew in size after 1970, their employees were able to specialize to a far greater extent than ever before. In the Congressional Research Service, for example, the increase in size allowed for the Service to be divided and subdivided into areas of intensive expertise, with “each attorney working in just a few legislative areas throughout his or her career,” as one scholar has put it.<sup>50</sup> The Offices of the Legislative Counsel underwent a similar specialization,<sup>51</sup> as did committee staffs.<sup>52</sup>

With this new specialization, not surprisingly, came a change in the balance of functions performed by members of Congress, as opposed to those performed by congressional staffers. No longer were these staffers simply performing minor clerical tasks. Instead, staffers began to perform three important lawmaking tasks: policymaking, statutory drafting, and pre-enactment review of statutory text.

Each of these shifts in responsibility is worth considering further. First, staffers had begun, by the late 1970s, to assume significant policymaking responsibilities. This shift was noted in several contemporaneous studies of Congress. A survey of the literature on congressional staffs from 1981, for example, observed that: “[I]n many specific situations, [member policy instructions to staffers] constitute no more than a general guide to action.”<sup>53</sup> In such instances, the authors observed, members relied upon “the often important role of staff in negotiating legislative substance.”<sup>54</sup>

These trends only continued throughout the 1980s. Speaking in 1986, Senator William Cohen (R-Me.) could observe that:

[N]o single person can keep up with the sprawling substance of policy. . . . [A member] will dart into one hearing, get a quick fill-in from his staffer, inject his ten minutes' worth and rush on to the next event, often told by an aide how to vote as he rushes onto the floor. Only the staff specialist has any continuity with substance. The member is constantly hopscotching.<sup>55</sup>

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[www.congressfoundation.org/storage/documents/CMF\\_Pubs/cm-f-state-of-the-congress.pdf](http://www.congressfoundation.org/storage/documents/CMF_Pubs/cm-f-state-of-the-congress.pdf)  
[<https://perma.cc/FKY7-FFC8>].

<sup>50</sup> Shobe, *supra* note 25, at 837.

<sup>51</sup> *Id.* at 822.

<sup>52</sup> *Id.* at 845; *see also* FOX & HAMMOND, *supra* note 1, at 144 (“Today [i.e., in 1977] staff are more expert and are becoming increasingly specialized.”).

<sup>53</sup> Salisbury & Shepsle, *supra* note 2, at 567; *see also* FOX & HAMMOND, *supra* note 1, at 143 (describing Senators as “giving direction to policy and giving staff the responsibility for the details”).

<sup>54</sup> Salisbury & Shepsle, *supra* note 2, at 569.

<sup>55</sup> SMITH, *supra* note 42, at 292.

The result of this situation, Cohen added, was that: “You [as a senator] skate along on the surface of things. More and more you are dependent on your staff.”<sup>56</sup> Consequently, Cohen noted, staffers were routinely making significant policymaking decisions by the mid-1980s.<sup>57</sup>

In their efforts to describe this new division of labor within Congress, scholars in the 1970s and 1980s repeatedly turned to the same analogy: members of Congress, they observed, now more closely resembled a corporate CEO than a traditional legislator.<sup>58</sup> Rather than make each minor policy decision for themselves, members would now oversee a set of subordinates who were empowered to make these decisions. These members shifted into a supervisory role—a role that allowed them to retain responsibility for reviewing larger scale decisions that subordinates believed warranted the attention of their principals.

As part of this larger retreat into a managerial role, members of Congress also increasingly shifted responsibility for statutory drafting to staffers. Stuart Eizenstat, former domestic policy chief in the Carter White House, would remark in 1986 that members were routinely delegating statutory drafting of tax bills to the nonpartisan staffers on the Joint Tax Committee. As Eizenstat said:

The actual drafting of [tax] legislation, the fine points, the statement of managers, the explanations, the things that can make millions and millions of dollars of difference have to be done by Joint Tax because of the complexity and technicality of the tax code. . . . They’re the only ones who can deal with it. And every tax conference of necessity leaves significant areas for the Joint Committee to fill in. Significant areas, involving tens of millions of dollars in decision.<sup>59</sup>

Notwithstanding Eizenstat’s observation about the role of the Joint Tax Committee, however, the offices that would assume nearly sole responsibility for statutory drafting during these decades were the Offices of the Legislative Counsel. As these offices became larger and more specialized, they assumed an increasingly large role as the primary drafters of statutory text. Today, Legislative Counsel drafts nearly every bill that is introduced in Congress. In their recent survey of contemporary congressional drafting practices, one staffer told Abbe Gluck and Lisa Schultz Bressman that “99% [of

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<sup>56</sup> *Id.* at 289–90.

<sup>57</sup> *See id.* (quoting Cohen as saying: “[S]ometimes you’ll call a senator and ask, ‘Why are you opposing me on this?’ and he’ll say, ‘I didn’t know I was.’ And you’ll say, ‘Well check with your staff and see.’”).

<sup>58</sup> *See, e.g.,* FOX & HAMMOND, *supra* note 1, at 143 (“Senators, indeed, are functioning more and more like the president or chief operating officer of a corporation, giving direction to policy and giving staff the responsibility for the details.”); Salisbury & Shepsle, *supra* note 2, at 559 (“[A]s a consequence of staff expansion each member of Congress has come to operate as the head of an enterprise.”); Breyer, *supra* note 3, at 858–59.

<sup>59</sup> SMITH, *supra* note 42, at 279.

statutory text] is drafted by Legislative Counsel,” and they were told by another that “[n]o staffer drafts legislative language. Legislative Counsel drafts everything.”<sup>60</sup> Indeed, the Rules Committee of the House frequently will not even consider amendments to bills unless the members of Congress have used the services of Legislative Counsel to draft the text of the amendment.<sup>61</sup>

As Gluck and Bressman point out, the assumption of drafting responsibilities by Legislative Counsel has a noteworthy implication: it reveals “an important disconnect . . . between members and statutory text.”<sup>62</sup> A 2002 study coauthored by Victoria Nourse—a former counsel to the Senate Judiciary Committee—and Jane Schacter uncovered the same disconnect, asserting that: “Most staffers indicated [in a survey] that, as a general rule, senators themselves did not write the text of legislation.”<sup>63</sup> Ganesh Sitaraman—a former Senior Counsel for Senator Warren<sup>64</sup>—similarly has noted in a law review article that: “[S]taff drafts virtually everything; members almost never write or edit legislative text.”<sup>65</sup> Sitaraman adds:

The overall picture that emerges from understanding the workings of a congressional office is that [members of Congress] are not drafters but rather decisionmakers. They are managers of a mini-bureaucracy who set the direction for policy and sometimes wade into the details of policy, but who rarely get into the technical work of legislative drafting.<sup>66</sup>

Ted Kennedy similarly attested to this disconnect between members and statutory text in his 2009 memoir. Kennedy stated that: “Ninety-five percent of the nitty-gritty work of drafting and even negotiating is now done by staff. That alone marks an enormous shift of responsibility over the past forty or fifty years.”<sup>67</sup> Reflecting on Kennedy’s observation in light of his journalistic study of the Dodd-Frank bill, Robert Kaiser would add:

In the case of Dodd-Frank, 95 percent might understate staff members’ share of the work. . . . [Staffers] were responsible for every aspect of producing the final legislation: writing provisions (most

<sup>60</sup> Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 740 (2014).

<sup>61</sup> *Amendment Submission Guidelines*, H. COMM. ON RULES, DEMOCRATS, <http://democrats.rules.house.gov/amendment-summary/112th/amendment-submission-guidelines> [<https://perma.cc/PF8X-ACDX>].

<sup>62</sup> Bressman & Gluck, *supra* note 60.

<sup>63</sup> Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 585 (2002).

<sup>64</sup> *About Ganesh*, GANESH SITARAMAN, <https://ganeshsitaraman.com/about-ganesh/> [<https://perma.cc/73JW-Y4HB>].

<sup>65</sup> Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79, 88 (2015).

<sup>66</sup> *Id.* at 90–91.

<sup>67</sup> EDWARD M. KENNEDY, *TRUE COMPASS: A MEMOIR* 486 (2009).

based on Obama administration drafts), vetting the contents with interest groups of all kinds, looking for glitches or omissions, and hearing out the recommendations and complaints of hundreds of experts, lobbyists and affected parties.<sup>68</sup>

As the work by the aforementioned scholars makes clear, the delegation that occurred with respect to the Dodd-Frank bill was no exception. Rather, the delegation of statutory drafting to staffers has, today, become a fully entrenched practice within Congress.

Additionally, the shift to the staffer-delegation model also has meant that members of Congress typically will not perform a pre-enactment review of statutory text. As one lobbyist put it when asked if members read most of the bills: “Most of the bills? [They read] almost none of them! Any member that was honest will tell you that.”<sup>69</sup>

Representative Jim Moran (D-Va.) did indeed acknowledge this fact in an interview about the 2014 National Defense Authorization bill. Moran partook in the following exchange:

[Interviewer]: “Have you read all 1,648 pages of the final text of the National Defense—”

Moran: “Of course not. Are you kidding?”

[Interviewer]: “Are you planning on reading it before you vote?”

Moran: “No.”

[Interviewer]: “How will you know what’s in it?”

Moran: “Because we were, many of these issues we worked on for years and I trust the leadership . . . .”

[Interviewer]: “Do you think Boehner and Reid have read it?”

Moran: “I know their staff has.”<sup>70</sup>

These anecdotal statements are supported by a qualitative study conducted in 2013 that found that, in the modern Congress, members of Congress typically do not conduct pre-enactment review of statutory text.<sup>71</sup>

<sup>68</sup> Robert G. Kaiser, *Three Reasons Congress Is Broken*, WASH. POST (May 23, 2013), [https://www.washingtonpost.com/opinions/the-three-reasons-congress-is-broken/2013/05/23/8b\\_282d2c-b667-11e2-aa9ea02b765ff0ea\\_story.html?utm\\_term=.77c9a80268fb](https://www.washingtonpost.com/opinions/the-three-reasons-congress-is-broken/2013/05/23/8b_282d2c-b667-11e2-aa9ea02b765ff0ea_story.html?utm_term=.77c9a80268fb) [https://perma.cc/BR2V-QRBS]. See ROBERT A. KATZMANN, *JUDGING STATUTES 20–21* (2014) for a discussion of Kennedy’s quotation and Kaiser’s additional observation.

<sup>69</sup> LAWRENCE LESSIG, *REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT* 126 (2011).

<sup>70</sup> Lauretta Brown, *Did Rep. Moran Read 1648-Page Defense Bill? “Are You Kidding?”*, CNS NEWS (Dec. 4, 2014), <http://www.cnsnews.com/news/article/lauretta-brown/did-rep-moran-read-1648-page-defense-bill-are-you-kidding> [https://perma.cc/8KRH-BJA2].

<sup>71</sup> Brian Christopher Jones, *Don’t Be Silly: Lawmakers “Rarely” Read Legislation and Oftentimes Don’t Understand It . . . But That’s Okay*, 118 PENN STATIM 7, 13–14 (2013), <http://www.pennstatelawreview.org/118/penn%20statim/DontBeSillyFinal.pdf> [https://perma.cc/5DLF-CG4X].

When asked if members of Congress read bills, one representative journalist responded: “Oh . . . absolutely not, no. Not in the United States Congress.”<sup>72</sup>

Instead, the study found, responsibility for pre-enactment review of statutory text is conventionally entrusted to staffers. One chief of staff said that reading legislation was “mostly a staff thing,”<sup>73</sup> while a Legislative Director said it was “predominantly staff’s job” to read all the legislation.<sup>74</sup> The study found journalists familiar with Congress corroborating this finding.<sup>75</sup> Summarizing these findings, the study stated that: “[M]embers of Congress employ specialized staff whose job it is to read and write legislation, and report to their bosses on particular points of interest.”<sup>76</sup> In their survey of congressional staffers, Gluck and Bressman similarly observed: “Our findings cast doubt on whether members or high-level staff read, much less are able to decipher, all of the textual details, and illustrate how the different players in the legislative process contribute to the final product in different ways, not all of them text focused.”<sup>77</sup>

This is not to say that members of Congress categorically refuse to read statutory text. Indeed, members may well supplement bill summaries by perusing isolated provisions of actual statutory text. However, such reviews—which are scattershot and de-contextualized—can hardly be considered thoroughgoing “readings” of the statutory text.<sup>78</sup> Instead, the nature of the pre-enactment review process—and the sum of materials used by members therein—suggests that, in essence, most members now provide only an indirect review of the contents of statutes.

In short, a host of scholarly and journalistic studies have documented the fact that, in the staffer-delegation era, members of Congress have shifted responsibility for three important tasks to staffers: the tasks of interstitial policymaking, statutory drafting, and pre-enactment review of statutory text. Due to this shift in responsibility, these studies reveal, members of Congress are performing only indirect reviews of the statutes upon which they vote. This gives rise to questions. What exactly is the nature of this indirect review? What information do members of Congress actually review before voting on a bill?

*iii. The Inner Workings of the Staffer-Delegation Model.* In the effort to understand the nature and sources of information that members of Congress draw upon to understand bills, interviews were conducted for this Article with twenty-five congressional staffers. Together, these staffers have worked

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<sup>72</sup> *Id.* at 14.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 8.

<sup>77</sup> Bressman & Gluck, *supra* note 60, at 742.

<sup>78</sup> See, e.g., Christopher Beam, *Paper Weight*, SLATE (Aug. 20, 2009), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2009/08/paper\\_weight.html](http://www.slate.com/articles/news_and_politics/explainer/2009/08/paper_weight.html) [<https://perma.cc/EHQ2-G57Z>] (describing members “when necessary, poring over the actual text to understand the more crucial bits”).

in seventy-five different positions within Congress. Interviewees were drawn from both parties, both chambers of Congress, and a wide range of committee and member offices. The interviews were semi-structured in nature; planned questions were posed to interviewees that, while open-ended, nonetheless would permit for coding by response; and spontaneous follow-up questions were posed in order to invite interviewees to provide detail and elaboration on their initial answers. When interviewees answered a question multiple times to account for the different members for whom they had worked, their responses were coded as separate answers.

An interview-based study of this sort has several limitations, of course, a few of which are worth noting at the outset. Such studies always are subject to possible manipulation by interviewees, who might feel professional pressure to provide self-serving answers to sensitive questions about the conduct of their superiors. Moreover, a preference for depth and detail led to the use of open-ended questions. Due to the time-consuming nature of such questioning, the number of interviews that feasibly could be conducted was limited—a tradeoff that prevents the resulting study from operating as a comprehensive or exhaustive survey of congressional offices.

With these caveats in mind, we can turn to the findings of the study. First, interviewees were asked: how do members of Congress learn the contents of bills? Interviewee responses coded as follows:

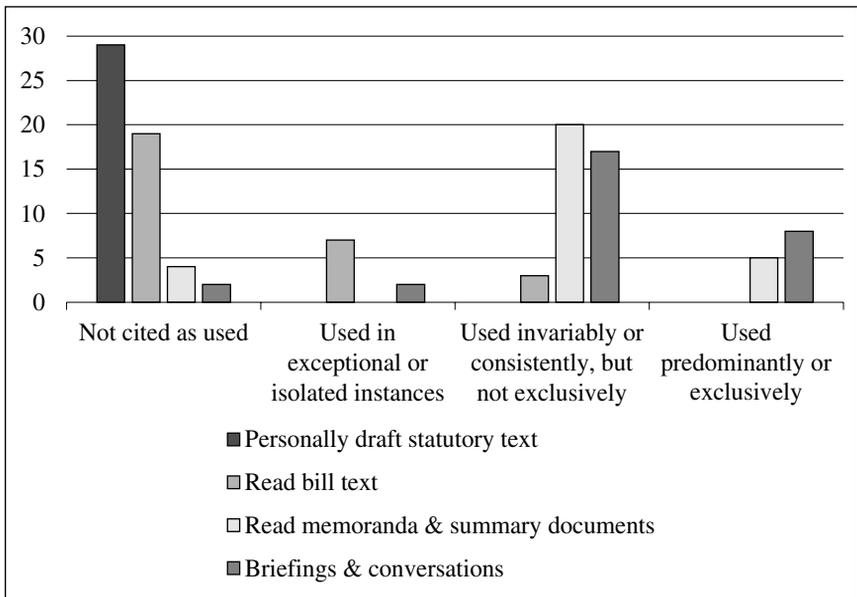


Figure 1. How members learn bill contents.

Several findings captured in Figure 1 warrant discussion. First, no interviewee mentioned direct member involvement in bill drafting. In this way, the interviews underscored the fact that members no longer participate per-

sonally in the drafting of statutory text and that, consequently, none learn the contents of bills through this activity. This highlights the level at which members are engaging with bills. As one interviewee put it:

[Members are] not sitting there with a pen and writing the legislation themselves. But they oftentimes think about the concept, at a very general level. . . . [T]he staffer will get the idea—again, very broad-based from [the member]—and it's your job to take that, run with it, figure out the details.<sup>79</sup>

Second, the majority of interviewees (nineteen respondents) did not cite direct review of statutes as a method used by members; a smaller number (seven respondents) mentioned it as a method used only in exceptional instances; and very few (three respondents) cited it as a consistently used method. These findings offer several lessons. On the one hand, they counsel against any categorical assertion that members never read bill text. A particular member of Congress was mentioned by several interviewees as reading nearly every bill voted upon, and one committee staffer expressed his belief that most members on his committee did spend some time with statutory text. On the other hand, these heavier readers of statutory text appear to be outliers. One interviewee who worked for a member who read some statutory text, for example, added: "My impression was that was not normal."<sup>80</sup> Another such interviewee estimated that only thirty percent of members look at statutory text.<sup>81</sup> This outlier status is reflected in the aggregate interview data, where only three out of twenty-five interviewees described review of bill text as a method consistently used by members.

More commonly, as mentioned above, interviewees either did not list this method at all (nineteen respondents), or they described it as an exceptional practice reserved for abnormal instances (seven respondents). In a typical response flagging this method as exceptional, for example, one interviewee said: "Largely it's a conceptual conversation with occasional references to sections of legislation."<sup>82</sup> There was no uniform description of these abnormal instances. Various interviewees mentioned the following as abnormal instances that increase the likelihood of some statutory text getting consulted: when a provision addresses a hot-button topic;<sup>83</sup> when a provision addresses an issue on which the member has staked a reputation for high knowledge or passion;<sup>84</sup> when a larger bill is of particular political or social

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<sup>79</sup> Interview with No. 23, Cong. Staffer, in Wash., D.C.

<sup>80</sup> Interview with No. 22, Cong. Staffer, in Wash., D.C.

<sup>81</sup> Interview with No. 18, Cong. Staffer, in Wash., D.C.

<sup>82</sup> Interview with No. 3, Cong. Staffer, in Wash., D.C.

<sup>83</sup> Interview with No. 4, Cong. Staffer, in Wash., D.C.; Interview with No. 11, Cong. Staffer, in Wash., D.C.

<sup>84</sup> Interview with No. 22, Cong. Staffer, in Wash., D.C.

consequence;<sup>85</sup> and when a particular member's vote is undecided and is essential to passage.<sup>86</sup>

Two interviewees also mentioned a practice that may effectively prevent "off-committee" members from learning bill contents by reading the bill. Sometimes, they asserted, a committee will not share the actual bill text with member offices until shortly before the bill text is posted publicly.<sup>87</sup> This practice exists, interviewees said, due to concern that member offices might, intentionally or unintentionally, leak the bill text before the committee hopes to release it publicly. While bill text must be posted forty-eight hours in advance of action on the bill, it often has been lamented that this provides insufficient time for outside actors to read a bill comprehensively. Based on these interviewees' remarks, some member offices may labor under similar constraints (though they may not mind this, as explained below).

In short, while it is an overstatement to say that members categorically refuse to read statutory text, interviews made clear that it is not prevailing practice for members to learn bill contents by reading the bill.

Instead, Figure 1 outlines a world in which members of Congress now rely overwhelmingly on two sources for their information about bills: (1) memoranda and summary documents; and (2) briefings and conversations. Twenty-five interviewees reported that memoranda (and other summary documents) were used exclusively or routinely by members for this purpose, and twenty-five interviewees similarly reported that briefings (and other in-person conversations) were used exclusively or routinely by members for this purpose. When it comes to how members learn bill contents, as one interviewee put it: "Conversations and memos are usually [the strategy]."<sup>88</sup>

To shed light on the nature of these information sources, interviewees were asked a number of questions about them. With respect to memoranda and summary documents, interviewees first were asked about the type of summary documents used. In response, they mentioned a number of different documents that might be provided to the member, but the most commonly reported document—by a wide margin—was a staffer-generated memorandum. In the words of a typical respondent: "Almost every personal office that I have worked in or worked with, the [legislative] staff do vote memos for members."<sup>89</sup> Another remarked: "Whenever we do a bill introduction, we do a memo to [our member] outlining the parameters of [it, which would say]: 'This is what the bill would do, this is our idea, this is the general concept.'"<sup>90</sup>

<sup>85</sup> Interview with No. 20, Cong. Staffer, in Wash., D.C.

<sup>86</sup> Interview with No. 8, Cong. Staffer, in Wash., D.C.

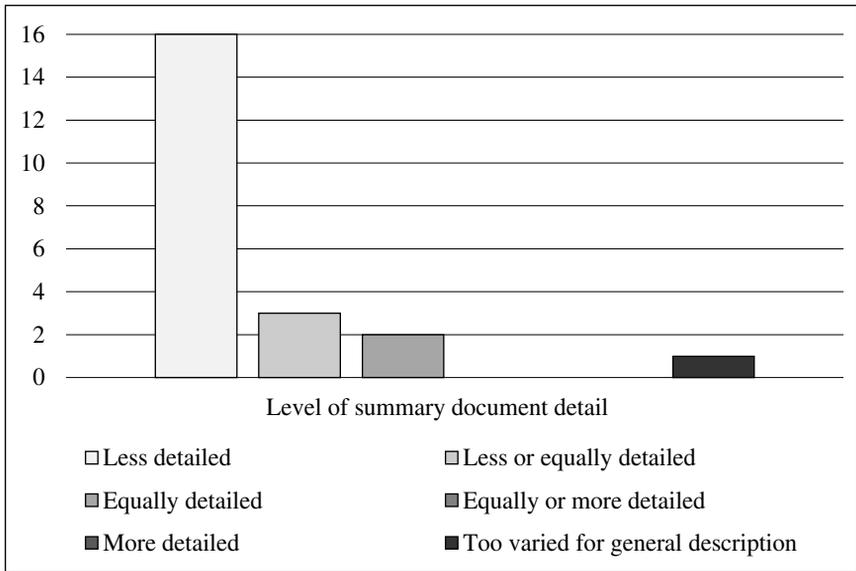
<sup>87</sup> *Id.*; interview with No. 8, Cong. Staffer, in Wash., D.C.; Interview with No. 12, Cong. Staffer, in Wash., D.C.

<sup>88</sup> Interview with No. 10, Cong. Staffer, in Wash., D.C.

<sup>89</sup> Interview with No. 21, Cong. Staffer, in Wash., D.C.

<sup>90</sup> Interview with No. 23, Cong. Staffer, in Wash., D.C.

Asked to compare the level of detail in these documents to that found in the section-by-section of a committee report, interviewees responded as follows:



*Figure 2. Summary documents, compared to section-by-section.*

Section-by-section breakdowns in committee reports, it must be recalled, are themselves relatively concise. Yet, as the above chart shows, interviewees were unambiguous: memoranda and other summary documents are more brief and purpose-oriented than even a section-by-section. As interviewees put it:

- “[Summary documents are] much more of an overview than a section-by-section. Pithiness is valued very much on the Hill.”<sup>91</sup>
- “You’re distilling a 60-page bill into 500 words, or 300 words—very top-level.”<sup>92</sup>
- “We send information upwards—at my level, it’s X amount of information, and then what I give to the staff director is X minus two, because you need to simplify it, because they have less time. And then they take that, and it’s like X minus six for the staff director’s staff director, and then it’s even less when it gets to the member. It then ends up being talking points.”<sup>93</sup>
- “Less is generally more.”<sup>94</sup>

<sup>91</sup> Interview with No. 9, Cong. Staffer, in Wash., D.C.

<sup>92</sup> Interview with No. 16, Cong. Staffer, in Wash., D.C.

<sup>93</sup> Interview with No. 18, Cong. Staffer, in Wash., D.C.

<sup>94</sup> Interview with No. 15, Cong. Staffer, in Wash., D.C.

- “Most members, everything they get is a very, very concentrated look at what the issue is.”<sup>95</sup>
- “[We] had a top-level document that kind of said, ‘Okay, we fixed [the issue]!’ Which is really what [members] cared about. ‘And here are the offsets [i.e., spending reduction policies that offset the bill’s costs].’ That’s what they want to know.”<sup>96</sup>
- “In terms of the detail, it will not necessarily be a section-by-section—I think that’s really information that, in the agent-principal relationship, your [member] is deferring to you to know the details in the weeds. It’s usually bigger picture. . . . So a memo would generally set out, very briefly, ‘Here is the contents of what’s in the bill, here are the [members] that support the bill, here are the groups that support the bill and oppose the bill, here is the pathway to passage . . . and here is your staff recommendation and why.’”<sup>97</sup>
- “If you go to congress.gov, the summary page on each of the bills—that’s how much information [about 70% of the members] will take.”<sup>98</sup>

The brevity of these memoranda was underscored by a noteworthy congressional practice that was mentioned by seven different interviewees: an informal expectation that memoranda should not exceed one page in length. One interviewee referred to this as the “one-page rule.” In the words of interviewees:

- “Some members would like to see all the information and read everything, [but] most members want no more than one page on any given issue, on any given bill.”<sup>99</sup>
- “If I can’t fit an entire ‘rec’ [i.e., vote recommendation] on one page, then I’m not doing my job well enough.”<sup>100</sup>
- “I would say that, for the most part, they don’t know what’s in the contents of the bill. They certainly know what’s in a one-pager, and a summary. I don’t know if I would go as far as to say that they know what’s in a section-by-section of the bill. . . . That’s the vast majority of members.”<sup>101</sup>
- “Any time you go past one page, then you need a reason for it. Your typical vote memo for a non-controversial bill is probably a page. For a bill you think your boss is interested in, [it] might be two. I would consider a four-page memo to be a super-long

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<sup>95</sup> Interview with No. 18, Cong. Staffer, in Wash., D.C.

<sup>96</sup> Interview with No. 19, Cong. Staffer, in Wash., D.C.

<sup>97</sup> Interview with No. 23, Cong. Staffer, in Wash., D.C.

<sup>98</sup> Interview with No. 18, Cong. Staffer, in Wash., D.C.

<sup>99</sup> Interview with No. 9, Cong. Staffer, in Wash., D.C.

<sup>100</sup> Interview with No. 11, Cong. Staffer, in Wash., D.C.

<sup>101</sup> Interview with No. 17, Cong. Staffer, in Wash., D.C.

memo that I would only send to a substantive member that was really interested.”<sup>102</sup>

- “The unwritten rule is, you really want to give [your member] one page. . . . If you’re voting on an amendment on the floor, it could be very much shorter than that. It may literally be a paragraph of three to four sentences. ‘Here is your staff’s recommendation, here’s why.’”<sup>103</sup>

Four additional interviewees mentioned that memoranda for members should not exceed two pages.<sup>104</sup> In the words of one such interviewee: “[Typically,] it’s been literally two pages or less. If you’re feeling really special today, maybe you can go into a third.”<sup>105</sup> There was some additional variation in the responses on memorandum length; one interviewee claimed to insist upon writing five-to-eight-page memoranda,<sup>106</sup> and another mentioned that, while some members would not read past the first page, others would read a five-page memorandum.<sup>107</sup> Even these outlier reports, however, describe documents that, when compared to the length of many federal bills, are very brief. And, overall, the interviews supported the contention of one interviewee that “some members would like to see all the information and read everything, [but] most members want no more than one page on any given issue, on any given bill, so that they are able to understand the gravity of their vote.”<sup>108</sup>

A few other summary documents warrant comment. One—already mentioned above—is the “vote rec,” which provides a member with a brief summary of a bill and a staff recommendation on how to vote. A “vote rec” for the floor of Congress often is limited to a notecard or sheet of information. For some members, this notecard presumably serves merely as a reminder of the bills to be voted upon. Yet staffers also describe these notecards as regularly constituting the entirety of the information that members will consume on bills, saying:

- “When members go down to vote every day, they get a card which is two-and-a-half inches by six, or seven. And it has the recommendations for why they should vote yes or no on every bill that’s going to be on the floor. And the blurb is—imagine that small of a notecard, and that’s how much [roughly seventy percent of members] will usually know. Unless they care about

<sup>102</sup> Interview with No. 21, Cong. Staffer, in Wash., D.C.

<sup>103</sup> Interview with No. 23, Cong. Staffer, in Wash., D.C.

<sup>104</sup> Interview with No. 5, Cong. Staffer, in Wash., D.C.; Interview with No. 6, Cong. Staffer, in Wash., D.C.; Interview with No. 24, Cong. Staffer, in Columbia, S.C.; Interview with No. 25, Cong. Staffer, in Columbia, S.C.

<sup>105</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.

<sup>106</sup> Interview with No. 14, Cong. Staffer, in Wash., D.C.

<sup>107</sup> Interview with No. 21, Cong. Staffer, in Wash., D.C.

<sup>108</sup> Interview with No. 9, Cong. Staffer, in Wash., D.C.

it, where they'll pull a staffer and take them with them and walk and talk on the way to the floor."<sup>109</sup>

- “[A member’s staff] will write up a ‘vote rec.’ So, personal office staffers . . . will write up a vote recommendation, like, ‘Lean yes. Yes. Lean no. No.’ And why—a paragraph why. And so most members, you’ll see them walk on the floor with a card, you know, this big [gestures the size of a notecard], that has their vote recs on it. A lot of them don’t know what they’re voting on. You’re on the floor, they’re like, ‘what am I voting on right now?’”<sup>110</sup>

Several interviewees also mentioned “dear colleague” letters as an educational tool, which are letters written in the voice of one member explaining the bill’s goals to another. Other interviewees mentioned a “charge-and-response,” which outlines the opposing party’s likely criticisms of a bill and provides retorts to those criticisms. Others mentioned the fact sheet about the bill that the Leader’s office typically generates. All of these documents were described as similarly concise and overview-oriented in nature, with interviewees saying:

- “Generally a ‘dear colleague’ is broad . . . you might have a bill that’s pretty long—100 pages plus—and you still have a single-page ‘dear colleague.’”<sup>111</sup>
- “[In a charge and response,] if you’re defending against a response for three or four pages, methinks you do protest too much.”<sup>112</sup>
- “The leadership [fact sheet] is usually much more message focused [i.e., focused on political rhetoric and ‘spin’] than ours is, and it usually ends up being longer. . . . I think their press staff do it. . . . So it’s more of a communications document.”<sup>113</sup>

The brevity of these documents can seem disconcerting, but the documents do not exist in a vacuum. Only four interviewees described summary documents as the exclusive material used by members. Rather, most interviewees described a process whereby memoranda and staff-generated summary documents worked in tandem with: (1) additional summary documents (though of a similar overview nature) such as analyses from stakeholders, newspaper articles, Bloomberg and Congressional Quarterly summaries, and whip notices; and (2) in-person briefings of, and conversations with, members on the contents of bills. These briefings and conversations were described as taking various forms, such as:

<sup>109</sup> Interview with No. 18, Cong. Staffer, in Wash., D.C.

<sup>110</sup> Interview with No. 12, Cong. Staffer, in Wash., D.C.

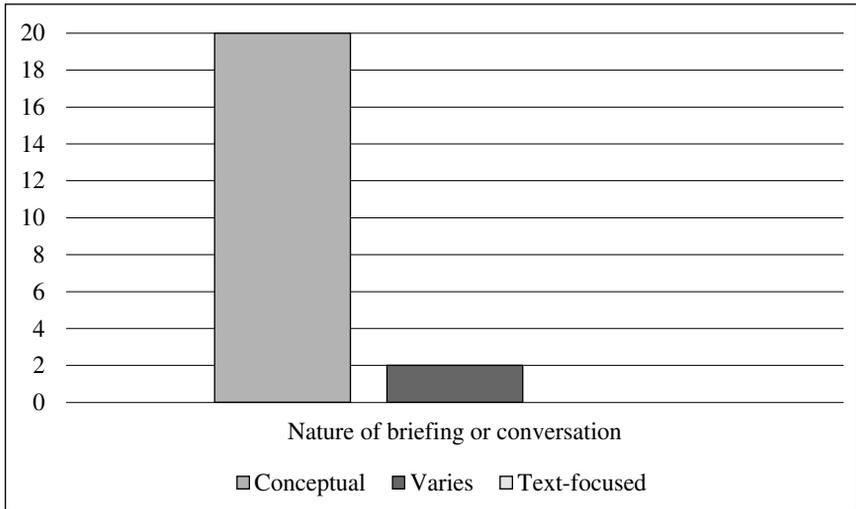
<sup>111</sup> Interview with No. 21, Cong. Staffer, in Wash., D.C.

<sup>112</sup> Interview with No. 13, Cong. Staffer, in Wash., D.C.

<sup>113</sup> Interview with No. 21, Cong. Staffer, in Wash., D.C.

- Member-to-member conversations.
- Member legislative staff briefing the member.
- Committee staff briefing individual members.
- Committee staff briefing caucuses.
- Committee staff briefing member staffers (who then brief members).
- Whip sessions and other whip briefings to staff and members.

What, then, is the nature of these briefings and conversations? Asked whether these were conceptual or text-focused, interviewees responded as follows:



*Figure 3. Briefing and conversations: conceptual or text focused?*

As Figure 3 reflects, interviewees were unambiguous that briefings and conversations are more conceptual in nature. Elaborating, interviewees remarked:

- “I think the majority of members—I would say eighty-five percent of members—it’s going to be a conceptual conversation. Like, you’re going to say, ‘Here’s what the bill does.’ You would never go through the statute with them or say, ‘Here, in [the text of this specific section of existing law].’ . . . [W]hat they do is say, ‘Take me through section by section. What does this do.’ And you walk through. But you’re not going to take out your statute and say, ‘Here’s where it goes.’”<sup>114</sup>

<sup>114</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.

- “Largely, it’s a conceptual conversation with occasional references to sections of legislation.”<sup>115</sup>
- “Oh, [it is] conceptual for sure.”<sup>116</sup>
- “It’s not text-based. It’s much more conceptual than that. It’s a high-level discussion. There are individual folks who may want to get more engaged and may want to get more into the weeds, but generally speaking, at these staff director or LD [i.e., legislative director] briefings, or member-level briefings, they tend to be ten-thousand foot. . . . All overview stuff.”<sup>117</sup>
- “[You do it] conversationally. ‘This is the problem. This is what we’re trying to do to address it. This is generally how we’re addressing it.’ But you make it conversational.”<sup>118</sup>
- “Our conversations tend to be very akin to a law clerk-judge relationship, where you’re talking very broadly about the concept, and then you’re delegated the responsibility to implement that—to fill it in, fill in the weeds and the details. If specific issues come up that could be problematic in the weeds, you may revisit and talk to [the member] about it. But for the most part, once you’re given the marching orders, you pretty much execute.”<sup>119</sup>
- “Usually it’s at a high level, so usually it’s more of a policy question [that is discussed], and the policy strengths and weaknesses. . . . Who will be impacted, what will be the limitations, how broad will the scope be, how does this reconcile with what I have supported or voted on in the past.”<sup>120</sup>

Just as the brevity of congressional memoranda underscored their general, purpose-focused nature, the time constraints for member briefings emphasize the same quality. Interviewees remarked:

- “You’re not going to take out your statute and say, ‘Here’s where it goes.’ Because you don’t get that much time with them. You get, if you’re really lucky, 30 minutes, on a pretty deep topic. It’s really rare that you would get more than that with them. And that’s going to be interrupted. . . . You’ve got to speak fast and speak concisely.”<sup>121</sup>
- “You get two minutes up front to make your pitch, and then they ask questions.”<sup>122</sup>

<sup>115</sup> Interview with No. 3, Cong. Staffer, in Wash., D.C.

<sup>116</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.

<sup>117</sup> Interview with No. 7, Cong. Staffer, in Wash., D.C.

<sup>118</sup> Interview with No. 13, Cong. Staffer, in Wash., D.C.

<sup>119</sup> Interview with No. 23, Cong. Staffer, in Wash., D.C.

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

<sup>121</sup> Interview with No. 6, Cong. Staffer, in Wash., D.C.

<sup>122</sup> Interview with No. 21, Cong. Staffer, in Wash., D.C.

- “[The member] would look at [the summary documents and text] overnight, send back comments and say, ‘Let me meet with them for fifteen minutes today. The vote’s tomorrow.’”<sup>123</sup>
- “You may have a bill that you’ve worked on for three months, and you may have anywhere from five to fifteen minutes to talk to the [member] about everything they need to know. So . . . you don’t have to communicate the whole fact pattern—but it’s knowing, what are the major issues, what is it that the [member] needs to know, and making sure they know that.”<sup>124</sup>
- “[Conversations are] anywhere from as short as thirty seconds to as long as maybe forty-five minutes to an hour, depending on what’s at stake, depending on how weighty the issue is, how technical it could be.”<sup>125</sup>

The discovery of these time constraints reinforces the central finding about briefings: namely, that they provide members with a big-picture, purpose-level overview, not with all the fine details embedded in statutory text.

In aggregate, interviewees therefore depicted a staffer-delegation model that relies largely on memoranda and briefings to educate members on the contents of bills—materials that were depicted as conceptual and concise. As a result, they depicted a system in which members of Congress typically are engaging with bills at the level of statutory purpose. As interviewees put it:

- “For the most part, my observation is [that members] don’t really care about the details of an individual bill. They would consider themselves more big-picture thinker[s], not really concerned with the details. The staff will handle that.”<sup>126</sup>
- “Most members do not want to understand the intricacies of [an in-the-weeds reform]. They want to know how it’s going to affect their [district]. So, you can say, ‘Here’s what we’ve done, generally speaking, and here’s how it’s going to affect X, Y, and Z.’ [That] is what they’re really concerned about, not the technical [issues, such as], ‘And then, we inserted a subclause (I)!’”<sup>127</sup>
- “I think it’s safe to say that senators and representatives are generalists and they’re conceptualists. They’re big-picture people, and they hire staff to fill in the weeds and to know the details—and to be able to communicate with them what those details are, and to tell them what’s important.”<sup>128</sup>

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<sup>123</sup> Interview with No. 22, Cong. Staffer, in Wash., D.C.

<sup>124</sup> Interview with No. 23, Cong. Staffer, in Wash., D.C.

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

<sup>126</sup> Interview with No. 17, Cong. Staffer, in Wash., D.C.

<sup>127</sup> Interview with No. 19, Cong. Staffer, in Wash., D.C.

<sup>128</sup> Interview with No. 23, Cong. Staffer, in Wash., D.C.

This information about members of Congress comes with a caveat mentioned by nearly every interviewee: that the internal operations of congressional offices can vary significantly, based on the member. Office practices—including with respect to legislative activities—are designed to accommodate the preferences, interests, and learning styles of the elected representative. Consequently, there is no uniform rule about how members learn the contents of bills. Yet this diversity only makes the trends discovered in this empirical study all the more interesting—and they paint an unambiguous picture of members relying primarily on briefings and memoranda to engage with bills at the level of statutory purpose.

### B. *The Necessity of Delegation*

The rise within Congress of the staffer-delegation model of lawmaking begs an important question: Why have members of Congress, for several decades, consistently delegated certain lawmaking tasks to others? Why have they not simply performed these tasks themselves?

Commentators have offered one possible answer to this question. Most often, these commentators suggest, delegation within Congress is due to the fact that members of Congress are busy individuals. In his concurrence to *Bank One Chi. v. Midwest Bank & Trust*,<sup>129</sup> for example, Justice Stevens stated that delegation to committees was necessary because: “Legislators, like other busy people, often depend on the judgment of trusted colleagues when discharging their official responsibilities.”<sup>130</sup> More recently, Judge Katzmman has made the same point, stating “the expanding, competing demands on legislators’ time reduce opportunities for reflection and deliberation. In that circumstance . . . members operate in a system in which they rely on the work of colleagues [to discover] what the proposed legislation means.”<sup>131</sup> As John Manning has observed, these arguments by Justice Stevens and Judge Katzmman are typical. They assume that congressional delegation both is occurring and is permissible because, as Manning put it: “A busy Congress must have the ability to paint with a broad brush and leave the detail work to the committees and sponsors who take the lead in framing solutions to a perceived social problem.”<sup>132</sup>

This assumption—namely, that members of Congress delegate lawmaking tasks simply because they are busy people—has a noteworthy consequence. It suggests to courts that, while this delegation may indeed be occurring, it is not a fact that courts should take into account when interpreting statutes. The assumption has this effect for two reasons. First, the “busy

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<sup>129</sup> 516 U.S. 264, 276 (1996) (Stevens, J., concurring).

<sup>130</sup> *Id.*

<sup>131</sup> KATZMANN, *supra* note 68, at 17–18.

<sup>132</sup> John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 693 (2001); see also Jones, *supra* note 71, at 9 (suggesting that members do not read statutory text because “[l]awmakers are extremely busy individuals”).

Congress” hypothesis suggests that Congress’s use of the staffer-delegation model is the result of workflow patterns in Congress that are variable, uncertain, and difficult to verify. After all, how busy are members of Congress, really? And do they really need to be this busy? It is difficult to measure this—and even more difficult to predict it for the future. As such, delegation to staffers does not appear to be a solid, unwavering, documentable fact about congressional practice—i.e., the sort of fact that courts want to rely upon when making assumptions about the lawmaking process.

Indeed, in his efforts to discourage legislative history usage by courts, Justice Scalia gave voice to this precise concern. As Scalia put it:

The only plausible justification for giving effect to legislative history is that the legislature is far too busy to consider the minute details of the bills that it considers—that it expects, it wishes, them to be resolved by the members and committees that draft the legislation and bring it to the floor. We have no idea whether this assessment of legislative expectations and desires is correct; there are forceful assertions of congressional sentiment to the contrary.<sup>133</sup>

When delegation is understood simply to be the result of a busy Congress, then this delegation frequently will appear to judges as it appears to Justice Scalia: as too variable and uncertain to warrant judicial recognition.

Moreover, there is a second reason why the “busy Congress” hypothesis might make courts hesitant to acknowledge the omnipresence of staffer delegations: the hypothesis makes these delegations appear to be the product of choice rather than of necessity. If someone is “too busy” to do something, then that fact seemingly reflects the person’s priorities as much as the person’s workload. When delegation is viewed as the result of members being too busy to craft statutes themselves, therefore, it paints a troubling picture of Congress. The drafting, reviewing, and passing of statutes are, after all, the core professional responsibilities of members of Congress. If members of Congress believe that they are too busy to engage in these lawmaking activities, the thinking goes, then perhaps they should simply clear more time on their schedules for this activity.<sup>134</sup> And the last thing that courts should do is enable this irresponsible congressional behavior—yet this is precisely what courts would be doing, it seems, by acknowledging these delegations.<sup>135</sup> In this sense, a theory that grounds congressional delegation in the “busy Congress” hypothesis dissuades courts from acknowledging these delegations

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<sup>133</sup> ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 384 (2012).

<sup>134</sup> For a scholar making these claims, see Hanah Metchis Volokh, *A Read-the-Bill Rule for Congress*, 76 MO. L. REV. 135, 140–41 (2011).

<sup>135</sup> See *id.* at 152 (criticizing instances where a “court decides to facilitate that improper behavior” of legislators not reading bills).

for a second reason: it seems to incentivize bad behavior by members of Congress.

How accurate is the “busy Congress” hypothesis, however? The answer to this question is somewhat complex. On the one hand, there undoubtedly is some truth to the hypothesis, as members of Congress now have an incredible number of demands on their time. At the same time, however, this hypothesis is notably incomplete. The routine delegation of lawmaking tasks to staffers is not simply the result of members of Congress being busy. Rather, this delegation also is a result, at least in part, of the fact that members of Congress now unavoidably exist at the intersection of two conflicting realities: a Constitution that envisions generalist legislators, on the one hand, and a complex modern world that requires specialized, expert governance, on the other hand.<sup>136</sup>

Consider each of these conflicting elements in greater detail. On the one hand, the Constitution mandates that members of Congress be generalists. The Constitution makes no effort to divide the legislative power and assign it to individuals who have in-depth knowledge or expertise in subject-matter areas. In fact, the Constitution actively prevents such a division; it does not permit the citizens of a state to elect a senator of military affairs, a senator of health care, a senator of agriculture, and so on. Instead, it mandates that electors choose individuals to represent them—and to make legislative decisions—with respect to the full range of legislative issues that will arise in the federal government.<sup>137</sup>

On the other hand, members of Congress find themselves in the position of regulating modern institutions, actors, and forces that are incredibly sophisticated and complex. Today, this complexity takes the form of at least three distinct challenges. First, members face the challenge posed by real-world complexity. The complexity encountered on this front has increased

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<sup>136</sup> In some senses, the concern about this tension is as old as the Founders. *See, e.g.*, THE FEDERALIST NO. 62, at 379 (James Madison) (Clinton Rossiter, ed., 1961). (“It is not possible that an assembly of men called for the most part from pursuits of a private nature continued in appointment for a short time and led by no permanent motive to devote the intervals of public occupation to a study of the laws, the affairs, and the comprehensive interests of their country, should, if left wholly to themselves, escape a variety of important errors in the exercise of their legislative trust.”) This was a concern, Publius elsewhere noted, because: “No man can be a competent legislator who does not [possess] . . . a certain degree of knowledge of the subjects on which he is to legislate.” THE FEDERALIST NO. 53, at 332 (James Madison) (Clinton Rossiter, ed., 1961).

Nonetheless, Publius was not envisioning a world in which legislators would need to possess a level of expertise anywhere near the level required today. This fact is highlighted by Publius’s proposed solution to this problem: multi-year terms in the House and Senate. *See id.* (explaining that two-year terms in the House afforded the “actual experience” necessary to become, and to function as, a “competent legislator” on federal matters); THE FEDERALIST NO. 62, at 374 (James Madison) (Clinton Rossiter ed., 1961) (“Another defect to be supplied [that is, remedied] by a senate lies in a want of due acquaintance with the objects and principles of legislation.”).

<sup>137</sup> U.S. CONST. art. I, § 1, cl. 1 (vesting “All legislative Powers” in members of Congress, rather than dividing these powers among different individuals based upon subject matter).

significantly since the dawn of the twentieth century. Specialization during this period meant that many regulated industries and institutions became internally more complex—a fact which makes it more challenging to intervene in these industries in a precise, effective, and minimally disruptive fashion. Moreover, these specialized institutions have provided access to increasingly sophisticated knowledge of the surrounding world—knowledge that, once available, legislators were expected to draw upon in the production of legislation.

Environmental legislation provides a good example. This legislation no longer is motivated by traditional, generalist-accessible concerns about nuisances. Instead, the Clean Air Act outlines a regulatory regime relating to ozone pollutants that creates tiers based on the concentration of such pollution in micrograms per cubic meter;<sup>138</sup> that weighs treatment of CO compounds as opposed to volatile organic compounds;<sup>139</sup> and that outlines the balance of benzene, aromatics, and oxygen that may be included in reformulated gasoline.<sup>140</sup> Here, twentieth-century specialization has led to fields of knowledge that, even as they motivated legislation, also rendered that legislation accessible only to a relatively small field of experts.

Generalist legislators have little way of knowing, at the outset, whether such complexities lurk with respect to any given bill or legislative project. A bill that uses seemingly simple terms frequently will belie a thicket of concerns. To take one example: the real-world complexities of the health care industry have led the seemingly straightforward term “hospital” to have different, highly-technical meanings in different areas of federal law (indeed, even within different parts of the Medicare statute).<sup>141</sup> When complexities so frequently lurk beneath seemingly straightforward language, responsible legislation essentially requires reliance upon a system of consistent delegation.

Moreover, the modern Congress also must navigate a second challenge that necessitates expertise: the challenge of statutory complexity. Many federal statutory regimes are now both incredibly large and impenetrably dense. First, consider their size: by the early 1980s, to take one example, the federal criminal code was already estimated to address more than 3000 distinct crimes.<sup>142</sup> The Social Security Act, which was thirty-five pages in length when first enacted, now contains an individual title that is itself over 1000 pages in length.<sup>143</sup> The tax code, meanwhile, is now roughly 2600 pages in

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<sup>138</sup> Clean Air Act of 1963 § 163(b), 42 U.S.C. § 7473 (2012).

<sup>139</sup> *See, e.g., id.* § 187(b)(2).

<sup>140</sup> *See id.* § 211(k).

<sup>141</sup> *See* Social Security Amendments of 1965, 42 U.S.C. § 1395x(e) (2012) (outlining numerous exceptions to the internal definition of the word “hospital”).

<sup>142</sup> *See* Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, WALL ST. J. (July 23, 2011), <https://www.wsj.com/articles/SB10001424052702304319804576389601079728920> [<https://perma.cc/H7ZN-BVJC>].

<sup>143</sup> *See* Social Security Act § 5 et seq., 42 U.S.C. § 1395 et seq. (2012).

length.<sup>144</sup> While these statistics are not necessarily good proxies for the complexity of the underlying laws, they nonetheless illustrate the vastness of the existing statutory regime.

In addition, these statutes often are dense with formulas and defined terms that ripple throughout the statute in far-flung and hard-to-perceive ways.<sup>145</sup> Consider again the example of the Medicare statute. Here, the term “star rating system” that appears in Part C of the statute has no formal definition, but it implicitly imports a definition previously developed by the agency to administer Part D of the statute.<sup>146</sup> Meanwhile, the formula for physician payments in Part B of the statute scaffolds upon prior payment formulas located elsewhere in the statute (but not cross-referenced),<sup>147</sup> and it makes no mention of a multiplier that appears much later in the statute (which, in some years, can vary the payment amount by as much as eighteen percent).<sup>148</sup> Describing the resulting statute, the Fourth Circuit once observed: “There can be no doubt but that the statutes and provisions in question, involving the financing of Medicare and Medicaid, are among the most completely impenetrable texts within human experience.”<sup>149</sup>

Due to statutory complexity of this sort, the Legislative Counsel for the Senate would remark, even decades ago, that it took two or three years of on-the-job training in order for an individual to become a competent drafter even with respect to a single subject-matter area of federal legislation.<sup>150</sup> In the equivalent drafting office for the House of Representatives, conventional wisdom now holds that it takes closer to six years to reach this level of competence. The notion that a generalist legislator elected for a six-year term (or, in the House, for a two-year term) could navigate this statutory landscape in any competent way for herself, rather than by delegating the task, is farfetched.

<sup>144</sup> Andrew L. Grossman, *Is the Tax Code Really 70,000 Pages in Length?*, SLATE (Apr. 14, 2014, 11:56 PM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2014/04/how\\_long\\_is\\_the\\_tax\\_code\\_it\\_is\\_far\\_shorter\\_than\\_70\\_000\\_pages.html](http://www.slate.com/articles/news_and_politics/politics/2014/04/how_long_is_the_tax_code_it_is_far_shorter_than_70_000_pages.html) [https://perma.cc/6SSK-SBFT].

<sup>145</sup> On the complexity of modern statutes, see Victoria McGrane, *Read the Bill? It Might Not Help*, POLITICO (Sept. 8, 2009, 4:24 AM), <https://www.politico.com/story/2009/09/read-the-bill-it-might-not-help-026846> [https://perma.cc/QC4D-D87B] (quoting political scientist Ross Baker as saying: “These bills are not written for even the educated layperson. They are written for specialists.”).

<sup>146</sup> Social Security Act § 1853(o)(4), 42 U.S.C. § 1395w-23 (2012).

<sup>147</sup> See *id.* § 1848(d)(1)(B).

<sup>148</sup> See *id.* § 1848(b)(1) (outlining certain components of the formula for physician payments); *id.* § 1848(q)(6)(E) (describing an additional merit-based incentive payment system, which increases or decreases Medicare payments by up to nine percent a year).

<sup>149</sup> *Rehab. Ass’n of Va., Inc. v. Kozlowski*, 42 F.3d 1444, 1450 (4th Cir. 1994).

<sup>150</sup> *A Concurrent Resolution Establishing a Joint Committee on the Organization of Congress S. Con. Res. 2 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 served in it for 2 or 3 years . . .”).

Moreover, a third challenge awaits any member of Congress who is drafting legislation: the challenge of agency-implementation complexity. Today, executive agencies are massive, sophisticated institutional operations. The Department of Defense, which technically has over 3.2 million employees, is reported to be the largest employer in the world.<sup>151</sup> The Department of Transportation—perhaps a more representative agency—still has over 56,000 employees and a budget of over \$70 billion.<sup>152</sup> The Department of Health and Human Services processes over a billion claims for Medicare payment each year, and it provides Medicare coverage to more than 50 million persons through annual expenditures of more than \$600 billion.<sup>153</sup> These are large institutions—and the quantity of their output befits their size. In 2013, agencies collectively published over 75,000 pages of material in the *Federal Register*<sup>154</sup>—a number which includes the publication of anywhere between 2500 and 4500 rules per year.<sup>155</sup> Agencies, in short, are massive bureaucratic undertakings. Legislation that is not attentive to their voluminous products and to their complex internal processes can result in significant and costly disruptions to ongoing implementation operations. A policy that appears wise out of context often appears quite different when viewed in light of agency-level realities, and policies that are uninformed by the minutiae of agency-implementation realities can quickly go astray.

These three challenges—posed by real-world complexity, statutory complexity, and agency-implementation complexity—confront any modern legislator who attempts to draft responsible legislation. The result is a modern drafting landscape that fundamentally differs from the comparatively simple drafting scenarios envisioned in many legislation classrooms.<sup>156</sup> In this complex modern landscape, it is difficult to imagine any option that a legislator has other than to delegate extensive policymaking and drafting decisions to agents. In these situations, direct member involvement leads only to frustrations of the sort articulated by Representative John Conyers (D-Mich.), who asked: “What good is reading the bill if it’s a thousand pages

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<sup>151</sup> Ruth Alexander, *Which Is the World's Biggest Employer?*, BBC NEWS (Mar. 20, 2012), <http://www.bbc.com/news/magazine-17429786> [https://perma.cc/DWA3-NSTQ].

<sup>152</sup> DAVID RANDALL PETERMAN, CONG. RESEARCH SERV., R44062, DEPARTMENT OF TRANSPORTATION (DOT): FY2016 APPROPRIATIONS 2 (2015), [https://www.everycrsreport.com/files/20150615\\_R44063\\_cb6d07e0ef31474cb715e23defe58b1b5380a5cc.pdf](https://www.everycrsreport.com/files/20150615_R44063_cb6d07e0ef31474cb715e23defe58b1b5380a5cc.pdf) [https://perma.cc/5S47-W647].

<sup>153</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVS., 2016 CMS STATISTICS 3, 23, 42 (2016), [https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/CMS-Statistics-Reference-Booklet/Downloads/2016\\_CMS\\_Stats.pdf](https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/CMS-Statistics-Reference-Booklet/Downloads/2016_CMS_Stats.pdf) [https://perma.cc/3BTU-9LHX].

<sup>154</sup> MAEVE P. CAREY, CONG. RESEARCH SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *Federal Register* 17 (2016), <https://fas.org/sgp/crs/misc/R43056.pdf> [https://perma.cc/S22G-BPSY].

<sup>155</sup> *Id.* at 2.

<sup>156</sup> H. L. A. Hart's famous “No vehicles in the park” scenario provides a notable example. See H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

and you don't have two days and two lawyers to find out what it means after you read the bill?"<sup>157</sup>

In these situations, in short, delegation of lawmaking is not merely a byproduct of legislators having busy schedules. It is a necessary adaptation to the complexity of modern lawmaking.

The legal community has long acknowledged that Congress's use of its prior model of delegation—the agency-delegation model of lawmaking—was a necessary response to the complexity of lawmaking in the modern era.<sup>158</sup> Indeed, the Court has repeatedly concurred in this assessment.<sup>159</sup> As the Court put it in *Mistretta v. United States*<sup>160</sup>:

[O]ur jurisprudence [regarding rulemaking delegations to agencies] has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.<sup>161</sup>

In the context of agency delegations, therefore, it has been acknowledged that the complexity of modern lawmaking necessitated the use of a delegation model. So, why has the same acknowledgment not been made with respect to the more recent use of the staffer-delegation model? In the decades since the New Deal, after all, the complexity of Congress's regulatory tasks has only grown. In their 1981 study of Congress, Salisbury and Shepsle could observe that: "[T]he sheer scope and complexity of the legislative agenda make it impossible for . . . [a] member to master the substance of every issue sufficiently well to reach in isolation a judgment about how to vote."<sup>162</sup> More recently, Lawrence Lessig has added that: "[I]t is literally impossible [for members to read all the bills for themselves] today: the complexity of the bills Congress considers is vastly greater than in the past. The Senate version of the health care reform bill, for example, was more

<sup>157</sup> Nicholas Ballasy, *Conyers Sees No Point in Members Reading 1,000-Page Health Care Bill—Unless They Have 2 Lawyers to Interpret It for Them*, CNS NEWS (July 27, 2009, 7:04 AM), <https://www.cnsnews.com/news/article/conyers-sees-no-point-members-reading-1000-page-health-care-bill-unless-they-have-2> [<https://perma.cc/A92A-VRKD>].

<sup>158</sup> See, e.g., G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 94–127 (2000) (reviewing repeated assertions since the Interstate Commerce Act of 1887 that agency delegation was a response to the rise in the “complexity” of modern lawmaking).

<sup>159</sup> See, e.g., *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935) (“Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national Legislature cannot deal directly.”); *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932) (acknowledging that lawmaking had taken on a “variety and need of detailed statement [that] it was impracticable for Congress to prescribe”); *Union Bridge Co. v. United States*, 204 U.S. 364, 387 (1907) (writing that to deny Congress the power to delegate “would be ‘to stop the wheels of government’ and bring about confusion, if not paralysis, in the conduct of the public business”).

<sup>160</sup> 488 U.S. 361 (1989).

<sup>161</sup> *Id.* at 372.

<sup>162</sup> Salisbury & Shepsle, *supra* note 2, at 565.

than two thousand pages long when introduced.”<sup>163</sup> Similarly, Judge Katzmman recently observed: “[Members of Congress] cannot read every word of the bills they vote upon, and, indeed, reading every word is often not particularly instructive, to the degree bills contain language amending the United States Code or enacted statutes” because such language often is exceedingly difficult to understand.<sup>164</sup>

In short, the delegation-based approach to legislation is not the result of members of Congress simply being busy. Rather, this approach is the method by which Congress has chosen to negotiate two conflicting and stable forces: a set of constitutional imperatives written in a generalist era, on the one hand, and the reality of a hyper-specialized, complex bureaucratic world, on the other hand. Neither of these two forces shows any signs of waning or wavering in the foreseeable future. As such, courts can—and should—be confident that modern statutes are the product of significant delegations to staffers.

### III. TEMPLATE FOR A NEW DOCTRINE: *KING V. BURWELL*

The congressional divisions of labor described in Part II—divisions which assign statutory purpose and statutory text to different congressional actors—provide good reason for courts to modify their approach to statutory interpretation. In particular, courts ought to consider adopting a new doctrine of statutory interpretation—one labeled here as the “staffer’s error doctrine.”

This Part prefaces the argument that will be made in Part IV for this “staffer’s error doctrine.” It does so by examining a recent case that can provide a useful model for this new doctrine: *King v. Burwell*.

Section A reviews the Court’s decision in *King*. Section B then explains how this decision looks different—and useful—once it is viewed in light of modern congressional divisions of labor.

#### A. *The Court’s Reasoning in King v. Burwell*

In *King*, the Court had to interpret a provision in the Patient Protection and Affordable Care Act that awards tax credits to low-income individuals—tax credits that are designed to make it financially feasible for these individuals to purchase health insurance.<sup>165</sup> Under the provision, the amount of the tax credit depends partly on whether the individual has enrolled in an insurance plan through an “Exchange established by the State under section 1311 of the [Act].”<sup>166</sup> If this reference to an “Exchange established by the

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<sup>163</sup> LESSIG, *supra* note 69, at 126.

<sup>164</sup> KATZMANN, *supra* note 68, at 18.

<sup>165</sup> Affordable Care Act § 1401(a), 26 U.S.C. § 36B (2012 & Supp. V 2017). Individuals must have a household income between 100 percent and 400 percent of the federal poverty line to qualify for the tax credit. *See id.* § 36B(c)(1)(A).

<sup>166</sup> 26 U.S.C. § 36B(b)–(c).

State” did not capture exchanges established by the federal government (as well as those established by a state), then low-income individuals residing in states that had federal exchanges would be calculated to receive no tax credit under the provision. However, the Internal Revenue Service (“IRS”) had interpreted this reference to an “Exchange established by the State under section 1311 of the [Act]” to apply more broadly. This reference included federal as well as state exchanges, the IRS argued—an interpretation which assured that all low-income individuals throughout the nation would have access to the tax credit.<sup>167</sup> In *King v. Burwell*, the Court was faced with a challenge to this IRS interpretation.

In its opinion, the Court essentially conceded that the plain meaning of the statutory text in the tax credit provision, if considered alone, referred exclusively to state exchanges. As the Court put it: “[T]he meaning of the phrase ‘an Exchange established by the State under [section 1311 of the Act]’ [seems] plain when viewed in isolation.”<sup>168</sup> Consequently, the Court confessed that: “Petitioners’ arguments about the plain meaning of [the tax credit provision] are strong.”<sup>169</sup>

However, the Court was not content to resolve the case based solely upon the plain meaning of the statutory provision. Instead, the Court sought to develop an understanding of the purpose and scheme of the statute—and to determine whether the plain meaning, if applied, would allow that purpose to be realized.<sup>170</sup>

In conducting this purposive inquiry, the Court discovered that the Affordable Care Act was designed to achieve an overarching goal: to increase the number of individuals who were able to participate in insurance markets.<sup>171</sup> In order to achieve this goal, the Court found, Congress sought to enact three interlocking reforms.<sup>172</sup> First, Congress sought to implement a requirement that, whenever an insurer sells health insurance, the insurer must make the insurance available to all individuals who want to purchase it (a reform implemented via the “guaranteed issue” and “community rating” requirements).<sup>173</sup> By itself, however, this reform would allow individuals to

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<sup>167</sup> See *King*, 135 S. Ct. at 2487–88.

<sup>168</sup> *Id.* at 2495.

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

<sup>170</sup> For the Court’s understanding of the statute’s purpose, see *infra* notes 173–77 and accompanying text. For the idea of checking whether the purpose would be realized, see *King*, 135 S. Ct. at 2495 (“In this instance, the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.”).

<sup>171</sup> See, e.g., *King*, 135 S. Ct. at 2493 (“[T]hese three reforms work together to expand insurance coverage.”).

<sup>172</sup> See *id.* at 2486–87 (“The Affordable Care Act adopts a version of the three key reforms that made the Massachusetts system successful. . . . These three reforms are closely intertwined.”).

<sup>173</sup> As the Court put it: “First, the Act adopts the guaranteed issue and community rating requirements.” *Id.* at 2482. “Guaranteed issue” means that health insurers are required to sell (or “issue”) insurance to individuals; “community rating” means that health insurers must sell that insurance to all individuals (i.e., to the “community”) at a substantially similar price (or “rate”). See *id.*; see also 42 U.S.C. § 300gg (2012).

wait until they became ill to purchase health insurance—a practice known as “adverse selection” that could cause health insurance markets to collapse.<sup>174</sup> Consequently, the Court discovered, Congress also enacted a second reform: a mandate that all individuals either maintain health insurance, or else make a payment to the IRS.<sup>175</sup> This “individual mandate” created another problem, however. By itself, it would require low-income individuals to purchase something they could not afford (viz., health insurance). Consequently, the Court found, Congress enacted a third reform. It provided low-income individuals with tax credits that could be used to purchase the health insurance that they were required to buy under the individual mandate.<sup>176</sup>

Through its purposive analysis, therefore, the Court discovered that the tax credit provision was meant to serve a specific purpose: namely, to allow Congress's first two reforms to take effect—including with respect to low-income individuals—in a manner that would avoid the catastrophic consequences of “adverse selection.”<sup>177</sup> Tax credits would allow the guaranteed issue, community rating, and individual mandate reforms to operate in a way that would not threaten to collapse health insurance markets around the country.

When viewed in light of this intended purpose, the Court explained, it was clear that the phrase “Exchange established by the State under section 1311 of the [Act]” was intended as a reference to both federal and state exchanges.<sup>178</sup> After all, tax credits were Congress's strategy to prevent its other reforms from collapsing health insurance markets. Every state was subject to these other reforms. The overwhelming weight of the purposive evidence suggested that Congress wanted to achieve the same results in all states. Tax credits were essential to achieving this. As the Court put it: “Those credits are necessary for the Federal Exchanges to function like their State Exchange counterparts, and to avoid the type of calamitous result that Congress plainly meant to avoid.”<sup>179</sup> Consequently, the Court concluded, statutory purpose plainly pointed toward a specific answer to the question at

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<sup>174</sup> Health insurance companies rely on premiums from healthy individuals to subsidize care for the ill, so an imbalance in healthy-versus-ill individuals can undermine the market. See *King*, 135 S. Ct. at 2485 (“The guaranteed issue and community rating requirements achieved that goal, but they had an unintended consequence: They encouraged people to wait until they got sick to buy insurance. Why buy insurance coverage when you are healthy, if you can buy the same coverage for the same price when you become ill? This consequence [is] known as ‘adverse selection’ . . .”).

<sup>175</sup> Affordable Care Act § 1401(a), 26 U.S.C. § 36B (2012 & Supp. V 2017).

<sup>176</sup> *King*, 135 S. Ct. at 2487 (“Third, the Act seeks to make insurance more affordable by giving refundable tax credits to individuals with household incomes between 100 percent and 400 percent of the federal poverty line.”).

<sup>177</sup> See *id.* at 2486–87.

<sup>178</sup> *Id.* at 2495.

<sup>179</sup> *Id.* at 2484; see also *id.* at 2496 (“Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them.”).

issue in the case: the phrase “Exchange established by a State under section 1311 of the [Act]” was meant to capture both federal and state exchanges.<sup>180</sup>

In *King v. Burwell*, therefore, the Court confronted a situation in which, by the Court’s own admission, statutory purpose was in tension with statutory text. How would the Court resolve this conflict? “In this instance,” the Court stated, “the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase.”<sup>181</sup> Statutory purpose prevailed, the Court said—and it prevailed specifically at the expense of the plain meaning of statutory text.<sup>182</sup>

### B. *The Court’s Reasoning and the Staffer-Delegation Model*

While the Court’s opinion in *King v. Burwell* took recourse to statutory purpose, its methodology was not one that, under the typical conception, would be considered “purposive.” After all, the Court did not use statutory purpose to fill every gap or to resolve every ambiguity in the statute—situations in which statutory purpose is being extended into marginal applications.<sup>183</sup> Instead, the Court in *King* did something different: namely, it reviewed an isolated provision of statutory text in order to ensure that this text did not wholly collapse the basic purpose of the statute.

When viewed in light of Congress’s current division of labor, this purpose-based review of statutory text takes on an important new light. Within the staffer-delegation model, it will be recalled, members of Congress have delegated to staffers the minutiae involved in producing statutory text. However, members have retained personal responsibility for devising, reviewing, and approving statutory purpose. By reviewing an isolated provision of statutory text in order to ensure that it did not undermine statutory purpose, therefore, the Court effectively reviewed the work product of congressional staffers to ensure that it did not undermine the decisions made by elected members of Congress. Viewed as such, the Court in *King v. Burwell* developed a method of statutory interpretation that, in the context of the modern

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<sup>180</sup> 135 S. Ct. at 2487.

<sup>181</sup> *Id.* at 2495.

<sup>182</sup> For an admonition not to interpret the Court’s ruling “as a text-versus-purpose showdown,” as the present Article does, see Abbe Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 66 (2015).

<sup>183</sup> The label of “purposivism” can be applied to many interpretive theories, of course, and it perhaps is reductive to assert that purposivism is defined as an interpretive model that takes recourse to statutory purpose in order to resolve statutory ambiguities, including those that bear on instances of marginal applications. Since the Court’s renewed emphasis on the plain meaning rule in the Burger era, however, the Court has moved away from the strongest forms of purposivism that might use statutory purpose to overcome plain statutory text and toward narrowed versions that take recourse to purpose in situations of ambiguity. See generally Bressman & Gluck, *supra* note 60, at 407–09 (recounting the evolution of the Court’s uses of legislative history and statutory purpose since the Burger era).

Congress, serves an interesting function: namely, it provides a means by which courts can protect legislatures from the errors of unelected staffers.

#### IV. THE STAFFER'S ERROR DOCTRINE

##### A. *Precedent: The Scrivener's Error Doctrine*

Several critics have argued that the Court's interpretive approach in *King v. Burwell* was illegitimate.<sup>184</sup> The most notable of these was Justice Scalia, whose dissenting opinion was quick to criticize the majority for exceeding the scope of its powers within our constitutional system. As Justice Scalia put it: "This Court . . . has no free-floating power 'to rescue Congress from its drafting errors.'"<sup>185</sup> However, when viewed as rescuing elected members of Congress from drafting errors committed by unelected agents of Congress, there is a time-tested judicial canon which suggests that courts do indeed have this power: the scrivener's error doctrine.

In statutory interpretation, the scrivener's error doctrine posits that judges have the authority—and, arguably, the obligation—to identify and correct a narrow set of technical mistakes in statutes (such as punctuation errors).<sup>186</sup> Why have courts believed themselves to be justified in correcting this set—and only this set—of statutory errors? According to Justice Scalia himself (along with coauthor Bryan Garner), this doctrine has historically been justified by a specific theory: one that, in the following pages, will be described as the "division-of-labor theory."

As described by Scalia and Garner, this division-of-labor theory has two components. First, the theory posits that, under the scrivener's error doctrine, judges have traditionally been allowed to correct a narrow set of statu-

<sup>184</sup> See, e.g., Elizabeth Price Foley & David Rivkin, *Symposium: Bypassing Separation of Powers to "Fix" Sloppy Laws*, SCOTUSLOG (June 25, 2015, 6:35 PM), <http://www.scotusblog.com/2015/06/symposium-bypassing-separation-of-powers-to-fix-sloppy-laws/> [<https://perma.cc/8SAW-6S4X>] (arguing that, in *King*, the Court effectively acted as an "unconstitutional Council of Revision").

<sup>185</sup> *King*, 135 S. Ct. at 2504 (Scalia, J., dissenting) (quoting *Lamie v. United States Trustee*, 540 U.S. 526, 542 (2004)).

<sup>186</sup> For differing views on the scope of the doctrine, see, for example, *United States v. Locke*, 471 U.S. 84, 120–26 (1985) (Stevens, J., dissenting) (applying the doctrine to application dates); *Costanzo v. Tillinghast*, 287 U.S. 341, 344 (1932) (arguing that the doctrine should apply to syntax as well as punctuation); *Barrett v. Van Pelt*, 268 U.S. 85, 91 (1925) (saying that the doctrine should only apply to punctuation); *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 448 F.3d 1092, 1097 (9th Cir. 2006) (Bybee, J., dissenting) (arguing that the doctrine should only apply to instances of nonsensical or ungrammatical sentences or erroneous cross-references). For a modern argument that the doctrine should encompass any statutory text that appears on the face of the statute to be an error, regardless of the nature of the error, see SCALIA & GARNER, *supra* note 133, at 235–36. See generally Ryan D. Doerfler, *The Scrivener's Error*, 110 Nw. U. L. REV. 811 (2016) (discussing and critiquing this iteration of the doctrine). For a discussion of the particular iteration that the Court had been applying leading up to *King*—viz., the doctrine of mistake outlined in *Lamie v. United States Trustee*—see Gluck, *supra* note , at 103–05.

tory errors because such errors have been “thought to be the work of the engrossing clerk or the printer” rather than of the legislators themselves.<sup>187</sup> In other words, the doctrine has targeted minor typographical features because the insertion of these features into statutory text—a specific drafting task—has been assumed to be a task performed by unelected staffers. Second, the theory holds that the doctrine is further justified by the fact that: “[I]n days of yore . . . because many legislators voted only on the basis of bills that they heard read aloud—without seeing the printed page—they could take no notice of the punctuation marks.”<sup>188</sup> Put differently, the doctrine has been further justified by the fact that staffers, not legislators, traditionally have provided the pre-enactment review of these typographical features. According to Scalia and Garner, therefore, the scrivener’s error doctrine targeted certain typographical errors because the doctrine was designed to allow judges to review—and to correct—those portions of statutes that legislators typically neither draft nor subject to pre-enactment review.

This division-of-labor view of the doctrine is not specific to Scalia and Garner. It is embedded, for example, in the very name that judges and scholars have accepted as the proper label for the doctrine: the scrivener’s error doctrine.<sup>189</sup> This moniker rests upon two assumptions: first, that a division of tasks exists within a legislature (viz., between legislators and “scriveners”), and second, that courts should correct errors made by a specific institutional actor within this internal bureaucracy (viz., the scrivener).<sup>190</sup> These same assumptions are found in the oft-repeated idea that the doctrine allows judges to correct “clerical” errors in statutes—a description which assumes that such errors result from the work of “clerks,” as Scalia and Garner put it,

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<sup>187</sup> SCALIA & GARNER, *supra* note 133, at 161 (quoting *Morrill v. State*, 38 Wis. 428, 434 (1875)).

<sup>188</sup> *Id.* (quoting James DeWitt Andrews, *Statutory Construction*, in 14 AMERICAN LAW AND PROCEDURE 1, 47 (James Parker Hall & James DeWitt Andrews eds., rev. ed. 1948)).

<sup>189</sup> Jonathan Siegel has traced the use of this label for the doctrine, saying:

[T]he *National Bank* case is the first in which the Court invoked the term “scrivener’s error” in exercising the power of statutory correction. Neither the Court nor any Justice used the term before 1985, when Justice Stevens used it in his opinion in *United States v. Locke*, 471 U.S. 84, 123 (1985) (Stevens, J., dissenting). Older cases from other courts show the term used almost invariably in connection with errors made either by private parties in drafting contracts or similar instruments or by courts or court clerks in connection with judgments. Courts consider themselves empowered to disregard such errors. *See, e.g.*, *Christensen v. Felton*, 322 F.2d 323, 325 (9th Cir. 1963) (disregarding a scrivener’s error in a contract). But at least some older cases use the term with reference to judicial reform of statutes. *See, e.g.*, *In re Deuel*, 101 N.Y.S. 1037, 1038–39 (N.Y. App. Div. 1906) (correcting a “scrivener’s error” that resulted in the omission of the term “not” in a statute).

Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 146 n.152 (2009).

<sup>190</sup> As other scholars have noted, this term is taken from the field of contract law, where it was preceded by the term *vitium scriptoris*—literally, the “mistake of a scribe.” *See* David M. Sollors, *The War on Error: The Scrivener’s Error Doctrine and Textual Criticism: Confronting Errors in Statutes and Literary Texts*, 49 SANTA CLARA L. REV. 459, 461 (2009).

rather than of legislators.<sup>191</sup> As Scalia and Garner note, these are assumptions that have a long history in statutory interpretation—assumptions that are brought to the fore by these widely used labels.<sup>192</sup>

According to the division-of-labor theory, therefore, the scrivener's error doctrine embodies two insights. First, the doctrine acknowledges the reality that a division of tasks regularly occurs within legislatures. Second, the doctrine advances the basic idea that, when legislatures do indeed divide legislative tasks among different actors, courts have a role to play in protecting and preserving the decisions that democratically elected legislators are making within this institution—including by protecting them from the errors of unelected agents who assume some of the tasks of statutory production.<sup>193</sup>

In order to properly serve this protective function, however, the scope of the review that judges perform under the doctrine must track the actual division of tasks within the legislature. To the extent that it is desirable for the doctrine to serve this function with respect to federal statutes, therefore, it is necessary for the doctrine to be grounded in a realistic, up-to-date understanding of the inner workings of Congress. In particular, the doctrine must be anchored in an accurate understanding of the range of tasks that members of Congress actually delegate to unelected staffers and agents.

In this regard, modern judges have failed in their task of ensuring that the scrivener's error doctrine remains vital and coherent. While the number of legislative tasks performed by congressional staffers has dramatically expanded in the staffer-delegation era, this expansion has not been accompanied by a corresponding growth in the number of statutory features that judges will review for errors under the scrivener's error doctrine. Instead, the doctrine has retained a narrow focus upon the drafting issues that were han-

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<sup>191</sup> SCALIA & GARNER, *supra* note 133, at 161. For descriptions of the doctrine as addressing “clerical” errors, see, for example, *Ass’n of Tex. Prof’l Educators v. Kirby*, 788 S.W.2d 827, 830 (Tex. 1990) (stating that a refusal to correct such errors would “amount to government by clerical error”); Michael S. Fried, *A Theory of Scrivener’s Error*, 52 RUTGERS L. REV. 589, 593 (2000) (“‘Scrivener’s error’ refers to a typographical mistake or other error of a clerical nature in the drafting of a document.”).

<sup>192</sup> A cursory review by Scalia and Garner finds these assumptions in a legal textbook from 1948, SCALIA & GARNER, *supra* note 133, at 161 (citing James DeWitt Andrews, *supra* note 188), and in a court case from 1875, *see id.* (citing *Morrill*, 38 Wis. at 434). Other cases also evince these assumptions. *See U.S. Nat’l Bank of Ore. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 462 (1993) (“[W]e are convinced that the placement of the quotation marks in the 1916 Act was a simple scrivener’s error, a mistake made by *someone* unfamiliar with the law’s object and design.”) (emphasis added); *In re Deuel*, 101 N.Y.S. at 1038–39.

<sup>193</sup> In the recent oral arguments for *Lockhart v. United States*, 136 S. Ct. 958 (2016) Justice Breyer interestingly articulated both of these principles in a different context—namely, in the context of construing statutory ambiguity, not of remedying evident drafting errors—and he seemed interested in updating them to reflect modern congressional divisions of labor. *See Transcript of Oral Argument at 39–40, Lockhart v. United States*, 136 S. Ct. 958 (2016) (No. 14-8358), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2015/14-8358\\_i3kn.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/14-8358_i3kn.pdf) [<https://perma.cc/US84-U76S>]. Justice Scalia and Chief Justice Roberts responded by voicing skepticism that this division of labor exists. *Id.* at 42.

dled by unelected staffers in the “days of yore,” as Scalia and Garner put it.<sup>194</sup>

As such, those who wish to see this doctrine continue to perform the function implied by the division-of-labor theory need to do more than simply defend the original, antiquated formulation of this doctrine. They also need to advocate for the doctrine to be expanded in a manner that would permit judges, in the search for errors, to review all aspects of statutes that members routinely assign to staffers in the modern Congress. Under such an expansion, the doctrine presumably would allow judges to review all statutory text (i.e., the work of today’s unelected staffers) for errors.

Interestingly, this is the review that the Court actually performed in *King v. Burwell*. The Court essentially reviewed statutory text for a specific, particularly egregious type of staffer error. By scanning statutory text for any conflicts with broad statutory purpose, it effectively looked for staffer errors that had undermined a decision that members of Congress had directly and personally made with respect to a statute. By contrast, the Court did not seek out staffer choices that, while perhaps “errors” in the sense that they violated members’ presumed but unexpressed wishes, nonetheless did not violate any concrete decisions made by members—staffer choices that therefore would not present instances of staffers exceeding their delegations. Instead, the Court’s review functioned simply as a check for staffer errors that were so egregious as to undermine core statutory purpose—which is to say, for errors that would undermine the basic goal that members of Congress would have entrusted to them.

Through its use of this review, therefore, the Court in *King v. Burwell* effectively created a model for a narrow but updated version of the scrivener’s error doctrine—a version that, in order to reflect this updated quality, might be described as a “staffer’s error doctrine.” It is a doctrine that begins with the principles that animated the original scrivener’s error doctrine—and that combines these principles with an awareness that today’s staffers perform a wider range of lawmaking functions than did the “scriveners” of old. By essentially creating such a “staffer’s error doctrine,” the Court (perhaps inadvertently) found a way to make these principles relevant once again—and its interpretive approach should be considered in light of this underappreciated merit.

### B. Administration of the Staffer’s Error Doctrine

By revisiting the Court’s method in *King v. Burwell*, therefore—and re-reading this method in light of both the historical purpose of the scrivener’s error doctrine and the drafting practices of the modern Congress—we can discover the possibility of a new “staffer’s error doctrine.” This doctrine would direct judges to identify instances in which the work product of staff-

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<sup>194</sup> SCALIA & GARNER, *supra* note 133, at 161.

ers (viz., statutory text) undermined rather than advanced decisions made directly by members of Congress (viz., the selection of overarching policy goals). As such, the doctrine gives rise to the question: how, as a practical matter, would courts administer this doctrine?

One potential answer to these questions is found in the template that the Court provided in *King v. Burwell*. In this case, the Court's reasoning suggested a three-step review process that a court could conduct after developing its initial interpretation of a statute. In the first step of this review process, courts would identify the overarching policy goals that a statute is designed to achieve. In *King v. Burwell*, for example, the Court used a number of sources in order to reconstruct the statute's purpose. It looked at findings that Congress inserted into the statute,<sup>195</sup> external sources that documented the historical context of the legislation (including amicus briefs, scholarly articles, and congressional hearings),<sup>196</sup> and the operative provisions of the statute.

Having identified the statute's overarching policy goals, courts then would move to the second step of this three-step review: they would check whether the isolated snippet of statutory text before them, if applied as written, would sabotage those overarching policy goals. This, it should be noted, is a high threshold. The threshold is high for a reason: the process is tailored to catch only those passages of statutory text that represent instances in which staffers have wholly exceeded the scope of their delegation. Given the broad authority that staffers now possess to engage in interstitial policymaking, a staffer who produces a statutory regime filled with exceptions, exemptions, and anomalies can hardly be said to have exceeded the scope of his or her delegation. Consequently, the discovery of a mere policy anomaly or inconsistency would not suffice for purposes of this review. Rather, this step two review would seek to identify instances in which the statutory text at issue, if applied, would so thoroughly undermine the core policy goals of the statute—or carry the statute so dramatically far afield of these goals—that the statute could no longer be characterized, in any accurate sense, as a reasoned implementation of those basic goals.

In such situations, courts could proceed to the third step of the review. When a divide between purpose and text emerges, this final step directs courts to do the difficult work of investigating whether the divide is more

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<sup>195</sup> *King*, 135 S. Ct. at 2486–87, 2493 (citing 42 U.S.C. § 18091(2)(I) (2012)).

<sup>196</sup> See *id.* at 2486 (citing *Examining Individual State Experiences with Health Care Reform Coverage Initiatives in the Context of National Reform: Hearing Before the S. Comm. on Health, Educ., Labor, and Pensions*, 111th Cong. 9 (2009) (statement of John Kingsdale, Ph.D., Executive Director, Commonwealth Health Insurance Connector); Brief for America's Health Insurance Plans as Amicus Curiae at 10–11, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114); Brief for Bipartisan Economic Scholars as Amici Curiae at 24–25, *King v. Burwell*, 135 S. Ct. 2480 (2015) (No. 14-114); LEIGH WACHENHEIM & HANS LEIDA, THE IMPACT OF GUARANTEED ISSUE AND COMMUNITY RATING REFORMS ON STATES' INDIVIDUAL INSURANCE MARKETS 38 (2012), [http://www.statecoverage.org/files/Updated-Milliman-Report\\_GI\\_and\\_Comm\\_Rating\\_March\\_2012.pdf](http://www.statecoverage.org/files/Updated-Milliman-Report_GI_and_Comm_Rating_March_2012.pdf) [<https://perma.cc/8SCD-DV2F>]).

likely the result of a mistaken view, among the court, of the statute's purpose—or, instead, of a drafting error in Congress.

Applying this step in *King v. Burwell*, the Court found significant evidence, on the one hand, that the statutory text at issue resulted from a drafting error. This text was found within a statute that contained many instances of “inartful drafting”<sup>197</sup> and that was subject to unique procedural challenges that limited the opportunities for pre-enactment review.<sup>198</sup> The specific phrases that seemed plain in the relevant provision were used sloppily and inconsistently throughout the bill,<sup>199</sup> and its plain meaning would interact in odd ways with other provisions in the bill.<sup>200</sup> The Court further observed that other provisions of the bill seemed to assume that the provision at issue means something other than its plain meaning.<sup>201</sup> The result, the Court suggested, was a strong suggestion that the statutory text at issue was the result of a drafting error.

On the other hand, the Court found little reason to believe that it had been led astray by the secondary materials relied upon for its purposive analysis. With the exception of the provision at issue, the Court noted, these materials closely and accurately tracked the operative provisions of the bill.<sup>202</sup> This inspired confidence that these materials were designed to elucidate, not to mislead. The more compelling conclusion, the Court therefore found, was that the statutory provision at issue was the result of a staffer's error.

Through an application of the three-step process of the staffer's error doctrine, therefore, the Court essentially concluded that the text at issue in *King v. Burwell* was the result of a staffer's error. This conclusion, it is worth noting, appears to have been correct; several subsequent investigations have confirmed the text to have resulted from staffer error.<sup>203</sup> As Senator Bingaman (D-N.M.) put it to the *New York Times*: “As far as I know, [the relevant statutory text] escaped everyone's attention, or it would have been deleted, because it clearly contradicted the main purpose of the legislation.”<sup>204</sup> With respect to the provision at issue in *King v. Burwell*, therefore, it seems that the three-step process embedded in the staffer's error doctrine successfully performed its intended task: it correctly identified an instance of

<sup>197</sup> *Id.* at 2504.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 2498–99.

<sup>200</sup> *Id.* at 2495.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Robert Pear, *Four Words that Imperil Health Care Law Were All a Mistake, Writers Now Say*, N.Y. TIMES (May 25, 2015), <https://www.nytimes.com/2015/05/26/us/politics/con-tested-words-in-affordable-care-act-may-have-been-left-by-mistake.html> [<https://perma.cc/HXV2-HDW6>]; see also Gluck, *supra* note 182; Abbe R. Gluck, *Why Health Lawyers Must Be Public-Law Lawyers: Health Law in the Age of the Modern Regulatory State*, 18 J. HEALTH CARE L. & POL'Y 323, 325–29 (2015). See generally Doerfler, *supra* note 186 (canvassing the reasons why logically this was likely to be an error).

<sup>204</sup> Pear, *supra* note 203.

staffer error that undermined core decisions made by members of Congress—and that, consequently, exceeded the scope of staffers' delegation.

### *C. The Legitimacy of the Staffer's Error Doctrine*

Through its method of preserving the purpose of the statute, therefore, the Court's approach in *King v. Burwell* had the effect of restoring values that have long been embedded in statutory interpretation through the scrivener's error doctrine. Namely, it restored the value of protecting the decisions made by democratically elected members of Congress—including from the errors made by their agents.

Some may be skeptical of the notion that courts should be in the business of advancing this value, however. Such individuals might ask: why should courts attempt to protect Congress from the errors of its agents? What provides courts with the authority to adopt this approach? This Section explores possible answers to these questions. In particular, it examines the reasons why both intentionalists and textualists might be persuaded that courts have the authority to utilize this "staffer's error doctrine." To this end, Subsection 1 details the reasons why intentionalists ought to view this doctrine as legitimate—regardless of whether this new doctrine is viewed as a semantic canon or a substantive canon. Subsection 2 then outlines the reasons why, under four prominent versions of textualism, the doctrine similarly appears to be a legitimate tool of statutory interpretation.

#### *1. Intentionalism and the Staffer's Error Doctrine*

One way to conceptualize the staffer's error doctrine is as an interpretive tool that assists judges in the specific task of uncovering and enforcing legislative intent. According to the division-of-labor theory, the doctrine provides this assistance by directing judges to examine the work product of unelected staffers and, in so doing, to ensure that this work product has advanced, rather than undermined, the intent of legislators.<sup>205</sup> For intentionalists, it is a check premised on the notion that portions of statutes handled exclusively by unelected staffers are uniquely at risk of having veered away from legislative intent. By permitting (and perhaps requiring) judges to conduct this review, the staffer's error doctrine thereby protects and preserves the intent of legislators, guarding it from incursions by staffers.

Viewed as such, the doctrine clearly accords with intentionalist notions of the proper judicial role in statutory interpretation. As John Manning puts it: "[Intentionalists have] long emphasized that, as faithful agents of Congress, federal courts have a constitutional duty to implement Congress's 'in-

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<sup>205</sup> For Justice Breyer suggesting that judges, in situations of statutory ambiguity (as opposed to situations of error), might work to excavate the "general intention" that legislators entrust to drafters in the modern congressional bureaucracy, see Transcript of Oral Argument, *supra* note 193, at 40.

tent.”<sup>206</sup> The staffer’s error doctrine can be understood as assisting courts in their effort to serve as “faithful agents” of the sort that Manning describes.

By contrast, what is less evident is whether the staffer’s error doctrine—when viewed through this intentionalist lens—should be considered a semantic canon or a substantive canon of statutory construction.<sup>207</sup> The answer to this question depends upon one’s theory of the proper dividing line between these two categories of canons. According to some scholars, the difference between these two types of canons resides in the role that courts perform when using the canon. Semantic canons are designed to assist the courts in their role as faithful agents of Congress, the theory goes.<sup>208</sup> By contrast, substantive canons allow judges to inject extrinsic values into the legal process, thereby allowing judges to operate as cooperative partners that partake, alongside Congress, in the shared activity of lawmaking.<sup>209</sup> Viewed as such, the staffer’s error doctrine is best characterized as a semantic canon, since it assists the court in its role as a faithful agent of Congress.

According to other scholars, however, the difference between the two types of canons resides in the canons’ differing relationships to statutory text. Semantic canons are rules of language usage that reveal the meaning embedded within statutory text, these scholars argue,<sup>210</sup> whereas substantive canons impose values that are external to the text.<sup>211</sup> According to this view of the canons, the staffer’s error doctrine is a substantive canon since, in most iterations, it explicitly goes beyond the text of the statute.<sup>212</sup> Understood as such, the staffer’s error doctrine serves to advance a particular substantive value: the constitutional value of popular sovereignty.<sup>213</sup>

This theory of the staffer’s error doctrine relies upon a particular, intentionalist-friendly vision of popular sovereignty. Under this vision, the governmental architecture created by the Constitution is viewed as a means to an end. It is designed to allow the democratic will to flow outward from the

<sup>206</sup> See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2395 (2003).

<sup>207</sup> For an argument that it is not a doctrine of statutory interpretation at all but instead is an application of strict scrutiny to Article I, Section 7, see Fried, *supra* note 191, at 609.

<sup>208</sup> See ESKRIDGE, GLUCK & NOURSE, *supra* note 14, at 458 (noting that grammar canons are employed in part because “the legislature is presumed to know and follow basic conventions of grammar and syntax”).

<sup>209</sup> See, e.g., Andrew C. Spiropoulos, *A Defense of Substantive Canons of Construction*, 2001 UTAH L. REV. 915, 919 (2001) (“[B]y expecting judges to articulate and adhere to substantive canons of construction, we encourage judges to think of themselves as partners in the enterprise of lawmaking, rather than simple agents who are forced to accept bad policy.”).

<sup>210</sup> See, e.g., Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999, 1004 (2015) (noting that semantic canons “purport to reflect the meaning of the statutory language”).

<sup>211</sup> See, e.g., Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (2010) (“[I]t is generally recognized that substantive canons advance policies independent of those expressed in the statute.”).

<sup>212</sup> For a version that might not go beyond statutory text, see *infra* notes 219–23 and accompanying text.

<sup>213</sup> On the idea that popular sovereignty is the single, overarching idea that animates the Constitution, see, for example, AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 13 (2006) (explaining popular sovereignty as “the Constitution’s bedrock idea”).

public, through and across a variety of governmental actors and institutions, and back to the public as enforceable laws.

Within this constitutional architecture, the argument goes, the Founders outlined four important transition points. These are instances where the democratic will must be transferred from one constitutional actor to another. First, the democratic will must transfer from the public to members of Congress. This occurs primarily through the mechanism of elections.<sup>214</sup> Second, democratic will must transfer from members of Congress to legal texts. This occurs through the process of enacting laws.<sup>215</sup> Third, democratic will needs to transfer from legal texts to the executive and judicial branches. This is accomplished through the interpretation of laws.<sup>216</sup> Fourth, the democratic will transfers back to the public. This occurs through the enforcement of laws.

Under the popular sovereignty view, the underlying purpose of many constitutional provisions is to ensure that these transfers are successful. Consider the first transition point: the transfer of democratic will from the public to members of Congress.<sup>217</sup> A host of constitutional provisions are designed in the effort to ensure that this transfer is successful. The provisions requiring regular elections are the most notable example.<sup>218</sup> As Publius puts it in his analysis of the House of Representatives in *Federalist No. 52*:

As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the [House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured.<sup>219</sup>

The election provisions of Article I tether members of Congress to the public in two different senses. First, they require each member to have been recently selected by the public—something likely to happen only if the member is broadly sympathetic with the will of that public.<sup>220</sup> Second, regular elections warn each member of Congress that another election will be occurring soon. The anticipation of such elections is meant to force members

<sup>214</sup> U.S. CONST. art. I, §§ 2–6.

<sup>215</sup> U.S. CONST. art. I, §§ 7–8.

<sup>216</sup> U.S. CONST. art. I, § 1; *id.* art. II, § 1.

<sup>217</sup> See THE FEDERALIST NO. 52, at 327 (James Madison) (Clinton Rossiter ed., 1961) (“The scheme of representation [is] a substitute for a meeting of the citizens in person.”).

<sup>218</sup> U.S. CONST. art. I, §§ 2–3.

<sup>219</sup> THE FEDERALIST NO. 52, *supra* note 217, at 327.

<sup>220</sup> See THE FEDERALIST NO. 60 (Alexander Hamilton) (explaining that the public will elect representatives who mirror their interests); see also Jacob E. Gersen & Matthew C. Stephenson, *Over-Accountability*, 6 J. LEGAL ANALYSIS 185, 189 (2014) (describing this “selection effect” as a feature of accountability mechanisms in principal-agent relationships).

of Congress to internalize the interests of their communities, since most members would presumably want to be reelected.<sup>221</sup>

Elections were not the sole mechanism that the Founders used in order to transform members of Congress into embodiments of the will of their constituents, however. Publius also outlines a variety of other constitutionally induced pressures that would advance this purpose.<sup>222</sup> The idea, therefore, was that a host of constitutionally induced pressures would uniquely transform the members of Congress into vessels for the democratic will of their constituents, and thereby would act as “cords by which [members would] be bound to fidelity and sympathy with the great mass of the people.”<sup>223</sup>

Since this host of pressures would converge only upon members of Congress, it was essential to popular sovereignty that these individuals participate properly in the second transfer point in the constitutional scheme: the production of binding laws. It was vital that this group could successfully enact their decisions into law, for this was the activity that would allow the public will to continue on its path. Consequently, Article I vested the power to produce these laws exclusively in the members of Congress.<sup>224</sup> Moreover, Article I sought to ensure that no external impediments hindered these members in their efforts to successfully navigate this transition point. Consequently, it provided members with broad latitude to decide for themselves the manner in which to convert the public will into binding legal texts.<sup>225</sup>

The question posed by the problem of staffer’s errors is the following: what should courts do when this second transfer point within the constitutional scheme fails? What should courts do when there is compelling evidence that the will of members of Congress—itsself a proxy for the will of the public—was not successfully encoded within statutory text?

<sup>221</sup> See THE FEDERALIST NO. 57 (James Madison) (stating that anticipation of elections will create fidelity to public will).

<sup>222</sup> See THE FEDERALIST NO. 56, at 293 (James Madison) (Clinton Rossiter ed., 1961) (on requirements that members of Congress be inhabitants of the states they represent); *id.* at 297 (on members being subject to the laws they make); THE FEDERALIST NO. 62, *supra* note 136 (on the process of elections, and on bicameralism); THE FEDERALIST NO. 63 (James Madison) (on bicameralism); see also Gersen & Stephenson, *supra* note 220, at 189 (describing this “incentive effect” as a feature of accountability mechanisms in principal-agent relationships).

<sup>223</sup> THE FEDERALIST NO. 57, *supra* note 221, at 353.

<sup>224</sup> U.S. CONST. art. I, § 1 (vesting “All legislative Powers” in Congress). Sections 1 and 2 of Article I made it clear that “Congress” was understood here to mean, specifically, the collection of the members of Congress. *Id.* §§ 1–2. The presentment requirement also involves a democratically elected president in this process, of course.

<sup>225</sup> Article I, Section 5 of the Constitution grants Congress great flexibility in determining the methods by which it will draft, review, and approve legislation. See U.S. CONST. art. I, § 5. Meanwhile, the legislative power under Article I, Section 1 of the Constitution (along with the Necessary and Proper Clause of Article I, Section 8) gives Congress latitude to determine how best to pursue its legislative ends (including the power to create legislative branch officers via statute that might assist Congress with its lawmaking duties). U.S. CONST. art. I, §§ 1, 8; see also Buckley v. Valeo, 424 U.S. 1, 90 (1976).

As a substantive canon, the staffer's error doctrine asserts that courts have an active role to play in this situation. They can legitimately act to reconnect statutory text to a decision made by elected representatives and, in so doing, can thereby restore the flow of the public's will through the architecture of the federal government. In this way, the staffer's error doctrine functions to advance the constitutional value of popular sovereignty. As such, it can be treated much like other substantive canons that advance constitutional values, such as the constitutional avoidance canon and the federalism canons.<sup>226</sup> Like those other canons, it operates as "quasi-constitutional law," as Eskridge and Frickey put it.<sup>227</sup> It uses statutory interpretation as a vehicle to preserve a structural constitutional element—precisely the sort of element that Eskridge and Frickey describe as the primary concern of this subset of substantive canons.<sup>228</sup>

## 2. *Textualism and the Staffer's Error Doctrine*

While the appeal of the staffer's error doctrine for intentionalists is relatively straightforward, the doctrine's appeal for textualists is slightly more complex. This is true for two reasons. First, the doctrine admittedly violates a tenet that many textualists seek to uphold: the tenet that the plain meaning of the text must be respected. Second, textualism has been defined and justified in a variety of different ways (as discussed below), thereby meaning that no single analysis of the doctrine is likely to endear it to all textualists. Still, there are several important reasons why the staffer's error doctrine might be appealing to textualists.

i. *Textualism's Respect for Historical Pedigree.* The historical pedigree of the scrivener's error doctrine might be, for some textualists, a sufficient justification for the continued use of an updated staffer's error doctrine. After all, textualists are particularly likely to view the historical pedigree of the canons as providing justification for interpretive practices that otherwise might offend textualist principles. As Judge Amy Coney Barrett has put it, "[t]extualists have suggested that, in the modern landscape, those principles that we call substantive canons are a closed set of background assumptions justified by their sheer longevity."<sup>229</sup> Admittedly, some textualists have begun to revise this view, concluding that historical pedigree alone cannot redeem canons that conflict with textualist premises—and concluding also that the scrivener's error doctrine is fundamentally incompatible with such premises.<sup>230</sup> For others, however—including both textualists and non-textualists—

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<sup>226</sup> For a catalogue of these canons, see generally William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 *VAND. L. REV.* 593 (1992).

<sup>227</sup> *Id.* at 597.

<sup>228</sup> *Id.*

<sup>229</sup> Barrett, *supra* note 211, at 111.

<sup>230</sup> See, e.g., *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 448 F.3d 1092, 1097 (9th Cir. 2006) (Bybee, J., dissenting) (sharply limiting the doctrine based on

the historical pedigree of the scrivener's error doctrine alone may suggest that the staffer's error doctrine possesses a claim to legitimacy.

Moreover, Judge Barrett has documented a second reason why the longstanding use of the scrivener's error doctrine might persuade textualists that this doctrine's successor, the staffer's error doctrine, is legitimate. According to Barrett, the canons of construction were widely accepted as legitimate exercises of the judicial function at the time of the Founding.<sup>231</sup> In this regard, Barrett notes,<sup>232</sup> the canons are immune to John Manning's claim that non-textualist methods of interpretation exceed the original understanding "the judicial Power" conferred upon federal judges by Article III.<sup>233</sup>

Indeed, Judge Barrett makes this claim as someone sympathetic to Manning's general claim about "the judicial Power" (a claim that others have disputed).<sup>234</sup> Once the Court's approach in *King v. Burwell* is understood as a coherent application of the idea underlying the scrivener's error doctrine, therefore, this approach may elide the constitutional concerns that trouble textualists such as Manning.

ii. *Textualism as an Application of Congressional Intent.* Some textualists, including both Caleb Nelson and John Manning, have sometimes accepted the idea that courts should seek—and enforce—Congress's "intent." According to these scholars, textualism is a preferred interpretive method simply because it is the best way for courts to discern and apply congressional intent. For textualists of this variety, the staffer's error doctrine should have significant appeal.<sup>235</sup> In order to understand this appeal, it is worth examining the claims made by some of these textualists in detail.

a. *Textualism as Applying the Only Available Intent.* One version of this argument—i.e., the argument that textualism is the best method of discovering congressional intent—is well represented by John Manning. Here, Manning argues that, due to the murkiness of the inner workings of Congress, the intent of Congress is unknowable.<sup>236</sup> As Manning puts it: "The legislative process . . . is too complex, too path-dependent, and too opaque to allow judges to reconstruct whether Congress would have resolved any particular question differently from the way the clear statutory text resolves that

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textualist principles); *see also* Manning, *supra* note 206, at 2391–92 (rejecting absurdity doctrine due to this conflict with textualist principles despite acknowledging its pedigree). *See generally* John C. Nagle, *Textualism's Exceptions*, 2 ISSUES IN LEGAL SCHOLARSHIP 1 (2002).

<sup>231</sup> Barrett, *supra* note 211, at 110–11.

<sup>232</sup> *Id.*

<sup>233</sup> *See also* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 98–108 (2001).

<sup>234</sup> *See generally*, e.g., William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990 (2001) (arguing that "the judicial Power" includes the power of equitable interpretation).

<sup>235</sup> Ronald Dworkin also has argued that textualism is grounded upon a form of intentionalism compatible with the scrivener's error doctrine. *See* Ronald Dworkin, *Comment*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 115, 116 (Amy Gutmann ed., 1997).

<sup>236</sup> Manning, *supra* note 206, at 2410.

question.”<sup>237</sup> In the face of this unknowability, Manning argues, interpreters have no option but to abandon the search for actual congressional intent. Consequently, Manning says, interpreters must turn to a second-best form of intent. An appropriate form of second-best intent is found, he then argues, in Joseph Raz’s notion that: “Even without knowing the speaker’s actual intent or purpose in making a statement, one can charge the speaker with the minimum intention ‘to say what one would ordinarily be understood as saying, given the circumstances in which one said it.’”<sup>238</sup> In this way, Manning begins with a claim about the unknowability of Congress’s intent, and he concludes from it that, in order to operate as faithful agents plausibly carrying out congressional intent in some manner, courts should turn to textualist methods.

The use of the staffer’s error doctrine is more consistent with this set of interpretive assumptions than it might appear. After all, the point made by Raz is that, when a speaker makes an utterance, the speaker typically can be assumed to possess an intent to speak the uttered words (and, further, to have those uttered words interpreted according to prevailing interpretive conventions). Based on our intuitive awareness that this assumption is valid, Raz argues, we arrive at an everyday interpretive practice under which “the normal way of finding out what a person intended to say is to establish what he said.”<sup>239</sup> Even Raz accepts, however, that the default use of this “normal way” of locating intent is subject to rebuttal; it can be overridden by evidence that a specific error occurred in the conversion of an intention into a speech act. As Raz puts it: “An exception is any explanation of what went wrong [in the speech act] which establishes either that one was trying or had formed an intention to say something and failed, or that one did not mean what one said.”<sup>240</sup> The staffer’s error doctrine can be understood simply as a check to see whether such an explanation exists. For his part, Raz believes that underlying legislative intentions exist and can be identified (and, therefore, can be used to check for the existence of such a rebuttal).<sup>241</sup> It is Manning who adds the additional idea that legislative intent is unknowable. As such, the staffer’s error doctrine is consistent with Raz’s underlying theory. And it is possible that, while Manning presumably would reject the turn to intent in these instances, he nonetheless would acknowledge that

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<sup>237</sup> *Id.*; see also Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 459 (2005) (“According to the textualists, judges who try to reconstruct the legislature’s collective understandings (if any) by engaging in case-by-case investigation of individual legislators’ actual semantic intentions are doomed to failure; they do not know enough to identify reliably whatever collective understandings did in fact exist.”).

<sup>238</sup> Manning, *supra* note 206, at 2397–98 (quoting Joseph Raz, *Intention in Interpretation*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 249, 268 (Robert P. George ed., 1996)); see also Manning, *supra* note 132, at 692 (making the same argument based on Raz’s theory).

<sup>239</sup> Raz, *supra* note 238, at 270.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at 263–64.

these instances present a case in which this justification of textualism encounters its limit.

b. Textualism as Applying Intent of a Compromise-Driven Congress. Manning also offers a second argument suggesting that textualism is the best method of discovering congressional intent. This argument is based on a descriptive claim about the inner workings of Congress. The legislative process is marked by unprincipled compromises, Manning claims, not by principle or by logic.<sup>242</sup> Due to the prevalence of legislative bargains, Manning suggests, statutory text that appears philosophically inconsistent, erroneous, or even absurd is—more often than not—an accurate reflection of congressional intent.<sup>243</sup> Consequently, Manning argues, the best strategy for capturing congressional intent is simply to apply statutory text in all cases. Indeed, to interpret statutes otherwise would be to trample over bargains struck during the legislative process, Manning suggests—an approach that would undermine the power accorded to factions through the process of bicameralism and presentment.<sup>244</sup> In this way, Manning offers a second argument on behalf of textualist methods—an argument which asserts that these methods provide the best strategy by which to ascertain the intent of Congress.

An awareness of the staffer-delegation model qualifies Manning's claim that Congress is an institution driven by unprincipled compromises. Under the staffer-delegation model, lawmaking proceeds along two parallel tracks. Members of Congress make general policy decisions—and these decisions may be the result of bargains and unprincipled compromises. At the same time, members task staffers with producing a statute that will carry out these compromises—and, in so doing, the members frequently will award these staffers the power to strike further interstitial compromises. What is prohibited within the staffer-delegation model, however, is for staffers to make compromises that undermine the purposes agreed upon by members. Consequently, Congress is invariably purposive along a particular axis: statutory text is predictably designed to carry out, not to undermine, whichever purposive instructions members pass along to staffers. Put differently, delegations are inherently purposive; they award an agent with authority to pursue a set of goals (or purposes) on behalf of a principal. Due to the fact that Congress now predictably relies upon delegations in the production of statutory text,

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<sup>242</sup> Manning, *supra* note 206, at 2412; see also *Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. 616, 671 (1987) (Scalia, J., dissenting) (criticizing the Court for viewing the provision at issue as an isolated desire to enact a coherent congressional desire, rather than as an inseparable part of a “total legislative package containing many *quids pro quo*”).

<sup>243</sup> Manning, *supra* note 206, at 2390.

<sup>244</sup> Manning states:

[T]he Article I, Section 7 requirements of bicameralism and presentment are designed in part to [give] political minorities extraordinary power to withhold their assent to legislation or, more important, to insist on compromise as the price of assent. By disturbing the lines of compromise reflected in a clear statute, the absurdity doctrine risks diluting that protection.

*Id.* at 2391.

there is a narrow sense in which purposivist interpretation will reliably implement congressional intent—even if Congress otherwise is, as Manning claims, a compromise-driven institution. For this reason, even those subscribing to Manning's brand of textualism should acknowledge that the staffer's error doctrine, which requires the application of a narrow but rigid brand of purposivism, constitutes a legitimate exception to that interpretive methodology.

c. Textualism as Applying Intent While Accounting for Judicial Strengths and Weaknesses. Caleb Nelson additionally has argued on behalf of a brand of textualism which accepts the idea that statutory interpreters are engaged in the task of discerning congressional "intent." According to Nelson, a doctrine designed to correct "drafting errors" is perfectly permissible under this variant of textualism.<sup>245</sup> Textualists merely are more reluctant than intentionalists to conclude that a drafting error has occurred, Nelson claims, and so they require more compelling evidence of such an error.<sup>246</sup>

This reluctance has two distinct sources, Nelson observes. First, textualists are reluctant to correct "drafting errors" because textualists hope that this judicial practice will incentivize members of Congress—or their staffs—to review bills more closely.<sup>247</sup> As such, Nelson's claim is premised upon a theory about why drafting errors might typically find their way into statutes: because members of Congress and staffers might lack sufficient motivation to closely review statutory text. As Part II explained, however, members of Congress typically decline to perform pre-enactment review of statutory text for a different reason: in a world of significant statutory complexity, they lack the capacity to conduct this review. In such a situation, increased incentives cannot prove effective, at least with respect to the members themselves. Consequently, it might make particular sense for judges to seek out and correct drafting errors in the staffer-delegation era, since the countervailing interest in incentivizing members of Congress is absent in such instances. This is precisely what the staffer-delegation doctrine encourages them to do.

According to Nelson, textualists also are reluctant to acknowledge drafting errors because textualists "worry about errors [by judges] in the application of tests that require case-by-case exercises of judgment."<sup>248</sup> This concern is relevant, Nelson explains, because any "drafting errors" doctrine

<sup>245</sup> See Caleb Nelson, *What Is Textualism*, 91 VA. L. REV. 347, 380 (2005) ("No less than intentionalists . . . textualist judges acknowledge a concept of 'drafting error' that refers to the actual intent of individual legislators.").

<sup>246</sup> See *id.* ("It is in the practical application of this concept that textualists and intentionalists really part company.").

<sup>247</sup> *Id.* at 382 (expressing the hope that "the courts' reluctance to identify and correct 'drafting errors' may encourage members of Congress or their staffs to spend more time proof-reading and poring over each individual bill").

<sup>248</sup> *Id.* Nelson further states:

The more one distrusts the ad hoc judgments that tests for drafting errors necessitate . . . the more conservative one's favored test will be. In particular, one might adopt

is based on an intuitive calculation about the likelihood of false positives (i.e., of judges finding errors where none exist) versus the likelihood of false negatives (i.e., of judges overlooking genuine drafting errors).<sup>249</sup> The concern about case-by-case exercises of judgment is relevant because it alters this equation for textualists, making textualists particularly hesitant to declare a staffer error in any particular case.

Like other doctrines that seek to identify drafting errors, the staffer's error doctrine does require judges to perform "case-by-case exercises of judgment."<sup>250</sup> However, an awareness of the staffer-delegation model of lawmaking—and of members' dependence upon this model—would presumably alter the intuitive calculation described by Nelson (for both textualists and non-textualists). In a world where members of Congress often are not competent to review the work of the staffers who draft statutory text, the risks of errors—and therefore of false negatives—presumably is heightened. This would make any interpreter somewhat less reticent to conclude that a drafting error has occurred—and therefore more likely to apply the staffer's error doctrine.

iii. *Textualism as a Restriction on Source Materials.* According to some scholars, textualism's central tenet is a prohibition on the use of secondary materials—a prohibition that, for one reason or another, limits the interpreter to the text of the relevant statute. John Manning, for example, has argued for such a restriction on constitutional grounds. According to Manning, the nondelegation doctrine imposes a constitutional mandate that judges not stray beyond the text in statutory interpretation.<sup>251</sup> Scalia defended this restriction on practical grounds, meanwhile, arguing that legislative history "provides a uniquely broad playing field" for judges—one that, once allowed in statutory interpretation, permits too much "variety and specificity of result."<sup>252</sup>

Due to this strain of textualism, several judges and scholars have suggested that it is acceptable for courts to apply the scrivener's error doctrine any time the relevant error is evident to an interpreter based solely on the text of the statute. Most notably, Scalia argued that the doctrine can legitimately be applied to any situation in which: "[O]n the very face of the statute it is clear to the reader that a mistake of expression (rather than of

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the position advocated by modern textualists: judges should have leeway to identify and correct 'drafting errors' only in what they consider to be very clear cases.

*Id.* at 381.

<sup>249</sup> *Id.* at 381 (citing Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715, 730 (1992)).

<sup>250</sup> *Id.* at 382.

<sup>251</sup> Manning, *supra* note 132, at 696–99.

<sup>252</sup> Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3, 36 (Amy Gutmann ed., 1997).

legislative wisdom) has been made.”<sup>253</sup> Manning has contemplated such a version of the scrivener's error doctrine as well,<sup>254</sup> as has Nelson.<sup>255</sup>

This version of textualism raises an interesting question: can a version of the staffer's error doctrine be created that relies solely upon statutory text? It is difficult to know. Nonetheless, it is worth noting that the Court relied surprisingly heavily on statutory text—and surprisingly little on secondary materials—in its reconstruction of statutory purpose in *King v. Burwell*. Here, the Court relied upon findings within the statute for statements of statutory purpose, and it viewed these statements in conjunction with the statute's various provisions in order to develop a bird's eye view of how these provisions were meant to operate in service of the statute's larger goals.<sup>256</sup> In this sense, the Court's efforts in *King v. Burwell* paint an intriguing picture which suggests that a text-based version of the staffer's error doctrine—a version that potentially would appease source-focused textualists—might be possible.

iv. *Textualism as a Rejection of Intent-Based Interpretation.* According to the most natural interpretation of the staffer's error doctrine, this doctrine is designed to discover and enforce the intentions of Congress. Nonetheless, it also is possible to justify this doctrine without any recourse to notions of congressional intent. Such a justification may be particularly appealing to textualists, since many textualists reject the notion that congressional intent is the proper object of statutory interpretation.

According to this justification, the staffer's error doctrine does indeed rest upon the division-of-labor theory discussed in Section A of this Part. This doctrine, it confirms, is designed to induce courts to review the work of unelected staffers—in particular, to ensure that these staffers did not insert errors into statutory text. However, the work of unelected staffers does not receive additional review simply because it poses an inherent threat to the proper encoding of congressional intent, it argues. Instead, staffer work receives this added review because it makes sense, for some additional reason, to treat the work of unelected staffers differently from the work of elected representatives.

For example, one can imagine a situation in which courts might want to adopt textualist practices in order to incentivize members of Congress to perform their legislative tasks precisely and responsibly. However, textualists might simultaneously hope to refrain from incentivizing staffers, or from incentivizing Congress to rearrange its internal divisions of labor. This reti-

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<sup>253</sup> *Id.* at 20.

<sup>254</sup> Manning, *supra* note 206, at 2459–60 n.265 (“[W]hen an internal textual inconsistency or an obvious error of grammar, punctuation, or English usage is apparent from reading a word or phrase in the context of the text as a whole, there is only the remotest possibility that any such clerical mistake reflected a deliberate legislative compromise.”).

<sup>255</sup> Nelson, *supra* note 245, at 356.

<sup>256</sup> See *King v. Burwell*, 135 S. Ct. 2480, 2483 (2015) (“[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.”).

cence might be grounded, for example, in a concern about courts meddling with internal congressional practices and procedures. As such, this approach might be conceptualized as a peculiar form of respect for Article I, Section 5 of the Constitution, which provides members with autonomy to determine the internal rules, procedures, and practices of Congress.<sup>257</sup>

A similar theory could be offered that is based on retroactive accountability rather than forward-looking incentivizing. Under this view, elections are designed not only to provide accountability for legislators who have advanced policies that are contrary to the public will; rather, they also are designed to allow for the removal of legislators who are incompetent or ineffective. It is a view which assumes that elections are meant to hold representatives accountable for the process as well as the substance of their legislative work. When judges intervene to save legislators from their own errors, this theory would assert, they are undermining the proper operation of this constitutional mechanism. In effect, they are propping up incompetent legislators—individuals who should be allowed the opportunity to show that they can produce effective legislation, or who otherwise should be subject to judgment on that account at the ballot box.

Even if one accepts the idea that members of Congress should be held accountable for their own errors, however, it is not clear that they should equally be held accountable for the errors of their agents. This is particularly true in a period when the delegation of some lawmaking tasks is unavoidable, as it is today—and especially when many of these delegations are to career staffers whose employment cannot be terminated by an individual member of Congress. In this world—a world in which members of Congress inevitably are dependent upon some experts for the execution of their legislative vision—forcing members to stand judgment for staffer errors no longer seems to serve any accountability function. Instead, it seems to achieve quite the opposite: it takes any member who competently relies upon existing congressional delegation practices, and it renders that member randomly subject to the possibility of being undermined by forces largely outside the member's control.

In short, there are many reasons why courts might uniquely concern themselves with correcting errors by unelected staffers. While the most obvious reasons relate to the preservation of congressional intent, not all of these reasons are necessarily connected to an intentionalist agenda—and textualists should consider these alternative justifications before summarily dismissing the staffer's error doctrine.

## V. CONCLUSION: A NEW (YET OLD) THEORY OF CONGRESS

By outlining and defending a new “staffer's error doctrine,” this Article has developed an argument that has implications for the practice of statutory

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<sup>257</sup> U.S. CONST. art. I, § 5.

interpretation. At the same time, this argument also has theoretical implications for the field of legislation—one of which is particularly worth highlighting here. Namely, this argument reveals the inadequacy of the theories of Congress espoused by textualists and purposivists—and it points toward an alternative theory that ought to have a more prominent place in the field of legislation.

First, consider the theory of Congress found in purposivist scholarship. This scholarship typically argues that Congress is, above all, a purpose-driven institution. According to many purposivists, this characteristic is a result of the task that Congress must perform. The very nature of legislation, these scholars argue, is to realize broad social goals or objectives. This view is typified by the famous statement by Hart and Sacks that: “Law is a doing of something, a purposive activity, a continuous striving to solve the basic problems of social living.”<sup>258</sup> Based on this theory about the nature of lawmaking, purposivists frequently assume that Congress, as a lawmaking institution, must itself be purpose-driven. Hart and Sacks argued, for example, that courts could accurately assume “that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably.”<sup>259</sup>

By contrast, many textualists hold that Congress should be viewed instead as a deal-making institution. As one textbook has put it: “[Many textualists adopt] a view of the legislative process that is different—and grittier—than the one that underlies strong purposivism. Rather than seeing the legislative process as coherent and reasonable, the new textualists emphasize the rough-and-tumble of political compromise.”<sup>260</sup>

In distinction to these two theories, this Article has argued that a third theory of Congress is relevant to the field of statutory interpretation: namely, the theory embedded for many decades in the parallel field of administrative law. In administrative law, a defining feature of the modern Congress is assumed to be its delegation of lawmaking tasks to agents (namely, to executive branch agents). Due to fundamental changes that Congress underwent in the late twentieth century, this Article has argued, delegation to unelected agents has become a similarly defining feature of lawmaking within Congress. Consequently, modern federal lawmaking is invariably marked by delegation, regardless of whether it is outsourced to agencies or conducted within Congress.

Based on this observation, the foregoing pages have argued that courts should be reviewing these two types of lawmaking similarly. In each instance, courts should be ensuring that agents of Congress did not exceed the scope of their delegations. In this way, this article has argued that this alter-

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<sup>258</sup> HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 148 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958).

<sup>259</sup> *Id.* at 1378.

<sup>260</sup> JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 54 (2d ed. 2013).

native theory of Congress leads to a narrow but rigid brand of purposivism. It is a version whereby courts are not necessarily empowered to fill every gap and ambiguity in a statute with their understandings of statutory purpose, but where courts are empowered to ensure that no statutory text—no matter how unambiguous—is allowed to undermine the core purposes of the statute.

Not all will agree that courts' review of statutory text should more closely resemble their review of agency rulemaking, of course. The review of staffer drafting is, after all, a review of activity conducted prior to members of Congress voting upon a bill—a quality that distinguishes this activity from agency rulemaking. As such, some commentators will conclude that the proper form of review for errors made within the former process is a pre-enactment review by members of Congress, not a post-enactment review by the courts.

However, the staffer's error doctrine is based upon the idea that, in an era in which members of Congress are not competent to provide pre-enactment review of statutory text, this distinction between pre-vote and post-vote lawmaking is somewhat hollow.<sup>261</sup> In each instance, members of Congress are vulnerable to the threat of having their lawmaking agents undermine the decisions that they have made during the enactment process. Under the staffer's error doctrine, these comparable threats are met with comparable protections. As the foregoing pages have explained, they are protections that courts have long understood themselves as empowered to provide—and that make particular sense in an era marked by the staffer-delegation model of lawmaking.

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<sup>261</sup> This claim resembles Judge Posner's assertion in *Archer-Daniels-Midland Co. v. United States*, 37 F.3d 321 (7th Cir. 1994), that: "[I]n the case of statutory language [that is] technical and arcane . . . the slogan that Congress votes on the bill . . . strikes us as pretty empty." *Id.* at 324.