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Disaggregating Legislative Intent

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DISAGGREGATING LEGISLATIVE INTENT

Jesse M. Cross*

In statutory interpretation, theorists have long argued that the U.S. Congress is a “they,” not an “it.” Under this view, Congress is plural and nonhierarchical, and so it is incapable of forming a single, institutional intent. Textualists contend that this vision of Congress means interpreters must move away from concerns about intent altogether, and that they instead should speak in the register of textualism and its associated constitutional values, such as notice and congressional incentivization.

However, even if legislators’ intentions never coalesce into an institutional intent, a disaggregated-intent theory of legislation remains possible. Under this theory, statutes are understood as accomplishing a transfer not of the intent of a single legislature, but of a collection of individual legislators. While this theory often has been overlooked or summarily dismissed, this Article argues that it is theoretically viable, constitutionally defensible, and in accord with prevailing notions of legislative authority.

Moreover, disaggregated-intent theory generates its own vision of legislation and interpretation—one that can transform our understanding of specific methods of statutory interpretation. To illustrate this, the Article turns to intentionalism, showing how a different understanding of intentionalist methodology emerges from an approach rooted in disaggregated-intent theory. The result is a new vision of the strengths and weaknesses of both intentionalism and its competitor methodologies.

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INTRODUCTION

The central debate in the field of legislation has persistently asked: which method of statutory interpretation should courts use? In this debate, courts and scholars have advocated on behalf of a variety of competing methodologies, including intentionalism,¹ purposivism,² textualism,³ and dynamic statutory interpretation.⁴ These approaches all have benefited from storied pedigrees and high-profile adherents, and each arguably has had moments of ascendancy in our legal history. For textualism, that moment is now: textualist methodology plainly has gained significant traction with the current U.S. Supreme Court.⁵ As a result, textualism has largely displaced

1. On the basic tenets of intentionalism, see WILLIAM N. ESKRIDGE JR. ET AL., *STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES* 301–04 (1st ed. 2014).

2. For a formative, influential articulation of purposivism, see generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994); see also ESKRIDGE ET AL., *supra* note 1, at 318–49 (providing an overview of purposivist history and theory).

3. For influential accounts of textualism, see generally 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 (Amy Gutmann ed., 1997); William N. Eskridge, Jr., *The New Textualism*, 37 *UCLA L. REV.* 621 (1990) (chronicling the rise of the new textualist movement); see also Frank H. Easterbrook, *Statutes' Domains*, 50 *U. CHI. L. REV.* 533, 547 (1983); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 *COLUM. L. REV.* 673, 685–89 (1997).

4. See generally William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 *U. PA. L. REV.* 1479 (1986).

5. For a case that many have cited as marking the Court's recent embrace of textualism, see *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020). For examples of recent interrogations into the premises of textualism, see generally William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 *N.Y.U. L. REV.* 1718 (2021); Cary Franklin, *Living Textualism*,

the intentionalism that, in an earlier era, defined the Court's approach to statutory interpretation.⁶

This rise of textualist methodology has been propelled, in part, by textualist arguments that intentionalism suffers from a variety of troubling flaws.⁷ One such argument, and one that has proven especially durable,⁸ contends that the U.S. Congress and other legislatures lack the capacity to form a collective institutional intent.⁹ In a 1992 article, Professor Kenneth A. Shepsle distilled this argument into an oft-repeated phrase: "Congress is a 'they,' not an 'it.'"¹⁰ Intentionalism is a methodology designed to locate a collective institutional intent, these critics explain, and so the methodology is fundamentally misguided—a search for something that does not exist.¹¹ As such, interpreters should reject it.¹²

2020 SUP. CT. REV. 119; Matthew Jennejohn et al., *Hidden Bias in Empirical Textualism*, 109 GEO. L.J. 767 (2021) (arguing that corpus linguistics tools generate sexist results); Shlomo Klapper et al., *Ordinary Meaning from Ordinary People* (2020) (unpublished manuscript), <https://www.readcube.com/articles/10.2139%2Fssrn.3593917> [<https://perma.cc/W8JU-HHJN>] (finding that textualist methodology does not track nonlawyer interpretive practices, as textualists claim); Kevin Tobia et al., *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213 (2022) (same).

6. See ESKRIDGE ET AL., *supra* note 1, at 302; see also *infra* Part I.

7. These include providing courts with too much leeway to choose their politically preferred interpretation, see Scalia, *supra* note 3, at 36 (quoting Judge Harold Leventhal on his view that legislative history allows a judge to "look over the heads of the crowd and pick out [his or her] friends"), creating opportunities for unelected legislative staffers to manipulate court decisions, see *id.* at 32–35; *Hirschey v. Fed. Energy Reg. Comm'n*, 777 F.2d 1, 7–8 (D.C. Cir. 1985) (Scalia, J., concurring) (arguing that deference to committee reports created a system of "committee-staff prescription"), and failing to promote the legislative deals and compromises that textualists view as the essence of the legislative process, see John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2391 (2003) (describing textualism as protecting minority factions' constitutional prerogative "to insist on compromise as the price of assent").

8. See *infra* note 46 and accompanying text (tracing the argument back to Max Radin's famous 1930 article); *infra* note 77 and accompanying text (noting the return to this argument by scholars in recent years).

9. See RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* 15 (2012) ("The sceptical [sic] arguments all focus on the significance of the fact that the modern legislature is a group of legislators."); see also *infra* Part I (recounting the history of this argument).

10. Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 241–44 (1992). For authors repeating this phrase, see Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 1000 (2017) (noting "this slogan has come to be a truism that is accepted even by many who find the ability to attribute legislative intent unproblematic"); 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, 737 (2014) (noting "Kenneth Shepsle's famous insight"); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 711 (1992).

11. See, e.g., Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (describing the search for intent as a "wild-geese chase").

12. See, e.g., John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1915 (2015) ("I thought it obvious [in light of intent skepticism] that fighting it out on [nonintentional] terms was more desirable than taking on the seemingly fruitless task of asking whether one interpretive method or another better captures Congress's true 'intent.'").

This critique has not gone entirely unanswered over the years.¹³ Institutional legislative intent, several have responded, is a coherent concept—one that intentionalist courts deploy in a manner consistent with everyday linguistic practice, such as when we attribute intentions to corporations or governmental agencies.¹⁴ When courts claim to discover an “intent of Congress” in a statute, these scholars conclude, the courts engage in a justifiable act of pinpointing an intent that can rightly be attributed to a multimember institution.¹⁵

Despite these responses, however, this critique—which Professor John Manning has referred to as “intent skepticism”—has recently returned to legislation scholarship.¹⁶ Its return was precipitated, in significant measure, by a body of scholarship produced in the last decade that has chronicled the inner workings of the modern Congress.¹⁷ These congressional studies (by myself¹⁸ and others¹⁹) have illuminated real-world features of the present-day Congress,²⁰ and they have argued that those institutional features have practical implications for canons and doctrines of statutory

13. See *infra* notes 70–71 (citing scholars responding to intent skepticism).

14. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 859 (1992) (analogizing the corporate quality of legislatures to “other large institutions such as businesses, labor unions, and government departments”).

15. See, e.g., Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 428 (2005) (arguing “that it makes perfectly good sense to speak of legislative intent” for a multimember legislature in statutory interpretation).

16. See *id.* at 428 n.9.

17. As Part I explains, this movement is typically traced to a pair of 2013 articles by Professors Abbe R. Gluck and Lisa Schultz Bressman. See *infra* note 73 and accompanying text.

18. See generally Jesse M. Cross, *The Staffer’s Error Doctrine*, 56 HARV. J. ON LEGIS. 83 (2019) [hereinafter Cross, *Staffer’s Error Doctrine*]; Jesse M. Cross, *Legislative History in the Modern Congress*, 57 HARV. J. ON LEGIS. 91 (2020) [hereinafter Cross, *Legislative History*]; Jesse M. Cross, *When Courts Should Ignore Statutory Text*, 26 GEO. MASON L. REV. 453 (2018); Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541 (2020).

19. See generally, e.g., ROBERT A. KATZMANN, *JUDGING STATUTES* (2014); Abbe R. Gluck, Comment, *Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 90 (2015); Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013) [hereinafter Gluck & Bressman, *Statutory Interpretation I*]; Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946 (2020); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70 (2012); Jarrod Shobe, *Codification and the Hidden Work of Congress*, 67 UCLA L. REV. 640 (2020); Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807 (2014); Ganesh Sitaraman, *The Origins of Legislation*, 91 NOTRE DAME L. REV. 79 (2015); Bressman & Gluck, *supra* note 10; see also Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002).

20. To capture real-world institutional features, many have relied on interviews with congressional insiders. See, e.g., Cross & Gluck, *supra* note 18, at 1545; Cross, *Staffer’s Error Doctrine*, *supra* note 18, at 85; Cross, *Legislative History*, *supra* note 18, at 95; Gluck & Bressman, *Statutory Interpretation I*, *supra* note 19, at 905–06; Gould, *supra* note 19, at 1954.

interpretation.²¹ By drawing this connection between legislative reality and interpretive implication, this scholarship has—in the eyes of various intent skeptics—marked an implicit return to intentionalist methodology.²² In response to this work, several prominent scholars have revisited the longstanding critique of collective legislative intent, arguing that it renders intentionalism incoherent and thereby prevents the recent scholarship on Congress from carrying any interpretive import.²³

In a recent article, Professor Abbe Gluck and I offered one response to these recent critiques.²⁴ There, we observed unappreciated ways in which Congress, through the use of its nonpartisan offices, has a greater ability to act as a unitary institution than has been recognized.²⁵ It is an argument that likely could be extended to many partisan legislative products as well, which are themselves the product of what legal philosophers might call the “nested intentions” of the institution.²⁶ Few materials that emerge from Congress lack some sort of nested institutional pedigree.²⁷

However, this Article pursues a different line of argument. It grows out of a concern that, by responding in the manner that we have, institutional-intent scholars have disputed the skeptical conclusion offered by our textualist counterparts—but also have acceded to an initial premise. According to that premise, statutory interpretation entails a binary choice: either search for a collective institutional intent, or discard the concept of intent altogether.²⁸

This Article challenges that binary premise. Even if legislators’ intentions never coalesce into a single institutional intent, it explains, it remains possible to view statutes as accomplishing a transfer of disaggregated intent: not the intent of a single legislature, but of a collection of competing individual legislators. This Article examines and defends the vision of legislation (and interpretation) that emerges from this approach—one that it labels the *disaggregated-intent theory of legislation*.²⁹

21. See Cross, *Staffer’s Error Doctrine*, *supra* note 18, at 124–25 (proposing a doctrine for staff errors); see also Cross & Gluck, *supra* note 18, at 1674–79 (reviewing proposed interpretive canons).

22. See Manning, *supra* note 12, at 1935 (observing that Gluck and Bressman’s study “plainly invoke[s] intentionalist reasoning”).

23. See *id.*; see also Doerfler, *supra* note 10, at 998–1000.

24. See Cross & Gluck, *supra* note 18, at 1651–52.

25. See *id.*

26. For example, committee reports are the product of chamber rules, which are themselves sanctioned by Article I. See U.S. CONST. art. I, § 5, cl. 2; Rules of the House of Representatives, 117th Cong., R. XIII, at 26 (2021); STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, at 12, 31 (2013). On the idea of “nested intentions” and its relationship to institutional intent, see EKINS, *supra* note 9, at 10.

27. For an argument that attribution of group intentions need not even rely on this level of formality in the nesting of intentions, see EKINS, *supra* note 9, at 61 (arguing that “procedures are not fundamental to the structure of group action”).

28. This binary typically is simply assumed in the scholarship. For a scholar who explicitly defends it, see Doerfler, *supra* note 10, at 999–1000. For a response to Doerfler’s argument, see *infra* Part III.A.

29. This Article uses “disaggregated-intent theory of legislation” and “disaggregated-intent theory” interchangeably.

As this Article explains, disaggregated-intent theory is theoretically viable, constitutionally defensible, and in accord even with skeptical notions of legislative authority. On the theoretical front, disaggregated-intent theory has been overlooked only because two separate ideas about legislative intent—*consolidation* and *transfer*—have been conflated in discussions of intent skepticism. Once these ideas are disentangled, it becomes clear that intent skepticism leaves ample room for the continued relevance of legislative intent, as conceived under disaggregated-intent theory.

On the constitutional front, this Article argues that disaggregated-intent theory is sanctioned by the U.S. Constitution, both in superficial text and deeper structure. Textually, some have argued that the Constitution requires interpreters to view Congress exclusively in unitary, institutional terms.³⁰ Challenging this view, this Article explains that constitutional text in fact sanctions a plural, disaggregated view of Congress. Structurally, meanwhile, the argument for disaggregated-intent theory is even stronger. The Constitution equates the successful transfer of a certain type of disaggregated intention with advancement of the constitutional value of democratic self-government.³¹ By retaining a space for discussion of this legislator intention in statutory interpretation, disaggregated-intent theory both makes sense of constitutional structure and provides the opportunity to strategically advance values inherent in it. In this regard, it is textualism that encounters constitutional problems—at least, insofar as textualism is understood to entail a rejection of legislation as a vehicle for transfers of intent.³²

On the authority front, disaggregated-intent theory proves to be surprisingly compatible even with intent-skeptical notions of legislative authority. To illustrate this point, this Article examines Professor Jeremy Waldron's oft-cited theory of legislation and legislative authority.³³ While Professor Waldron argues that his notions of legislative authority entail a wholesale pivot away from intention in statutory interpretation, his theories of authority potentially point toward the need to preserve the same type of legislator intention that constitutional structure also deems significant.

Having argued for the theoretical, constitutional, and authority-based legitimacy of disaggregated-intent theory, this Article then contends that this theory, once accepted as legitimate, can revise our understanding of specific methods of statutory interpretation. To illustrate this, this Article turns to the interpretive method of intentionalism—showing how a different understanding of this methodology emerges from an approach rooted in disaggregated-intent theory. Here, this Article attempts to illustrate that,

30. See Doerfler, *supra* note 10, at 999–1000.

31. See *infra* Part III.B.

32. For a rare example of textualism that does not reject the search for intent, see Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 372 (2005) (suggesting that “textualists are as interested as intentionalists in enforcing the intended meaning of statutory language, and simply believe that the textualist approach will better capture the type of intent that both camps seek”).

33. For a detailed explanation of Professor Jeremy Waldron's theory of legislation and legislative authority, see *infra* Part IV.

once we reconceptualize intentionalism to fit the premises of disaggregated-intent theory, we gain a number of new insights into the methodology's strengths and weaknesses.

These insights emerge primarily because, as already mentioned, disaggregated-intent theory allows us to understand statutory interpretation as a method to advance the constitutional value of democratic self-government. Intentionalism proposes to do this by instructing interpreters to identify and give effect to their best guess of legislator understandings of statutes (i.e., the understandings that provide the foundation for legislator intentions). Understanding intentionalism in this way provides clarity with respect to a number of ambiguities that have plagued intentionalism, including questions about (1) *how many* legislators must share an intention, (2) *which type* of legislator intentions are relevant, and (3) *how far* one must go in promoting those intentions. Along the way, this reframing of intentionalism also addresses other traditional critiques of the methodology—including those related to Arrovian cycling,³⁴ to intentionalism's supposed denigration of the legislative process,³⁵ and to intentionalism's devaluation of the notice-giving function of statutes.³⁶

At the same time, this reconceptualization of intentionalism also raises new questions about the methodology. For example, it draws attention to intentionalism's tendency to treat legislators as having not only equal votes but also equal voices³⁷—a tendency that arguably preserves, and perhaps even needlessly magnifies, the apportionment distortions that impede the maximization of democratic self-government.³⁸

Congress's capacity to act as a single, unitary institution may be debatable. Even if we accept the idea of Congress as a "they," however, it does not eliminate the role of intent in statutory interpretation. To the contrary, it unlocks new ways of thinking about intent and interpretive method—ways that can help resolve longstanding stalemates in the field of legislation, as well as create new conversations about the role of courts in statutory interpretation.

This Article proceeds in five parts. Part I provides a brief background on the critique of corporate legislative intent. Part II explains that, even if we accept this critique, the disaggregated-intent theory of legislation remains theoretically viable. Part III argues that disaggregated-intent theory also is constitutionally permissible—and, in fact, accords with fundamental constitutional principles in ways that textualism does not. Part IV contends that disaggregated-intent theory also accords with Professor Waldron's skeptical notions of legislative authority. Part V examines what it means to think of intentionalism under disaggregated-intent theory—and it shows

34. See *infra* notes 216–22 and accompanying text.

35. See *infra* notes 212–22 and accompanying text.

36. See *infra* notes 259–68 and accompanying text.

37. Professor Richard Ekins refers to this quality as the "formal equality of legislators." EKINS, *supra* note 9, at 23.

38. For a summary of these apportionment distortions, see *infra* notes 203–06 and accompanying text.

how, once reconceived in these terms, several criticisms of intentionalism are resolved. Part V also considers possible counterarguments, and it highlights previously unexamined weaknesses of intentionalism that become evident under disaggregated-intent theory. A brief conclusion follows.

I. BACKGROUND: CONGRESS AS AN “IT”

A longstanding critique of intentionalism has posited that a legislature generally, or Congress in particular, is incapable of forming a collective institutional intent. When intentionalist courts look to identify legislative intent, these critics claim, they therefore look for something nonexistent. This part briefly reviews the history of this critique in American law.

Since the Founding, as even textualists have noted, it has been common for American courts to characterize Congress (and any other legislature) as a body that possesses an institutional “intent” and to describe statutory interpretation as a search for that intent.³⁹ Chief Justice John Marshall, for example, remarked that “the duty of the court [is] to effect the intention of the legislature,”⁴⁰ and he described the goal of interpretation as “discovering the mind of the legislature.”⁴¹ While competing, nonintentionalist approaches to statutory interpretation can be found in early American law, with judicial opinions buttressing ideas about courts acting as lawmaking partners⁴² or hewing to more textualist ideas,⁴³ it was widely accepted in early American legal history that legislative intent was an appropriate object to pursue in statutory interpretation.⁴⁴

This would begin to change with the legal realist movement of the 1930s.⁴⁵ In the effort to underscore the policymaking role that judges perform in statutory interpretation, Professor Max Radin offered a formative critique of the idea of legislative intent in a 1930 article, remarking:

A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number

39. See, e.g., John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 91 (2001) (explaining that “[t]he Marshall Court frequently emphasized that the federal judge’s constitutional duty was to adhere to the legislature’s intent”).

40. *Schooner Paulina’s Cargo v. United States*, 11 U.S. (7 Cranch) 52, 60 (1812) (“[I]t has been truly stated to be the duty of the court to effect the intention of the legislature . . .”).

41. *Pennington v. Coxe*, 6 U.S. (2 Cranch) 33, 52 (1804). But see William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 997 (2001) (“[Marshall’s] opinions run the gamut of methodologies but do consistently take a complex approach to text, as imbued with history, principles, and political choices.”).

42. See generally Eskridge, *supra* note 41 (documenting pragmatic or partnership models in early American jurisprudence).

43. See Manning, *supra* note 39, at 87–90 (documenting textualist models in early jurisprudence).

44. As one casebook puts it, “Since the beginning of our republic, courts have invoked the concept of legislative ‘intent’ to signal that legislators, not courts, create legislative meaning.” ESKRIDGE ET AL., *supra* note 1, at 302.

45. On the dating of the realist movement, see NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE 72–79* (1995).

rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.

That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition. The chances that of several hundred [legislators] each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small.⁴⁶

Realist critiques notwithstanding, however, the Supreme Court continued to approach statutory interpretation as a search for legislative intent throughout the New Deal⁴⁷ and post–New Deal eras.⁴⁸ During these years, the Court increasingly looked to legislative history that Congress was generating, both on the chamber floor and through its committee system,⁴⁹ for evidence of this institutional intent.⁵⁰

Beginning in the 1980s, this use of legislative history would undergo more sustained critique⁵¹—and so would the concept of legislative intent itself.⁵² Drawing upon Professor Radin’s earlier analysis,⁵³ a new movement of textualists increasingly viewed the concept as incoherent.⁵⁴ For instance, Justice Antonin Scalia argued that the search for legislative intent is a “wild-goose chase,”⁵⁵ while Judge Frank H. Easterbrook contended that intent is “fictive for a collective body”⁵⁶ and that “the concept of ‘an’ intent . . . for an institution [is] hilarious.”⁵⁷ Explaining the logic of this objection, Judge Easterbrook remarked that: “Because legislatures comprise

46. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930). For a discussion of a German antecedent to Professor Max Radin’s argument, see EKINS, *supra* note 9, at 4–5 (discussing Gustav Radbruch’s 1910 critique).

47. See Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 274 n.366 (describing the approach of “New Deal intentionalism”).

48. See, e.g., Caleb Nelson, *A Response to Professor Manning*, 91 VA. L. REV. 451, 456 (2005) (noting that “[f]rom the 1950s until the 1970s . . . the interpretive conventions associated with [intentionalism and purposivism] dominated American jurisprudence”).

49. On the hierarchy of legislative history sources that emerged from the Court during this period, see ESKRIDGE ET AL., *supra* note 1, at 631 (reporting the “conventional hierarchy” of legislative history).

50. See Tiefer, *supra* note 47, at 212–13 (“It was not until the New Deal Court . . . that the modern era of fuller, more accurate use of legislative history began.”).

51. See Solan, *supra* note 15, at 427 (“Perhaps the greatest controversy over statutory interpretation during the past two decades concerns the use of legislative history as evidence of the intent of the legislature.”).

52. See *id.* (“More basically, the concept of legislative intent has itself been subject to attack.”).

53. See William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 372–73 (1990) (discussing textualists’ debt to Radin); Manning, *supra* note 3, at 684–85 (connecting new textualist critiques to Radin’s realist analysis); Manning, *supra* note 7, at 2410 n.81 (noting that “textualists’ intent skepticism can be traced to the work of Max Radin”).

54. On this movement generally, see Eskridge, *supra* note 3.

55. Scalia, *supra* note 11, at 517; see also Scalia, *supra* note 3, at 29–32.

56. Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 68 (1994).

57. Frank H. Easterbrook, *Some Tasks in Understanding Law Through the Lens of Public Choice*, 12 INT’L REV. L. & ECON. 284, 284–85 (1992).

many members, they do not have ‘intents’ or ‘designs,’ hidden yet discoverable.”⁵⁸ In addition to building upon earlier realist critiques, these textualists drew upon more recent ideas in public choice theory,⁵⁹ a field that raised new questions about the ability of legislatures to possess stable, shared policy preferences.⁶⁰ Governmental actors such as the U.S. Department of Justice Office of Legal Policy,⁶¹ as well as prominent textualist scholars such as Professor Manning,⁶² both observed this growing criticism and further advanced it.⁶³ For these textualists, skepticism about the existence of a collective legislative intent typically was viewed as an indictment of intentionalist methodology, and therefore as an argument in favor of textualism as a competing method.⁶⁴ Meanwhile, other legal scholars increasingly joined this skepticism about corporate legislative intent, even when not endorsing textualist methodologies,⁶⁵ as did several prominent legal philosophers.⁶⁶ It was a skepticism that Professor Shepsle distilled into

58. Easterbrook, *supra* note 3, at 547; *see also* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 64 n.10 (1988) [hereinafter Easterbrook, *Original Intent*].

59. Describing public choice theory during its ascendancy, Professors Daniel A. Farber and Philip P. Frickey characterized it as “a highly influential group of economists and political scientists” who “apply economic methodology to the study of political institutions.” Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 424 (1988).

60. *See, e.g.*, Easterbrook, *supra* note 3, at 547–48 (explaining that intent skepticism “follows from the discoveries of public choice theory”). For a response to this use of public choice theory, *see infra* Parts V.A.2, V.B.2.

61. OFF. OF LEGAL POL’Y, U.S. DEP’T OF JUST., USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION ii (1989) (“[T]he problem of discerning the intended meaning of a collective body is essentially insoluble. . . . No one has yet proposed a satisfactory method of determining the group intent of a body when the individual members of that body may have differing intents.”).

62. *See, e.g.*, Manning, *supra* note 7, at 2410 n.81 (reiterating this critique and connecting it to Radin’s arguments); Manning, *supra* note 3, at 675 (noting and aligning with “textualist judges [who] argue that a 535-member legislature has no ‘genuine’ collective intent with respect to matters left ambiguous by the statute itself”).

63. *See also* JEREMY WALDRON, LAW AND DISAGREEMENT 99 (1999). For an overview of international courts and scholars making similar arguments, *see* EKINS, *supra* note 9, at 3–4.

64. *See, e.g.*, Easterbrook, *supra* note 56, at 67 (“The more of these propositions you accept [including that intent is an empty concept], the more likely you are to accept my conclusion that statutory text and structure, as opposed to legislative history and intent (actual or imputed), supply the proper foundation for meaning.”).

65. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 326 (1990) (“It is hard enough to work out a theory for ascertaining the ‘intent’ of individuals in tort and criminal law. To talk about the ‘intent’ of the legislature . . . multiplies these difficulties, because we must ascribe an intention not only to individuals, but to a sizeable group of individuals . . .”); *see also* RONALD DWORKIN, LAW’S EMPIRE 318–50 (1986).

66. *See, e.g.*, Joseph Raz, *Intention in Interpretation*, in THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 249, 258–59 (Robert P. George ed., 1996); DWORKIN, *supra* note 65, at 324; WALDRON, *supra* note 63, at 119–122; *see also* EKINS, *supra* note 9, at 10 (agreeing that Professors Dworkin and Waldron “succeed . . . in discrediting aggregative conceptions of legislative intent” while developing a theory of institutional intent).

a phrase that would become shorthand for this critique,⁶⁷ writing in a 1992 article that “Congress is a ‘they,’ not an ‘it.’”⁶⁸

In response to this textualist-driven critique, scholars advanced new arguments in defense of the idea of legislative intent, arguing that it was a coherent concept that courts deployed in a manner consistent with everyday linguistic practice.⁶⁹ Professor Lawrence Solan, for example, argued that advances in the humanities and social sciences revealed “that it makes perfectly good sense to speak of legislative intent,” observing that we “routinely attribute intent to a group of people” in an institution with the features of a legislature.⁷⁰ Justice Breyer advanced similar arguments.⁷¹

More recently, pressure has been put on the textualist-driven critique, albeit indirectly, by a wave of legislation scholarship that has emerged in the last decade. During this period, the field of legislation has experienced what Justice Barrett has termed a “process-based turn in statutory interpretation.”⁷² This process-based turn, largely inaugurated by a formative study by Professors Abbe R. Gluck and Lisa Schultz Bressman in 2013,⁷³ has generated a large and growing body of scholarship examining the institutional realities of the modern Congress and their implications for statutory interpretation doctrine.⁷⁴ This scholarship typically has not undertaken theoretical defenses of institutional legislative intent nor has it tended to engage in explicit debate over intent skepticism.⁷⁵ Nonetheless, in its assumption that legislative realities can and should bear upon statutory interpretation,⁷⁶ some have perceived an implied return to a brand of intentionalism that relies upon the idea of institutional legislative intent.⁷⁷

67. As Professor Ryan A. Doerfler notes, this phrase has become “a common refrain” in legislation scholarship. Doerfler, *supra* note 10, at 982. For prominent examples of its use, see *supra* note 9 and accompanying text.

68. Shepsle, *supra* note 10, at 244.

69. See, e.g., Solan, *supra* note 15, at 428; see also EKINS, *supra* note 9, at 1–14.

70. Solan, *supra* note 15, at 428; see also EKINS, *supra* note 9, at 1–14 (outlining a theory of legislation as action on joint intentions formed by legislature).

71. See generally STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW (2010); Breyer, *supra* note 14, at 865 (explaining that “those who understand the group do not ordinarily have trouble properly ascribing purposes to its activities, at least in ordinary cases”); see also generally CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS (2011).

72. Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2194 (2017). For her part, Justice Barrett is skeptical of the interpretive utility of this process-based turn. See *id.* at 2200–01, 2205.

73. See generally Gluck & Bressman, *Statutory Interpretation I*, *supra* note 19; Bressman & Gluck, *supra* note 10.

74. See *supra* notes 18–19 and accompanying text (listing works from this scholarly movement).

75. See, e.g., Manning, *supra* note 12, at 1935 (noting that “Professors Gluck and Bressman do not identify themselves with classic intentionalism”).

76. See *supra* note 21 (noting proposed doctrinal takeaways from this scholarship).

77. See, e.g., Manning, *supra* note 12, at 1935 (noting that, by invoking “the subjective expectations of legislative drafters,” Gluck and Bressman “plainly invoke intentionalist reasoning”).

In response to this process-based turn, several prominent scholars have revived arguments about the impossibility of Congress forming a single, collective intent.⁷⁸ Professor Manning, for example, has reiterated prior objections to the idea of congressional intent,⁷⁹ and he has argued that findings in the Gluck/Bressman study actually buttress concerns about the ability to locate a single institutional intent.⁸⁰ In addition, Professor Ryan A. Doerfler has argued that Congress lacks the delegatory structure required to meet the definition of shared agency used in scholarship on the philosophy of action, and that congressional intent therefore is a fiction.⁸¹ In each instance, skepticism about collective legislative intent has been presented as a rebuke to the process-based turn in legislation, a movement assumed by these critics to rest upon the theory of collective intent for the persuasiveness of its interpretive takeaways.⁸²

II. THE THEORETICAL VIABILITY OF DISAGGREGATED INTENT

Recent intent skeptics therefore have suggested that the critique of institutional legislative intent, if persuasive, directs statutory interpreters to discard the concept of intent in statutory interpretation. Yet even if we accept the premises of intent skepticism, the idea of legislative intent remains theoretically viable.

To understand the continued viability of intent, it is necessary to disentangle two actions that may be performed with legislative intent: *consolidation* and *transfer*. On the one hand, a legislature theoretically might *consolidate* legislative intent when drafting and approving legislation, thereby combining the myriad intentions of legislators into a single institutional intent. On the other hand, a legislature also might *transfer* legislative intent (or create the conditions for such a transfer), producing a text that could potentially advance legislative intentions when interpreted and applied.

Intent skeptics and their respondents have focused on a specific brand of intentionalism: one that views the enactment process, with respect to intent,

78. For the notable exception of a response that did not raise this critique, see Barrett, *supra* note 72, at 2200.

79. See Manning, *supra* note 12, at 1916 (“No one can identify ‘congressional intent’ or the ‘legislative deal’ as a matter of fact . . .”).

80. See *id.* at 1936–37 (“[The Gluck/Bressman study’s] findings . . . confirm rather than undercut (a) the ineffability and contingency of legislative intent and (b) the corresponding impossibility of treating intent as a ‘fact of the matter’ that can be made sense of without a normative frame of reference.”).

81. See Doerfler, *supra* note 10, at 979–80.

82. See Manning, *supra* note 12, at 1916 (“This Essay argues that the new empiricism does not undermine the intent skepticism that has framed so much of the discussion about how to read statutes.”); Doerfler, *supra* note 10, at 985–86 (“This Article argues that none of these approaches [of the process-based turn] makes sense when the context consists of information salient to all, not only to drafters. ‘[I]gnorance of how Congress works’ is lamentable for various reasons, but the nuances of the legislative process are largely irrelevant for the purpose of interpretation.” (second alteration in original) (quoting Nourse, *supra* note 19, at 85)).

as both a *consolidation* and a *transfer*.⁸³ Under this version of intentionalism, legislators are assumed to (1) combine to form a single institutional intent and (2) draft a statute that is designed (and has the capacity) to carry forward that single intent. This brand of intentionalism, with its emphasis on both *consolidation* and *transfer*, might be described as the *aggregated-intent theory of legislation*.

To critique aggregated-intent theory, intent skeptics have focused specifically on one prong of this theory: consolidation.⁸⁴ Yet a critique of consolidation, by itself, does not necessarily push interpreters to move away from intent altogether and to speak instead in the register of textualism and its associated constitutional values (such as notice⁸⁵ and congressional incentivization⁸⁶). Rather, it still might be possible to conceive of legislation as performing a *transfer*, but not a *consolidation*, of intent. Under this view, the legislature may never have formed a corporate, institutional intent with respect to a given statutory provision. Nonetheless, individual members of Congress still may have formed individual intentions they believed were encoded in the provision. Consequently, each statutory provision has the capacity to carry forward a set of legislator intentions—intentions that will be either advanced or frustrated by the statute’s interpretation. Because those intentions never coalesce into an intent of the legislature, however, an interpretation’s advancement of intent now becomes a fractional affair—realizing the intentions of some particular legislators, while frustrating others. This might be labeled the *disaggregated-intent theory of legislation*.

For intent skeptics to defend a pivot to textualism, they also must explain why the disaggregated-intent theory is untenable.⁸⁷ Otherwise, legislator intentions might remain relevant to statutory interpretation, intent skepticism notwithstanding.⁸⁸ This raises the question: what is the problem with the disaggregated-intent theory of legislation?

83. See, e.g., Manning, *supra* note 39, at 55; see also Eskridge, *supra* note 4, at 1479–80 (describing intentionalism as search for the “intent of the legislature”); Easterbrook, *supra* note 57, at 284 (describing intentionalism as the search for “intent . . . [of] an institution”).

84. See *supra* Part I (discussing the various components of aggregated-intent theory).

85. See, e.g., *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020) (“The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration.”); Barrett, *supra* note 72, at 2195 (arguing that textualists “view themselves as agents of the people rather than of Congress”).

86. See, e.g., *Finley v. United States*, 490 U.S. 545, 556 (1989) (“[It] is of paramount importance . . . that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.”); Easterbrook, *supra* note 3, at 539–40 (arguing for unambiguous interpretive rules to provide a clear backdrop for drafting legislation); Manning, *supra* note 12, at 1913–14 (noting that the interpretive method should facilitate legislative compromise).

87. Professor Doerfler recently attempted to offer such a defense. See Doerfler, *supra* note 10, at 999. For a response, see *infra* Part III.

88. As Professor Andrei Marmor puts it, “the skeptic is opposed to the ontological perplexities raised by the potential reference” to “the idea of a *group*-intention,” but this idea can be distinguished from the notion of “*shared* intentions,” the latter of which “involves no such ontological perplexities. Even if you are a skeptic about the idea of group intentions, you cannot deny that it is possible for many people to have basically the same kind of intentions (or at least very similar ones).” ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 124

III. THE CONSTITUTION AND DISAGGREGATED INTENT

Perhaps the answer lies in the Constitution. The disaggregated-intent theory of legislation might be theoretically viable, yet constitutionally problematic. As this part explains, however, that is not the case. The Constitution actually sanctions disaggregated-intent theory, as a matter of both superficial text and deeper principle. In fact, it is the intent skeptics who run into constitutional difficulty.

A. Constitutional Text

First, consider the plain text of the Constitution. Professor Doerfler has argued that constitutional text prohibits any turn to disaggregated-intent theory, saying:

As far as the Constitution is concerned, Congress is an “it,” not a “they.” Article I, Section 1 vests all granted legislative powers in “a Congress.” The Constitution also specifies various things that “the Congress” may or shall do. In each instance, the Constitution refers to Congress as a *single body* as opposed to a collection of individuals.⁸⁹

To the extent that weight is placed on this type of grammatical detail in Article I, however, much evidence also cuts in the opposite direction. If the founders were adamant about others (including courts) viewing Congress as a unitary institution, one would expect to find the Constitution referring to Congress exclusively in the unitary, institutional terms that Doerfler highlights.⁹⁰ Yet this is not how the Constitution always (or even typically) speaks of Congress. Quite literally, the Constitution labels Congress as a “they”; it refers to Congress via pronoun six times, and each time it uses the plural pronouns “they”⁹¹ and “their.”⁹² For example, the Constitution states, “The Congress shall . . . [meet] on the first Monday in December, unless *they* shall by Law appoint a different Day.”⁹³ References to the individual chambers are more mixed, but these similarly tend toward the plural; seven

(2d ed. 2005). For others noting this distinct concept of intentions without consolidation, see MARGARET GILBERT, ON SOCIAL FACTS 19 (1989) (referring to this as the idea of “summative” intentions); EKINS, *supra* note 9, at 47 (describing a version of intent that functions as “mere shorthand to enable us to refer to the intentions of many individuals at once”).

89. Doerfler, *supra* note 10, at 999. For an argument outside the statutory interpretation context highlighting the constitutional necessity of viewing Congress as a unitary institution, see Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1491–1501 (2015).

90. See Doerfler, *supra* note 10, at 999–1000.

91. See U.S. CONST. art. I, § 2 (“The actual Enumeration shall be made within three Years after the first Meeting of the Congress [and thereafter] in such Manner as they shall by Law direct.”); *id.* art. II, § 2 (“[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper . . .”); *id.* amend. XX, § 2 (“The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.”); see also *infra* note 93 and accompanying text.

92. See U.S. CONST. art. II, § 3 (“[The President] shall from time to time give to the Congress Information of the State of the Union, and recommend [measures] to their Consideration . . .”); see also *infra* note 96 and accompanying text.

93. U.S. CONST. art. I, § 4, cl. 2 (emphasis added).

single-chamber references are plural,⁹⁴ while only three are singular.⁹⁵ This usage appears even in the crucial bicameralism-and-presentment provision, with respect to both Congress⁹⁶ and each chamber.⁹⁷ This is not the language one employs to describe an institution that must be conceptualized in corporate, institutional terms. Instead, the term “Congress” repeatedly functions as a shorthand to refer to its various, disaggregated members. Constitutional text therefore offers a flipside to Professor Shepsle’s famous observation: Congress may indeed be a “they,” and constitutional text permits us to consider it as such.⁹⁸

B. Constitutional Design

There also are deeper structural reasons to believe that the Constitution sanctions disaggregated-intent theory. That theory retains a space in statutory interpretation for recognition of a certain type of individual legislator intention. The Constitution equates the successful transfer of such legislator intention with advancement of a key constitutional value: democratic self-government.⁹⁹ By retaining a space for analysis of this

94. *See id.* art. I, § 2 (“The House of Representatives shall chuse their Speaker and other Officers”); *id.* art. I, § 3 (“The Senate shall chuse their other Officers”); *id.* (“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”); *id.* (“The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation.”); *id.* art. I, § 5 (“Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy”); *id.* art. II, § 2 (“The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”); *see also infra* note 97 and accompanying text.

95. U.S. CONST. art. I, § 5 (“Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members”); *id.* (“Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour”); *id.* (“Each House shall keep a Journal of its Proceedings”).

96. *Id.* art. I, § 7 (stating that the failure by the President to return a bill within ten days makes it law “unless the Congress by their Adjournment prevent[s] its Return”).

97. *Id.* (“[T]hat House in which [a vetoed bill] shall have originated, . . . shall enter the [President’s] Objections at large on their Journal”).

98. *See* Shepsle, *supra* note 10, at 244. Applied to intent, this seemingly permits interpreters to consider what Professor Margaret Gilbert calls “summative accounts” of congressional intention. *See* GILBERT, *supra* note 88, at 19. As Professor Ekins puts it, congressional intent “is understood as a shorthand reference to what is common amongst members of the group,” rather than as a reference to a distinct, unitary institutional intent. EKINS, *supra* note 9, at 50.

99. *See* *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (“[I]n our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.”); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 472 (1793) (“Sovereignty [sic] is the right to govern . . . here it rests with the people”); *id.* at 471 (noting that “the sovereignty of the nation is in the people of the nation”); *see also* John Adams, *Autobiography*, in 3 CHARLES FRANCIS ADAMS, *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* 3, 16 (Boston, Little, Brown & Co. 1865) (claiming that under the Constitution “the people were the source of all authority and original of all power”); *THE FEDERALIST* No. 39, at 251 (James Madison) (Jacob E. Cooke ed., Wesleyan University Press 1961) (describing the federal government as “a government which derives all its powers directly or indirectly from the great body of the people”); James Wilson, *Speech to the Philadelphia Convention* (Dec. 4, 1787), in 2 JONATHAN ELLIOT, *THE*

legislator intention in statutory interpretation, disaggregated-intent theory therefore both makes sense of constitutional structure and provides the opportunity to strategically advance values inherent in it.

1. Design Explained

The value that our constitutional scheme places on democratic self-government is apparent.¹⁰⁰ In the words of *Federalist 39*, the Constitution was understood as a project to “rest all our political experiments on the capacity of mankind for self-government.”¹⁰¹ By committing to the idea of “self-government,” the Founding generation generally aspired to “make the voice of a majority of the people the law of the land,” as the Pennsylvania state constitution described it.¹⁰² In order to accomplish this goal, the Constitution aimed to create a system in which the political desires of the community would circle around, in some meaningful fashion, in the form of rules that govern the same community.¹⁰³ By creating this circuit of democratic will, the Constitution would attempt to create a system in which, as Chief Justice John Jay would reflect in *Chisholm v. Georgia*,¹⁰⁴ the people of the United States would work “as joint tenants in the sovereignty,” and with “none to govern but *themselves*.”¹⁰⁵

The Constitution was designed to promote this vision of self-government on two tracks.¹⁰⁶ First, it would promote it on the constitutional level, where

DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 453, 456 (J.B. Lippincott Co. 1891) (describing the public as “the fountain of government”).

100. See, e.g., AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 13 (2006) (describing it as “the Constitution’s bedrock idea”); Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994) (“The central pillar of Republican Government, I claim, is popular sovereignty. In a Republican Government, the people rule.”); Daniel M. Braun, *Constitutional Fractality: Structure and Coherence in the Nation’s Supreme Law*, 32 ST. LOUIS U. PUB. L. REV. 389, 395 (2013) (“The Preamble’s foundational principle of popular sovereignty reverberates throughout (virtually) the entire Constitution.”); Andrew G. I. Kilberg, Note, *We the People: The Original Meaning of Popular Sovereignty*, 100 VA. L. REV. 1061, 1102 (2014) (“[T]he Constitution is premised on popular sovereignty”); Kurt T. Lash, *The Cost of Judicial Error: Stare Decisis and the Role of Normative Theory*, 89 NOTRE DAME L. REV. 2189, 2206 (2014) (“The theory of popular sovereignty is foundational to the system of American constitutional law.”).

101. THE FEDERALIST NO. 39, *supra* note 99, at 250 (James Madison).

102. PA. CONST. § 17 (1776), https://avalon.law.yale.edu/18th_century/pa08.asp [<https://perma.cc/6EFE-DE8M>]; see also 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 451 (Max Farrand ed., 1911) (Aug. 29, 1787) [hereinafter FARRAND’S RECORDS] (statement of George Mason, as rendered by James Madison) (“The majority will be governed by their interests.”).

103. As George Mason put it, it was a system whereby “[t]he Majority will be governed by their interests.” See 2 FARRAND’S RECORDS, *supra* note 102, at 451 (Aug. 29, 1787) (statement of George Mason, as rendered by Madison).

104. 2 U.S. (2 Dall.) 419 (1793).

105. *Id.* at 472.

106. On the American system as a “dualist” or two-track system requiring different levels and types of public assent for different types of legal change, see 1 BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 3–34 (1991).

ratification¹⁰⁷ and amendment¹⁰⁸ rules would provide the public with a voice in shaping the nation's higher law.¹⁰⁹ Second, the Constitution also committed the nation to democratic self-government with respect to ordinary federal legislation.¹¹⁰ To this latter end, the Constitution created a governmental architecture designed to allow democratic will to flow outward from the public, through and across a variety of governmental actors and institutions, and back to the public as enforceable laws. Specifically, the Constitution outlined four key transfer points, where political desires would pass from one constitutional actor to another:

Transfer One: Public → Members of Congress (primarily via elections)¹¹¹

Transfer Two: Members of Congress → Legal texts (via enactment of laws)¹¹²

Transfer Three: Legal texts → Executive and judicial branches (via interpretation of laws)¹¹³

Transfer Four: Executive and judicial branches → Public (via enforcement of laws)¹¹⁴

Many constitutional provisions were designed to ensure that these transfers were successful. Consider the first transfer. Here, a key constitutional objective was to transmit the political goals of the public into the legislature. In so doing, it ideally would make the impulses of Congress mirror and mimic those in the larger public.¹¹⁵ As John Adams put it, a legislature

107. U.S. CONST. art. VII.

108. *Id.* art. V.

109. This was the role for “the People” signaled in the Preamble and perhaps for “Conventions” of the people in Article V. *Id.* pmb; *id.* art. V; *see also* ACKERMAN, *supra* note 106, at 168–75 (discussing the Founding-era understanding of the Convention).

110. *See* U.S. CONST. art. I, § 7. This was the role established for “the People” in Article I and for “the people” via the Seventeenth Amendment. *Id.* art. I, § 2; *id.* amend. XVII; *see also* AMAR, *supra* note 100, at 64 (discussing text of Article I, Section 2).

111. U.S. CONST. art. I, §§ 2–6.

112. *Id.* art. I, §§ 7–8.

113. *Id.* art. I, § 1; *id.* art. II, § 1.

114. *Id.* art. I, §§ 1, 8; *id.* art. VI.

115. *See Essays of Brutus III*, in 2 THE COMPLETE ANTI-FEDERALIST 358, 379–80 (Herbert J. Storing ed., 1980) (“The very term, representative, implies, that the person or body chosen for this purpose, should resemble those who appoint them—a representation of the people of America, if it be a true one, must be like the people. It ought to be so constituted, that a person, who is a stranger to the country, might be able to form a just idea of their character, by knowing that of their representatives. They are the sign—the people are the thing signified. It is absurd to speak of one thing being the representative of another, upon any other principle. The ground and reason of representation, in a free government, implies the same thing. . . . [T]hose who are placed instead of the people, should possess their sentiments and feelings, and be governed by their interests, or, in other words, should bear the strongest resemblance of those in whose room they are substituted.”); *see also* THE FEDERALIST NO. 52, *supra* note 99, at 355 (James Madison) (advocating for a “scheme of representation [that could function] as a substitute for a meeting of the citizens in person”); 1 FARRAND’S RECORDS, *supra* note 102, at 132–33 (June 6, 1787) (statement of James Wilson, rendered by Madison) (remarking that representation was “necessary only because it is impossible for the people to act collectively”); *id.* at 561 (July 9, 1787) (statement of William Patterson, rendered by Madison) (“What is the true principle of Representation? It is an expedient by which an assembly of certain individls [sic]

“should be in miniature an exact portrait of the people at large. It should think, feel, reason, and act like them.”¹¹⁶

A host of constitutional provisions therefore were designed to pressure each member of Congress to act in accordance with the political desires of his or her constituents, thereby effectively transferring constituent desires into legislators.¹¹⁷ As *Federalist 57* put it, “Duty, gratitude, interest, ambition itself, are the chords by which [representatives] will be bound to fidelity and sympathy with the great mass of the people.”¹¹⁸ This was the flip side of the Constitution’s physics-like calculations regarding personal ambition,¹¹⁹ which trafficked in attraction as well as repulsion.¹²⁰ Institutional design, it was hoped, would translate legislator ambition not only into salutary oppositions (i.e., checks and balances) but also into useful alignments—here, between voters and members of Congress.¹²¹ This goal shaped provisions on the regularity of elections,¹²² term lengths,¹²³ chamber

chosen by the people is substituted in place of the inconvenient meeting of the people themselves.”).

116. John Adams, *Thoughts on Government*, in AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805, at 401, 403 (Charles S. Hyneman & Donald S. Lutz eds., 1983); see also 1 FARRAND’S RECORDS, *supra* note 102, at 132 (June 6, 1787) (statement of James Wilson, rendered by Madison) (describing that a goal of Congress is to be “the most exact transcript of the whole Society”).

117. See THE FEDERALIST NO. 57, *supra* note 99, at 386 (James Madison) (describing the “ties which bind the representative to his constituents”); THE FEDERALIST NO. 52, *supra* note 99, at 357, 359 (James Madison) (describing the Constitution as creating for public “a due connection between their representatives and themselves” and a “Federal Legislature [that] will . . . be restrained by its dependence on the people”).

118. THE FEDERALIST NO. 57, *supra* note 99, at 387 (James Madison).

119. For a recent example discussing the constitutional understanding of ambition in terms of Founding-era physics, see Jonathan Turley, *Madisonian Tectonics: How Form Follows Function in Constitutional and Architectural Interpretation*, 83 GEO. WASH. L. REV. 305, 314 (2015).

120. For an overview of debates regarding the role of mechanistic and physics metaphors in constitutional construction, see generally Jesse M. Cross, *National “Harmony”: An Inter-Branch Constitutional Principle and Its Application to Diversity Jurisdiction*, 93 NEB. L. REV. 139, 174–77 (2014); Note, *Organic and Mechanical Metaphors in Late Eighteenth-Century American Political Thought*, 110 HARV. L. REV. 1832 (1997).

121. At the Founding, this public-to-legislator transition too regularly was understood as both consolidation and transfer. See, e.g., THE FEDERALIST NO. 10, *supra* note 99, at 57 (James Madison) (“By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”); THE FEDERALIST NO. 51, *supra* note 99, at 351 (James Madison) (“Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.”). As such, contemporary theory seems to have less trouble regarding this today in disaggregated terms.

122. U.S. CONST., art. I, §§ 2–3; see also THE FEDERALIST NO. 52, *supra* note 99, at 355 (James Madison) (explaining that election provisions were expected to create “a common interest with the people” and secure “an immediate dependence on, [and] an intimate sympathy with the people”).

123. U.S. CONST. art. I, §§ 2–3; see also THE FEDERALIST NO. 52, *supra* note 99, at 356 (James Madison) (“[W]e cannot doubt that a reduction of the period from seven to three years, with the other necessary reforms, would so far extend the influence of the people over their representatives, as to satisfy us, that biennial elections under the federal system, cannot possibly be dangerous to the requisite dependence of the house of representatives on their

size,¹²⁴ bicameralism,¹²⁵ subjection of legislators to rule of law,¹²⁶ legislative salaries,¹²⁷ per capita legislator voting,¹²⁸ publication of each chamber's Journal,¹²⁹ publishing of accounting,¹³⁰ member residency requirements,¹³¹ and electoral processes,¹³² among others.¹³³ As *Federalist 57* explained, these provisions together would provide “every security which can be devised or desired for [ensuring legislators'] fidelity to their constituents.”¹³⁴

Having created a system to transfer political intentions from constituents to legislators, the Constitution then envisioned a second transfer: from

constituents.”); THE FEDERALIST NO. 57, *supra* note 99, at 384 (James Madison) (describing the Constitution as containing “such a limitation of the term of appointments, as will maintain a proper responsibility to the people”); *id.* at 386 (“[T]he House of Representatives is so constituted as to support in the members an habitual recollection of their dependence on the people. Before the sentiments impressed on their minds by the mode of their elevation, can be effaced by the exercise of power, they will be compelled to anticipate the moment when their power is to cease, when their exercise of it is to be reviewed”); THE FEDERALIST NO. 37, *supra* note 99, at 234 (James Madison) (“The genius of Republican liberty, seems to demand . . . that those entrusted with [power] should be kept in dependence on the people, by a short duration of their appointments”).

124. U.S. CONST. art. I, §§ 2–3; *see also* THE FEDERALIST NO. 56, *supra* note 99, at 378 (James Madison) (noting that the unity of each state's interests rebuts the claim that the House “will be too small to possess a due knowledge of the interests of its constituents”); *see also* AMAR, *supra* note 100, at 79–80 (outlining Madison's arguments for a large House of Representatives).

125. U.S. CONST. art. I, § 1; *see also* THE FEDERALIST NO. 63, *supra* note 99 (James Madison); THE FEDERALIST NO. 62, *supra* note 99, at 418 (James Madison) (“It is a misfortune incident to republican government . . . that those who administer it, may forget their obligations to their constituents, and prove unfaithful to their important trust. In this point of view, a senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government.”).

126. *See* THE FEDERALIST NO. 57, *supra* note 99, at 386 (James Madison) (noting that the provision that the House “can make no law which will not have its full operation on themselves and their friends . . . has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together” and “creates between them that communion of interests and sympathy of sentiments”).

127. U.S. CONST. art. I, § 6. In addition to allowing a broader segment of society to run for office, mandatory salaries prevented members from forgoing a salary, an action that might decrease their sense of obligation or indebtedness to the electorate. For related observations, *see* AMAR, *supra* note 100, at 72–74 (discussing the constitutional salary provision as preventing the forgoing of a salary as a form of bribing electorates in colonial America).

128. U.S. CONST. art. I, § 3 (providing one vote for each Senator). Under the Articles of Confederation, voting had been by state, not by member, a system which allowed electors to avoid public accountability. *See* ARTICLES OF CONFEDERATION of 1781, art. V. The Constitution was not explicit about a one-vote rule for the House.

129. U.S. CONST. art. I, § 5. Publication pressured members to advocate for positions in line with those of their constituents, who would learn if they failed to do so.

130. *Id.* art. I, § 9. This would serve a similar function to the Journal publication requirement.

131. *See id.* art. I, §§ 2–3; *see also* THE FEDERALIST NO. 56, *supra* note 99 (James Madison).

132. *See* THE FEDERALIST NO. 62, *supra* note 99 (James Madison).

133. Census and apportionment rules, for example, were meant to ensure that these constituent desires were conveyed in the proper proportions, at least in the House. *See* U.S. CONST. art. I, § 2. On the Senate, *see infra* Parts V.A.2, V.B.1.

134. THE FEDERALIST NO. 57, *supra* note 99, at 385 (James Madison).

legislators to statutes.¹³⁵ Here, legislators would use their Article I, Section 7 power to produce statutes that encoded, and therefore might carry forward, their political objectives.

This assumption about legislation—that it can provide a vehicle for the transfer of legislator intentions—accords with common sense. Consider an example: Imagine that legislators enact a statute meant to lower taxes. If legislation genuinely cannot accomplish a transfer of legislator intent, then there would not be a better-than-random chance that the resulting statute would be interpreted to lower taxes. Instead, it would have an equal chance of being understood by good-faith interpreters as an effort to accomplish virtually any possible objective—e.g., to raise taxes, rename a post office, declare war, or expand environmental protections. Intuitively, we know that this is untrue: no one seriously thinks that legislative power affords legislators no communicative control over statutory meaning.¹³⁶ Put differently, it is clear that legislation affords a plausible vehicle to transfer political intentions into (or via) a text.¹³⁷

This hypothetical also illustrates the constitutional significance of intent transference at this transition point—in particular, its essential role in democratic self-government.¹³⁸ Imagine, for example, that legislators are

135. On the theoretical imperative to identify a connection between these two nodes, see Raz, *supra* note 66, at 258, 265–66 (“It makes no sense to give any person or body law-making power unless it is assumed that the law they make is the law they intended to make. . . . [T]he notion of legislation imports the idea of entrusting power over the law into the hands of a person or an institution, and this imports entrusting voluntary control over the development of the law, or an aspect of it, into the hands of the legislator.”).

136. Even textualists who otherwise disavow a role for intent sometimes implicitly acknowledge this, such as in their emphasis on legislation as a tool to accomplish legislative compromises. See, e.g., Manning, *supra* note 12, at 1913–14; Scalia, *supra* note 11, at 517 (arguing for textualism as a methodology that creates a “background rule of law against which Congress can legislate”).

137. See Mathew D. McCubbins & Daniel B. Rodriguez, *Statutory Meanings: Deriving Interpretive Principles from a Theory of Communication and Lawmaking*, 76 BROOK. L. REV. 979, 982 (2011) (applying transmission theory of communication and interpretation); Nelson, *supra* note 48, at 454 (describing legislative supremacy as making it “surely desirable for there to be some connection between what members of the enacting Congress understood themselves to be doing and what judges take them to have done”); Raz, *supra* note 66, at 258–59 (“But if so, why does it matter who the members of the legislature are, whether they are democratically elected or not, whether they represent different regions in the country, or classes in the population, whether they are adults or children, sane or insane? Since the law they will end by making does not represent their intentions, the fact that their intentions are foolish or wise, partial or impartial, self-serving or public spirited, makes no difference.”); see also Manning, *supra* note 3, at 691 (“If statutory construction bore no relation to the law the legislator intended to make, it would mean very little to say that ours is a system marked, within constitutional boundaries, by legislative supremacy.”).

138. In his Tanner Lectures, Justice Breyer aptly described this transfer as central to the Constitution’s “democratic objectives”—which, as he put it, aim to “translate[] the general desire of the public for certain ends, through the legislator’s efforts to embody those ends in legislation, into a set of statutory words that will carry out those general objectives.” Stephen Breyer, Assoc. Just., U.S. Sup. Ct., Harvard University Tanner Lectures on Human Values: Our Democratic Constitution (Nov. 17–19, 2004), https://www.supremecourt.gov/publicinfo/speeches/sp_11-17-04.html [<https://perma.cc/9CG8-EQVY>]; see also *id.* (observing that “[l]egislation in a ‘delegated democracy’ is meant to embody the people’s will”).

elected on a platform of lowering taxes. Once elected, the legislators work under intense pressure from their constituents to lower taxes. They sit down, draft, and enact a bill meant to lower taxes. However, legislation affords them no communicative control over statutory meaning, so they are unable to use the bill as a vehicle to transfer their intent to lower taxes. As a result, they produce a statute that instead is understood, say, to outlaw health insurance—a goal none of them sought, and one never requested by their constituents. In what sense would the public, by living under that law, experience meaningful self-government? The law bears no resemblance to choices and preferences the public communicated into the architecture of government. And it is the perception of that alignment and causal relationship—between political desires the public holds as sovereign, and binding rules it lives under as subjects—that is the hallmark of self-governance. That alignment becomes impossible (or, no more likely than random) if statutes cannot provide a transfer of intent.

Across myriad provisions, the Constitution assumed otherwise. Many constitutional provisions were grounded in the belief that legislation empowers legislators to transfer political desires into statutes that might reasonably carry forward those desires.¹³⁹ These included provisions relating to the enforcement of federal law,¹⁴⁰ subjection of members to

139. See William Penn, *Preface to THE FRAME OF THE GOVERNMENT OF THE PROVINCE OF PENNSYLVANIA IN AMERICA* 2 (1682) (vesting of legislative power means that “the people are a party to the laws”); Breyer, *supra* note 138 (“[T]he Framers created the Constitution’s complex governmental mechanism in order better to translate public will, determined through collective deliberation, into sound public policy.”).

140. See *THE FEDERALIST NO. 27*, *supra* note 99, at 175 (Alexander Hamilton) (arguing that the “interests of ambition” in legislatures will generate laws responsive “to the motives of public good,” and that “there is good ground to calculate upon a regular and peaceable execution of the laws of the Union[,] if its powers are administered with a common share of prudence”).

laws,¹⁴¹ legislator qualifications,¹⁴² bicameralism,¹⁴³ Senate structure,¹⁴⁴ and Congress's enumerated powers,¹⁴⁵ as well as Publius's famous analysis of faction in *Federalist 10*.¹⁴⁶ Each assumed that statutes provide a means to advance "the intention of [the people's] agents," in the words of *Federalist 78*.¹⁴⁷

Once a binding statute is produced, the act of interpretation then would convey political intentions across a third transition point: from legal texts to the executive and judicial branches. The Constitution therefore provided that statutory interpretation be performed by the President,¹⁴⁸ the federal

141. See THE FEDERALIST NO. 35, *supra* note 99, at 221 (Alexander Hamilton) (explaining that "the necessity of [the representative] being bound himself and his posterity by the laws to which he gives his assent" create preenactment motivation to enact laws that the representative wishes to be subjected to postenactment).

142. See THE FEDERALIST NO. 56, *supra* note 99, at 379 (James Madison) ("It is a sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents. But this principle can extend no further than to those circumstances and interests, to which the authority and care of the representative relate. An ignorance of a variety of minute and particular objects, which do not lie within the compass of legislation, is consistent with every attribute necessary to a due performance of the legislative trust. In determining the extent of information required in the exercise of a particular authority, recourse then must be had to the objects within the purview of that authority."); see also THE FEDERALIST NO. 35, *supra* note 99, at 222 (Alexander Hamilton) ("There can be no doubt that in order to a judicious exercise of the power of taxation it is necessary that the person in whose hands it is should be acquainted with the general genius, habits and modes of thinking of the people at large and with the resources of the country. And this is all that can be reasonably meant by a knowledge of the interests and feelings of the people.").

143. See THE FEDERALIST NO. 63, *supra* note 99, at 426 (Alexander Hamilton) (explaining bicameralism as a response to the facts that the "people can never wilfully betray their own interest" but "they may possibly be betrayed by the[ir] representatives," both of which assume statutes as reliable means of encoding interests); see also *id.* at 431 (arguing that the highly democratic nature of the House would motivate the Senate to enact legislation that constitutes "such a display of enlightened policy, and attachment to the public good, as will divide with that branch of the legislature, the affections and support of the entire body of the people themselves," which could only be accomplished if binding legislation successfully reflected legislator goals).

144. See THE FEDERALIST NO. 63, *supra* note 99 (James Madison) (outlining reasons why the Senate, as designed, was not so autonomous that it might produce legislation unmoored from constituent pressures, despite long terms and an indirect election).

145. See THE FEDERALIST NO. 44, *supra* note 99, at 304 (James Madison) ("[I]n every new application of a general power, the particular powers, which are the means of attaining the object of the general power, must always necessarily vary with that object[,] and be often properly varied whilst the object remains the same.").

146. See THE FEDERALIST NO. 10 (James Madison) (regarding majority factions as a problem because legislative power enables majorities to successfully convert oppressive intentions into oppressive laws). This leads to further institutional design, with Publius seeking a diverse legislature encompassing many interests, as this makes majority factions less likely. See *id.*

147. THE FEDERALIST NO. 78, *supra* note 99, at 525 (Alexander Hamilton).

148. U.S. CONST. art. II, § 3.

courts,¹⁴⁹ and state courts and officers.¹⁵⁰ Through these acts of interpretation, courts ideally would preserve and advance “the constitutional intentions of the legislature,” as *Federalist 78* put it.¹⁵¹

This did not mean that courts would need to be intentionalists—a fact that highlights the distinction between intentionalism, on the one hand, and the advancement of legislative intent, on the other. Intentionalism is a particular method of statutory interpretation: one where courts perform the task of consciously attempting to locate legislator intent in statutory text.¹⁵² This interpretive method, as well as other methods, may function well or poorly to advance legislator intentions. It is this underlying function, not the method used to accomplish it, that is relevant to the constitutional value of democratic self-government.¹⁵³ To return to the tax-bill hypothetical: if the public elects legislators specifically to lower taxes, and legislators enact a statute designed to lower taxes, yet the courts interpret the statute to outlaw health insurance (and leave taxes unchanged), then the experience of self-government is thwarted.¹⁵⁴ This is true regardless of the methodology used to reach that interpretation. In this way, constitutional structure treats the preservation of legislative intentions as inherently valuable—regardless of the methodology that steers toward that result.¹⁵⁵

Finally, political intentions were designed to transmit across a fourth transition: from the judicial and executive branches to the public.¹⁵⁶ This would be accomplished via enforcement of laws. Statutes therefore were

149. *Id.* art. III, § 2; see also THE FEDERALIST NO. 78, *supra* note 99, at 525 (Alexander Hamilton) (noting that it “belongs to [judges] to ascertain . . . the meaning of any particular act proceeding from the legislative body” and that “it is the province of the courts to liquidate and fix [competing statutes’] meaning and operation”).

150. U.S. CONST. art. VI.

151. THE FEDERALIST NO. 78, *supra* note 99, at 526 (Alexander Hamilton); see also *id.* at 525 (noting that courts should attempt to locate “the intention of their agents” in statutes); *id.* (noting that “judges ought to be governed by” the “will of the legislature, declared in its statutes”); *id.* at 526 (“The courts must declare the sense of the law . . .”); *id.* (arguing that courts should not substitute “their pleasure to that of the legislative body”); THE FEDERALIST NO. 81, *supra* note 99, at 545 (Alexander Hamilton) (arguing that courts should not contravene “the will of the legislature”).

152. See ESKRIDGE ET AL., *supra* note 1, at 301–04.

153. See Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RESV. L. REV. 179, 189–90 (1987) (“[Judges] are part of an organization, an enterprise—the enterprise of governing the United States—and when the orders of their superiors are unclear, this does not absolve them from responsibility for helping to make the enterprise succeed.”).

154. See Farber & Frickey, *supra* note 59, at 459–60 (using an analogy to executive-branch interpretation of presidential decisions to underscore statutory interpretation’s connection to democratic legitimacy).

155. See Breyer, *supra* note 138 (“[A]n interpretation of a statute that tends to implement the legislator’s will helps to implement the public’s will and is therefore consistent with the Constitution’s democratic purpose. For similar reasons an interpretation that undercuts the statute’s objectives tends to undercut that Constitutional objective.”).

156. This assumes enforcement of judicial interpretations of the law, of course. See BREYER, *supra* note 71, at 28 (discussing a quote often attributed to Andrew Jackson in the wake of *Worcester v. Georgia*, 31 U.S. 515 (1832): “John Marshall has made his decision, now let him enforce it.”).

given a legislative power that would be binding on the public that, under the Constitution's vision, ultimately had issued them¹⁵⁷—a continuation, yet modification, of the Articles of Confederation's earlier project to align power (as sovereign) with binding consequence (as subject).¹⁵⁸

2. Implications for Legislative Theory

This analysis of constitutional structure offers some lessons regarding disaggregated-intent theory. That theory proposes that legislator intentions remain relevant to statutory interpretation. As illustrated above, the Constitution affirms this relevance: it attaches stakes to the preservation of these intentions, equating their preservation with advancement of a constitutional value. Far from prohibiting a turn to disaggregated-intent theory, therefore, the Constitution gives meaning and justification to the theory's basic project.

By contrast, intent skeptics' view of statutes suddenly appears constitutionally worrisome. That view holds that courts and scholars should abandon the idea of statutes as vessels for the transfer of intent.¹⁵⁹ If the argument is simply that we should not conceptualize statutes this way, it is difficult to see why, given that this conceptualization is central to the constitutional scheme. By discarding the idea of intent transference, we risk discarding conversation around a pivotal constitutional value (viz., democratic self-government) as well, and it is not clear why that should happen. And if the argument instead is that statutes genuinely cannot transfer legislative intent, then it becomes unclear how these critics conceptualize democratic self-government operating in our system.¹⁶⁰

Turning from interpretive theory to practice, the foregoing analysis also justifies conscious efforts to preserve legislator intentions during statutory interpretation. After all, courts often use statutory interpretation to advance

157. See U.S. CONST. art. I, § 1 (granting Congress "legislative power"); *id.* art. I, § 8 (granting Congress the necessary and proper power to "make all Laws" within its assigned fields); *id.* art. VI (making federal statutes "supreme Law of the Land").

158. Under the Articles of Confederation, federal legislators generally had been selected by state officials—and so their legislation (and judicial interpretations of it) were binding only upon the states, not the citizens themselves. See ARTICLES OF CONFEDERATION of 1781, art. V (providing state legislatures with power to determine selection of delegates); see also THE FEDERALIST NO. 23, *supra* note 99, at 148 (Alexander Hamilton) ("[W]e must abandon the vain project of legislating upon the States in their collective capacities; [w]e must extend the laws of the federal government to the individual citizens of America . . ."); AMAR, *supra* note 100, at 65 ("Because representatives would derive their authority directly from the people, Americans could confidently entrust the new Congress with authority to legislate directly upon the citizenry. The old Confederation Congress members had not personally faced the voters and thus could claim no democratic mandate to lay burdens on them.").

159. See *supra* Part I.

160. Professor Ekins also notes that, by removing this idea of intent transfer, skeptics further struggle to account for legislator participation in the process. See EKINS, *supra* note 9, at 11 ("[A]ll fail to make intelligible the reasonable legislator's participation in the process, for they do not explain how legislating might change the law in some reasonable way.").

structural constitutional values.¹⁶¹ If the Constitution equates preservation of these legislator intentions with advancement of a constitutional value, then methods of statutory interpretation justifiably might seek to advance this constitutional value as well. This would provide courts with good reason to approach the task of judging as a pragmatic effort to maximize those legislators whose intentions are fulfilled, and to minimize those who find it frustrated.¹⁶²

IV. LEGISLATIVE AUTHORITY AND DISAGGREGATED INTENT

Parts II and III have argued that disaggregated-intent theory is both theoretically viable and constitutionally permissible. However, perhaps these parts have recommended a theory that is fundamentally at odds with the nature of legislation, or of legislative authority. One prominent argument to this end, developed by Professor Waldron, has garnered particular attention in the legislation literature.¹⁶³ Does Waldron's argument about legislative authority provide good reason to discard disaggregated-intent theory?

Answering this question requires a close look at Waldron's theory of "unintentional legislation."¹⁶⁴ In his book *Law and Disagreement*, Waldron presents modern legislation as "unintentional" in the sense that it cannot (or should not) be characterized as the direct utterance of a single intentional actor.¹⁶⁵ Instead, he suggests, legislation is better conceptualized as the product of a mechanistic (i.e., inhuman, nonintentional) selection or combinatory process.¹⁶⁶ In developing this theory, Waldron does not deny

161. See generally William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992) (chronicling and explaining the ways that many canons of construction operate to protect structural constitutional values).

162. This argument grounds the turn to legislative intent in democratic theory, not in linguistic necessity. For a version of the linguistic necessity argument, see Doerfler, *supra* note 10, at 986–98.

163. For references to Professor Waldron's argument in legislation scholarship, see Richard A. Posner, *Review of Jeremy Waldron, Law and Disagreement*, 100 COLUM. L. REV. 582, 584–85 (2000); Doerfler, *supra* note 10, at 1024–25, 1039; Manning, *supra* note 12, at 1918–20; Manning, *supra* note 3, at 692; Nourse, *supra* note 19, at 81–85; see also EKINS, *supra* note 9, at 9 (citing Professors Dworkin and Waldron as "the most sophisticated philosophical skeptics").

164. WALDRON, *supra* note 63, at 129.

165. See *id.* at 121 ("My submission is going to be that . . . we will do better by eschewing any model that regards legislation as most commonly the intentional product of a single law-making author."); *id.* at 127 (viewing intentional legislation as meaning it is the "product of one person's coherent intention"); *id.* at 129 (equating intentional legislation with the notion that legislation "must embody a particular intention attributable to a language-user"). Professor Waldron does acknowledge a minimal intention of the legislature to have its statutes understood according to their conventional meanings. See *id.* at 142–43 ("The intentional description will be that such-and-such words were used with their conventional English meaning. That, however, is *all there is to say* about the institution's intentions.").

166. See, e.g., *id.* 126 (outlining Richard Wollheim's idea of a "democratic machine" that aggregates legislator inputs and arguing that it provides the most compelling understanding of the modern legislature).

that individual legislators make intentional inputs into this mechanistic process.¹⁶⁷ Rather, he emphasizes that those intentional inputs simply do not have direct and final control over the statutory text's content, which instead is left up to subsequent processes.¹⁶⁸

While Waldron acknowledges the presence of intentional inputs by individual legislators, he further argues that statutory interpretation should not attend to these inputs. For Waldron, this conclusion follows from the nature of modern legislative authority.¹⁶⁹ As Waldron puts it, "the best arguments for the authority of statutes produced under [modern] conditions are arguments which actually preclude any appeal to the intentions of particular legislators as a general interpretive strategy."¹⁷⁰ He argues that the nature of legislative authority means that "we would do best to abandon all talk of such intentionality" and instead should attend only to "the linguistic meaning . . . of the legislative text itself."¹⁷¹

As Waldron acknowledges, the persuasiveness of his account relies on the accuracy of his basic depiction of the modern legislature—by which he means, the legislature in a diverse, pluralistic society.¹⁷² In such a society, he takes the key traits of the legislature to be its numerosity, diversity, and disagreement.¹⁷³ For this type of legislature, he argues, legislation's

167. See, e.g., *id.* at 127 (acknowledging that "those inputs [by individual legislators] are fully intentional"); *id.* at 128 (stating that "each of the latter actions—the individual actions—is of course the product of an intention").

168. See *id.* at 121 ("[T]heir ability to integrate a diversity of purposes, interests, and aims among their members into the text of a single legislative product" has authority "only by virtue of the way in which it combines the interests and knowledge of its members in the act of legislating.")

169. See *id.* ("We must ask, then, whether there is anything true in general about the way in which statutes are produced that makes appeal to legislators' intentions a proper strategy of interpretation. How we answer that question will depend on what we take to be the most helpful general model of the legislative process, so far as theories of authority are concerned."); *id.* (arguing that he is examining "theories of legal authority (and any concomitant theories of interpretation)"); *id.* at 138 ("I also want to argue that in the case of each of these processes, any reason we have for according Raz-ian authority to the resultant legislation is also a reason for discounting the authority of the views or intentions of particular legislators considered on their own."); *id.* at 144 (contending that his theory is anchored in "the political authority of a legislature").

170. *Id.* at 122; see also *id.* at 119 (framing his argument as a rejection of the "initially appealing answer . . . that we should interpret the statute in the way the legislators intended, resolving any vagueness or ambiguity by finding out as much as we can about what the legislators had in mind").

171. *Id.* at 142.

172. See, e.g., *id.* at 127 ("The interesting question is which picture is more helpful for our thinking about the intentionality of statutes under modern legislative conditions."); *id.* at 121; *id.* at 144 (asserting that "the elementary circumstance of modern politics is *plurality*").

173. See *id.* at 123 ("I shall assume . . . that the legislators are a diverse body of people, drawn from different groups in a heterogeneous and multicultural society. I assume in other words that there is very little in the way of shared cultural and social understandings among them . . ."). According to Waldron, these traits explain why written texts are essential to the modern legislative process: they provide a focal point that prevents legislative debate among differing parties from disintegrating into chaos. Statutory text therefore provides the tool that enables coordinated legislation in the face of disagreement, entitling it to our respect. See, e.g.,

authority is derived primarily from the feat accomplished in the mechanistic, combinatory process of producing legislation in the face of pervasive disagreement—not from the inherent authority of any particular voice in the legislature. If so, he observes, it makes sense not to conflate any legislator’s individual policy goal or preference with an authoritative view.

It is understandable that, for this legislature, Waldron would conclude that certain ways of using legislator intent are off-limits. Less clear, however, is why Waldron believes that his vision of legislative authority allows interpreters to disregard any shared understandings of legislative text that prevailed among the enacting legislators. Waldron seems to give only one defense of this disregard for legislator understandings—and it relies on a view of the legislature that has been undermined by recent research.

To make this defense, Waldron returns to the premise of diversity in the modern legislature. According to Waldron, we cannot assume that the “modern” legislature is one drawn from a homogenous society marked by consensus or by a large, shared set of linguistic and cultural practices. Under these conditions, he says, statutory text plays a particular function in the legislature. He explains:

[W]e must assume we are not dealing with persons . . . who share a comprehensive body of common understandings. Legislators will come to the chamber from different communities, with different ideologies, and different perspectives The only thing they have in common, in their diversity and in the welter of rhetoric and mutual misunderstanding that counts for modern political debate, is the given text of the measure currently under consideration. That is constituted by the conventions of the shared official language as the only landmark, the only point of reference or co-ordination, in a sea of possible misunderstanding—and even then it is fragile enough and always liable to fly apart on account of the fragility of shared meanings.¹⁷⁴

In other words, interpreters need not attend to legislator understandings of statutory text because, given the nature of a numerous and diverse legislature, those understandings naturally will be captured by plain meaning interpretation.

This line of argument relies on claims about the modern legislature that, in light of recent research into the contemporary Congress, now appear difficult to sustain. First, Waldron asserts that statutory text is necessary, in a legislature marked by plurality, to prevent the legislative process from spiraling into discord and confusion. Yet Congress often proceeds quite productively without any statutory text. For instance, the U.S. Senate Committee on Finance—one of the most powerful committees in Congress—holds its markups as “conceptual markups” that occur without any bill

id. at 108 (“A piece of legislation deserves respect because of the achievement it represents in the circumstances of politics: action-in-concert in the face of disagreement.”).

174. *Id.* at 145.

text.¹⁷⁵ Moreover, even when bill text is present in Congress, it often is mere pretext and unrelated to the unfolding (and again, sometimes quite productive) debate.¹⁷⁶ Congress therefore seems to do just fine in advancing policies and structuring debate in the absence of a focal statutory text. This alone raises concerns about Waldron's assumptions on the degree of plurality in the legislature, and on the role it requires of statutory text.

More importantly, developments in Congress also have provided reason to revise Waldron's claim about legislator understanding of statutory text. Waldron suggests that legislators, because they are coming from drastically different backgrounds, are unlikely to successfully communicate with each other except through the vehicle of a statutory text interpreted via its plain meaning.¹⁷⁷ However, the "process-based turn"¹⁷⁸ in legislation scholarship has undermined this idea. This recent work in legislative studies (by myself and others) has established that, as Congress has become a modern bureaucratic institution, a coherent interpretive community has formed within Congress—one that has developed its own interpretive lens and interpretive practices for understanding statutes.¹⁷⁹ When legislators (and their staffs) read bills, this work has shown, they apply the interpretive lens this scholarship has uncovered.¹⁸⁰ That provides the foundation for shared meaning, not an interpretation under a plain meaning interpretive lens.

Put differently, recent scholarship has shown that the legislature, at least in the case of Congress, is a modern bureaucratic institution.¹⁸¹ And

175. See Press Release, U.S. Senate Committee on Finance, Hatch Unveils Pro-Growth, Pro-Jobs, and Pro-Family Tax Overhaul Plan (Nov. 9, 2017), <https://www.finance.senate.gov/chairmans-news/hatch-unveils-pro-growth-pro-jobs-pro-family-tax-overhaul-plan> [<https://perma.cc/HS28-TC5B>] ("The Senate Finance Committee traditionally holds conceptual markups, meaning the legislation is debated and examined as a detailed narrative, rather than actual bill text."). Moreover, even when bill text is present in Congress, it sometimes is mere pretext and unrelated to the unfolding (and, again, sometimes quite productive) debate.

176. For example, committees regularly conduct markups while being aware that a manager's amendment or amendment in the nature of a substitute is planned to replace the existing bill at a subsequent legislative stage, and members perform the technicality of proposing to amend statutory text, often by proposing to "strike the last word," in order to open discussion on elements of the legislation unrelated to that text-based motion.

177. See WALDRON, *supra* note 63, at 123. This claim is also at odds with common sense, as this ostensibly modern vision of the legislature actually is rather antiquated. In an era of homogenized national culture in the United States (including political culture), national politicians surely share a vocabulary that is richer than any bare overlap of linguistic "plain meaning." To use an example from the "plain meaning" literature: two elected officials in the present-day United States surely share a far richer set of cultural, linguistic, and interpretive assumptions than a contemporary Senator shares with, say, an Australian newspaper reader from the 1800s.

178. For a review of this scholarship, see *supra* notes 18–19.

179. This was emphasized in the recent study conducted by Professors Jesse M. Cross and Abbe R. Gluck. See generally Cross & Gluck, *supra* note 18.

180. See *id.*

181. See, e.g., Bressman & Gluck, *supra* note 10, at 755 ("Congress is a big bureaucracy . . ."); Cross & Gluck, *supra* note 18, at 1543 ("Congress has a bureaucracy."); Cross, *Legislative History*, *supra* note 18, at 93 ("In short, Congress has been transformed into something that it did not resemble prior to the 1970s: a large, modern bureaucratic institution.").

bureaucracies do not handle plural, diverse membership in the way Waldron posits. According to Waldron, legislatures manage this diversity by falling back upon bare linguistic meaning, which is presumed available to all, and thereby abandon the possibility of any richer institutional interpretive practices.¹⁸² However, bureaucracies typically take a different approach. They develop institutional interpretive practices, and they pair those interpretive practices with familiar bureaucratic tools (e.g., explanatory briefings and memoranda; staffing of principals with institutionally acculturated staff) to render accessible the interpretive assumptions that prevail within the institution.¹⁸³ Anyone who has worked in a large institution with a heterogeneous workforce knows this about bureaucracies, and about the shared meanings that are created within them. In the case of Congress, we now have research that has confirmed this practice.

In light of recent scholarly developments, therefore, it is implausible to assume that those inside Congress rely on plain meaning interpretive practices to develop their shared understandings of statutory text, or that the possibility of legislator difference requires them to do so. This is noteworthy, given that legislators' shared understandings seem to provide the foundation for legislative authority under the various theories proffered by Waldron.¹⁸⁴

182. See WALDRON, *supra* note 63, at 142.

183. On the role of staff memos and briefings in educating members of Congress on legislation, see Cross, *Staffer's Error Doctrine*, *supra* note 18, at 100.

184. Over the course of his analyses, Waldron outlines five theories of legislative authority that he suggests are available to modern legislatures. These might be labeled as: coordinative authority, majoritarian authority, and three types of Razian authority—utilitarian, Condorcetian, and individual Aristotelian. On coordinative authority, see WALDRON, *supra* note 63, at 108 (“A piece of legislation deserves respect because of the achievement it represents in the circumstances of politics: action-in-concert in the face of disagreement.”). Here, the resulting authority presumably would attach to the understanding of statutory text that actually prevailed in the legislature and thereby performed the coordinating function. On majoritarian authority, see *id.* at 113 (arguing that a majority decision gains authority because it “giv[es] positive decisional weight to the fact that a given individual member of the group holds a certain view”). This authority therefore relies on implementation actually capturing the “certain view” held by the majority. On utilitarian authority, see *id.* at 132–34 (explaining that, if inputs by each legislator express the legislator’s (or her constituents’) particular interest, then aggregation of those interests in a statute can claim to represent the general interest). Such utilitarian authority relies upon capturing the wisdom of the collective group—and that, in turn, relies on capturing the interpretation assumed by the group members when inputting their wisdom. On Condorcetian authority, see *id.* at 134–36 (contending that, when each legislator votes on her understanding of what is best for everyone and on a question where each has a better-than-even chance of being correct, each individual will do better by trusting an aggregative vote on the right answer than their own individual assessment). As with the utilitarian conception, this concept relies on capturing the wisdom of collective group inputs based on their understanding of policy alternatives. On individual Aristotelian authority, see *id.* at 136–38 (theorizing that deliberation produces a synthesis in the mind of each legislator that produces better policies than any one actor could devise alone). Here, authority relies on the statute capturing the policy that legislators have in mind once this synthesis occurs; any interpretation that fails to capture it loses the Aristotelian deliberative benefits (and presumably the claim to authority). Waldron also notes a sixth form of legislative authority, group Aristotelian authority, which presumably would not attach to a legislator’s understanding of the policy, but he concludes this form of authority likely is not available to legislatures. See *id.* at 141.

If so—if shared legislator understandings and inputs do remain relevant—then statutory-interpretation theory must retain a space to consciously consider and pursue those understandings. In this sense, statutory interpretation must continue to care about legislator intent.

V. DISAGGREGATED-INTENT THEORY AND INTENTIONALISM

The foregoing parts have argued that disaggregated-intent theory is theoretically viable, constitutionally defensible, and in accord with Waldron's skeptical conception of legislative authority. As this part explains, disaggregated-intent theory also is useful: it unlocks new understandings of interpretive methodology, providing a potential opportunity to move beyond existing stalemates in our methodological debates. To illustrate this, this part will explain how one method of statutory interpretation—intentionalism—appears different under disaggregated-intent theory.

A. Understanding Intentionalism

As previously noted, intentionalism is a longstanding, well-established method of statutory interpretation.¹⁸⁵ It treats the task of interpretation as the explicit search of statutory text, perhaps with support of secondary sources, for legislative intent.¹⁸⁶ In other words, the methodology assigns the interpreter a specific task: to locate the interpretation that, if the text had been composed by an intentional actor bestowed with legislative power, is the best guess of the intention that such actor would have been pursuing in the composition of the text.¹⁸⁷ Subject to some exceptions discussed in Part V.B, intentionalism instructs courts to locate and apply that meaning.

What does disaggregated-intent theory add to our understanding of this interpretive practice? For one thing, it offers a useful way to conceptualize it—namely, as a search for a collection of congruent individual legislator intentions. Understood as such, the intent sought by intentionalism is not necessarily fictive, even if we accept critiques of collective intent. This fact allows intentionalism to survive the challenge raised by intent skeptics, thereby rendering the methodology more theoretically defensible.¹⁸⁸

Moreover, for reasons discussed in Part III, disaggregated-intent theory also unlocks an understanding of why intentionalism is potentially valuable. It implies that intentionalism can be understood as a strategy to maximize the constitutional value of democratic self-government—a goal it equates with the maximal preservation of a certain type of legislator intention.¹⁸⁹ Once we view intentionalism in this way, democratic theory provides defensible

185. See *supra* notes 39–50 and accompanying text.

186. See ESKRIDGE ET AL., *supra* note 1, at 301–04.

187. For the argument that this methodology is not the best way to advance legislative intent, see Nelson, *supra* note 32, at 351 n.10, 380–82.

188. On the idea of intent simply as a fiction and heuristic, see JAMES WILLARD HURST, *DEALING WITH STATUTES* 32–33 (1982).

189. See *supra* Part III.

answers to many questions that, according to prior theorists, intentionalism has trouble answering (or answering satisfactorily). These include questions regarding (1) *how many* legislators must share an intention, (2) *which type* of legislator intention is relevant, and (3) *how far* one must go in promoting that intention. This part examines the answers that disaggregated-intent theory provides to each of these questions. In so doing, it shows that disaggregated-intent theory provides a lens through which to view the intentionalism—and criteria through which to evaluate it.

1. Requisite Number of Intending Legislators

One question that has plagued intentionalism has asked: *how many* legislators must share an intent in order for it to be credited by an intentionalist court? It has been argued that the intention must be shared by a legislative majority,¹⁹⁰ a supermajority capable of enacting law,¹⁹¹ and the entire legislature.¹⁹² In addition to positing standards that conflict with each

190. See, e.g., *Int'l Brotherhood of Elec. Workers v. NLRB*, 814 F.2d 697, 718 (D.C. Cir. 1987) (Buckley, J., concurring) (“A committee’s purposes cannot be imputed to Congress as a whole, and references to committee action (or inaction) on the Senate floor will not change this fact. . . . [I]t cannot be said that *Congress*—which acts through a majority of its 535 members—expressed any opinion whatever on the merits of [a committee] proposal . . .”). For a summary of work invoking this standard, see Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 599 (1995) (describing the critiques that target the idea “that at least a majority of legislators had the same intent or broad purpose in mind”); see also DWORKIN, *supra* note 65, at 320–21 (posing alternatives of a majority decision, plurality decision, and representative decision rule and suggesting that the multiple options pose a problem for intentionalist theory); GERALD C. MACCALLUM, JR., *LEGISLATIVE INTENT AND OTHER ESSAYS ON LAW, POLITICS, AND MORALITY* 26 (Marcus G. Singer & Rex Martin eds., 1993); EKINS, *supra* note 9, at 6–7, 218–19 (noting the “majority model” and the “agency model” and the differing number of legislators each requires).

191. See Easterbrook, *Original Intent*, *supra* note 58, at 63 (“If the meaning the Court gives to the law today had been spelled out, together with its implications, would the bill have been passed? The answer often will be no. That answer should reveal the problems of the technique. It produces ‘laws’ that could not be passed.”); Manning, *supra* note 7, at 2409 (“[T]he relevant question is whether the legislature—constrained by the legislative process—would have been able to agree on wording that would include or exclude the troubling application or omission.”).

192. See *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (“The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute . . .”); *Thompson v. Thompson*, 484 U.S. 174, 192 (1988) (Scalia, J., concurring) (“It is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions.”); John F. Manning, *Without the Pretense of Legislative Intent*, 130 HARV. L. REV. 2397, 2406 (2017) (“[E]xactly whose intentions should count in the tabulation of ‘Congress’s intent?’ Is it the intentions of the entire Congress, the enacting majority, the legislators who drafted the bill, the agency officials who helped shape it, or perhaps the President who signed it? And even if one could decide that a particular group’s intention is dispositive (say, the enacting majority), how does one sum up the intentions of its members if they are not all of one mind on the question at hand?” (footnotes omitted)); Radin, *supra* note 46, at 870 (arguing the implausibility “that of several hundred [legislators] each will have

other, this scholarship has set discouragingly high thresholds that must be met for any attribution of intent—ones that seem to make intentionalism unlikely to succeed in many cases.

Viewed as a means of promoting democratic self-government, however, intentionalism requires a different (and lower) standard. Here, intentionalism is understood as a strategy to maximize the constitutional value of democratic self-government, and to accomplish this by maximizing the preservation of a certain type of legislator intention. Under this view, the goal simply is to get the intent correct for the greatest number of legislators that one can. It does not matter that an intent may not have been shared by the full Congress, had majority support, or been filibuster-proof. When courts look to promote a constitutional value in statutory interpretation, they typically do not have a cutoff threshold to trigger its relevance. Disaggregated-intent theory, because it reframes intentionalism as a strategy to advance a constitutional value, suggests that the same logic should apply to the promotion of legislator intent.¹⁹³ Courts must apply the provision somehow—and constitutional values recommend that they do so in the most democratically available way, regardless of just how democratic that option might be.

2. Choosing Among Types of Intention

Disaggregated-intent theory also clarifies the type of intent that intentionalism seeks to locate. As Part III.B explained, this theory views a particular intent transfer, in which legislator intent is embedded in statutory text, as one step in a chain of intent transfers. It equates the recovery of that intention—of the policy that legislators intend to use their vote to communicate forward in the architecture of government—with the advancement of the constitutional value of democratic self-government.¹⁹⁴ This, it explains, is why various constitutional pressures are made to weigh on legislators specifically in the moment of voting: it is their intention to use that vote to support enactment of specific substantive policies, as they understand them, that is relevant to the constitutional project.

In this way, constitutional structure directs attention to what might be termed the *post-consolidation intention* of the legislator. This intention is not “post-consolidation” in that it refers to any consolidation of legislator

exactly the same determinate situations in mind as possible reductions of a given determinable”); Scalia, *supra* note 3, at 32–34, 35–37 (arguing that the legislative record cannot be evidence of “legislative intent” because it does not represent views of all members). *But see* Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 307 (1990) (“To disregard committee reports on the ground that all congress-persons do not consider or rely upon these reports is equally problematic. First, it denies legitimacy to all materials, even statutes, that have not been personally read by all the members of a Congress . . .”).

193. Judge Richard A. Posner has been read as reaching a similar conclusion on the proper threshold of legislator assent. *See* Farber & Frickey, *supra* note 59, at 461–63 (reading Judge Posner’s model as picking the interpretation with the greatest likelihood of being correct).

194. *See supra* Part III.B.

intentions into a single, institutional intent. Rather, it refers to the intention that each legislator forms with respect to the consolidated legislative product. Our system presumes that the nature of the law-writing task—and by extension, the interpretation that fleshes out its meaning¹⁹⁵—is that legislators must reduce a plurality of competing hopes and desires to a single set of instructions.¹⁹⁶ This consolidation is presumed necessary to advance another constitutional value—the rule of law—and to thereby prevent “a hydra in government, from which nothing but contradiction and confusion can proceed,” as *Federalist 80* put it.¹⁹⁷ It is the intentions that legislators commit to with respect to this consolidated legislative product—this focal legislative proposal—that presumably are the objects of an intentionalism grounded in the promotion of democratic self-government.

By clarifying that intentionalism is focused on post-consolidation intent, disaggregated-intent theory addresses two separate criticisms of intentionalism that Judge Easterbrook particularly has emphasized. First, Easterbrook has criticized intentionalism as a methodology that is insufficiently respectful of the legislative process.¹⁹⁸ According to Easterbrook, “the whole process of interpretation from intent is an end run around process.”¹⁹⁹ Intentionalism therefore is troubling for Easterbrook, an interpreter who believes that “process is the essence of legislation”—and that, consequently, legislative supremacy requires the use of interpretive methods that are sufficiently deferential to that legislative process.²⁰⁰

Understood as a method of seeking legislators’ post-consolidation intentions, however, intentionalism actually is remarkably deferential to legislative process—perhaps even too deferential, and certainly more so than Easterbrook’s approach. In particular, intentionalism is highly deferential to the two acts of consolidation that define the democratic process—the electoral and enactment consolidations. Rather than second-guessing those consolidations or attempting to correct for their imperfections, intentionalism

195. On the extension of Article III judicial power to federal statutes as an effort to promote uniformity in interpretation of federal law, see THE FEDERALIST NO. 80, *supra* note 99, at 535 (Alexander Hamilton) (“If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws, decides the question.”).

196. For a reflection on this consolidation role of this transition, see Robert H. Jackson, *Problems of Statutory Interpretation*, 8 F.R.D. 121, 125 (1948).

197. THE FEDERALIST NO. 80, *supra* note 99, at 535 (Alexander Hamilton). *But see generally* Ryan Doerfler, *Can a Statute Have More Than One Meaning?*, 94 N.Y.U. L. REV. 213 (2019).

198. See Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 445 (1990) [hereinafter Easterbrook, *Legislative History*] (“What distinguishes laws from the results of opinion polls conducted among legislators is that the laws survived a difficult set of procedural hurdles and either passed by a two-thirds vote or obtained the President’s signature.”); Easterbrook, *Original Intent*, *supra* note 58, at 64 (“[T]he technique assumes that intentions are ‘the law.’ Why are they? If we took an opinion poll of Congress today on a raft of issues and found out its views, would those views become the law? Certainly not. They must run the gamut of the process . . .”).

199. Easterbrook, *Original Intent*, *supra* note 58, at 65.

200. *Id.* at 64.

leaves it to other political actors to ensure that the consolidations occur properly. It assumes they have been successful, and it offers an interpretive approach that advances a constitutional value only if they are, indeed, a success.

Consider the first consolidation point: that which is accomplished by the electoral process. Here, a large community of voters is consolidated into a smaller number of representatives. Ideally, the electoral process that performs this consolidation would recreate the voting community in miniature.²⁰¹ It would create a legislative body that holds the same political interests as the larger community, and in the same proportions.

The Constitution did not actually accomplish this goal with Congress, of course. While Congress was in several ways a fuller achievement of mimetic representation than its predecessor legislatures had been,²⁰² it still contained many distortions of the voting public. In the Senate, small states were overrepresented.²⁰³ At the Founding, slave states were overrepresented in the House.²⁰⁴ The House also suffered from intrastate malapportionments,²⁰⁵ and present-day rules requiring a representative for each state and capping the legislature at 435 representatives create continued distortions.²⁰⁶ As a result, federal legislators consistently have represented unequal numbers of voters.

These unbalanced representations raise a question for statutory interpreters interested in advancing democratic self-government. Should interpreters second-guess this flawed electoral act of consolidation and attempt to undo the distortions they perceive in it? If so, it might make sense to disproportionately value the voices of legislators who represent greater populations. Such an approach would emphasize the voices of larger states over those of smaller states. In Founding-era statutes, it would prioritize to some extent the voices of the free states over those of the slave states. Although Part V.B.1 ultimately will question this, it is possible that such an approach might more robustly promote democratic self-government—applying the interpretation of laws that was presumed or desired by the representatives who stood in for greater numbers of voters. However, it also would second-guess the consolidation process that the Constitution and Congress had established. It would not view the Constitution's consolidation

201. On this goal, see *supra* note 116 and accompanying text.

202. See AMAR, *supra* note 100, at 79–85 (noting the Constitution's improvements on enumeration and apportionment over its predecessors).

203. U.S. CONST. art. I, § 3 (providing each state with two Senators).

204. See U.S. CONST. art. I, § 2, cl. 3 (providing for slaves to be counted as “three fifths of all other Persons” added onto slave state apportionment tabulations).

205. See AMAR, *supra* note 100, at 97.

206. See U.S. CONST. art. I, § 2 (requiring at least one representative per state); Reapportionment Act of 1929 § 22, 2 U.S.C. § 2a, *invalidated by* *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015) (capping the size of the House). For a discussion of these many present-day distortions and for a proposal to correct them, see generally Comment, *Pack the Union: A Proposal to Admit New States for the Purpose of Amending the Constitution to Ensure Equal Representation*, 133 HARV. L. REV. 1049 (2020).

process as having created legislators with equal voices, despite the Constitution assigning them equal votes.²⁰⁷

This is not the approach traditionally taken by intentionalism. Instead, despite the fact that some legislators represent more voters than others, intentionalism typically treats each legislator voice equally.²⁰⁸ Or, to the extent it weighs voices differently, it does so by reference to factors such as proximity to a legislative decision—not voters represented.²⁰⁹ On occasion, this actually leads intentionalism to correct for distortions in the representative system—in particular, by giving weight to the voices of nonvoting legislators.²¹⁰ Typically, however, this approach maintains (and potentially extends) democratic defects in this consolidation process.²¹¹

Intentionalism is equally deferential at the second consolidation point: from representatives to binding laws. Here, a collection of legislators must distill their competing political desires to a single, binding text.

207. The Constitution is explicit about Senators each having one vote, U.S. CONST. art. I, § 3, presumably to distinguish the Senate from its predecessor under the Articles, under which states voted in state delegations. See ARTICLES OF CONFEDERATION of 1781, art. V (“In determining questions in the united states, in Congress assembled, each state shall have one vote.”). The Constitution left the one-vote rule implicit in the House.

208. See ESKRIDGE ET AL., *supra* note 1, at 301–04.

209. See *id.* at 631 (reviewing conventional use of legislative history documents).

210. See, e.g., *Fontenot v. Hunter*, 378 F. Supp. 3d 1075, 1098 (W.D. Okla. 2019) (citing the statement of an American Samoa representative as evidence of legislative intent); *Native Am. Arts, Inc. v. J.C. Penney Co.*, 5 F. Supp. 2d 599, 608 (N.D. Ill. 1998) (same).

211. This deference that intentionalism gives to the electoral act of consolidation can be conceptualized in several ways. First, it might be viewed as a form of respect for the tradeoffs and deals that were necessary to create a federal government founded on democratic self-government to begin with. This would perceive in the Constitution a set of compromises like those textualists often see in ordinary legislation. For support of this view, see THE FEDERALIST NO. 62, *supra* note 99, at 416 (James Madison) (“The equality of representation in the senate is another point, which, being evidently the result of compromise between the opposite pretensions of the large and the small States, does not call for much discussion.”); see also MICHAEL J. KLARMAN, THE FRAMERS’ COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 201 (2016) (explaining the Constitutional Convention’s voting structure that gave small states leverage to achieve this compromise). Second, it might be viewed as embodying a respect for additional constitutional values that are embedded in the design of the Congress, such as a balance in the Senate of democratic self-government and respect for state sovereignty. See THE FEDERALIST NO. 62, *supra* note 99, at 417 (James Madison) (“[T]he equal vote allowed to each state, is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument for preserving that residuary sovereignty.”); *id.* at 416 (“If indeed it be right that among a people thoroughly incorporated into one nation, every district ought to have a *proportional* share in the government[,] and that among independent and sovereign states bound together by a simple league, the parties however unequal in size ought to have an *equal* share in the common councils, it does not appear to be without some reason that in a compound republic partaking both of the national and federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation.”). Third, with the Senate, this deference might be understood as advancing a different form of representation in which individuals are represented in their collective capacity as citizens of a state. See THE FEDERALIST NO. 39, *supra* note 99, at 254 (James Madison) (describing the House as requiring the concurrence of “a *majority* of the people” and the Senate “a *majority* of the States”). Nonetheless, however conceptualized, the consolidation point of elections is clearly flawed from a democratic self-government perspective.

Intentionalism does not look to question this act of consolidation; it does not seek the pre-consolidation desires of legislators.²¹² This is where disaggregated-intent theory clarifies the intentionalist project in the face of Judge Easterbrook's concerns.²¹³ When Easterbrook equates intentionalism with "[taking] an opinion poll of Congress [to find] out its views" and permitting those views to "become the law,"²¹⁴ he imagines that intentionalists seek to identify the raw political desires of legislators.²¹⁵ Under the disaggregated-intent view, however, this is not why intentionalists presumably care about the viewpoints that legislators express during the legislative process. Rather, intentionalists value statements of individual political desire by legislators because, in the context of a discussion of a specific piece of legislation, those statements carry an implied corollary that effectively says, "I understand this bill, this consolidated document, does (or will) address these desires that I am expressing." In other words, intentionalists are not understood to seek the pre-consolidation desires of legislators—a desire that takes the form of the statement: "I want X to happen." Rather, they are presumed to be seeking the post-consolidation understanding of legislation, an understanding that takes the form of the statement: "I understand our consolidation to do X, and I intend to vote on it given that understanding."

If there is anyone who second-guesses this second act of consolidation, ironically, it is Judge Easterbrook himself. This is revealed in his concerns about Arrovia cycling.²¹⁶ The typical cycling situation posits a set of

212. It also does not attempt to imaginatively reconstruct that act of consolidation. In this sense, this also is a feature that distinguishes intentionalism from approaches such as Professor Einer Elhauge's preference-estimating approach. See Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2084 (2002). Professor Elhauge assumes that, in cases of statutory ambiguity, actual congressional intent has run out, and interpreters are in a blank space of judicial improvisation—i.e., "cases of hermeneutic exhaustion." *Id.* In that situation, he argues that judges should endeavor to defer to democratic will by recreating a simulacrum of statutory intent. See *id.* at 2038.

213. See Easterbrook, *Original Intent*, *supra* note 58, at 62–65; Easterbrook, *supra* note 3, at 547–48 ("The existence of agenda control makes it impossible for a court—even one that knows each legislator's complete table of preferences—to say what the whole body would have done with a proposal it did not consider in fact."); see also Manning, *supra* note 192, at 2406 (describing intentionalism as asking "the counterfactual question of what Congress would have intended to do on an ambiguous point").

214. Easterbrook, *Original Intent*, *supra* note 58, at 64.

215. See Easterbrook, *Legislative History*, *supra* note 198, at 445 ("What distinguishes laws from the results of opinion polls conducted among legislators is that the laws survived a difficult set of procedural hurdles . . .").

216. Easterbrook, *supra* note 3, at 547 (citing Arrow for the proposition that "it turns out to be difficult, sometimes impossible, to aggregate [legislators' preferences] into a coherent collective choice"); Easterbrook, *supra* note 57, at 286–87 (discussing the utility and limits of public choice for various areas of legal scholarship); see also WILLIAM RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* 115–36 (1982) (explaining the Arrovia critique); Farber & Frickey, *supra* note 59, at 426–37, 453–69 (explaining the Arrovia critique while arguing that it does not pose the suggested problems for intentionalism).

pre-consolidation policy preferences among legislators.²¹⁷ In its simplest form, it posits the following pre-consolidation legislative desires of three legislators (legislators one, two, and three) with respect to three policy options (policies A, B, and C), where policies are listed in order of descending legislator preference from left to right:

Legislator One: $A \rightarrow B \rightarrow C$

Legislator Two: $B \rightarrow C \rightarrow A$

Legislator Three: $C \rightarrow A \rightarrow B$

In this particular alignment of legislator preferences, the Arrovian critique observes, there is no political desire that is plainly preferred to its competitors.²¹⁸ Conceived as a series of either-or choices, these legislators would choose policy A over policy B (by a two-to-one vote), policy B over policy C (by a two-to-one vote), and policy C over policy A (by a two-to-one vote).²¹⁹ Therefore, the legislative choice among these policies will turn on the manner and order in which votes among competing choices are structured, not on some deeper consensus about the preferred policy—because, in this instance, such a consensus does not exist.²²⁰ If intentionalists are looking to identify the stable pre-consolidation political desire of legislators, critics therefore conclude, they are seeking something that may not exist, at least in certain legislative situations.²²¹

The focus on post-consolidation intent reduces these concerns about cycling. Imagine that our hypothetical legislators, discussed above, arranged their decision-making process in the following order: B versus C, then the winner versus A. In this process, they would select policy A. Beneath that legislative choice, there admittedly would be a cycling of personal pre-consolidation policy preferences among the legislators. In other words, if the three policy makers were asked to identify the policy that they each individually preferred, they would have given answers that evinced cycling. If the policy makers instead were asked to identify the policy that they voted to approve, however, they presumably would all give the same answer: policy A. There would *not* be a cycling of interpretation, in other words. Intentionalism anchored in disaggregated-intent theory seeks the answer to the latter question—and that is a question we have good reason to suspect has relatively stable answers.²²²

This is not to say that cycling raises no concerns for intentionalism under disaggregated-intent theory. While cycling may not undermine the viability of the interpretive task that intentionalists perform, it does raise concerns about the value of that task. If the second consolidation point in our

217. *See generally* KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963).

218. *See id.*

219. *See id.*

220. *See id.*

221. *See, e.g.,* Easterbrook, *supra* note 3, at 547.

222. For additional discussion of the stability of interpretation within communities, see *infra* Part V.B.

legislative process truly is an arbitrary selection among policy options—the product of procedural accidents, not legislator policy desires—then there is no room in our system for democratic self-government, and so it is foolish to use an interpretive method designed to promote it. Part V.B.1 will engage more deeply with this concern.

For now, however, the primary point is this: the Arrovian critique is based on a deep skepticism of the legislative process. It fundamentally questions the ability of that process to consolidate legislator intentions into nonarbitrary, much less democratically optimal, legislative products. It is difficult to square that intense skepticism of the legislative process with the deference to the legislative process that Judge Easterbrook simultaneously demands. By contrast, intentionalism actually goes much further toward realizing this Easterbrookian virtue—a fact that becomes apparent once disaggregated-intent theory and its constitutional aims are employed to clarify precisely the type of intent sought by intentionalism.

3. Intent Trumping Text

A final question that has plagued intentionalism asks: *how far* must interpreters go in promoting intent? According to textualist critics, a rigorous commitment to intentionalism would lead an interpreter to prioritize legislative intent in all situations.²²³ This would include allowing it to trump plain statutory text.²²⁴ The fact that intentionalists typically are reluctant to override statutory text, critics conclude, reveals the inconsistency of the intentionalist position—and perhaps evinces a lingering awareness among intentionalists that their methodology is at root indefensible.²²⁵ In this regard, intentionalism has been criticized as a methodology not in accord with its theoretical premises.

Elsewhere, I have argued that it might indeed make sense for statutory interpreters to allow intent to trump plain statutory text in certain narrowly defined situations.²²⁶ Setting that aside, however: under

223. See Antonin Scalia, Speech on Use of Legislative History 16–17 (1985–86) (transcript on file with the *Fordham Law Review*); Farber & Frickey, *supra* note 59, at 460; see also Easterbrook, *Original Intent*, *supra* note 58, at 60–61 (“The judge rooting about in the history of the statute assumes, in other words, that the written word is but an imperfect reflection of the real law. The true law, the governing rule, is not down on paper; it is in the minds of the legislators. The true rule applies no matter what the words say.”); OFF. OF LEGAL POL’Y, *supra* note 61, at 22 (“A search for the intended meaning as opposed to the meaning that the words actually convey denies controlling effect to the language of the statute. The language becomes merely evidence of the legislative intent, and when better evidence is available, it presumably must be accepted. . . . [T]his position is highly paradoxical . . .”).

224. OFF. OF LEGAL POL’Y, *supra* note 61, at 22.

225. This intentionalist approach was aptly summarized by Judge Henry J. Friendly in his description of Justice Felix Frankfurter’s methodology, which he said provided that “if an intent clearly expressed in committee reports is within the permissible limits of the [statutory] language and no construction manifestly more reasonable suggests itself, a court does pretty well to read the statute to mean what the few legislators having the greatest concern with it [i.e. the committee] said it meant to them.” HENRY J. FRIENDLY, *Mr. Justice Frankfurter and the Reading of Statutes*, in BENCHMARKS 196, 216 (1967).

226. Cross, *Staffer’s Error Doctrine*, *supra* note 18, at 132–38.

disaggregated-intent theory, there is nothing inconsistent about a brand of intentionalism that refuses to trump the plain statutory text. This is how the promotion of constitutional values typically operates in the domain of statutory interpretation. In cases of statutory ambiguity, courts deploy substantive canons of construction to resolve the ambiguity in a manner that promotes certain constitutional values—especially structural constitutional elements.²²⁷ In these instances, statutory interpretation operates as “quasi-constitutional law,” as Professors William Eskridge, Jr. and Philip Frickey put it.²²⁸ Yet these substantive canons are used to promote constitutional values only until they bump up against limits on the plausible meaning of statutory text.²²⁹ The promotion of democratic self-government, itself a structural constitutional element, operates no differently.

Viewing intentionalism through this lens, where it is akin to a substantive canon of construction, may seem odd. However, that is because interpreters rarely stop to disentangle the various constitutional values that they promote simply by hewing to plausible interpretations of statutory text. Two such values already have been noted: democratic self-government and the rule of law. Other constitutional values also are advanced by this practice, including the provision of notice²³⁰ and the advancement of the separation of powers.²³¹ In relatively straightforward statutory interpretation cases, these values are all advanced simultaneously, and they are advanced simply by ensuring that a court’s interpretation remains within the bounds of the permissible meanings of statutory text. In such situations, it is easy to see why other constitutional values, such as those embodied in the substantive canons, cannot trump plain statutory text. If they were to trump it, then the constitutional value embodied in the substantive canon would be advanced at the expense of the many values preserved by hewing to plausible textual interpretations—a seemingly bad trade-off. The question that textualists implicitly raise in their text-versus-intent hypothetical, however, is: What should be done when the constitutional values that typically travel together in statutory text suddenly become unbundled? What do we do when, in order to advance democratic self-government (by hewing to legislator intentions), we must forgo other constitutional values such as notice and separation of powers (by contravening any plausible construction of statutory text)? In response, intentionalists have given the eminently reasonable answer:

227. For a catalogue of these canons, see Eskridge & Frickey, *supra* note 161, at 597.

228. *Id.*

229. See *Skilling v. United States*, 561 U.S. 358, 423 (2010) (Scalia, J., concurring in part and concurring in the judgment) (noting that substantive canons should be applied only when two “fair alternatives” of statutory readings exist (quoting *United States v. Rumely*, 345 U.S. 41, 45 (1953))); see also ESKRIDGE ET AL., *supra* note 1, at 494 (noting that substantive canons typically function as tiebreakers, presumptions, or clear statement rules).

230. For sources on the importance of public notice, see *supra* note 85 and accompanying text.

231. Limiting statutory meaning to plausible interpretations of statutory text presumably cabins legislative power by preventing legislatures from remaking statutory meaning without exercising legislative power, as well as executive and judicial powers by cabining discretion to bounds set by legislature.

sacrifice the value of democratic self-government in that instance, just as we often sacrifice other constitutional values that fall outside the text in statutory construction.²³²

What is exceedingly odd about modern textualism, beyond its critique of an intentionalist concession to values textualism prioritizes, is that it simply discusses this tradeoff as though there were no constitutional value on the other side of the ledger. It proceeds as though the sacrifice of democratic self-government were no sacrifice at all. This is a strange way to talk about legislation in a system in which democratic self-government arguably is the preeminent constitutional value, and in which legislation must operate as a central vehicle for realizing that value.

B. Intentionalism Critiques

The foregoing discussion has attempted to outline a version of intentionalism rooted in disaggregated-intent theory and its corresponding vision of democratic self-government. This part examines two categories of counterarguments that might be raised to this: (1) that intentionalism only poorly promotes democratic self-government, and therefore does not achieve its purported goals; and (2) that while intentionalism may promote democratic self-government, it does so at the expense of other constitutional values that instead should have priority. In addressing these, the goal is not necessarily to rebut each counterargument, but rather to show how disaggregated-intent theory usefully reframes the debates surrounding them.

1. Intentionalism Poorly Promotes Self-Government

With a turn to disaggregated-intent theory, this Article has argued, intentionalism can potentially be defended as a methodology grounded in its capacity to advance the constitutional goal of democratic self-government. In response, critics may argue that this goal—even if laudable—is one that intentionalism accomplishes only poorly (or, worse, not at all). This failure might be attributable to the fact that promoting democratic self-government simply is impossible, or to intentionalism being a bad method of promoting it.

As Part III explained, the constitutional vision of democratic self-government relies on successful transfers of political will occurring at four different transition points. For intentionalism to fail in its goal of promoting democratic self-government, it presumably means that either (1) a failure has occurred at one of the two antecedent transition points, and so courts do not encounter any meaningful political will in statutes for them to advance, or (2) intentionalism is a poor strategy for locating the political will that is, in fact, accessible in statutes.

232. For an argument that hewing to text in these instances may better promote intent in the long run, too, however, see Farber & Frickey, *supra* note 59, at 460–61.

There are myriad ways in which failure might occur at each constitutional transition point, and exploring every possible way is beyond the scope of this Article. Still, it is worth examining a few possibilities.

a. Elections

First, consider the transfer point of elections. Part V.A chronicled one sense in which this transition point, while not entirely broken, nonetheless distorts political will in its act of transference: by inadequately committing to proportional representation, it fails to convey political desires into Congress in the same proportions that exist in the larger voting public.²³³

To a certain extent, this means that intentionalism (or any interpretive method) unavoidably will convey a distorted political will back to the public, as courts will interpret and apply statutes enacted by a legislature that did not fully mirror the people. However, as Part V.A observed, interpretive method might have some leeway to minimize or magnify these political distortions. When assessing statements by representatives in legislative history, intentionalists typically treat each legislator as having not only an equal vote, but also an equal voice.²³⁴ Or, if intentionalism does prioritize certain legislative voices, it gives greater weight to voices that are closer to the decision-making process for a bill (e.g., bill sponsors or committee chairs), not to voices that represent larger constituencies.²³⁵ This may be an accurate assessment of who within Congress has the actual power to shape voting patterns and communal interpretations—but it might also perpetuate those power dynamics that, viewed from a democratic self-government lens, are distorted.²³⁶

There have been scholars who have argued that, at both constitutional and statutory levels, there is a justifiable role for courts to perform in correcting for distortions and defects in the democratic and legislative processes.²³⁷ This raises the intriguing possibility of a form of intentionalism that, as a method that aims to maximize democratic self-government, prioritizes the voices and interpretations of representatives who speak for larger constituencies.

233. *See infra* Part V.A.

234. For an explanation of the conventional hierarchy of legislative materials, see ESKRIDGE ET AL., *supra* note 1, at 631.

235. *See id.*

236. Interestingly, there is evidence that the founders thought this power dynamic would run in the other direction. *See* THE FEDERALIST NO. 58, *supra* note 99, at 393 (James Madison) (“Notwithstanding the equal authority which will subsist between the two houses on all legislative subjects, except the originating of money bills, it cannot be doubted that the house, composed of the greater number of members, when supported by the more powerful states, and speaking the known and determined sense of a majority of the people, will have no small advantage in a question depending on the comparative firmness of the two houses.”).

237. *See, e.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980) (arguing that judicial review is justified as a means of enhancing democratic participation and representation); Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1582 (1988) (arguing that courts are “to use interpretation to guard against or limit [possible] malfunctions [in the legislative process]”).

That said, if the object sought by interpreters typically is a communal interpretation that prevailed within the legislature, then perhaps classic intentionalism gets it correct and each legislator voice indeed is equally useful. In these instances, a legislator viewpoint is treated not simply as an expression of that legislator's understanding of the legislation, but as one data point about the prevailing interpretation in the legislature. In this regard, the stability of interpretation within communities may mean that an intense concern with weighing individual legislative voices is misplaced, and that intentionalism's tendency to regard legislators as having equal voices may make sense as part of a strategy to use interpretation to promote democratic self-government.²³⁸

b. Enactment

Next, consider the second constitutional transition point: the enactment of binding laws. The foregoing sections already discussed the most prominent argument that has been made against this transition point: the textualist argument that Arrovia cycling prevents bill voting and enactment from capturing any meaningful snapshot of legislator preferences.²³⁹ As Part V.A.2 explained, this Arrovia critique does not undermine the feasibility of intentionalism; intentionalists are seeking legislator understandings of their post-consolidation legislative product, and those understandings are likely to be relatively stable, even in situations of cycling.²⁴⁰ However, Arrovia cycling admittedly does call into question the extent to which intentionalism, even if it can locate those understandings, advances democratic self-government by finding and applying them. After all, if statutes—and legislator understandings of them—are simply the arbitrary product of procedural factors rather than a meaningful distillation of legislators' political preferences, then locating legislator understandings will do little to advance any political will that legislators have carried into the legislature. However, several scholars have argued persuasively that concerns about Arrovia cycling may be overblown.²⁴¹ And it is not evident that textualists are willing to accept the relatively radical consequences of a thoroughgoing

238. See *infra* notes 248–50 and accompanying text. It also is unclear how such a methodology would apply with respect to older statutes enacted during periods with different population distributions.

239. See *supra* notes 216–22 and accompanying text.

240. See *supra* note 216 and accompanying text.

241. See, e.g., Arthur Lupia & Mathew D. McCubbins, *Lost in Translation: Social Choice Theory Is Misapplied Against Legislative Intent*, 14 J. CONTEMP. LEGAL ISSUES 585, 588 (2005); William H. Panning, *Formal Models of Legislative Processes*, 8 LEGIS. STUD. Q. 427, 438–40 (1983); Farber & Frickey, *supra* note 59, at 429; see also Michael Laver, *Legislatures and Parliaments in Comparative Context*, in THE OXFORD HANDBOOK OF POLITICAL ECONOMY 121, 135 (Barry R. Weingast & Donald A. Wittman eds., 2006); John M. Carey, *Legislative Organization*, in THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 431, 444–47 (R.A.W. Rhodes et al. eds., 2006); EKINS, *supra* note 9, at 175–76; WALDRON, *supra* note 63, at 89–90.

Arrovian critique, which essentially views meaningful democratic self-government as impossible.²⁴²

Another critique that bears upon the second constitutional transition point challenges the very idea of individual legislator intent.²⁴³ According to scholars advancing this critique, the idea that legislators possess coherent intentions is false. Consequently, any interpretive project that defines itself as a conscious search for legislator intent is engaged in a fool's errand.²⁴⁴

While an absence of individual intent does not necessarily spell the demise of intentionalism,²⁴⁵ the brand of intentionalism outlined in this Article does rely on the reality of individual intent. To those convinced by critiques of individual legislator intent, therefore, it has little to say. Nonetheless, by tracing the role that legislator intent is designed to play in the constitutional scheme, this Article does raise questions about these skeptics' vision of democratic self-government. It seems incumbent upon these theorists to explain how a system of democratic self-government operates in a world devoid of intent, assuming that their contention is not that democratic self-government is simply a fiction that has outlived its theoretical underpinnings.

c. Interpretation

Finally, consider the third constitutional transition point: statutory interpretation. Even if we agree that interpreters ideally should advance

242. See, e.g., RIKER, *supra* note 216, at 2–3 (“According to democratic theory, democratic ends can be achieved by democratic means. Now, of course, that assertion may or may not be true. If it is true, then the notion of democracy makes sense. But if it is not true, if the method cannot realize the ideal, then, however lofty the ideal may be, the notion of democracy is meaningless.”).

243. See Ronald Dworkin, *Law as Interpretation*, 9 CRITICAL INQUIRY 179, 197 (1982) (“[J]ust as we noticed that a novelist’s intention is complex and structured in ways that embarrass any simple author’s intention theory in literature, we must now notice that a legislator’s intention is complex in similar ways.”); Easterbrook, *supra* note 3, at 536 (stating that “speakers do not even have determinative intents about the meanings of their own words”); Easterbrook, *supra* note 56, at 68 (“*Intent is empty*. Peer inside the heads of legislators and you find a hodgepodge. . . . Intent is elusive for a natural person, fictive for a collective body.”); Easterbrook, *supra* note 57, at 284 (“Any one author has a mix of objectives, motives, desires, and concerns that we fuse together and for which ‘intent’ is a handy label. . . . [T]he concept of ‘an’ intent for a person is fictive and for an institution hilarious.”).

244. This work sometimes has drawn on postmodern theory—an odd source for textualists in particular to cite, as much postmodern theory rejects the idea that texts contain stable or determinate meanings, too. See, e.g., Easterbrook, *supra* note 3, at 536; see also Schacter, *supra* note 190, at 602–03 (“The advent of postmodernism has further eroded the essentialist idea that statutory language can convey clear and determinate commands. The postmodern assault on the determinacy and transparency of meaning, with origins and reverberations well beyond the domain of law, has struck at the heart of the essentialist account in a way more fundamental and sweeping than anything offered by the legal realists.”).

245. The exercise of seeking legislator intent might serve benefits, even if it ultimately is a search for something nonexistent. See, e.g., Victoria F. Nourse, *Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language*, 69 FLA. L. REV. 1409, 1428 (2017) (explaining its role in counteracting biases or limiting discretion).

democratic self-government by locating legislator intent in a statute and giving legal effect to that intent, is intentionalism a good strategy for doing so? Several scholars have argued that it is not.²⁴⁶ Under the theory of statutory interpretation advanced in this Article, this is a valid and plausible challenge to intentionalism.

By contrast, another textualist critique of intentionalism carries less weight. According to this critique, intentionalism unduly relies on isolated statements from individual legislators, and thereby takes a lone individual's view and irresponsibly attributes it to an entire body of legislators.²⁴⁷ Intentionalism thereby is viewed as a system that relies on exceedingly paltry evidence—what just one or two people thought—and therefore is likely to make poor guesses about the intentions of the larger legislature.

This criticism of intentionalist method overlooks a variety of reasons to think that, when an individual legislator articulates an interpretation of a statute, the proffered interpretation is shared by more than just the individual legislator. First, as Professor Stanley Fish has chronicled, interpretations tend to be relatively stable and consistent within identifiable communities.²⁴⁸ Rarely is there a chaos of rogue interpretations, where an interpretation is not shared by others in the same community.²⁴⁹ Second, specifically with regard to drafter or sponsor statements, we know practically that audiences (including co-signatories) regularly defer to author understandings and explanations of written texts; convention tells us that authors try to do something with words, and fellow readers rely upon the authors'

246. See, e.g., *Blanchard v. Bergeron*, 489 U.S. 87, 97 (1989) (Scalia, J., concurring); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1866 (1998) (“[T]he interaction between distinctive features of legislative history and structural constraints of the adjudicative process may indeed cause legislative history to reduce rather than increase judicial accuracy.”); Nelson, *supra* note 32, at 372 (suggesting that “textualists are as interested as intentionalists in enforcing the intended meaning of statutory language, and simply believe that the textualist approach will better capture the type of intent that both camps seek”); see also Easterbrook, *supra* note 56, at 67–70 (arguing that use of legislative history confers troubling discretion); Farber & Frickey, *supra* note 59, at 460–61 (explaining how a presumptive “plain language” rule accords with an emphasis on drafter intent); Wald, *supra* note 192, at 284 (“Justice Scalia’s own strong, albeit undocumented, sense of the ‘reality’ of the legislative process leads him to conclude with great confidence that judges can arrive at a ‘truer’ understanding of ‘real’ congressional intent if we shut ourselves off from all of the extrinsic materials Congress has left in its wake when it finally enacts a bill into law.”).

247. *Bergeron*, 489 U.S. at 98 (“That the Court should refer to the citation of three District Court cases in a document issued by a single committee of a single house as the action of Congress displays the level of unreality that our unrestrained use of legislative history has attained. I am confident that only a small proportion of the Members of Congress read either one of the Committee Reports in question, even if (as is not always the case) the Reports happened to have been published before the vote.”); Easterbrook, *Original Intent*, *supra* note 58, at 60 (observing and further supporting Justice Scalia’s concern that “words uttered on the floor are more apt to reflect Quixotic views of maverick legislators than the sense of the whole body”); Scalia, *supra* note 3, at 36.

248. See generally STANLEY E. FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980).

249. For a discussion on Congress as a community with separate, discoverable interpretive conventions, see generally Cross & Gluck, *supra* note 18.

explanations of what has been done. Put differently, written texts come with assumptions of authorial intent that justify deference to, and prioritization of, linguistic decisions made by the person holding the pen. Third, the rise in complexity of federal law has led Congress to further consolidate and delegate the development of statutory meaning to those developing statutory text.²⁵⁰

All of these factors support the belief that we can reasonably project out, at least somewhat, interpretations that we discover within Congress. Such projections are useful, particularly within a system of intentionalism designed to promote democratic self-government—a system where, as Part V.A.1 explained, an interpretation is not measured against any mythical gold standard, but rather against the competing argument that legislator intent cuts another way. This is the nature of the judicial task—courts need to pick one interpretation or another. In that situation, the difference between knowing one likely influential actor’s intent and knowing none—merely speculating based on dictionary definitions, for example—probably is significant.

2. Interpretation Should Promote Other Constitutional Values

This Article has emphasized the importance of promoting the constitutional value of democratic self-government through statutory interpretation. In response, critics may argue that statutory interpretation should focus instead on advancing different constitutional values. An awareness that legislation must also serve other values traces back to the founders, with James Madison noting in *Federalist 62*:

It will be of little avail to the people that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man who knows what the law is to-day can guess what it will be to-morrow.²⁵¹

In recent years, textualists particularly have emphasized the importance of advancing alternative values through statutory interpretation.²⁵² And the substantive canons typically have been understood to embody an intuition that, in certain instances, various other constitutional values should be promoted in statutory interpretation—values that are best realized by a

250. See Cross, *Staffer’s Error Doctrine*, *supra* note 18, at 91–110; Cross, *Legislative History*, *supra* note 18, at 93–95.

251. THE FEDERALIST NO. 62, *supra* note 99, at 421 (James Madison).

252. See, e.g., *supra* note 85 and accompanying text (citing sources arguing for promotion of notice); Manning, *supra* note 7, at 2437–38 (arguing for protection of political minorities). Even when statutory interpreters, including textualists, look to promote the value of self-government, meanwhile, they often do it through elaborate efforts at incentivization and other visions of “metademocracy” rather than by simply promoting legislator understandings and intentions. See Schacter, *supra* note 190, at 599; see also Breyer, *supra* note 14, at 863–64 (applying an agency-like theory of democratic participation by interest groups to statutes and statutory interpretation); Elhauge, *supra* note 212, at 2049–73 (outlining a theory of preference-estimating default rules to apply in statutory interpretation akin to those used in contract or corporate law).

conscious turn away from legislator intent.²⁵³ It is easy to imagine that some might contest this Article's focus on democratic self-government, therefore, and might instead call for a focus upon different constitutional values.

In response, several points can be made. First, it is worth noting that intentionalism already makes a variety of compromises among competing constitutional values. For example, our legal system forces judges to guess at the most intent-maximizing interpretation—and to do so with relatively little evidence—rather than permitting them to bring legislators before the court to personally explain their intentions.²⁵⁴ Perhaps that is partly because we believe that legislators would present bad evidence. Yet it also results from a trade-off made in exchange for other constitutional values—e.g., preservation of legislative autonomy and secrecy and separation of powers (by preventing the legislature from controlling implementation and adjudication).

As previous sections explained, intentionalism similarly compromises democratic self-government by deferring to the imperfect consolidations that happen in the legislative process, and also by refusing to permit legislator intent to trump plausible textual meaning, thereby balancing it against values such as notice.²⁵⁵ And intentionalism further compromises this constitutional goal in exchange for other values. For example, democratic self-government might arguably be better promoted by a method that attempts to align interpretation with present-day political preferences among either legislators or the general public, rather than aligning it with enacting legislator intentions.²⁵⁶ By declining to take that approach, intentionalism perhaps makes a trade-off of democratic self-government (or, at least, a certain version of it) in exchange for values such as protection against ex post facto laws, protection of liberty, and promotion of deliberation. In these and other ways, intentionalism strikes a complex balance between a variety of competing constitutional values, rather than single-mindedly pursuing the goal of self-government.

Nonetheless, the version of intentionalism outlined in this Article does move the value of democratic self-government to the fore. It assumes that, within the space of statutory interpretation, promotion of that value is laudable. That assumption is grounded in the belief that few values are more fundamental to the constitutional scheme than democratic

253. As Professor Larry Solan notes, “Courts also resort to a set of interpretive arguments that do not rely upon intent. Instead, they rely on values that are thought to make a statutory code a good one. Among them are canons of construction” Solan, *supra* note 15, at 471. For a detailed discussion of the constitutional dimension of these canons, see generally Eskridge & Frickey, *supra* note 161.

254. Professor Caleb Nelson sees a similar but distinct point in this refusal, viewing it as evidence that intentionalists do not seek purely subjective intent but rather a quasi-objective intent drawn from artificially restrained sources that is not radically different from the form of intent textualists seek. See Nelson, *supra* note 32, at 359–61.

255. See *supra* Part III.

256. For a discussion of the possible role of contemporary values in statutory interpretation, see generally Eskridge, *supra* note 4.

self-government,²⁵⁷ and that the Constitution envisions statutes as the essential vehicle for elected legislators to realize this value.²⁵⁸ When statutory interpretation has the capacity to realize it, or to realize it more completely, it seems that there are strong constitutional reasons to do so.

Instead of focusing on the maximization of self-government, textualists have sometimes emphasized a different value: the provision of notice.²⁵⁹ By aligning interpretation with “ordinary” or “plain” meaning rather than with possibly idiosyncratic legislator interpretations, these textualists argue, courts can empower the public to open the statute books and gain an understanding of the laws to which they will be held accountable.²⁶⁰ Most agree that, to the extent statutes can perform this function, it is valuable for them to do so.²⁶¹

However, if we are going to bring realist scrutiny to the idea of legislation as a vehicle for legislator intention,²⁶² then we should bring that same scrutiny to bear upon the idea of notice. To what extent do courts’ choices among interpretive methods genuinely alter the public’s notice of the laws? In their book on statutory interpretation, Professor Bryan A. Garner and Justice Antonin Scalia detail dozens of canons of interpretation.²⁶³ Does the public actually have greater notice of those canons and of how they will be applied to a particular statute than it does of an interpretation that might be based in legislator intentions, even when found partly in legislative history?²⁶⁴ And do textualist methods, even where they produce determinate results, generate interpretations that align with those the general public would anticipate? (On the latter question, recent empirical studies suggest that they do not.²⁶⁵)

257. See *supra* Part III (outlining the democratic self-government argument).

258. See *supra* notes 135–38 and accompanying text.

259. See *supra* note 85 and accompanying text (citing sources arguing for the promotion of notice).

260. See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020) (“The people are entitled to rely on the law as written . . .”).

261. See Doerfler, *supra* note 10, at 1018–19 & n.201 (noting the consensus among courts and scholars regarding fair notice).

262. For critics advancing this argument, see *supra* Part I.

263. They list fifty-seven canons and interpretive principles, in addition to the thirteen “falsities” they expose. See generally ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

264. For a famous argument that courts always have discretion to choose between two contradictory canons, and therefore to steer statutory cases in multiple directions, see generally Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950). See also Victoria F. Nourse, *Two Kinds of Plain Meaning*, 76 BROOK. L. REV. 997, 1000–05 (2011) (noting multiple types of plain meaning); Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 772 (2020) (finding that “ordinary meaning” tools of dictionaries and corpus linguistics regularly provide differing meanings); Eskridge & Nourse, *supra* note 5, at 1721–22 (arguing that judges engage in “gerrymandering” when deciding between different statutory canons).

265. See generally Klapper et al., *supra* note 5; Tobia et al., *supra* note 5; Tobia, *supra* note 264.

Realist concerns remain even if we set the details of textualist methodology aside. What percentage of the general public even receives its notice of legal rules from the actual text of the laws? Modern federal law is exceedingly complex and voluminous—and this means that statutory text largely loses its practical ability to provide direct notice to a general public.²⁶⁶ As a result, there is little leeway for a statutory interpretive method to promote or hinder the provision of notice through statutory text.²⁶⁷ Once we bring a realist skepticism to bear on the value of notice—and not simply upon the ability of statutory interpretation to advance legislator intent—the trade-off that intentionalism offers with respect to notice seems less stark.²⁶⁸

CONCLUSION

The premises of intent skepticism are debatable, and they will continue to be debated. Even if we accept those premises, however, there are compelling reasons for intent to remain an important element in both statutory interpretation and legislative theory. By retaining a role for intent in our conversations about legislation, we preserve a role in these discussions for democratic self-governance—a core constitutional concept, and one that has too easily fallen out of legislation discourse. In the face of these challenges, disaggregated-intent theory provides useful conceptual solutions. It is a theory with promise not only to move beyond the concerns of intent skepticism, but also to move decades-old discussions about legislation in new directions.

266. An example of one measure of statutory complexity: in the statutory drafting office for the House of Representatives, conventional wisdom holds that it currently takes six years to understand the statutory regime *in a single subject area* sufficiently well to draft laws in it. See Cross, *Staffer's Error Doctrine*, *supra* note 18, at 114. Members of the Senate counterpart to this office publicly attested as early as 1965 that it takes two to three years. See *Hearings Before the J. Comm. on the Org. of the Cong.*, 89th Cong. 1182 (1965) (statement of John H. Simms, Legis. Couns., U.S. Senate) (“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.”).

267. For those interested in providing the public with greater notice of legal regimes, a more productive path may be to promote programs like the Affordable Care Act’s Patient Navigator Program, which promoted individuals and organizations meant specifically to provide “fair, accurate, and impartial” information about elements of the Act to employers, employees, and consumers potentially impacted by the Act. See Patient Protection and Affordable Care Act of 2010 § 1311(i), 42 U.S.C. § 18031(i)(5). President Donald J. Trump dramatically cut funding to the program, but President Joseph R. Biden has committed robust funding for it. See Ken Alltucker, *Trump Administration Slashes Funding for Obamacare Outreach Program*, USA TODAY (July 10, 2018, 9:53 PM), <https://www.usatoday.com/story/news/nation/2018/07/10/obamacare-cuts-mean-groups-have-less-sign-up-customers/773728002/> [<https://perma.cc/P2U9-2HFV>]. *But cf.* Phil McCausland, ‘A Sea Change’: Subsidiaries and White House Push Leads to Surge in Obamacare Sign-Ups, NBC NEWS (May 15, 2021, 6:00 AM), <https://www.nbcnews.com/politics/politics-news/sea-change-subsidies-white-house-push-leads-surge-obamacare-sign-n1267466> [<https://perma.cc/88SV-7VQR>].

268. See Nelson, *supra* note 32, at 367 (“[I]t is hard to believe that the textualists’ position on legislative history really reflects special sensitivity to the goal of fair notice, because the most widely used kinds of legislative history are now no less available to the citizenry than the statutory texts they purport to explain.”).