

THE ORIGINS OF LEGISLATION

*Ganesh Sitaraman**

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* Assistant Professor of Law, Vanderbilt Law School. Insights in this Article are derived in part from the author's experiences serving as senior counsel to Senator Elizabeth Warren. Nothing in this Article should be taken to reflect the practices, views, positions, or opinions of Senator Warren or her staff. Thanks to Lisa Bressman, Bill Jordan, David Lewis, Michael Livermore, Jerry Mashaw, Nick Parrillo, Jim Rossi, Ed Rubin, Chris Serkin, Kevin Stack, Peter Strauss, and participants in the University of Virginia faculty workshop for helpful comments and suggestions, and to John Elrod, Mary Fleming, Kimberly Ingram, Laura McKenzie, and Mary Nicoletta for research assistance.

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ABSTRACT

Although legislation is at the center of legal debates on statutory interpretation, administrative law, and delegation, little is known about how legislation is actually drafted. If scholars pay any attention to Congress at all, they tend to focus on what happens after legislation is introduced, ignoring how the draft came to exist in the first place. In other words, they focus on the legislative process, not the drafting process. The result is that our account of Congress, the legislative process, and the administrative state is impoverished, and debates in statutory interpretation and administrative law are incomplete. This Article seeks to demystify important elements of the legislative drafting process. Descriptively, it provides a comprehensive typology of the origins of legislative drafts, outlining the many ways in which drafts emerge. At times, the descriptive insights are surprising: for example, when a committee drafts legislation in a bipartisan manner, it sometimes uses a “legislative notice-and-comment” process, sharing a draft publicly prior to its introduction so that stakeholders can review the draft and comment. At other times, the descriptive insights add substantial complexity to our accounts. For example, the executive often drafts legislation. This creates a principal-agent drafting problem between Congress and the Executive parallel to the principal-agent problem that emerges with delegation, but operating prior to a legislative enactment. The Article goes on to explain why members of Congress pursue different drafting processes and to explore the consequences of variety in legislative drafting for theories of statutory interpretation, for identifying reliable sources of legislative history, and for arguments about congressional delegation and judicial deference to agencies.

INTRODUCTION

Legislation is the central feature of the modern American legal system. More than common law rules or constitutional doctrines, legislation shapes, governs, and dominates virtually every aspect of modern life. Laws permit military operations and intelligence gathering. Tax, monetary, and financial rules keep the economy running. Legislation authorizes regulations that promote safe workplaces, protect children from choking on toys, and help ensure clean air and clean water. For administrative agencies, judges, and

legal scholars who are interested in our “Republic of Statutes,”¹ perhaps the central issue is determining the meaning of the legislation that Congress has enacted. To that end, courts and commentators have engaged in extensive and unending debates on theories and practices of statutory interpretation, the sources and role of legislative history, and the practices of legislative delegation and judicial deference to agencies.

Despite the importance of legislation to the functioning of the legal system, the actual workings of the legislative process are little known and much maligned. Scholars routinely treat the legislative process with disbelief,² if not with outright contempt.³ One leading scholar has described the legislative process as “‘opaque,’ ‘awkward,’ ‘complex,’ ‘cumbersome,’ ‘highly intricate,’ ‘strategic,’ ‘arbitrary,’ ‘nonsubstantive,’ and ‘tortuous.’”⁴ Perhaps because they see Congress as crass, unprincipled, and chaotic,⁵ scholars and judges have not focused their attention on learning more about congressional procedures and operations.⁶ Instead, some argue that judicial interpretation of statutes should focus on simple, administrable rules because courts’ institutional capacity is far too limited to understand the workings of Congress,⁷ or because these rules act as important coordinating devices.⁸ Others argue that canons of interpretation, even when based on “fictions” about the legislative process, can be justified because courts have a duty to ensure that the law is coherent.⁹ Still others argue that the goal should be to

1 WILLIAM N. ESKRIDGE & JOHN A. FERREJOHN, *A REPUBLIC OF STATUTES* (2010).

2 See, e.g., ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 113 (2006); see also Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 *YALE L.J.* 70, 134 (2012) (“Some legal scholars or judges are quick to say that legislative procedures are simply too complex for lawyers or judges.”).

3 See, e.g., Victoria F. Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 *GEO. L.J.* 1119, 1138 (2011) (“Academic textualists’ most ardent supporters are resolutely pessimistic (if not contemptuous) about the legislative process.”).

4 See *id.* at 1138 (quoting John F. Manning, *Textualism and Legislative Intent*, 91 *VA. L. REV.* 419, 431, 438 (2005) (“tortuous”); *id.* at 423, 430 n.34, 431, 444 n.84, 450 (“opaque”); *id.* at 424, 429 n.30, 430, 438 n.64, 448 n.96, 450 (“complex”); *id.* at 423, 426 n.23, 431 (“cumbersome”); *id.* at 432 & n.43 (“strategic”); *id.* at 431, 432 n.43 (“arbitrary”); *id.* at 420, 425, 445 (“awkward”); *id.* at 431, 432 (“nonsubstantive”); *id.* at 431 (“highly intricate”)).

5 *Id.* at 1139; Nourse, *supra* note 2, at 86.

6 Robert A. Katzmann, *Statutes*, 87 *N.Y.U. L. REV.* 637, 645 (2012) (“[T]here has been scant consideration given to what I think is critical as courts discharge their interpretative task—an appreciation of how Congress actually functions . . .”).

7 Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 *MICH. L. REV.* 885, 887, 921–22, 928–31 (2003).

8 Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 *SUP. CT. REV.* 231, 232 (advocating the plain meaning rule as a “second-best coordinating device”).

9 See, e.g., *Lozman v. City of Riviera Beach*, 133 *S. Ct.* 735, 744 (2013) (“Consistency of interpretation of related state and federal laws is a virtue in that it helps to create simplicity making the law easier to understand and to follow for lawyers and for nonlawyers alike.”);

force Congress to draft legislation more clearly.¹⁰ These approaches are particularly surprising because few legal scholars or practitioners, if any, would argue that judicial procedures and practices are simply too complicated and that lawyers should abandon their attempts to understand them altogether.¹¹

The central problem is that the legislative process remains seriously understudied and severely undertheorized.¹² This may be because law school education rarely focuses much on legislation,¹³ or because few in the legal academy or on the bench have worked in the legislature.¹⁴ Whatever the reason, among legal academics, there has been comparatively little written on the inner workings of Congress.¹⁵ In recent years, some scholars have begun to dig deeper into legislative practices and procedures. A few have discussed the constitutional links to congressional procedure.¹⁶ Others have identified rules of congressional procedure and practice that bear directly on statutory interpretation.¹⁷ And in path-breaking articles, Professors Nourse, Schacter, Bressman, and Gluck have conducted empirical research on legisla-

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 . . . on the basis of which meaning is . . . most compatible with the surrounding body of law into which the provision must be integrated . . .”). For a more extended discussion of this argument, see 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, 961–64 (2013).

10 For one example, see Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2169–70 (2002). For other examples, see Nourse, *supra* note 2, at 77 (describing proposals for federal rules of statutory interpretation, revisions to the use of legislative history, and other democracy forcing reforms).

11 Cf. Nourse, *supra* note 2, at 76 (“No one looks for the nine-Justice Supreme Court’s intent in determining the meaning of a judicial decision, and no one need look for the fictional intent of Congress in searching for the meaning of its decisions.”).

12 Katzmann, *supra* note 6, at 660 (“[Interpretive debates have] taken place in a vacuum, largely removed from the reality of how Congress actually functions.”).

13 Richard A. Posner, Book Review, 74 VA. L. REV. 1567, 1567 (1988) (reviewing WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION* (1988)).

14 Nourse, *supra* note 2, at 73–77, 74 n.6, 85–87; see also Dakota S. Rudesill, *Closing the Legislative Experience Gap: How a Legislative Law Clerk Program Will Benefit the Legal Profession and Congress*, 87 WASH. U. L. REV. 699, 706–08 (2010) (providing an empirical study showing a “virtual non-existence of legislative work experience” among judges and top legal faculty members).

15 Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 576 (2002) (“Articles about statutory interpretation fill the pages of law reviews, but the vast majority of this scholarship focuses on courts. If the scholarship looks at legislatures at all, it does so from an external perspective, looking at Congress through a judicial lens. Little has been written from the legislative end of the telescope.”).

16 See Josh Chafetz, *Congress’s Constitution*, 160 U. PA. L. REV. 715 (2012); Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361 (2004).

17 See Nourse, *supra* note 2; Jarrod Shobe, *Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting*, 114 COLUM. L. REV. 807 (2014).

tive drafting.¹⁸ These writings are notable because their findings demonstrate not only the flaws of existing scholarship that relies on an idealized image of the legislative process, but also the richness and variety of legislative actions. As Gluck and Bressman conclude,

The foundational scholarship of federal legislation has, for the most part, been based on a generic and stylized account of statutory drafting—an understandable focus for a field that is still in its relative infancy. However, there is great variety that exists across drafters, types of statutes, the reasons why and ways in which Congress delegates, and countless other aspects of the drafting process. A mature theoretical account will have to contend with that variety or else come up with better justifications for ignoring it.¹⁹

In this context, it is unsurprising that the origins of legislative drafts are understudied. Despite courts often referring to the “legislator” as the drafter of legislation,²⁰ the standard “Schoolhouse Rock!” model of how a bill becomes a law is undoubtedly wrong.²¹ From interviews with congressional staff, scholars have found that “there is no uniform process of legislative drafting followed in all cases.”²² The standard scholarly account of legislation recognizes variety in the origins of legislation, but does little more than simply assert that legislative drafts can originate with members of Congress, the executive branch, interest groups, lobbyists, constituents, industry, academics, and local governments.²³ Recent research has tried to identify the relative weight of these sources of legislative drafts, based on the perceptions of congressional staff: 25% of first drafts come from the White House and agencies and 34% from outside groups and policy experts.²⁴ Some accounts note that bills can be drafted not just by different persons, but in different locations, such as the floor of the House or Senate, or in conference commit-

18 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 (2014); Gluck & Bressman, *supra* note 9; Nourse & Schacter, *supra* note 15.

19 Gluck & Bressman, *supra* note 9, at 911.

20 Nourse & Schacter, *supra* note 15, at 585.

21 Schoolhouse Rock!, *I’m Just a Bill*, *YOUTUBE* (Sept. 1, 2008) <https://www.youtube.com/watch?v=tyeJ55o3E10>.

22 Nourse & Schacter, *supra* note 15, at 583.

23 See, e.g., WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 72 (2d ed. 2006) (“Once proponents convince a legislator to draft (or accept their draft of) a bill and to introduce it, they must make sure it survives the committee to which it is referred.”); JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 24 (2d ed. 2013) (“Many bills that result in major legislation are proposed by the executive branch or significant interest groups.”); STEVEN S. SMITH ET AL., *THE AMERICAN CONGRESS* 97 (4th ed. 2006) (“Legislation may be drafted by anyone—a member and his or her staff, a committee, lobbyists, executive branch officials, or any combination of insiders and outsiders—but it must be introduced by a member and while Congress is in session.”); Nourse & Schacter, *supra* note 15, at 584 (“Respondents told us, for example, that ideas for new legislation came from a broad array of sources—newspapers and court cases, lobbyists and the White House, Sunday-school teachers and law-review articles, to name a few.”).

24 Bressman & Gluck, *supra* note 18, at 758.

tee.²⁵ Only a few scholars have attempted to develop more systematic typologies of legislative drafting. Professors Bressman and Gluck argue that there are three basic bill types: omnibus legislation, appropriations, and ordinary bills.²⁶ Professors Nourse and Schacter have argued for four different drafting processes: the extended drafting process (through committee structures), consensus drafting (which includes multiple legislators and their staffs), drafting on the floor, and drafting in conference.²⁷ Both sets of scholars agree that the differences in legislative drafting processes could have significant implications for statutory interpretation.²⁸

This Article seeks to demystify important elements of the legislative drafting process in the United States Congress. It provides a comprehensive typology of the origins of legislative drafts, explains the factors members of Congress and their staffs consider in deciding which drafting pathway to take, and explores the implications of the origins of legislation on legal debates related to statutory interpretation. The Article proceeds in four Parts. Part I addresses common misunderstandings and confusion about the different actors within Congress. It provides an overview of the structure of legislator-staff relationships and describes the roles that members of Congress (MCs), personal staff, committee staff, and legislative counsel play. Emerging from this description is the reality that MCs are best characterized not as drafters, but as decisionmakers.

Part II provides a comprehensive typology of the origins of legislative drafts. It identifies eleven different categories of the sources of legislative drafts. The typology first distinguishes between (1) drafts by legislators and their staffs, (2) drafts through committee processes, and (3) drafts by individuals or groups outside the legislature. Within those categories, it identifies a variety of species of origin stories for legislative drafts. These origin stories apply to legislation on most topics—ranging from legislative authorizations on health care, to financial regulation, to national security. The diversity of approaches is rich, and some of these origin stories are likely to surprise, such as examples of agencies and industry jointly drafting legislation and then giving the agreed-upon text to Congress for swift passage. It also discusses the role of legislative counsel and “technical assistance” from the executive branch. While this typology is comprehensive, it is not necessarily mutually exclusive or completely exhaustive. Legislative staff are constantly innovating, finding creative ways to advance legislative goals in a hotly contested and complex political environment. As a result, the origin stories presented here can be combined, and new origin stories may emerge in the future. Despite this limitation, these categories nonetheless provide identifiable and consistent pathways for how legislative drafts originate—and with far greater depth and granularity than has hitherto been outlined in the scholarly literature.

25 Katzmann, *supra* note 6, at 655.

26 Bressman & Gluck, *supra* note 18, at 760–62.

27 Nourse & Schacter, *supra* note 15, at 590–94.

28 *Id.*; Bressman & Gluck, *supra* note 18, at 760–76.

With so many different drafting pathways, the obvious follow-up question is why MCs pursue different drafting strategies. Part III outlines a variety of factors that are relevant in determining which drafting pathway is adopted. There is no simple formula here. The factors vary widely, from the purpose of the bill to political considerations to individual idiosyncrasies of particular MCs. In any particular case, different factors operate with different strengths, and different factors might cut in opposite directions. But again, these factors are recognizable, predictable, and consistent. As a first step to greater understanding, identifying them is critical.

The implications of this more granular understanding of the origins of legislative drafts are significant. First, as a simple descriptive matter, a more detailed understanding of the varieties of legislative drafting deepens our knowledge of Congress and the legislative process generally, critical components of our constitutional system.²⁹ At times, the descriptive insights may be surprising; for example, when a committee drafts legislation in a bipartisan manner, it sometimes uses a “legislative notice-and-comment” process, sharing a draft publicly prior to its introduction so that stakeholders can review the draft and comment.³⁰ At other times, the descriptive insights add substantial complexity to our accounts. For example, the executive often drafts legislation.³¹ This creates a principal-agent drafting problem between Congress and the executive that parallels the principal-agent problem familiar from delegation, but that operates prior to a legislative enactment.³²

Second, as a more complex functional matter, because most legal debates in statutory interpretation and administrative law are predicated on a view of Congress, the origins of legislation have implications for theories of statutory interpretation, the use of legislative history, and ongoing debates on the delegation doctrine and judicial deference to agencies. Part IV suggests some possible implications of the more textured view of legislative drafting on these legal debates and identifies further avenues for research.

Consider theories of statutory interpretation. The detailed analysis provided here has implications for both textualists and purposivists. The complexity and difficulty of understanding the pathways of legislation from origins to passage might support a prudential argument for textualism, that limiting analysis to the text limits the time and resource costs of interpretation and protects against mistakes. On the other hand, for purposivists, the descriptive account here provides a rich, discernable set of pathways that can be readily used to identify congressional actions. With greater understanding, it becomes easier to use nontextual sources and more likely that use of those sources will be accurate. Moving beyond textualism and purposivism,

29 Importantly, the descriptive contributions here are independent of any particular theory that explains the legislative process. As a result, these descriptive contributions should be of interest to those who adhere to public choice explanations, public interest explanations, or other explanations altogether.

30 See *infra* subsection II.B.2.

31 See *infra* subsections II.C.1, II.C.2.

32 See *infra* subsection IV.C.1.

all the leading theories of statutory interpretation—textualism, purposivism, intentionalism—are universalist theories, theories that apply regardless of particular legislative processes or features (such as committee jurisdiction, legislative process, or subject area). Recently, some scholars have argued that statutory interpretation should be more granular, focused on particular, discernable congressional procedures and practices.³³ Understanding the origins of legislation is a critical component to this emerging trend of anti-universalist theorizing in statutory interpretation, an approach that is rooted in the diverse paths that legislation takes.³⁴

Greater understanding of the legislative process also improves the ability of judges and scholars to identify the most reliable legislative history for interpreting specific statutory provisions.³⁵ For example, if a statute is drafted in a partisan manner through a committee, it makes sense to look at the statements of the members of that committee of the drafting political party; but if the statute was drafted in a bipartisan manner on committee, statements from members of both parties might be legitimate. Understanding the source of the draft bears directly on the legitimacy of the sources used in legislative history. Moreover, the realities of the legislative drafting process suggest that the comparative legitimacy and reliability of legislative materials may be more dependent on MCs signaling that the materials are part of the legislative record, rather than on the members actually drafting, reading, or relying on those materials. In other words, we need to start with the premise that members of Congress are not drafters but decisionmakers.

Finally, understanding the origins of legislation requires revisiting debates on delegation and deference to agencies.³⁶ In the conventional model, Congress passes legislation and agencies implement it, creating a principal-agent problem in which agencies may drift away from congressional intent. However, in some cases, agencies and the White House are actually the primary drafters of the statute, and in other cases they provide consistent feedback and “technical assistance” throughout the drafting process.³⁷ That the agency charged with interpreting the statute actually wrote the statute defies the conventional principal-agent model, and while it is likely that scholars are generally aware of the phenomenon, it has not been discussed or theorized at any length in the legal literature. At least in some cases, this departure from the conventional model suggests rethinking congressional delegation and judicial deference to agencies.

I. DRAFTERS AND DECISIONMAKERS

Before delving into the various origins of legislative drafts, it is important to understand the basic structure of a congressional office and the relation-

33 See *infra* Section IV.A.

34 See *id.*

35 See *infra* Section IV.B.

36 See *infra* Section IV.C.

37 See *infra* subsections II.C.1, II.C.2; Section II.D.

ship of legislative staff to members of Congress. Indeed, some theories of statutory interpretation seem to be at least partly predicated on the role that legislators and staff play in the drafting process. For example, some textualists have argued that legislative history is less reliable than the texts of legislation because legislative history, unlike text, is written by congressional staff.³⁸ To evaluate this claim, it is essential to know who exactly does the drafting and what role MCs play.

Whether in the House or in the Senate, four sets of people are most important to the legislative drafting process. First are members of Congress. Members of Congress are elected representatives who have formal authority to debate and pass legislation. Second are personal staffs. Each MC has a personal staff that usually comprises legislative assistants (LAs), who each have a portfolio of topics they cover, such as health care or education.³⁹ If the MC is a member of a committee, she may have a dedicated personal staff member cover all the issues that arise in that committee (e.g. a foreign affairs LA for a member sitting on the Senate Foreign Relations Committee).⁴⁰ Often—particularly in the House of Representatives, where staffs are smaller—an LA will cover a wide variety of topics that might span multiple committees.⁴¹ Legislative correspondents (LCs) answer mail and are often assigned to one or more LAs, serving as the junior staff member for that subject area.⁴² In addition, MCs have a legislative director to manage the LAs, press and communications personnel, constituent services staff, and other administrative support staff (e.g., scheduler, chief of staff).⁴³ The MC hires the personal staff, and the “legislative staff” (the legislative assistants, legislative correspondents, and legislative director) is the core team working on policy and legislative issues (including drafting) for the member.⁴⁴

Separate from the MC and her personal staff is committee staff. Each house of Congress is divided into committees, and each committee has its own staff.⁴⁵ The chairman and ranking members of the committee each hire all of the committee staff for their side. The result is that the entire committee staff works directly for the chair (or the ranking member), not for the members of the committee in their political party or members of the commit-

38 Nourse & Schacter, *supra* note 15, at 608 & n.69 (“One of these claims is that legislative history should be rejected by courts because it frequently is drafted by staffers—as opposed, presumably, to senators themselves.”).

39 1 CONG. QUARTERLY INC., GUIDE TO CONGRESS 596–97 (5th ed. 2000).

40 *See id.*

41 *Id.* at 597.

42 *Id.*; *see also, e.g.*, Committee on House Administration, Overview of 13 Common Staff Positions 6, <https://cha-diversity.house.gov/position-descriptions.pdf> (listing responsibilities for a legislative correspondent as including “[p]rovid[ing] administrative support and assistance to Legislative Aides”).

43 CONG. QUARTERLY INC., *supra* note 39, at 596–97.

44 *See id.* at 595–597 (describing the relative autonomy that MCs have in hiring their personal staff, but identifying common structures and positions).

45 *Id.* at 590–91.

tee as a whole.⁴⁶ This is significant because although MCs and their personal staffs work extremely closely with committee staff, it is a mistake to think that committee staff are apolitical bureaucrats who work for the committee members as a whole. Committee staff work for the committee chair or ranking member, and it is rarely the case that they are not extremely closely aligned with their boss's personal preferences and political agenda and incorporated into their managerial structure. As a result, MCs and personal staff do not treat committee staff as they would treat fellow members of their personal office.⁴⁷ The same can be said for subcommittee staff. When subcommittee chairmen have funds to hire staff,⁴⁸ they hire subcommittee staff who work directly for them, not for the committee chair or the other committee members.

Last is legislative counsel ("LegCo" in the parlance of Congress). Legislative counsel has historically been "mostly invisible" in the literature on drafting and statutory interpretation,⁴⁹ but recent work has largely demystified the role of legislative counsel.⁵⁰ Legislative counsel consists of two different offices—one for each house—of professional staff dedicated to drafting legislation.⁵¹ Legislative counsels are divided by subject matter, they are nonpartisan, and they do not directly work for any member of Congress.⁵² They work with staffs from anywhere in the chamber to draft, revise, edit, and format legislation.⁵³

While there is no universal framework for staff structures or processes, there are some generalizable practices. First, as a number of scholars have pointed out, staff drafts virtually everything; members almost never write or edit legislative text.⁵⁴ Staff (committee and personal) are also the primary

46 YALE LAW SCHOOL, *Working on Capitol Hill* 5 (2012–2013), http://www.law.yale.edu/documents/pdf/CDO_Public/2012_Guide_Body_Public.pdf.

47 CONG. QUARTERLY INC., *supra* note 39, at 590.

48 *Id.* at 592.

49 Bressman & Gluck, *supra* note 18, at 739. The literature is limited. *See, e.g.*, Harry W. Jones, *Bill-Drafting Services in Congress and the State Legislatures*, 65 HARV. L. REV. 441, 443–447 (1952); Robert A. Katzmann, *The American Legislative Process as a Signal*, 9 J. PUB. POL'Y 287 (1989); Frederic Lee, *The Office of the Legislative Counsel*, 29 COLUM. L. REV. 381 (1929); Shobe, *supra* note 17; B.J. Ard, Comment, *Interpreting by the Book: Legislative Drafting Manuals and Statutory Interpretation*, 120 YALE L.J. 185 (2010).

50 Bressman & Gluck, *supra* note 18, at 739–47; Shobe, *supra* note 17, at 818–35.

51 Shobe, *supra* note 17, at 818.

52 *Id.*

53 *Id.* at 826–829. I distinguish legislative counsel from the American Law Division (ALD) of the Congressional Research Service (CRS). ALD often provides interpretations of law, but they are not primarily drafters. *See id.* at 837.

54 Gluck & Bressman, *supra* note 9, at 906 ("Most importantly, current doctrine makes assumptions about what legislative drafters know, and it is widely acknowledged (and our study confirms) that members do not do the actual drafting."); *id.* at 983–84 (noting that staff draft everything); Nourse & Schacter, *supra* note 15, at 585 ("Perhaps unsurprisingly, our staff respondents saw themselves as centrally involved in bill drafting efforts. They also richly described the role of others in drafting but consistently described staffers as having

drafters of legislative history.⁵⁵ Legislative counsel is sometimes, though not always, involved in drafting the actual text of legislation.⁵⁶ Because of their technical expertise in legislative format and cross references, and familiarity with legislative language in a specific subject area, they are often consulted to draft, revise, edit, or format legislation.⁵⁷ In the case of appropriations, where the appropriations report is the relevant document (the actual appropriations bill is almost entirely numbers), legislative counsel is highly involved.⁵⁸ Because many pieces of legislation originate with committee chairs or go through committee on their way to the floor, committee staff have a central role to play in the legislative drafting process—and perhaps the central role in drafting language for committee reports.⁵⁹ Committee chairmen and their staff also frequently shepherd major legislation through to consideration on the chamber floor. Personal staff are also involved in legislative drafting. First, they can draft, edit, and revise language themselves for their MC. Second, when the MC is not chair of the committee, they are the link between the committee and the MC. Personal staff covering farm subsidies for a Senator on the Agriculture Committee, for example, will be in frequent touch with committee staff regarding a pending farm bill. The personal staff members are the ones who brief an MC on a bill's progress, draft floor speeches and colloquies, and write press statements. They are also the ones who (sometimes with outside help) will draft amendments to the bill as it goes through committee.

Staff and members rely on four different categories of sources: formal sources, public and semi-public sources, non-public sources, and cloakroom summaries. The most obvious category is the formal sources—legislative text, committee, and conference reports. Generally, MCs vote on these documents, and surveys suggest that many have not read and almost certainly have not written or edited them personally.⁶⁰ The second category is public and

principal responsibility for producing bill drafts.”); *id.* at 585–86 (“Most staffers indicated that, as a general rule, senators themselves did not write the text of legislation . . .”).

55 Nourse & Schachter, *supra* note 15, at 608 (“Respondents readily acknowledged that staff, rather than senators, drafted legislative history. Staffers regularly wrote committee reports, floor statements, conference reports, and colloquies on the floor.”).

56 Katzmann, *supra* note 6, at 654–55 (“Although legislators and their staffs are not required to consult with legislative counsel, doing so is prudent because a poorly drafted bill can lead to all manner of problems for agencies and courts charged with interpreting the statute.”). See Bressman & Gluck, *supra* note 18, at 739–47, for a discussion of the situations in which Legislative Counsel is likely consulted. It is worth noting that Bressman & Gluck’s excellent study may suffer from some selection and reporting bias, as Legislative Counsel members have good reason to inflate their role and committee staff have good reason not to criticize.

57 See Shobe, *supra* note 17, at 821–27.

58 Gluck & Bressman, *supra* note 9, at 980. Legislative counsel usually draft the central appropriations report, which is the guide to how appropriations are to be spent.

59 CONG. QUARTERLY INC., *supra* note 39, at 591–92 (noting that committee staff are involved in drafting and that committee reports are “almost entirely written by staff”).

60 Gluck & Bressman, *supra* note 9, at 972–73 (quoting one survey respondent as saying, “Members don’t read text. Most committee staff don’t read text. Everyone else is

semi-public sources. Congressional staffers and MCs frequently have access to section-by-section summaries of legislation written by the legislation's sponsor (or by committee staff), one-page summaries designed to provide an overview of the legislation for staffers, press releases that summarize the goals and provisions of legislation, summaries written by outside groups (non-profit organizations, industry lobbyists, etc.), or reports from the Congressional Research Service (CRS).⁶¹ Note that some of these sources are deliberately designed to persuade, not simply to summarize.

The third category is non-public sources. Congressional staff will frequently engage in informal contacts via phone or email with the staffs of legislative sponsors, academics, executive branch officials, or outside groups to inquire about the scope or substance of legislative provisions. In addition, staff usually draft non-public memoranda to MCs relying on formal, public, semi-public, and non-public sources; these memoranda will often summarize and analyze legislation and make recommendations to the MC on whether to support the legislation. Legislative counsel work product and some CRS analyses also fall into this category.

The fourth category is cloakroom summaries, something legal scholars have hitherto not identified as a source in the legislative process. Each party has a cloakroom off the floor of the chamber, with a staff that helps manage their side's floor activities. For many pieces of legislation—and particularly for amendments to legislation—the cloakroom staff for each side writes short summaries of the basic point of the legislation (or amendment). These summaries are available to the MCs while they are on the floor, and if staff have failed to brief the MCs prior to a vote, these summaries may be the only thing that the MC reads before deciding how to vote. When there are divisions within the party on an issue, there might be multiple summaries of the same amendment, each with a different spin representing the views of the subgroup.

The overall picture that emerges from understanding the workings of a congressional office is that MCs are not drafters but rather decisionmakers.⁶²

working off [the section-by-section] summaries [in the legislative history]. . . . The very best members don't even read the text, they all just read summaries." (first and second alterations in original)); Nourse & Schachter, *supra* note 15, at 608 ("Many staffers volunteered that members did not even read committee reports, except perhaps those pertaining to the bills they themselves had sponsored. Many staffers also candidly acknowledged that senators generally did not read the *text* of bills either . . .").

61 It is important to note that CRS reports are generally not public, though they sometimes become public. In addition, CRS produces informal, individualized analyses for MCs. These analyses are not public and, like legislative counsel work product, are seen as protected under something like an attorney-client privilege.

62 The reasons for this might be many, ranging from the complexity and variety of issues to the demands of fundraising and heavy campaign schedules. For a discussion of the time MCs spend fundraising, see LAWRENCE LESSIG, *REPUBLIC, LOST* 138–42 (2011), and Ryan Grim & Sabrina Siddiqui, *Call Time for Congress Shows How Fundraising Dominates Bleak Work Life*, HUFFINGTON POST (Jan. 8, 2013), http://www.huffingtonpost.com/2013/01/08/call-time-congressional-fundraising_n_2427291.html.

They are managers of a mini-bureaucracy who set the direction for policy and sometimes wade into the details of policy,⁶³ but who rarely get into the technical work of legislative drafting—or into the staff work of drafting support documents (like one-page summaries or press releases), legislative history documents, or even floor speeches. This distinction, of course, runs contrary to the current doctrine on statutory interpretation. But as Professors Bressman and Gluck have noted, “Interpretive doctrines designed to reflect how members actually participate in the drafting process would look very different, and certainly less text oriented, than the ones that we currently have.”⁶⁴

II. THE ORIGINS OF LEGISLATIVE DRAFTS

Textbook and even scholarly understandings of the legislative process rarely investigate the origins of legislative drafts.⁶⁵ For the most part, scholars assume that scholars, interest groups, or staff draft legislation.⁶⁶ In fact, the legislative drafting process is far more varied and textured than is conventionally understood. Legislative drafts can originate from a wide range of sources and processes. For scholars, understanding how legislative drafts emerge provides greater clarity into how the first branch of government works. For agencies, litigants, and judges who rely on legislative history, it changes and complicates the sources and practice of statutory interpretation.

This Part provides a typology of legislative drafting practices, outlining eleven different pathways that lead to first drafts of legislation, organized into three categories. This typology provides a comprehensive understanding of the primary ways in which legislation emerges, with illustrative examples. Note that this typology is based on who drafts legislation, not on where they draft legislation. For example, legislation is sometimes drafted in committee, on the floor of the Senate or House, or in conference committee.⁶⁷ But in each case, it is initially written by an actor: individuals, committees, or outsiders. While the location of drafting is important to understanding the legislative process and particularly for identifying the strength of sources of legislative history, the focus of this typology is on the drafting process, and therefore on identity of the legislative drafter and the implications that dif-

63 Gluck & Bressman, *supra* note 9, at 940 (“The majority of respondents described their members’ involvement as taking place at the more abstract level of policy rather than at the granular level of text.”).

64 *Id.* at 906.

65 See, e.g., ESKRIDGE ET AL., *supra* note 23, at 72 (“Once proponents convince a legislator to draft (or accept their draft of) a bill and to introduce it, they must make sure it survives the committee to which it is referred.”); MANNING & STEPHENSON, *supra* note 23, at 24 (“Many bills that result in major legislation are proposed by the executive branch or significant interest groups.”); SMITH ET AL., *supra* note 23, at 97 (“Legislation may be drafted by anyone—a member and his or her staff, a committee, lobbyists, executive branch officials, or any combination of insiders and outsiders—but it must be introduced by a member while Congress is in session.”).

66 See, e.g., ESKRIDGE ET AL., *supra* note 23, at 72; MANNING & STEPHENSON, *supra* note 23, at 24; SMITH ET AL., *supra* note 23, at 97.

67 Nourse & Schachter, *supra* note 15, at 591–93.

ferent legislative drafters have on the legislative process and on legal debates. This Part concludes with a note on the role of legislative counsel and the executive branch in providing technical drafting assistance.

A. *Legislator-Based Drafting*

1. Sole Authorship

Perhaps the most obvious form of legislative drafting is sole authorship. On the classic story of “how a bill becomes a law,” a member of Congress will draft and introduce legislation on a topic of interest or importance. In previous times, members of Congress would actually draft and transcribe legislation themselves. Thus, we have Henry Clay’s handwritten draft proposal for the Compromise of 1850, which was voted down.⁶⁸ Today, an MC’s staff member will almost always draft sole-authored legislation. The staff might consult with legislative counsel, interest groups, and academic or policy experts, or the staff might just write the language themselves. Examples of sole-authored legislation abound—from bills to rescind stimulus funds for use in high-speed rail corridors⁶⁹ to bills pushing for jobs in forestry.⁷⁰

Sole authorship has important advantages for the author. Foremost is that the author gets full credit for drafting and introducing the legislation. Introducing legislation is one way to demonstrate that the MC is fighting on behalf of his or her constituents, which may help with reelection.⁷¹ Hence, many sole-authored pieces of legislation relate directly to the particular needs of the MC’s constituency.⁷² In addition to serving local constituents, credit can also help an MC stake out territory in a specific issue area.⁷³ Authorship indicates to colleagues and interest groups that the MC is interested in a particular topic. Interest groups will be more likely to approach and engage the MC thereafter, and out of respect, colleagues will usually consult with the MC when they are thinking about operating within the MC’s issue area. Over time, MCs gain a reputation for expertise and leadership in

68 Henry Clay, *Compromise of 1850*, OURDOCUMENTS.GOV, <http://www.ourdocuments.gov/doc.php?flash=true&doc=27>.

69 To Rescind All Unobligated Funds Made Available for Capital Assistance for High-Speed Rail Corridors under the American Recovery and Reinvestment Act of 2009, H.R. 2811, 112th Cong. (2011).

70 American Jobs in American Forests Act of 2013, S. 891, 113th Cong. (2013); Press Release, Sen. Jeff Merkley, Merkley Introduces Bill to Protect Forest Jobs (May 9, 2013), <http://www.merkley.senate.gov/newsroom/press/release/?id=cf7e7a5f-ed4e-4082-9144-23f16bf39134>.

71 See generally RICHARD F. FENNO, JR., *HOME STYLE* (1978) (exploring the role of constituents); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974) (describing the importance of reelection); CRAIG VOLDEN & ALAN E. WISEMAN, *LEGISLATIVE EFFECTIVENESS IN THE UNITED STATES CONGRESS: THE LAWMAKERS* (2014) (discussing legislative effectiveness and relationship to constituents).

72 See, e.g., Everglades for the Next Generation Act, S. 414, 113th Cong. (2013).

73 VOLDEN & WISEMAN, *supra* note 71, at 168–78.

the area, which has benefits in policy effectiveness and constituent service.⁷⁴ Second, sole-authored legislation allows MCs to stake out a position without negotiating with others. Members of Congress often introduce “message bills” to drive a particular political message or to try to reorient public debate.⁷⁵ Message bills may not have a high chance of passage, but they serve the member’s political goals. Third, sole authorship has the benefit of speed. Because the staff will not need to negotiate with staff in other offices to come to agreement on legislative language, sole authorship allows MCs to introduce legislation more quickly than other processes of legislative drafting. At the same time, sole authorship has an important drawback: because the MC and her staff have not engaged colleagues or committee staff in the drafting process, it may be more difficult for the MC to build support for her legislation.

2. Legislative Partnerships

Just as drafts originate with individual MCs, so too can they originate with small groups of Congressmen in cooperation. Often, two or more MCs will join together to draft legislation on an issue of shared concern and perspective. Sometimes legislative partnerships feature two or more members of the same party joining together to draft and introduce legislation.⁷⁶

However, the most significant benefit of partnership is that it can lead to bipartisan legislative drafts. Particularly in a polarized Congress, bipartisan legislation has political and policy benefits. As a political matter, bipartisan legislation often gets favorable media coverage. For MCs who are interested in showing that they are not extreme and obstructionist, but can find ways to work across party lines (though this is by no means all members), legislative partnerships bring favorable press coverage. As a policy matter, bipartisan legislation may appear to be (or actually be) more likely to gain support and pass through the chamber. When Congress is deeply divided, bipartisan legislation signals an area that may be less politically polarized and thus more likely to gain widespread agreement.

A recent example will demonstrate the benefits. Senator John McCain (R-AZ) was the Republican nominee for President in 2008 and is often a fierce critic of President Obama’s policies; Senator Elizabeth Warren (D-MA)

74 *Id.*

75 For a recent discussion of message bills, see Editorial, *The Bills to Nowhere*, N.Y. TIMES (June 7, 2012), <http://www.nytimes.com/2012/06/08/opinion/the-bills-to-nowhere.html>. For an academic treatment of “message politics” in the Senate, see C. Lawrence Evans & Walter J. Oleszek, *Message Politics and Senate Procedure*, in *THE CONTENTIOUS SENATE* (Colton C. Campbell & Nicol C. Rae eds., 2001).

76 See, e.g., A Bill to Amend the Grand Ronde Reservation Act to Make Technical Corrections, and for Other Purposes, S. 416, 113th Cong. (2013) (introduced by Jeff Merkley (D-OR) and Ron Wyden (D-OR)).

is widely seen as a leading progressive in the Senate.⁷⁷ In the spring of 2013, McCain and Warren worked together to draft the 21st Century Glass-Steagall Act, which they introduced along with Senators Maria Cantwell (D-WA) and Angus King (I-ME).⁷⁸ The original Glass-Steagall Act, officially the Banking Act of 1933, was passed as part of President Franklin Roosevelt's 100 days.⁷⁹ The original Act separated depository institutions from investment banking.⁸⁰ Starting in the 1980s, a series of decisions by the Federal Reserve and Office of the Comptroller of the Currency, in addition to court decisions, eroded the wall separating different types of financial institutions.⁸¹ The Act was ultimately repealed in 1999.⁸² In the wake of the 2008 financial crash, there was widespread discussion of the need to reinstate Glass-Steagall.⁸³ In this context, it is perhaps no surprise that the high-profile bipartisan partnership caused significant media interest behind bringing back Glass-Steagall-like reforms.⁸⁴

77 See, e.g., Jim Puzzanghera, *Sens. Warren, McCain Propose New Glass-Steagall Bank Restrictions Bill*, L.A. TIMES (July 11, 2013), <http://articles.latimes.com/2013/jul/11/business/la-fi-mo-elizabeth-warren-john-mccain-glass-steagall-bank-regulation-20130711>.

78 Press Release, Sen. Elizabeth Warren, Senators Warren, McCain, Cantwell, and King Introduce 21st Century Glass-Steagall Act (July 11, 2013), http://www.warren.senate.gov/?p=press_release&id=178.

79 Glass-Steagall Act (Banking Act of 1933), Pub. L. No. 73-66, 48 Stat. 162 (1933).

80 *Id.*

81 For a discussion of these and related developments, see generally Saule T. Omarova, *The Merchants of Wall Street: Banking, Commerce, and Commodities*, 98 MINN. L. REV. 265 (2013); Saule T. Omarova, *The Quiet Metamorphosis: How Derivatives Changed the "Business of Banking"*, 63 U. MIAMI L. REV. 1041 (2009); Saule T. Omarova & Margaret E. Tahyar, *That Which We Call a Bank: Revisiting the History of Bank Holding Company Regulation in the United States*, 31 REV. BANKING & FIN. L. 113 (2011).

82 Gramm-Leach-Bliley Act (Financial Services Modernization Act of 1999), Pub. L. No. 106-102, 113 Stat. 1338, 1341 (1999) (codified as amended at 15 U.S.C. §§ 6801–09 (2012)).

83 See, e.g., Daniel Gross, *Shattering the Glass-Steagall*, SLATE (Sept. 15, 2008), http://www.slate.com/articles/business/moneybox/2008/09/shattering_the_glasssteagall.html; Cyrus Sanati, *10 Years Later, Looking at the Repeal of Glass-Steagall*, N.Y. TIMES DEALBOOK (Nov. 12, 2009), http://dealbook.nytimes.com/2009/11/12/10-years-later-looking-at-repeal-of-glass-steagall/?_r=0; Robert Weissman, *Reflections on Glass-Steagall and Maniacal Deregulation*, COMMON DREAMS (Nov. 12, 2009), <http://www.commondreams.org/view/2009/11/12-8>.

84 See, e.g., Puzzanghera, *supra* note 77 ("Warren (D-Mass.), an outspoken liberal, and McCain (R-Ariz.), a conservative who was his party's 2008 presidential nominee, are an unlikely pair. But they are united in the belief that separating traditional deposit-taking from investment activities would reduce risk in the banking system and lessen the chance of future bailouts."); see also Carter Dougherty & Cheyenne Hopkins, *Warren Joins McCain to Push New Glass-Steagall Law for Banks*, BLOOMBERG (July 12, 2013), <http://www.bloomberg.com/news/articles/2013-07-11/warren-joins-mccain-to-push-new-glass-steagall-bill-for-banks>; Jim Lardner, *Wall Street's Weak Arguments Against a New Glass-Steagall*, U.S. NEWS (July 31, 2013), <http://www.usnews.com/opinion/blogs/economic-intelligence/2013/07/31/elizabeth-warren-and-john-mccain-make-the-case-for-a-new-glass-steagall>; Dylan Matthews, *Elizabeth Warren and John McCain Want Glass-Steagall Back. Should you?*, WASH. POST WONK-

3. Legislative Gangs

A relative of the legislative partnership is the legislative gang. On many of the most high profile, politically charged issues of the day, a group of legislators of both parties will form a “gang” to hammer out a compromise that can gain support from enough members to pass. These gangs have become common: the 2013 Gang of Eight on immigration reform; the 2005 Gang of Fourteen on filibuster reform; the 2007 Gang of Twelve on immigration reform; the 2011 Gang of Six on deficit reduction; the 2008 Gang of Ten on energy; and the 2009 Gang of Six on health care.⁸⁵

Superficially, legislative gangs are a subset of legislative partnerships—a mere grouping of legislators working together on an issue. In practice, however, legislative gangs are different in significant ways. First, legislative gangs arise only in the Senate, because the House of Representatives’ structure creates a strong majoritarian system with centralized power. Second, the “gang” formulation is only used when the issue is of great salience and when an agreement is more likely to lead to passage. In contrast, legislation arising out of partnerships may be—like all legislation—unlikely to be enacted into law.⁸⁶

Perhaps most interestingly, the use of legislative gangs differs from common political science models of legislative behavior. Political scientists have offered a variety of theories to explain when legislation is likely to pass. The

BLOG (July 12, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/12/elizabeth-warren-and-john-mccain-want-glass-steagall-back-should-you/>.

85 See, e.g., David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1076 (2008) (book review) (noting that in May 2005, the Senate’s Gang of Fourteen “crafted a political solution to a seemingly intractable political problem over use of the filibuster against judicial nominees”); Kara L. Wild, Comment, *The New Sanctuary Movement: When Moral Mission Means Breaking the Law, and the Consequences for Churches and Illegal Immigrants*, 50 SANTA CLARA L. REV. 981, 1006–07, 1007 n.219 (2010) (observing that the Comprehensive Immigration Reform Act of 2007, S. 1348, 110th Cong. (2007), had the “enthusiastic support of a bipartisan group of Senators” known as the Gang of Twelve); *Obama Endorses ‘Gang of Six’ Deficit Plan*, NBCNEWS.COM (July 20, 2011, 8:22 AM), http://www.nbcnews.com/id/43807163/ns/politics-capitol_hill/t/obama-endorses-gang-six-deficit-plan/#.UldqyWTXi3M (describing the efforts of the Senate’s 2011 Gang of Six to formulate a successful deficit reduction plan); Eric Randall, *The U.S. Senate’s “Gang” Problem*, THE ATLANTIC WIRE (July 20, 2011), <http://www.theatlanticwire.com/politics/2011/07/us-senate-gang-problem/40199/> (noting that the Senate’s 2008 Gang of Ten failed to accomplish its goal of resolving energy policy); Robert Reich, *Why the Gang of Six Is Deciding Health Care for Three Hundred Million of Us*, THE HUFFINGTON POST (Aug. 21, 2009), http://www.huffingtonpost.com/robert-reich/why-the-gang-of-six-is-de_b_265684.html (“Last night, the so-called [2009 Senate Finance Committee’s] ‘gang of six’ . . . reaffirmed their commitment ‘toward a bipartisan health-care reform bill’”); Rachel Weiner, *Immigration’s Gang of 8: Who are they?*, WASH. POST (Jan. 28, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/01/28/immigrations-gang-of-8-who-are-they/> (“There’s a new bipartisan gang in town known as the Gang of 8: Eight senators who will unveil an immigration overhaul”).

86 VOLDEN & WISEMAN, *supra* note 71, at 27 (“[O]nly about one in twenty bills becomes a law.”).

most prominent are majoritarian theories, under which legislation passes when a party has a majority of votes in the chamber to guarantee passage;⁸⁷ median voter theory, in which MCs must gain the support of the median legislator in order to guarantee passage;⁸⁸ and pivotal politics theory, in which MCs must be able to gain the support of the legislator whose vote is needed to defeat a filibuster or override a presidential veto.⁸⁹ In each of these cases, legislators are lined up based on their preferred policy (e.g., from strongly supporting immigration reform to strongly opposing it).⁹⁰ Although legislative gangs might still need to satisfy the median or pivotal legislator, their use does not exactly fit the conventional approach because it stresses the importance of balancing various power bases within the legislative body. Take the 2013 immigration reform bill, for example. The Gang of Eight in that case comprised Senators Michael Bennett (D-CO), Richard Durbin (D-IL), Jeff Flake (R-AZ), Lindsey Graham (R-SC), John McCain (R-AZ), Bob Menendez (D-NJ), Marco Rubio (R-FL), and Chuck Schumer (D-NY).⁹¹ On a conventional measure of partisanship in the Senate, only a few of the Gang of Eight are among the centrist votes closest to bringing the Democratic majority to the sixty votes needed to defeat a filibuster.⁹² Nor can the composition of the Gang of Eight be explained by seniority, as Senator Flake was a freshman member of the Senate.⁹³ Nor can it be explained by geographic diversity, as Senators McCain and Flake both represent Arizona; or committee membership, as Bennett, Menendez, McCain, and Rubio are not on the Judiciary Committee.⁹⁴ In fact, the Gang of Eight's composition shows attentiveness to geography, representation for sub-groups within parties, members' level of interest, and formal and informal leadership within the party.

B. Committee-Based Drafting

Legislative drafts do not just originate with members of Congress and their staffs. The organization of Congress into committees with jurisdictional authority gives committees—and particularly committee staff—a central role in the legislative drafting process. In addition to legislators having a personal staff, with staff members covering different policy issues, each committee has

87 See DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* (1991); E.E. SCHATTSCHEIDER, *PARTY GOVERNMENT* (1942).

88 See DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* (1958).

89 KEITH KREHBIEL, *PIVOTAL POLITICS* (1998).

90 *Id.*

91 Weiner, *supra* note 85.

92 Only three are close: McCain is ranked fifty-seventh, Flake is sixty-third, and Graham is fifty-ninth. For the full rankings from 2013, see Senate Ratings, NAT. J., <http://www.nationaljournal.com/free/document/download/5077-1>.

93 *About*, JEFFFLAKE.COM, <http://jeffflake.com/> ("Jeff began serving in the United States Senate in 2013.").

94 *Committee Members*, U.S. SENATE COMM. ON THE JUDICIARY, <http://www.judiciary.senate.gov/about/members>.

a staff. Committee staff are allocated differently based on the committee. Sometimes committee chairs and ranking members hire all of the respective majority and minority staff members.⁹⁵ Other times, subcommittee chairs and ranking members may be able to hire their own staff.⁹⁶

1. Partisan Committee Drafting

Some legislation is drafted through a committee-led, partisan process with the goal of developing legislation that every member of the committee (on the majority or minority side) will support.⁹⁷ On this model, majority or minority committee staff will convene the relevant staffer from each MC's personal office who is on the committee and of the same political party. This group is usually referred to by party, issue area, and staff title (e.g., Republican Environment and Energy LAs, Democratic Banking LAs), and they meet regularly so members are informed about the committee's business. When the committee embarks on partisan committee drafting, staffers gather frequently to discuss the goals of the legislation and the policy preferences of each member, debate outlines of legislation, and eventually discuss and revise particular legislative language. All of this work takes place at the staff level. Committee staff usually organize the meeting, drive the conversation, and provide draft outlines and draft language (in consultation with legislative counsel), based on the conversations with staffers from each office. Each member's personal staffer reports back to their office (usually to the legislative director and MC), summarizing the developments of the most recent meetings, and then the staffer works to identify priorities and strategy for future meetings. If individual members have previously introduced sole-authored legislation or jointly authored legislation that is relevant to the topic, they may try to insert that legislation into the legislative draft. In addition, the committee staff and personal staff will usually engage the opinions of stakeholders, who are constituents or sympathetic to their perspective on the issue. Partisan committee drafting also has a strategic component: by "grabbing the pen," the majority or minority committee can set the agenda for future negotiations with the other side.

As an example of partisan committee drafting, consider the legislative drafts for the 2013 reauthorization of the Elementary and Secondary Education Act (ESEA). In the spring of 2013, the Republicans and Democrats on the Senate Health, Education, Labor, and Pensions (HELP) Committee each introduced different versions of the reauthorization—versions that every

95 CONG. QUARTERLY INC., *supra* note 39, at 592 ("The chairman or the top-ranking minority party member of a committee selects most committee employees, as a prerequisite of office, subject only to nominal approval by the full committee.")

96 C. LAWRENCE EVANS, *LEADERSHIP IN COMMITTEE: A COMPARATIVE ANALYSIS OF LEADERSHIP BEHAVIOR IN THE U. S. SENATE* 33 (2001) (discussing subcommittee chair control of subcommittee staff).

97 Note that what might appear to be partisan committee drafting is sometimes sole authorship, when the committee chair or ranking member produces a draft on her own and then sells it to their partisan committee members.

committee member of each party supported.⁹⁸ The Democratic version was drafted through a committee-led process, in which committee staff worked with personal staff from each office through successive drafts of the legislation, including making specific wording changes in response to concerns from committee members. The Democratic draft also featured sections that were based on individual members' sole-authored legislation. For example, Senator Al Franken (D-MN) introduced the Accelerated Learning Act of 2013 on May 23, 2013.⁹⁹ That stand-alone bill appears virtually word-for-word in the Democratic draft of the ESEA reauthorization as Subpart 2 of Title I, Part B.¹⁰⁰

2. Bipartisan Committee Drafting

Similar to the partisan committee drafting process is the bipartisan committee drafting process. On this model, committee staff from both parties convene the personal staff for committee members (e.g., all the health legislative assistants), and the group of all staff meets frequently to develop the legislative draft. As with the partisan committee process, the entire group considers the goals and structure of the legislation, comes to agreement on policy issues, and eventually works through specific legislative language (put together with the help of legislative counsel). Bipartisan committee drafting has some obvious challenges. Foremost, there is greater difficulty getting all members to agreement. Second, although meetings and negotiations involve the entire bipartisan staff, the majority and minority staff directors need to have a trusted working relationship. The committee staff directors are involved in something akin to what game theorists call a two-level game.¹⁰¹ The Level I game is her negotiations with the opposing party's committee staff director, in which she looks to find common ground and ensures that negotiations are in good faith and do not break down. The Level II game is her negotiation with the individual staff members representing MCs in the committee staff deliberations. The committee staff director needs to find a win-set that incorporates both Level I and II constraints. Committee staff therefore often meet at Level II (partisan committee staff and personal staff)

98 Strengthening America's Schools Act of 2013, S. 1094, 113th Cong. (2013); *see also* Press Release, U.S. Senate Comm. on Health, Educ., Labor & Pensions, Harkin, HELP Committee Democrats Introduce Bill to Prepare All Children for Success and Fix "No Child Left Behind" (June 4, 2013), <http://www.help.senate.gov/newsroom/press/release/?id=E561493c-1cc4-46ba-8e8d-b427b82891be>. The Republican version was introduced as a substitute in committee, which all of the Republicans on the Senate committee supported. *See* S. REP. NO. 113-113 (2013), <https://beta.congress.gov/congressional-report/113th-congress/senate-report/113/1>.

99 Accelerated Learning Act of 2013, S. 1082, 113th Cong. (2013); *Sen. Franken Introduces Bill to Help Make College Affordable, Improve Opportunities for Students*, AL FRANKEN, U.S. SENATOR FOR MINN. (May 23, 2013), http://www.franken.senate.gov/?p=hot_topic&id=2424.

100 *See* S. 1094, at §§ 1221-26.

101 Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427 (1988).

in order to discuss issues and determine a strategy that they can bring into the Level I bipartisan negotiations.

A third feature is the role of interest groups, or stakeholders. In bipartisan committee drafting, the number and variety of stakeholders are greater than in partisan committee drafting, as every member on the committee has constituents and interest groups that they respect or from whom they seek support. Perhaps most interesting is that staffers have developed processes that we can think of as “legislative notice-and-comment.” This process engages stakeholders in ways similar to the legislative hearings that MCs engage in and to the notice-and-comment process that administrative agencies follow.¹⁰² The bipartisan staffs will often gather with a panel of experts or stakeholder representatives (including sometimes members of relevant executive branch agencies) to discuss their ideas. Usually, the panel members make an opening presentation or statement (just as committee hearing witnesses do for MCs) and then the bipartisan staff members can ask questions (just as MCs do in a legislative hearing). Unlike hearings in which MCs participate, these sessions are not focused on a public audience. Rather, these private sessions are frequently technical and are genuinely focused on fact-finding: understanding the problem, the perspectives of stakeholders, and the concerns and pressures in the area. Then, once the committee staff has a draft that most or all of the MCs have agreed to, the committee will release that draft, prior to the draft being introduced as legislation, for a comment period for stakeholders to consider the draft and to provide feedback. At the end of the comment period, the bipartisan committee staff returns to the draft and decides if there is need for further changes based on what they have heard from constituents and stakeholders.

In 2013, the HELP Committee pursued this bipartisan committee drafting process, with notice and comment procedures, leading to the Pharmaceutical Compounding Quality and Accountability Act.¹⁰³ In the fall of 2012, thirty-two people were killed after an outbreak of fungal meningitis, stemming from drugs compounded at the New England Compounding Center (NECC).¹⁰⁴ Compounded drugs fell into a regulatory gray area. In 1997, Congress passed a law regulating the industry,¹⁰⁵ but in 2002, the Supreme Court struck down portions of the law relating to advertising as violating the First Amendment.¹⁰⁶ The Court, however, did not squarely answer the sever-

102 For an example of the foregoing process, see *infra* notes 103–112 and accompanying text.

103 Pharmaceutical Compounding Quality and Accountability Act, S. 959, 113th Cong. (2013).

104 *Pharmacy Compounding: Implications of the 2012 Meningitis Outbreak. Hearing before the S. Comm. on Health, Educ., Labor, & Pensions*, 112th Cong. (2012) (statement of Margaret Hamburg, Comm’r of Food and Drugs), <http://www.fda.gov/newsevents/testimony/ucm327667.htm>. For comprehensive analysis of the outbreak, see *The Meningitis Outbreak*, BOS. GLOBE, <http://www.bostonglobe.com/metro/specials/meningitis/>.

105 FDA Modernization Act of 1997, Pub. L. No. 105-115, 111 Stat. 2296 (1997).

106 *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002).

ability question, and lower courts interpreted the decision differently.¹⁰⁷ The patchwork regulatory scheme led to widespread underenforcement of the remaining portions of the law.¹⁰⁸ Senators attempted to reform the law in 2007¹⁰⁹ but failed due to heavy industry lobbying against new regulations.¹¹⁰ After NECC, the Senate HELP Committee decided to take up the issue and find a bipartisan solution. Throughout the spring, committee and personal staff of both parties worked together on the draft legislation, engaging in meetings with stakeholders, and ultimately releasing a proposed legislative draft. The draft was not introduced by any Senator; rather, it was posted online with a request for stakeholder comments.¹¹¹ After comment and revision, the draft was introduced as actual legislation in the Senate.¹¹²

3. Bipartisan, Bicameral Drafting

Perhaps the oddest form of committee drafting is the phenomenon of bipartisan, bicameral committee drafting. Selected staff from relevant personal offices and from the committees will meet with their counterparts in the other chamber to reach an agreement on legislative language. The result is a bipartisan, bicameral draft that has the benefit of being likely to pass both houses of Congress without trouble. Note that this is not the conference committee process. This is also distinct from the “preconference” process, by which amendments are negotiated to make each chamber’s legislation identical without going through the conference process.¹¹³ Rather, bipartisan bicameral drafting can take place even if legislation has not yet been introduced. To see an example, return to the legislation on compounding.¹¹⁴

107 *Med. Ctr. Pharmacy v. Mukasey*, 536 F.3d 383 (5th Cir. 2008) (ruling that the advertising provisions were severable). The Ninth Circuit had previously held that they were not severable and struck down the entire pharmaceutical compounding provision, leading to the *Thompson* case in the Supreme Court, 535 U.S. 357. The Supreme Court did not address severability in its opinion, leaving the Ninth Circuit’s position intact.

108 *See, e.g.*, Thomas M. Burton et al., *Pharmacies Fought Controls*, WALL ST. J. (Oct. 14, 2012), <http://www.wsj.com/articles/SB10000872396390444657804578052972230404046> (describing difficulties the FDA faced in enforcing the law after *Thompson*).

109 Safe Drug Compounding Act of 2007, 110th Cong. (2007) (discussion draft).

110 *See, e.g.*, Burton et al., *supra* note 108.

111 *See Draft Proposal on Pharmaceutical Compounding*, SENATE COMM. ON HEALTH, EDUC., LABOR & PENSIONS, 113TH CONG. (Apr. 26, 2013), <http://www.help.senate.gov/newsroom/press/release/?id=0aa068ee-4f2a-4e31-9fd6-39f4d7472a5a&groups=ranking,Chair>.

112 Pharmaceutical Compounding Quality and Accountability Act, S. 959, 113th Cong. (2013); Press Release, U.S. Senate Comm. on Health, Educ., Labor & Pensions, Harkin, Alexander, Roberts, Franken Introduce Legislation to Clarify Oversight Responsibilities for Pharmaceutical Compounding, Ensure Safety for Consumers (May 15, 2013), <http://www.help.senate.gov/ranking/newsroom/press/harkin-alexander-roberts-franken-introduce-legislation-to-clarify-oversight-responsibilities-for-pharmaceutical-compounding-ensure-safety-for-consumers>.

113 For a brief discussion of the “preconference” process, see Bressman & Gluck, *supra* note 18, at 762.

114 For another example, see Press Release, Senate Comm. on Health, Educ., Labor & Pensions, Bicameral Group Announces Deal to Improve American Workforce Develop-

After the Senate HELP Committee passed the bill, the bill stalled. Members of staff from the Senate HELP Committee began working with their counterparts in the House to come to an agreement that both chambers would be able to pass. In September 2013, after bipartisan, bicameral negotiations, a group of HELP Committee Senators introduced a new bill, the Drug Quality and Security Act, which was a revised version of the earlier legislation—but with the full support of the Chairman and Ranking Members of the House Energy and Commerce Committee.¹¹⁵ Again, note that the legislative compromise did not take place during conference committee—and that neither chamber had passed the legislation yet. The negotiations took place prior to these formal processes.

4. Reauthorizations

A variation on the partisan and bipartisan committee drafting processes is the drafting process for reauthorizations. Most legislation that is policy-focused is an authorizing piece of legislation, providing the authority for an agency to take on some kind of action. Authorizations are in contrast to appropriations bills, which actually provide funding for activities that have already been authorized.¹¹⁶ Some authorizations expire after a period of time, and Congress will then reauthorize the government programs with whatever revisions or new innovations they seek.¹¹⁷ Reauthorizations differ slightly from other drafting processes because they usually begin with the existing text of the law. Note that if an agency has residual authority, for example, a reauthorization might not actually be necessary for the agency to continue its programs.

A few examples of reauthorization. The Elementary and Secondary Education Act (ESEA) is an example of partisan committee drafting that was actually a reauthorization.¹¹⁸ The 2013 Water Resources Development Act (WRDA)¹¹⁹ is an example of a bipartisan committee drafted reauthorization, though WRDA departed from the ideal type discussed above in important ways. As an authorization for the U.S. Army Corps of Engineers water infrastructure projects, WRDA does not involve the same level of painstaking cooperative drafting between parties; most of the bill is just a list of projects

ment System (May 21, 2014), <http://www.help.senate.gov/newsroom/press/release/?id=A6347a77-f014-4877-bd5b-47775a3f83c3> (describing bipartisan, bicameral drafting process that led to the introduction of the Workforce Innovation and Opportunity Act).

115 See Press Release, Senate Comm. on Health, Educ., Labor & Pensions, Broad Range of Stakeholders Agree: Bipartisan, Bicameral Drug Quality and Security Act Will Improve Drug Safety, Should be Enacted As Soon as Possible (Sept. 28, 2013), <http://www.help.senate.gov/newsroom/press/release/?id=049ab377-a426-4dd1-90dd-b9b770de7a65&groups=chair>.

116 See BILL HENIFF, JR., CONG. RESEARCH SERV., RS20371, OVERVIEW OF THE AUTHORIZATION-APPROPRIATIONS PROCESS 1 (2012).

117 *Id.*

118 See *supra* text accompanying note 98.

119 Water Resources Development Act of 2013, S. 601, 113th Cong. (2013).

that the Army Corps is slated to pursue.¹²⁰ Indeed, WRDA also shows that not all bipartisan committee drafting is without controversy. A portion of the legislation made changes to environmental reviews.¹²¹ Despite support from the liberal committee Chairwoman, Senator Barbara Boxer, environmental groups and progressive members of the Senate opposed these provisions and sought to amend them when the legislation came to the floor of the Senate.¹²²

5. Multicommittee Drafting

Sometimes, drafting does not take place within a single committee. Rather, two or more committees will work together on putting together the first draft of legislation. The reasons are formal and functional, but first some background on congressional rules: in both the Senate and the House of Representatives, newly introduced legislation is referred to one or more committees based on the committees' jurisdiction and the chamber's rules. In 1995, the House changed its rules to eliminate "joint referrals," the simultaneous referral of legislation to two or more committees.¹²³ Under the current rules, the Speaker identifies a committee with primary jurisdiction and then can pursue one of two kinds of multiple referral: sequential referral, under which the legislation is referred to one committee, then another, and so on; and split referral, in which the specific parts of the legislation are referred to different committees.¹²⁴ In the Senate, joint, sequential, and split referrals are also allowed, but by custom, multiple referrals require unanimous consent.¹²⁵

The formal structure of committee referrals, particularly in the House, creates an incentive for drafters to work across committees when drafting legislation that spans across committee jurisdiction. Members of Congress know that if they want to get legislation that spans multiple committees passed, they will eventually need the assent of members of the other committees (either because the legislation will be split in referral or will go through sequential referral). As a result, sometimes drafters will want to engage in *ex ante* negotiations with members of the relevant committees, so that their leg-

120 *Id.*

121 *Id.* §§ 2032–33.

122 *See, e.g.*, Larry Schweiger et al., *Water Protection: Federal Law Would Again Let Army Corps Run Roughshod Over Environment*, SAN JOSE MERCURY NEWS (May 3, 2013), http://www.mercurynews.com/opinion/ci_23168131/; *see also* NAT'L WILDLIFE FED'N, NATIONAL WILDLIFE FEDERATION ANALYSIS WATER RESOURCES DEVELOPMENT ACT OF 2013 — S. 601 (2013), http://www.nwf.org/pdf/WRDA/NWF_MemoS_601_WRDA_2013Final_40513.pdf; ROBERT W. ADLER ET AL., NAT'L WILDLIFE FED'N, STRIKE HARMFUL STREAMLINING PROVISIONS IN S.601 (Apr. 8, 2013), https://www.nwf.org/pdf/WRDA/WRDA%202013%20Streamlining_Professors%20Letter_Final_04-08-13.pdf (letter written to express concerns with sections 2033 and 2032 of the proposed Water Resources Development Act of 2013).

123 JUDY SCHNEIDER, CONG. RESEARCH SERV., RL30945, HOUSE AND SENATE RULES OF PROCEDURE: A COMPARISON 1 (2008).

124 *Id.*

125 *Id.* at 2.

islation can more smoothly move through each committee. Even in the Senate, where multiple referrals are less common, MCs will want to engage in such consultations across committees in order to build support (or at least prevent opposition) to their legislation because it encroaches on the turf of another committee. A frustrated committee chair who was not consulted has considerable power to delay or even block a bill on the Senate floor.

As an example, consider the initial drafting in the House of Representatives of what ultimately became the Affordable Care Act. The House Energy and Commerce, Ways and Means, and Education and Workforce Committees all have jurisdiction over health policy issues.¹²⁶ In March 2009, in order to prevent the “turf fights” that had (among other things) plagued the Clinton health care reform effort in the early 1990s, the chairmen of these committees all agreed to jointly draft the legislation, which would then be introduced into all three of their committees.¹²⁷ By early June, they had produced a first draft of the legislation, and after negotiations with the House Democratic leadership and various groups within the Democratic caucus, they ultimately reported the legislation out of each committee in July 2009.¹²⁸

C. Outsider-Based Drafting

Despite the idealized understanding of Congress, in which all legislation emerges from public-spirited legislators, scholars have long understood that outside groups sometimes provide first drafts of legislation.¹²⁹ For the most part, scholars of legislation have identified interest groups and academic experts as legislative drafters.¹³⁰ But there are other sources of outsider drafting. The executive branch, for example, sometimes drafts entire pieces of legislation and, in some cases, the executive branch and private industry will even jointly work together to draft legislation.

1. Executive Branch Authorship

Despite the conventional understanding of Congress as the primary source of legislation, often, the executive branch will draft entire pieces of

126 *Committee History*, HOUSE ENERGY & COMMERCE COMM., <http://energycommerce.house.gov/about/committee-history> (last visited Oct. 31, 2014); *Health*, HOUSE COMM. ON WAYS & MEANS, <http://democrats.waysandmeans.house.gov/subcommittees/health> (last visited Oct. 31, 2014); *Workforce Issues: Health Care*, HOUSE COMM. ON EDUC. & THE WORKFORCE, <http://edworkforce.house.gov/issues/issue/?IssueID=9933> (last visited Oct. 31, 2014).

127 BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 187* (4th ed. 2012); John Cannan, *A Legislative History of the Affordable Care Act: How Legislative Procedure Shapes Legislative History*, 105 *LAW LIBR. J.* 131, 137 (2013).

128 SINCLAIR, *supra* note 127, at 188–90; Cannan, *supra* note 127, at 137.

129 *See, e.g.*, Nourse & Schacter, *supra* note 15, at 587, 610–13.

130 *See supra* note 23.

legislation and transmit that legislation to Congress.¹³¹ At that point, MCs (or Committees) will take the draft, edit it, make revisions, and eventually introduce it as their own. But members of the executive branch write the original draft. The functional reasons why both MCs and the executive find executive branch authorship valuable are not surprising. First, members of the executive branch have considerable expertise in the subject areas they cover—likely far more than their counterparts in Congress—and they are tasked with implementing the laws, so they have a granular understanding of what needs to be improved in existing laws. Second, members of Congress do not have the resources, time, or personnel to thoroughly engage some of the most complex policy issues. Finally, for the executive, participation in drafting has important policy benefits: it enables the executive to shape the laws that it will be implementing (thereby aligning them with its policy preferences), coordinate between departments and agencies that might have a stake or expertise on the particular issue (with either OMB or the White House taking that coordination role), and it allows executive branch officials to help ensure that laws are not filled with mistakes and problems—at least in the first draft.

This practice is longstanding. During the late 1930s, executive branch officials were highly involved in drafting legislation and even in ghostwriting congressional reports and floor speeches.¹³² Edwin Witte, executive director of Franklin Roosevelt’s Committee on Economic Security in 1934 and 1935, went so far as to comment in 1942 that

[b]eyond question many important statutes enacted by Congress have their origin in administrative departments and congressional action is profoundly influenced by the wishes of these departments. To my personal knowledge this has been the situation as to substantially all social security legislation and also, I believe, as to most of the agricultural, banking, credit, defense, housing, insurance, public utility, securities, tax, and much other legislation of the last five or eight years.¹³³

Witte went on to describe the close relationship between agency staff and Congress, including agency participation in every stage of drafting—from initial idea development to floor debates to final negotiations.¹³⁴

Although MCs now have larger staffs, enabling staff to take a greater role in drafting, the practice of executive drafting still continues. In a recent arti-

131 There is some constitutional authority for this practice. The President has Article II authority to “recommend to [Congress’s] Consideration such Measures as he shall judge necessary and expedient.” U.S. CONST. art. II, § 3. In spite of the formal authority, the conventional textbook account of the legislative process does not adequately account for the executive role in drafting the laws and legal scholarship has been insufficiently attentive of this phenomenon as well. See *infra* Section IV.C.

132 Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266, 282, 339–40 (2013).

133 *Id.* at 340 (alteration in original) (quoting Edwin E. Witte, *Administrative Agencies and Statute Lawmaking*, 2 PUB. ADMIN. REV. 116, 116 (1942)).

134 *Id.* at 340–41.

cle, Professor Christopher Walker surveyed agency rule-writers and, among other things, asked about their role in the legislative process.¹³⁵ Fifty-nine percent of the agency rule-drafters responded that their agency “always” or “often” plays a policy or substantive part in the drafting of statutes within their jurisdiction.¹³⁶ An additional twenty-seven percent believed that their agency “sometimes” plays such a role.¹³⁷

Perhaps the best recent example is the Dodd-Frank Act of 2010. In the wake of the financial crisis and the election of President Obama, the President and Representative Barney Frank, Chairman of the House Financial Services Committee, met in February 2009 and agreed that the White House would take the lead on the first draft of regulatory reform legislation. According to Frank, the President suggested that, given the complexity of the issue, it would be better if the executive drafted the legislation. Frank was eager to accept that offer.¹³⁸ Over the next few months, White House and Treasury Department staff drafted first a white paper outlining the basic structure of financial reform, and then ultimately an initial draft of the legislation.¹³⁹ Frank then picked up the draft and proceeded with the usual legislative process of wrangling members and interest groups in order to get the legislation passed. During the negotiations, executive branch officials remained involved, often discussing particular elements of the draft legislation with members of Congress and their staffs.¹⁴⁰

2. Private-Executive Authorship

Legislative drafts can also originate from an agreement between the executive branch and private industry, with consultation from other stakeholders. Perhaps the best examples are the User Fee Agreements (UFAs) that fund and govern certain Food and Drug Administration (FDA) processes. Take the Prescription Drug User Fee Act (PDUFA).¹⁴¹ Under PDUFA, first passed by Congress in 1992, the FDA charges user fees to prescription drug manufacturers.¹⁴² The fees go toward processing drug applications (and are supplementary to regular FDA appropriations).¹⁴³ In addition, the law requires the FDA to meet certain performance goals and targets that are jointly agreed to by industry and the FDA and then presented

135 Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999 (2015).

136 *Id.* at 1037.

137 *Id.*

138 ROBERT G. KAISER, ACT OF CONGRESS 37 (2013).

139 *Id.* at 85–86, 115.

140 For a personal account of some of these conversations, see TIMOTHY F. GEITHNER, STRESS TEST: REFLECTIONS ON FINANCIAL CRISES (2014).

141 21 U.S.C. § 379 (2012).

142 SUSAN THAUL, CONG. RESEARCH SERV., R42366, PRESCRIPTION DRUG USER FEE ACT (PDUFA): 2012 REAUTHORIZATION AS PDUFA V 1 (2013), <http://www.fas.org/sgp/crs/misc/R42366.pdf>.

143 *Id.*

to Congress.¹⁴⁴ The PDUFA has since been reauthorized four times, most recently in 2012.¹⁴⁵ The 2012 reauthorization process is indicative of the overall model. The FDA met with industry and stakeholders frequently to come to agreement on legislative language, performance goals, and user fee levels.¹⁴⁶ In September 2011, the FDA posted the draft agreement on its website, subject to review by the Secretary of Health and Human Services (HHS) and the Office of Management and Budget (OMB).¹⁴⁷ In January 2012, the Secretary of HHS submitted new draft legislative language and the performance-goals document to Congress, at which point the relevant committees took up the draft legislation, marked it up, and eventually passed the legislation.¹⁴⁸

3. Private Authorship

Legislative drafts can also emerge from private authors—interest groups, industry, academics, individual policy experts, or bodies of experts like the Administrative Conference or the American Law Institute. In these cases, the draft is passed through to an MC's office, and the MC adopts the draft as her own. The practice is frequent, though examples tend not to be public because MCs do not want to concede they let interest groups draft their legislation. Still, there are some examples: Citigroup has been reported to be the author of the Swaps Regulatory Improvement Act,¹⁴⁹ and Harvard Law Professor Jeannie Suk has been reported to have helped author the Innovative Design Protection and Privacy Prevention Act, legislation based on an article she published.¹⁵⁰

144 *Id.* at 1, 5.

145 *Id.* at 1.

146 See Press Release, U.S. Food & Drug Admin., FDA Completes Work on Three Drug User Fee Programs (Jan. 13, 2012), <http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm287723.htm>. For information on meetings with stakeholders, see *PDUFA Meetings*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/ForIndustry/UserFees/PrescriptionDrugUserFee/ucm117890.htm> (last updated Aug. 13, 2015).

147 Patrick Frey, Acting Director, Office of Planning and Analysis, U.S. Food & Drug Admin., Remarks at Public Meeting for the Prescription Drug User Fee Act (PDUFA) Reauthorization 7 (Oct. 24, 2011), <http://www.fda.gov/downloads/ForIndustry/UserFees/PrescriptionDrugUserFee/UCM279724.pdf>; ROBERT CHURCH & LYNN MEHLER, HOGAN LOVELLS, THE FDA DRUG LAG 42 (May 18, 2011), <http://www.hoganlovells.com/files/Uploads/Documents/FDA%20Drug%20Lag%20seminar%20May%2018%202011.pdf>.

148 THAUL, *supra* note 142, at 1–2.

149 Swaps Regulatory Improvement Act, H.R. 992, 113th Cong. (2013); see Erika Eichelberger, *See How Citigroup Wrote a Bill So It Could Get a Bailout*, MOTHER JONES (May 24, 2013), <http://www.motherjones.com/politics/2013/05/citigroup-hr-992-wall-street-swaps-regulatory-improvement-act>; Eric Lipton & Ben Protess, *Banks' Lobbyists Help in Drafting Financial Bills*, N.Y. TIMES DEALBOOK (May 23, 2014), http://dealbook.nytimes.com/2013/05/23/banks-lobbyists-help-in-drafting-financial-bills/?_r=0.

150 Innovative Design Protection Act of 2012, S. 3523, 112th Cong. (2012); see Christopher Muther, *If the Shoe Fits, They'll Copy It*, BOS. GLOBE (Mar. 7, 2010), http://www.boston.com/lifestyle/fashion/articles/2010/03/07/should_the_law_protect_fashion_from_knockoffs/.

D. A Note on Technical Assistance

Regardless of which path a first draft of legislation takes, MCs and staff can—and frequently do—get technical help in drafting, editing, and revising legislative drafts. Technical drafting assistance can come from a variety of sources, including academics and interest groups, but the two central sources are legislative counsel and the executive branch. Until recently, legislative counsel’s role has gone almost completely unnoticed.¹⁵¹ Recall that legislative counsel consists of professional drafters of legislation, organized within each chamber of Congress and by subject matter.¹⁵² Legislative counsel can be asked to draft entire legislation based on simple policy goals, it can be asked to take a draft written through any of the processes described in Part II and edit or revise the draft using their technical expertise, or it can be ignored altogether.¹⁵³

The second source of technical help is the executive branch, through what is referred to as “technical assistance” (or “TA” in legislative parlance). Technical assistance refers to help from the executive branch on specific (hence technical) policy or drafting issues. For example, the head of an office at the FDA can tell congressional staff how existing provisions are being interpreted, how a suggested draft would change that interpretation, what the policy consequences would be, and how resource-intense a new policy would be for the agency. Technical assistance can also extend to the agency drafting, editing, or commenting on legislative language. It is important to note that the White House and OMB might not always pre-clear technical assistance; contacts between agency officials and congressional staff can be extensive without rising to the level of importance or formality that leads to White House or OMB involvement. For example, seemingly innocuous background like data on the number and frequency of inspections of an industry and the cost of each inspection might radically influence congressional staff’s thinking about the policy choices in a draft piece of legislation.

The practice of providing technical assistance is pervasive. In his survey of agency rule-drafters, Christopher Walker reports that 78% of drafters said their agency “always” or “often” provides technical assistance during the legislative drafting process—with another 15% believing that their agency “sometimes” does so.¹⁵⁴ Despite its importance in the drafting process, technical assistance has hitherto only been mentioned in passing in legal scholarship—and even then, infrequently.¹⁵⁵

151 See *supra* note 49.

152 Bressman & Gluck, *supra* note 18, at 739.

153 See, e.g., Nourse & Schachter, *supra* note 15, at 588–89 (“On some occasions, the staffer would send a memo describing what the proposed legislation would do and then would receive back a first draft from the Legislative Counsel’s office. More typically, however, a staffer would prepare a first draft and then forward it to Legislative Counsel attorneys for what was repeatedly characterized as ‘stylistic’ or ‘technical’ input . . .”).

154 Walker, *supra* note 135, at 1037.

155 See Carol J. Haley, *The Minor Use and Minor Species Animal Health Act: Past, Present, and Future*, 61 FOOD & DRUG L.J. 13, 22 (2006) (noting that “[a]lthough FDA was not permitted

Congressional staff rely on executive branch technical assistance for a variety of reasons. Executive branch departments and agencies have considerable expertise in their fields. Policymakers and lawyers at departments and agencies have a comparative institutional advantage vis-à-vis congressional staff—and interest groups and academic or policy experts. They are better positioned to understand the interpretive challenges in a statutory draft, the practical challenges likely to be faced in implementing a statute, the relationship between the agency’s different statutory mandates, and the agency’s existing financial and personnel resources and the resources necessary for new legislative mandates. Each of these factors is critical to successful statutory implementation, and by virtue of the fact that they implement statutes in a particular field—and are closer to the street-level bureaucrats¹⁵⁶ doing the implementation—the executive branch’s institutional competence in drafting is significant.

Perhaps the most immediate implication of the availability and use of technical drafting help is that professionals with policy or drafting expertise are often involved in writing legislation. In the case of legislative counsel, it is unclear how much of an impact this has. One recent study, for example, found that legislative counsel members “had no greater knowledge of most of the [substantive] canons [of interpretation] than the [non-Legislative Counsel]” committee staff.¹⁵⁷ At the same time, however, Legislative Counsel are generally considered to have substantial expertise and institutional memory when it comes to specific technical drafting practices, such as identifying necessary cross-references, linkages to other statutes in the same subject-area, and language usage across a statute or multiple statutes.¹⁵⁸ With respect to technical assistance, the implications are more interesting. The fact that the executive branch—the very departments and agencies that are tasked with implementing and interpreting the legislation—is helping write

to draft or lobby” for the Minor Use and Minor Species Animal Health Act, the FDA’s Center for Veterinary Medicine “could and did provide technical assistance”); Uwe Kischel, *Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law*, 46 ADMIN. L. REV. 213, 253 (1994) (mentioning that agencies can sometimes provide technical assistance to MCs in the drafting process); Diana E. Murphy, *Inside the United States Sentencing Commission: Federal Sentencing Policy in 2001 and Beyond*, 87 IOWA L. REV. 359, 391 (2002) (noting that the Sentencing Commission’s Office of Legislative Affairs provides Congress with “technical assistance in drafting legislation that may impact the [Sentencing] Guidelines”); Lydia S. Amamoo, Note, *Why Brokers Are Not Investment Advisors: ERISA’s Fiduciary Duty Only Applies to Those Who Provide Investment Advice to Pension Plans*, 9 CARDOZO PUB. L. POL’Y & ETHICS J. 119, 146 n.144 (2010) (“The [Department of Labor’s] Plan Benefits Security Division, for example, does extensive legislative work on the ERISA statute and regulations including ‘providing technical assistance and support to congressional staffs’”); Note, *Toward New Modes of Tax Decisionmaking—The Debt-Equity Imbroglia and Dislocations in Tax Lawmaking Responsibility*, 83 HARV. L. REV. 1695, 1710–11, 1711 n.81 (1970) (noting that “detailed recommendations [for tax legislation] typically come from the administration” in the form of “technical assistance”).

156 MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY (1980).

157 Bressman & Gluck, *supra* note 18, at 744.

158 *Id.* at 746.

that legislation is contrary to the conventional principal-agent models of congressional-executive relations. The consequences of this fact are explored at greater length in Part IV.

III. THE CHOICE OF DRAFTING PROCESS

With so many different approaches to the drafting process, the question invariably is why a member of Congress chooses a particular drafting strategy. The answer depends on a variety of factors, and these factors can cut in different directions. For example, an important, complex piece of legislation might be urgently necessary in a crisis. The desire for speed suggests less extensive drafting processes, but the need for sound policy and the complexity of the issue suggest more extensive processes. As a result, there is no mechanical formula in making these choices, but it is still possible to identify the most important factors. This Part outlines the factors that influence the decision of which drafting process to adopt.

A. *The Purpose of the Bill*

Not all bills are drafted with the purpose of enactment into law. Often, members of Congress know the likelihood of enactment is low, but they still want to draft a bill for political, personal, or policy reasons. These reasons, independent of probability of enactment, can influence the choice of drafting process. Politically, a member of Congress might want to pass a “message bill,” a bill that makes a political statement—sends a message—even if it has little chance of enactment.¹⁵⁹ Message bills might burnish the MC’s credentials with an ideological faction or significant group of supporters, be useful during an election year as a sword or shield against opponents, or might just put a political stake in the ground to pull the public conversation in their direction. As a drafting matter, message bills might frequently be partisan or sole-authored, and they are less likely to involve executive authorship or technical assistance. Members also often draft legislation to address constituent needs or preferences. Thus, one frequently sees draft bills introduced by two or more members from the same state.¹⁶⁰ Bills driven by constituent needs are most likely to be sole-authored or legislative partnerships (partisan or bipartisan), with MCs participating based on the constituency whose needs are at issue. In addition, members introduce bills to satisfy interest groups. When interest group preferences motivate MCs, private authorship by the interest group itself may be likely.

Members of Congress have personal goals in drafting legislation as well. Members often care about specific issues because of a personal connection, passion, or area of expertise.¹⁶¹ More strategically, MCs sometimes have a

159 See Editorial, *supra* note 75; Evans & Oleszek, *supra* note 75.

160 See, e.g., A Bill to Amend the Grand Ronde Reservation Act to Make Technical Corrections, and for Other Purposes, S. 416, 113th Cong. (2013) (introduced by Jeff Merkley (D-OR) and Ron Wyden (D-OR)).

161 VOLDEN & WISEMAN, *supra* note 71, at 168–78.

personal goal of adopting an issue as their own and being identified as the leader on the issue in their chamber.¹⁶² As a result, MCs might introduce legislation on a topic to signal to others that the topic is theirs—and as a matter of comity, members in the same chamber, of the same party, will likely defer to their colleague. These personal goals all cut in the direction of sole authorship in drafting.

Finally, members can have policy goals—independent of enactment—in drafting bills. Sometimes a draft bill is designed to build foundation for future legislation—in other words, it serves as an on-the-shelf draft that is a starting point for a future bill that might actually have the chance of passing. Depending on the salience and ripeness of the issue, different drafting processes might be preferable. On an important issue that is ripe, a more extensive committee process might be favorable. On an obscure issue, sole or partnership drafting will be more likely. In addition, MCs can use legislation as a part of oversight. Draft legislation can act as a focal point to push an agency to revise its policies. The bill places the agency on notice that a member of Congress feels strongly about a topic. In these cases, the drafts are likely to be sole-authored, part of a legislative partnership, or privately authored.

B. Legislative Politics

The insider politics of Congress are another factor in choosing a drafting process. A full accounting of factors here is impossible, given the constantly shifting political context within Congress, but there are some overarching consistent features. Foremost is the question of whether a bipartisan process will make the bill more likely to get the support necessary for passage. In the Senate, bipartisan drafting processes—partnerships, gangs, bipartisan committee drafting—can help the enactment process because of both perception (the appearance and reality of common ground) and votes (the need to gain the votes of members from the other political party to defeat a filibuster).¹⁶³ In some cases, however, bipartisanship in the Senate is unnecessary: the majority might have the votes or know that it will be unable to get bipartisan cooperation at the drafting stage. In these cases, partisan committee processes or other partisan drafting might be more likely. In the House of Representatives, the strong majoritarian structure makes bipartisanship less necessary, even for bills that have a chance of passing.

While it is often recognized that Congress is a “they” not an “it,”¹⁶⁴ sometimes it might be more useful to say Congress is really composed of 535 “I’s.” In a Congress of individuals, personal relationships often define the choice of drafting process. Some members of Congress might be leaders on

162 See *id.* at 136–37; see also JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* 39 (2d ed. 1995).

163 See KREHBIEL, *supra* note 89.

164 Kenneth A. Shepsle, *Congress is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

particular issues, have a large public platform on certain issues, or have credibility or power (formal or informal) within a committee or in a chamber—all of these are factors that can influence the choice of drafting. For example, consider a Senator interested in passing environmental legislation, but who isn't on the Environment and Public Works (EPW) committee. One option for increasing the likelihood of ultimate passage is to jointly author the environmental bill with a member of the EPW committee. The EPW member, having a stake in the bill as a co-author, will be more likely to push the bill in committee and attempt to attach it to bills that are moving toward passage. Or take a message bill, intended for political purposes during an election year. Members of Congress might work with an MC who has a particularly broad base of public support and gets extensive media coverage so that when the bill is introduced, it gets more attention. The result is that the bill becomes an election issue and the MCs can trumpet their support for it during their campaigns.¹⁶⁵ While they will be partly overshadowed by the more popular MC, they gain access to audiences they previously could not reach—and the salience of the politically useful issue rises. A still more personality driven choice might depend on an MC's interests and biography. Recall that MCs sometimes draft bills out of personal interest.¹⁶⁶ If another MC wants an ally in, or wants to curry favor with, a member who has a personal interest in an issue, that MC might engage in a legislative partnership with the personally interested member. The personal history of one member can therefore drive the drafting choices of another.

Finally, drafting choices are in part a function of the desire, or need, for stakeholders to be involved in the process or to support the bill. The various drafting choices provide a spectrum of options with respect to stakeholder involvement. On the one hand are bills drafted through private authorship by an interest group itself. On the other hand are bills for which interest group input is necessary (as opposed to simply doing the group's bidding). In these cases, any of the procedures can be adopted, as long as staff engage with stakeholders. Some processes, like the legislative notice-and-comment process in bipartisan committee drafting,¹⁶⁷ are relatively formal and involve a wide range of interests. Others involve fewer: a partisan committee process, for example, would take into account the views of stakeholders that generally support that party, not the views of stakeholders on the other side. Still other processes are informal: a staffer writing a sole-authored bill can engage with experts and stakeholders to gain insight and input into the legislative text.

The critical question is which interests the MC wants to involve in the drafting process. Involving stakeholders has a few benefits. First, early involvement allows stakeholders to provide input and shape the bill, making it more likely they will support it. Second, early involvement enables stakeholders to be ready to support the bill publicly upon its introduction. Finally,

165 See Editorial, *supra* note 75.

166 See *supra* notes 159–60 and accompanying text.

167 See *supra* subsection II.B.2.

involvement in drafting makes it more difficult for stakeholders to oppose the legislation strongly, even if they ultimately do not agree with it.

Note also that the legislative notice-and-comment feature is unlikely to occur outside of bipartisan committee or gang-based drafting. This is due to the political dynamics involved in drafting. Bipartisan committee drafting and gang-based drafting enable a notice-and-comment process because both parties tie themselves to the bill draft. As a result, both parties can jointly hear feedback, jointly make changes, and jointly claim they are being responsive to stakeholders. In contrast, consider the use of notice-and-comment in partisan committee drafting. If a partisan committee draft is made public for comment, the draft could be attacked both by stakeholders and by members of the opposition party. Any subsequent change in the draft would amount to the drafters backing down vis-à-vis the opposing party prior to engaging them in legislative negotiations (remember that legislative notice-and-comment takes place prior to the bill being introduced). Moreover, the public draft puts the drafters on record as supporting a set of policies that can then be attacked by the opposing party. These political problems do not occur if stakeholder feedback is privately solicited. They also do not occur in a bipartisan process because both sides have already attached themselves to the bill; any negotiation is only with stakeholders.

C. *Sound Policymaking*

The choice of drafting process is also a function of the desire for sound policymaking. First, the various drafting processes involve different levels of expertise. Most prominently, executive authorship or technical assistance and private authorship place drafting in the hands of knowledgeable experts. At the same time, the gains in expertise trade off against the principal-agent drafting problem, under which the MC might not prefer (or understand fully) the expertly drafted bill. Second, drafting processes involve different levels of diversity in input. Some processes, like bipartisan committee drafting, involve extremely diverse input from people of both parties, many regions of the country, and different stakeholders (either directly through comments or indirectly via the concerns of MCs). Legislative gang processes similarly can lead to diversity of input. Recall that legislative gangs are not necessarily centered on the median legislator or even the pivotal legislator. They incorporate important members of each party, depending on the topic. Diversity in drafting, as with diversity in decisionmaking, might lead to better policy.¹⁶⁸

D. *Efficiency*

Another factor is efficiency. Some drafting processes are more costly than others in terms of time, energy, effort, and speed. Committee

168 See SCOTT E. PAGE, *THE DIFFERENCE* (2007); Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1 (2009).

processes, for example, are more costly than sole authorship, which in turn is more costly than private authorship. Pathways that involve multiple drafters, bipartisan drafting, and committee drafting are more costly than processes that involve fewer drafters, operate within the same party, and without committee constraints. In situations where efficiency—and particularly speed—is important, drafting is more likely to follow the less costly pathways. In situations where there is less urgency and there is time to spend energy and effort on drafting, more costly drafting pathways are more likely.

E. *The Nature of the Issue*

The nature of the issue in the bill is another factor in determining the drafting pathway. Depending on the importance and the complexity of the issue, different pathways might be preferable. When an issue is particularly important or complex, the need for external drafting and stakeholder input will likely be greater for two reasons: First, as a matter of good policymaking, input from experts and stakeholders will help ensure the policy is workable (or at least not unworkable). Second, as a matter of politics, on important or complex issues, it is often helpful to have external validators for the bill—people who can vouch for the soundness of the policy against skeptics or opponents—and to build a coalition that will support the bill even after it is passed into law. Thus for simple, symbolic actions, such as commemorative resolutions, drafters are often individuals or legislative partnerships.¹⁶⁹ But for complex, major pieces of legislation, drafting often involves executive branch drafting, input from interest groups, and an extensive committee process.¹⁷⁰

F. *Idiosyncratic Influences*

There are also idiosyncratic influences on the choice of drafting processes. Given that Congress is often best understood as 535 “I’s,” unsurprisingly MCs are sometimes rivals, sometimes friends. Some have personal preferences on whom they like to work with or how they operate. Some are steadfastly committed to ideology or bipartisanship; some are more pragmatic. Each of these personal characteristics can influence the choice of drafting process—sometimes in irrational or unpredictable ways.

Importantly, these interpersonal relationships are also critical at the level of the MCs’ staffs. Staff members between offices might have a friendly relationship or a rivalry. They might have close personal ties, such as having attended school together or having worked together on a campaign, or close professional ties from prior work together on other pieces of legislation or prior work as former colleagues for a single member of Congress. These personal relationships can also impact the choice of drafting process, as the

169 See, e.g., A Resolution Recognizing the 50th Anniversary of the Congressional Designation of Bourbon Whiskey as a Distinctive Product of the United States, S. Res. 446, 113th Cong. (2014).

170 See, e.g., KAISER, *supra* note 138 (describing the Dodd-Frank Act legislative process).

staff will often recommend a drafting process they think will be more likely to proceed smoothly.

G. *The Politics of Technical Assistance and the Principal-Agent Drafting Problem*

Another factor is whether reliance on legislative counsel or the executive branch to draft legislation or provide technical assistance in drafting will create political dynamics that may be favorable or unfavorable. Importantly, technical assistance may not always be technical. Because any legislation is deeply connected to policy and politics, technical help also intersects with policy and politics.

First, legislative counsel's role and influence depends on the broader political environment. While some legislative counsel members are policy experts with considerable knowledge and expertise (particularly in technical areas, like the Social Security Act), others are not. Their degree of policy expertise does shape their influence over drafting. Some staff even worry that because of their lack of statutory expertise, they cannot evaluate legislative counsel's drafts to ensure they follow the desired policies.¹⁷¹ At the same time, legislative counsel can be constrained by politics. Staff sometimes insist on particular language (even if not technically optimal) for policy or political reasons.¹⁷² When particular language—even if suboptimal—is required to make a legislative deal or is demanded by an interest group who drafted the language, legislative counsel's role may be less effective.¹⁷³

Executive branch technical assistance suffers from a different concern. By consulting the executive branch, congressional staff create a principal-agent drafting problem that scholars have not previously noticed. Executive branch members—the agent of the congressional staff for technical assistance—have independent policy preferences based on institutional interests, the President's priorities, or their own personal views. As a result, executive branch members can use supposedly “technical” advice to shape legislation at a substantive level. One of the consequences is that congressional staff are more wary of technical assistance coming from executive branch members of the opposition party.¹⁷⁴ However, this healthy skepticism does not mean that technical assistance will never be used or requested during times of divided government, as there are still significant benefits to gaining perspective from the people who will be implementing and interpreting the legislation.¹⁷⁵

Finally, technical help from legislative counsel and the executive branch also factor into decisions on drafting processes because they can be a tactic for congressional staff to accomplish policy goals during internal negotiations on legislative drafts. Assume two MCs have different policy preferences

171 Bressman & Gluck, *supra* note 18, at 743.

172 *Id.* at 747.

173 *Id.*

174 Cf. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006).

175 See Jacob E. Gerson & Adrian Vermeule, *Delegating to Enemies*, 112 COLUM. L. REV. 2193 (2012).

and that the committee-based drafting process leads to a conflict between the committee chair's preferences (or the majority's preferences) and the preferences of an MC of the same political party. If the committee staff member does not want to confront the LA immediately, she can offer that they agree to defer the decision until they receive a legislative draft back from legislative counsel. By eliding policy and technical drafting recommendations, staff use legislative counsel or executive branch technical assistance as a sword or shield against other staff members. Thus, when the draft returns from legislative counsel, instead of arguing on the policy merits, the committee staff member can appeal to authority, arguing to the LA for the dissenting MC that legislative counsel (or the executive branch) provided technical help that necessitates drafting in a specific way. While this tactic may seem far-fetched, in the context of LAs who may not have law degrees or extensive experience with statutory drafting—and in a context in which dissent and disagreement have (even minor) political costs in a repeat game—the tactic can help the committee staffer diffuse the situation without engaging in a policy confrontation and allow the LA to avoid a direct confrontation.

IV. LEGISLATIVE DRAFTING AND LEGAL DEBATES

The typology of the origins of legislation provides more than just a deeper understanding of the legislative process. Understanding the origins of legislation has an impact on important debates about and features of the administrative state. This Part identifies three areas in which a deeper understanding of the origins of legislation adds to or requires rethinking existing debates. First, it shows how diversity in drafting contributes to debates over theories of statutory interpretation. Second, it argues that legislative origins can illuminate methodological issues about the use and reliability of legislative history. Finally, it explores how the executive role in drafting might require revisiting debates about delegation and deference.

A. *Revisiting Theories of Statutory Interpretation*

Given that statutory interpretation questions are a significant part of the Supreme Court's docket,¹⁷⁶ it is no surprise that theories of statutory interpretation have been hotly debated. Traditionally, the debate in the field of statutory interpretation focused on the differences between textualism, intentionalism, purposivism, dynamic theory, and imaginary reconstruction. In recent years, the clash between proponents of these theories (and particularly between textualists and purposivists) has become less and less fierce, with scholars now largely agreeing that textualism and purposivism are converging.¹⁷⁷ While it is beyond the scope of this Article to engage in a full

176 ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 13–14 (1997).

177 Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment Within Both*, 99 *CORNELL L. REV.* 685 (2014); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 *COLUM. L. REV.* 1 (2006); see also Caleb Nelson, *What is Textualism?*, 91 *VA. L. REV.* 347 (2005)

debate between textualism and purposivism, it is worth pointing out a few places in which an understanding of the origins of legislation can contribute to these debates.

First, this account of the origins of legislative drafting might be taken as evidence in support of textualist arguments. Textualism can be rooted in a variety of justifications, including textual constitutional requirements¹⁷⁸ and structural concerns linked to the nondelegation doctrine.¹⁷⁹ But textualism can also be justified based on judicial economy grounds—that the complexity of the legislative process imposes significant costs on interpreters and that these costs outweigh the benefits of engaging in purposivist endeavors.¹⁸⁰ The many different pathways for legislative drafting and sources involved could be seen as support for the judicial economy justification for textualism, though it also requires believing that the costs outweigh the benefits even as greater clarity about the legislative process reduces the costs of judicial understanding.

On the other hand, there are strong arguments that attention to the legislative process and the use of legislative history themselves have constitutional roots.¹⁸¹ For adherents to this view, the origins of legislation provide greater information and clarity to the legislative process, deepening and sharpening knowledge of how the process works and what materials might be relevant in particular cases.

Finally, the variety in the origins of legislative drafts contributes to scholarship that is increasingly pointing toward an “anti-universalist” approach to statutory interpretation.¹⁸² Most prominent theories of statutory interpretation are similar in that they are “universalist” with respect to the procedures used in Congress.¹⁸³ That is, the usual theories of interpretation generally do not assume that different statutes or statutory provisions should be interpreted differently based on congressional procedure or substantive issue area.

(arguing that the differences between textualists and intentionalism are less categorical than assumed, and largely turn on the rules versus standards debate).

178 Article I, Section 7 outlines the legislative process in a formal way that some textualists argue is a source of their interpretive method. See John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 99 (2006).

179 John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 706–07 (1997) (linking a non-delegation justification to bicameralism and presentment requirements).

180 Sunstein & Vermeule, *supra* note 7, at 887, 921–22, 929–31 (arguing that the judiciary does not have the capacity to understand the workings of Congress).

181 Article I, Section 5 gives Congress the power to “determine the Rules of its Proceedings,” and requires each House to “keep a Journal of its Proceedings, and from time to time publish the same.” U.S. CONST. art. I, § 5, cl. 1, 3. For a discussion of these clauses as the foundation for legislative history usage, see James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1217–24 (2010).

182 See Bressman & Gluck, *supra* note 18, at 798.

183 See *id.* at 797.

The universalism of the leading theories of statutory interpretation stems largely from the legal fiction of a unitary drafter with singular legislative intent¹⁸⁴—despite the fact that most scholars embrace Max Radin’s classic realist claim that there is no such thing as a unified, singular “legislative intent.”¹⁸⁵ The legal process school responded to the realist attack by interpreting legislative intent not as the particular intent of the legislature, but as the more general intent of “reasonable persons pursuing reasonable purposes reasonably.”¹⁸⁶ Theories of dynamic interpretation¹⁸⁷ and imaginative reconstruction¹⁸⁸ likewise assume a discernable legislative intent—albeit one that is modernized to address changed circumstances or unforeseen challenges. Textualists reject legislative intent per se, in favor of the statutory command of the legislature.¹⁸⁹ But they, too, embrace a universalist doctrine—textual plain meaning. Textualists assume a unitary drafter because, as Professor John Manning has said, “the legislative process is simply too complex and too opaque to permit judges to get inside Congress’s ‘mind.’”¹⁹⁰ Even antifoundational, eclectic theories of statutory interpretation—such as the pragmatic approach favored by Eskridge and Frickey¹⁹¹—assume a unitary drafter. Eskridge and Frickey take a highly contextual approach when it comes to “textual, historical, and evolutive evidence,” but they do not wade into the intricacies of legislative structure and process.¹⁹²

More recently, scholars have begun to question whether the prevailing universalism in statutory interpretation makes sense with respect to congressional procedure and practice.¹⁹³ Professors Bressman and Gluck have argued for abandoning the “universalist” approach that assumes a single regime “applies to all statutory drafters, types of statutes, legislative processes,

184 Gluck & Bressman, *supra* note 9, at 915 (“For instance, the fiction of the unitary drafter—the idea that all laws are drafted by the same group of legislators—undergirds a huge number of interpretive rules applied by textualists and purposivists alike. But this principle, as even the Justices who use it admit, is most certainly false. So, too, is the notion of a single ‘congressional intent,’ although purposivists continue to assert that such a fiction is useful nonetheless.”).

185 Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 872 (1930). On fictions, see Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 503–04 (1989).

186 HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS 1378* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

187 *E.g.*, WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 50 (1994).

188 *E.g.*, Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817 (1983).

189 SCALIA, *supra* note 176, at 31 (“I object to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of the law.”).

190 John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2390 (2003).

191 William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990).

192 *Id.* at 322.

193 See Bressman & Gluck, *supra* note 18; Todd D. Rakoff, *Statutory Interpretation as a Multifarious Enterprise*, 104 NW. L. REV. 1559 (2010).

subject matters, and agencies.”¹⁹⁴ They note that there is an anti-universalist tendency already emerging, given the increasing number of subject-specific canons of statutory interpretation,¹⁹⁵ and they suggest that statutory interpretation should go further and consider committee jurisdiction, subject area, and whether the legislation was omnibus, ordinary, or appropriations.¹⁹⁶ Professor Nourse has identified other granular factors in the congressional process: specificity of the provision, the latest time in which the provision was debated, and whether the author of legislative history was a winner or loser in the debate.¹⁹⁷

While this is not the place for a full theory of anti-universalism, the diversity of the origins of legislation suggests further engagement with this emerging anti-universalist trend in statutory interpretation. An anti-universalist approach to statutory interpretation could operate at both the substantive and procedural levels. At the substantive level, it would distinguish between topics of statutory interpretation, as subject-specific canons of interpretation do.¹⁹⁸ At the procedural level, anti-universalism involves attention to the specific path that legislation takes through Congress. This is where understanding the legislation’s origin story comes in.

What might this mean in practice? For those who adhere strongly to identifying legislative intent, understanding the origins of legislation can be important for determining statutory meaning. An omnibus vehicle includes multiple different pieces of legislation, each of which might have been drafted according to different processes and by different authors—and with a different purpose. Single-subject legislation might sometimes be drafted in a bipartisan way, sometimes in a partisan way, sometimes by a single author. The intent or purpose of a given provision might differ based on these origins.¹⁹⁹ The typology of origin stories presented here shows even greater diversity—and would be taken into account in the interpretive process.

For those who adhere to a strong form of textualism, understanding the origins of legislation would also have anti-universalist payoffs. Consider the use of the whole act rule, a technique of statutory interpretation upon which textualists often rely.²⁰⁰ Under the whole act rule, words used in two different parts of the same statute should, all things being equal, be presumed to mean the same thing.²⁰¹ The formalist, albeit fictional, justification for this rule is that there is a unitary drafter who likely used the same word in the same way throughout the statute—and who used different words and differ-

194 Bressman & Gluck, *supra* note 18, at 797.

195 *Id.* at 798.

196 *Id.*

197 Nourse, *supra* note 2, at 110.

198 For example, the Rule of Lenity applies only in criminal cases. For an overview, see CALEB NELSON, STATUTORY INTERPRETATION 108–09 (2011).

199 Bressman & Gluck, *supra* note 18, at 760–62 (arguing for distinguishing between single-subject, omnibus, and appropriations legislation).

200 See, e.g., William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 376 (1990).

201 *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974).

ent sections to accomplish different things.²⁰² The functional justification is to encourage consistency and policy coherence.²⁰³ Understanding legislative origins places some methodological limits on the appropriateness of the whole act rule. In the case of omnibus legislation, or even in situations where one MC's bill has been attached onto a larger legislative vehicle, the formalist justification is on shaky ground, as the drafter is in fact not unitary. Rather, different drafters might have used the same word with different meanings in mind. The functional justification for the whole act rule remains, but for textualists seeking to narrow judicial discretion, it is problematic. The functional justification relies not on judges following the command of the legislature, but on their preference for sensible policy. This is not to say that the whole act rule is always inappropriate for textualists, only that the weight it is given, like the weight that the whole code and *in pari materia* rules are given, might need to vary based on the context. In this sense, textualists can learn from the origins of legislation in an anti-universalist way—and without becoming purposivists.

B. *The Sources and Use of Legislative History*

Understanding the origins of legislation is also helpful for identifying the appropriate sources of legislative history. Although willingness to use legislative history is a difference between textualists and purposivists,²⁰⁴ even Justice Scalia and other textualists who routinely criticize legislative history sometimes consult it to illustrate meanings that are demonstrably false.²⁰⁵ For purposivists (and even some textualists), the question is thus not whether legislative history is used, but “how it is best used.”²⁰⁶ For more extreme textualists, a deeper understanding of the pitfalls of legislative history use, from the perspective of congressional drafting, might sharpen their critiques when they believe the practice is being used inappropriately. Again, it is beyond the scope of this Article to engage in a full debate on the uses and abuses of legislative history. But understanding the origins of legislation can help move debates about legislative history forward.

First, take a simple example: when legislation is drafted through a bipartisan committee-based process, the statements of Democrats and Republicans

202 Eskridge et al., *supra* note 23, at 273.

203 Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 *HASTINGS L.J.* 221, 244 (2010).

204 Molot, *supra* note 177, at 38–39.

205 See, e.g., *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment) (“I think it entirely appropriate to consult all public materials, including . . . the legislative history of [Rule 609(a)(1)'s] adoption, to verify that what seems to us an unthinkable disposition . . . was indeed unthought of . . .”); James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 *BERKELEY J. EMP. & LAB. L.* 117 (2008) (identifying an overall decline in legislative history but providing empirical data showing that the Court continues to use legislative history).

206 Nourse, *supra* note 2, at 72.

(who supported the draft) on the committee might all be considered relevant statements. In contrast, when legislation is drafted through a partisan committee process, the statements of only the party members who drafted the legislation would be relevant. For a more complex example, consider Senator Al Franken's (D-MN) Accelerated Learning Act of 2013.²⁰⁷ As noted above, that stand-alone bill—drafted by Senator Franken and his staff—appears virtually word-for-word in the partisan, committee-based draft of the ESEA reauthorization as Subpart 2 of Title I, Part B.²⁰⁸ In essence, Franken's bill was simply dropped into the larger bill's text. Although the overall ESEA legislation is ascribed to committee chairman Senator Tom Harkin,²⁰⁹ Senator Franken's comments on that portion of the bill should have greater weight than Chairman Harkin's comments on that part of the bill.

This internal committee perspective has gone unnoticed. In a sense, it parallels Professors Bressman and Gluck's account of the relevance of legislative history from chamber leadership. Professors Bressman and Gluck's research shows that congressional staff generally believe that the statements of House and Senate leadership with respect to legislative text are comparatively unreliable, because the leadership are not generally involved in drafting legislative language (that has gone through committee) and are primarily concerned with the politics of navigating their chamber and securing passage of the bill.²¹⁰ This same dynamic exists to a lesser degree within committees. Chairmen are often responsible for major legislation—but portions of that legislation might be at the initiative of individual members, such as in the Franken case. While the chair takes credit (and responsibility) for the whole legislation—just as chamber leadership does later in the process—an individual MC will often be the leader for their portion of the legislation. As a matter of professional comity, and as a way for MCs to gain credit at home for their work, other MCs will often defer to members on particular issues where they have shown leadership.

Second, understanding more about legislative drafting (and in particular, the role of MCs as decisionmakers and the variety of sources MCs rely upon in making decisions) also helps provide a theoretical justification for the hierarchy of legislative sources: MCs undertake costly signals to indicate what materials are appropriate as a matter of legislative history.

Conventionally, the sources of legislative history are understood as falling into a hierarchy, with some sources perceived as “inherently better” than

207 Accelerated Learning Act of 2013, S. Res. 1082, 113th Cong. (2013); *Sen. Franken Introduces Bill to Help Make College Affordable, Improve Opportunities for Students*, AL FRANKEN U.S. SENATOR FOR MINN. (May 23, 2013), http://www.franken.senate.gov/?p=hot_topic&id=2424.

208 See Strengthening America's Schools Act of 2013, S. Res. 1094, 113th Cong. §§ 1221–26 (2013); see also *supra* notes 98–100 and accompanying text.

209 S. Res. 1094; *HELP Chairman Tom Harkin Introduces the “Strengthening Schools Act of 2013”*: *Bill Summary*, SENATE HEALTH, EDUC., LABOR & PENSIONS COMM., <http://www.help.senate.gov/imo/media/doc/ESEA%20Summary%206.4.13.pdf>.

210 Bressman & Gluck, *supra* note 18, at 757.

others: “committee reports are better than author statements, and author statements are better than the statements of hearing witnesses.”²¹¹ Some scholars have noted that this hierarchy is “poorly theorized”²¹² and others have even characterized it as “wrong.”²¹³ Of defenders of legislative history usage, Professor Nourse provides the leading critique of the hierarchy of sources, arguing that the legislative history’s appropriateness should not be determined primarily by “essentialist category” (e.g., committee report, author statement).²¹⁴ Rather, relevant legislative history is the “last, most specific decision related to the interpretive question.”²¹⁵ The reason is easy to understand: the particular issue may be raised at different points in the legislative process, and the legislation might change throughout the process. The most important legislative history, then, cannot possibly be a committee report if the relevant text changed after the committee report was written. Post-committee legislative materials would be the relevant sources. Similarly, it may be that earlier legislative history sources speak more precisely to the issue at hand than later-in-time legislative history sources. The key is specificity and relevance to the textual provision. While Nourse’s approach is persuasive as a matter of legislative history methodology, it is incomplete because we still need to distinguish between various sources of legislative history.

Other scholars and jurists criticize legislative history as inappropriate because staff, rather than MCs, write it.²¹⁶ Scholars have now shown that staff write virtually everything: text and legislative history of all types.²¹⁷ The staff-versus-member distinction is therefore unhelpful. Another critique is that legitimacy is tied to the MC’s knowledge, even if the MC hasn’t written the text herself. Justice Scalia thus argues that “genuine knowledge is a precondition for the supposed authoritativeness of a committee report, and not a precondition for the authoritativeness of a statute.”²¹⁸ But if genuine knowledge is essential to the relevance of legislative materials, then virtually no legislative materials would be considered appropriate (which Justice Scalia might welcome). Of course, the text need not rely on the genuine knowledge theory, as it gains legitimacy from the Article I process. But almost all materials in which genuine knowledge is involved are non-public sources (memoranda from staff to MCs, conversations between staff and

211 Nourse, *supra* note 2, at 108; *see also* NELSON, *supra* note 198, at 362–63; George A. Costello, *Average Voting Members and Other “Benign Fictions”: The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 41–42 (recounting the standard hierarchy).

212 Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1880 (1998).

213 Nourse, *supra* note 2, at 109–10.

214 *Id.* at 110.

215 *Id.*

216 *See* SCALIA, *supra* note 176, at 34.

217 Gluck & Bressman, *supra* note 9, at 983; Nourse & Schacter, *supra* note 15, at 620–21.

218 SCALIA, *supra* note 176, at 34.

MCs, and in some cases, the floor summaries written by the cloakroom staff) or semi-public and public sources that staff might use to inform members (section-by-section summaries of legislation, press releases, and summaries by interest groups). Indeed, if we take the “genuine knowledge” theory to its logical conclusion, the most “formal” sources are the least relevant to decisionmaking. According to empirical research from Bressman and Gluck, committee reports and legislative text might never be relied upon in actual legislative decisionmaking.²¹⁹ A “genuine knowledge” theory therefore cannot support textualism; it must rely on the formal process in Article I, judicial economy, or other justifications.

Understanding that MCs are decisionmakers, not drafters, suggests an alternative theory for the hierarchy of sources. As a result, the relevant questions are not who wrote what or even who read what. The default presumption should be that MCs never draft any of the documents. Flipping the default presumption in this manner, the question becomes what the MC decided with respect to different documents.

With this question, focus shifts to the type of document and the process that it goes through—through this process, MCs in effect signal the degree to which they think the document is appropriate as part of the legislative record. We can think of this as a costly signaling theory of legislative history,²²⁰ in which the relevance of legislative materials is dependent on the MC’s signaling that the materials can and should be relied upon. As with costly signaling theories more broadly,²²¹ the key assumptions are first, that the statement represents the MC’s, committee’s, or chamber’s understanding of the interpretation of the language, and second, that the court can use the “quality” of the statement—which is “shorthand for what one might think of as the more superficial aspects of quality (polish, thoroughness, detail, complexity, raw length),”²²² and in the congressional context also includes who the audience is and whether the statement takes place within the Congress—as a proxy for the costs incurred in producing the interpretation. With these conditions in mind, courts can reason that the interpretation offered is more or less reliable. More reliable interpretations are more costly as a matter of signaling; less reliable interpretations are cheaper.

Signaling theory provides a justification for the hierarchy of materials because legislative materials fall along a spectrum in terms of costliness to produce and links to legislative debate. All legislative materials go through a different degree of internal legislative processes before they are made public (if ever). Some materials are never made public (e.g., internal memoranda between staff and members), and MCs have therefore decided they are not intended for use as legislative history. Other materials go through some process—a speech to the local high school, a press release. These materials are

219 Bressman & Gluck, *supra* note 18, at 740.

220 See Matthew C. Stephenson, *A Costly Signaling Theory of “Hard Look” Judicial Review*, 58 ADMIN. L. REV. 753 (2006).

221 See *id.*

222 *Id.* at 755.

developed through a more intensive process that signals the MC's decision that the text in these documents is intended as part of public debate. Still other materials go through significant processes that signal relevance as part of the legislative record: floor speeches take place within the chamber itself, colloquies are elaborately choreographed in cooperation with others, and committee and conference reports require negotiation and are voted upon. At the pinnacle of legitimacy is the legislative text itself—which follows the most stringent process, Article I, Section 7, and which the MC decides whether to support or not. In a sense, this alternative theory of legislative materials derives directly from Justice Scalia's formalist preferences: the legitimacy of legislative materials is tied to the process undertaken based on a genuine decision of the MC—but the MC's role is in decisionmaking about materials, not policy substance about what is in the materials.²²³

In other words, as a practice, MCs signal the relevance of certain materials over others. Reports they vote on are more relevant than speeches they give or public documents written under their name. A speech to a constituent group will send a different signal, for example, than a speech dissecting the bill, section-by-section, on the floor.²²⁴ Some have worried that statements by MCs are simply just “sales talk,” designed to persuade but not to capture the true meaning of the text.²²⁵ To be sure, MCs often simplify their statements—for example, a speech to the local rotary club touting banking reform legislation will put a positive spin on the legislation but is unlikely to go into much detail. Contrast a long, detailed speech on banking reform to the trade association of community banks. The MC cannot be engaged in “sales talk” of the crude type that some have suggested.²²⁶ If the member is misleading or inaccurate when getting into details of interpretation or actual statutory provisions, the audience will either know and the member will lose credibility with them, or the audience will rely detrimentally on what they hear and, upon finding out that the information was wrong, the member will lose credibility with them. Between these two examples is a spectrum of cases, but the point here is that the nature of the material, by virtue of its quality, can serve as a signal as to its relevance. Understanding how legislative drafts and materials are used enables this kind of interpretation.

223 Note that the relationship between authority of a text and the process used to create it is a central feature of administrative law's treatment of statutes, regulations, and guidance documents. Statutes go through extensive process and can only be overturned for constitutional reasons. Regulations have less extensive and legitimate processes undergirding them and thus gain less judicial deference. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Guidance documents have less procedural legitimacy and are afforded still less deference. See *United States v. Mead Corp.*, 533 U.S. 218 (2001).

224 The former will be more likely to be “sales talk” than the latter. Eskridge, *supra* note 200, at 402.

225 *Id.*

226 Cf. *id.*; see also Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1132 (1983) (arguing that floor debates are “laden with sales talk”).

This approach to legislative history accords better with the reality of how Congress functions. The actual author of the draft—rarely if ever an MC—is not relevant. Nor are the actual materials upon which the MC made the decision to support the legislation. What matters is whether and how the MCs signal that their statements are part of the legislative or public record. This approach accounts for the full variety of legislative materials—public, semi-public, and non-public—even though some are used in decisionmaking and some are not. Text retains the most important role, but other materials—committee and conference reports, colloquies, floor speeches, even op-eds and press releases—can be reliable as well.²²⁷ And perhaps most importantly, it does not rely on the fiction that MCs draft documents or that MCs or their staffs read documents. What matters is the decision to introduce those documents into the public or legislative record.²²⁸

C. *The Executive Role in Drafting the Laws*

One of the most interesting—and most important—insights from understanding the origins of legislation is that the executive branch participates extensively in legislative drafting, whether by drafting entire statutes or by providing technical assistance throughout the drafting process. Although scholars undoubtedly recognize that legislation emerges from negotiation with the President (because the President's consent, or a veto override, is necessary for passage), legal scholarship has not thoroughly explored the practice of executive branch drafting and technical assistance for administrative law.²²⁹ Yet its significance is potentially extensive. While a full theoretical account of the implications must be left to another time and place, it is worth outlining the basic contours of the problem and identifying some of the possible avenues for further research.

227 It is worth noting that some sources, maligned as “sales talk,” can still be useful for understanding the “public history” of the statute. See SCALIA, *supra* note 176, at 30; Vermeule, *supra* note 212, at 1836.

228 In an important sense, this approach aligns with Professor Victoria Nourse's “legislative decision theory.” Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1614 (2014).

229 The literature applying game theory and positive political theory to negotiations between the President and Congress, particularly with reference to the control of administrative agencies, is expansive. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992); Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671 (1992). Still, this work does not address statutory drafting practice. The executive role in drafting has hitherto only been examined in a limited fashion. For example, Samuel Huntington remarks on this phenomenon, but does not discuss it. Samuel P. Huntington, *Congressional Responses to the Twentieth Century*, in CONGRESS AND THE PRESIDENT 7, 24 (Ronald C. Moe ed., 1971). The most extensive historical discussion is in Parrillo, *supra* note 132.

1. Delegation and the Principal-Agent Problem

One of the central principles of our legal system is that “a fusion of law-making and law-exposition is especially dangerous to our liberties.”²³⁰ The concern is so great that some scholars have even suggested that judicial deference to agency interpretations of their own rules—what is called *Seminole Rock*²³¹ deference—is constitutionally suspect because of this principle.²³² The argument is that if the same people who write the laws (or in the case of *Seminole Rock*, the regulations) can interpret them, there is no check on the exercise of power. If we take this principle seriously, one possible conclusion might be that executive participation in drafting the laws is extremely troubling. Of course, as a formal matter, our constitutional system gives the executive a role in the legislative process, both through presentment before a bill becomes a law²³³ and through the executive’s power to “recommend” to Congress “such Measures as he shall judge necessary and expedient.”²³⁴ But as a theoretical matter, scholarly frameworks do not engage sufficiently with this practice.

Consider the standard, simplified models for legislative-executive relations. On the delegation story, Congress delegates power to agencies to act in certain ways, and the agencies then do so. The explanations for delegation vary. Political scientists often reference legislators’ desire to serve constituents; to take credit for advantageous policies and shift blame to agencies for objectionable policies; to establish a racket that leads to further campaign contributions; and to punt decisions on which compromise is difficult.²³⁵ Legal academics have noted that congressional delegation is inevitable (and desirable) in a complex society in which division of labor is necessary,²³⁶ and they stress agencies’ comparative expertise as a reason undergirding congressional delegation.²³⁷

The delegation story, however, is far richer than is conventionally depicted. In many cases, the executive may assist Congress in suggesting what topics are worthy of delegation, how much power to delegate, how that

230 John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 617 (1996).

231 *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). For a discussion of the scope of *Seminole Rock*, see Matthew C. Stephenson & Miri Pogoriler, *Seminole Rock’s Domain*, 79 GEO. WASH. L. REV. 1449 (2011).

232 Manning, *supra* note 230.

233 U.S. CONST. art. I, § 7, cl. 2.

234 *Id.* art. II, § 3.

235 See, e.g., DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS* 30–32 (1999) (reviewing the arguments in political science).

236 Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1744 (2002).

237 JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 22–23 (1938) (viewing administrative agencies as expert managers); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2261 (2001) (discussing expertise as a justification for bureaucratic power). Political scientists, of course, mention these features too. See, e.g., EPSTEIN & O’HALLORAN, *supra* note 235.

power might be used, and what resources are necessary to execute on the delegation. In other words, delegation is not simply a unilateral congressional decision—it is a joint endeavor, a cooperative effort to establish a framework for policymaking. Two other facts are worth noting. First, a participating agency might not be seeking to aggrandize its power through delegation;²³⁸ rather, in some cases, it might advise Congress to narrow the scope of delegations because it is resource-constrained or fears being blamed if it cannot manage the delegated authority effectively. Note also that for those who prefer a more robust nondelegation doctrine, it is not obvious that nondelegation would mitigate executive participation. Enforcement of nondelegation might simply force greater executive participation into the drafting process, as the executive's expertise would be of greater importance in the initial statutory drafting. This fact still blurs the distinction between lawmaking and law-exposition.

Executive drafting also has implications for the principal-agent framework to delegation.²³⁹ If the central concern with agency costs²⁴⁰ is principal-agent drift based on an informational deficiency (i.e., the agency does not know what Congress intended),²⁴¹ that problem is mitigated significantly by executive participation in the drafting process, at least when regulations are promulgated close in time to the statute's passage. Greater executive participation should reduce the agency's information deficit and the likelihood of drift. However, if the central concern is a bad-faith agency that seeks to act outside the scope of the intended delegated authority,²⁴² then executive participation in drafting is more problematic. As is the concern with *Seminole*

238 Cf. Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005).

239 For an example of this approach, see Barry R. Weingast, *The Congressional-Bureaucratic System: A Principal Agent Perspective (with Applications to the SEC)*, 44 PUB. CHOICE 147 (1984).

240 For the classic discussion, see Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

241 Cf. Kathleen Bawn, *Political Control Versus Expertise: Congressional Choices About Administrative Procedures*, 89 AM. POL. SCI. REV. 62, 63 (1995) (arguing that “the degree of agency independence on any particular policy reflects the legislature’s willingness to trade uncertainty about policy consequences for uncertainty about agency behavior”).

242 See, e.g., J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1454 (2003) (“[D]elegation allows agencies to exploit their discretion and pursue their own policy agendas—to defy Congress and simply do as they please. Viewed in this light, agency officials are rational actors, who may seek to expand their authority, enlarge their budgets, ensure their survival, improve their future employment prospects, or otherwise pursue interests that may not coincide with those of Congress.”). On this approach, agency drift could be a function of the agencies’ preferences, see, e.g., Matthew [sic] D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 435–40 (1989), or of interest group influence operating through the agency, see, e.g., Jonathan R. Macey, *Organizational Design and the Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 100 (1992).

Rock, the agency might be creating opportunities to give itself discretion it can abuse.

In addition, the conventional solutions to narrowing the principal-agent drift problem do not contemplate executive participation in drafting as a remedy. The conventional *ex post* solution is congressional oversight through police patrols and fire alarms.²⁴³ The conventional *ex ante* solution is for Congress to establish well-defined administrative procedures.²⁴⁴ Because executive participation in drafting can reduce the informational deficiency problem, it operates as an additional *ex ante* strategy for Congress to prevent agency drift. Importantly, *ex ante* participation in drafting might also improve *ex post* oversight, as MCs can criticize agencies for acting against what they knew as the shared understanding of the legislation.²⁴⁵

2. Agency Statutory Interpretation

An alternative model for the legislative process, as Professor Ed Rubin has argued, understands legislation as setting public policy goals, rather than creating “law,” understood as primary directives aimed at individuals.²⁴⁶ On this theory, it may be better to interpret Congress and the executive as partners—working together to set and then implement public policy goals. As Rubin argues, broad delegations and vague wording are not an abdication of legislative responsibility because the control of implementation is not limited to the specificity of articulated rules.²⁴⁷ Instead, implementation can be shaped and controlled through a variety of political means: oversight, letters, hearings, appropriations, publicity, investigations, and the like. On this theory, the simple separation-of-powers and delegation models are simply irrelevant because they “rest on the old-fashioned and abstract idea that power can be doled out in discrete portions to those who implement the statute.”²⁴⁸

As a practical matter, this approach to addressing the insight of the executive role in drafting has implications for the ongoing debate on the practice of agency statutory interpretation. In particular, it lends support to scholars who claim that the practice of statutory interpretation in agencies is distinct from how courts interpret statutes.²⁴⁹ As Professors Peter Strauss and Jerry

243 See Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984).

244 See Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987).

245 Cf. DeShazo & Freeman, *supra* note 242, at 1446–47 (2003) (noting that committees might have outsized influence in legislative oversight related to their subject area).

246 Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 374, 377 (1989).

247 *Id.* at 393–94.

248 *Id.* at 408.

249 See Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 504 (2005); Walker, *supra* note 135; see also Kevin M. Stack, *Purposivism in the Executive Branch*, 109 NW. L. REV. (forthcoming); Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHL-KENT L. REV. 321 (1990).

Mashaw have argued, agencies, unlike courts, are constantly in dialogue with Congress,²⁵⁰ they are subject to executive orders and directives,²⁵¹ and they have different duties in applying constitutional avoidance doctrines.²⁵² These differences suggest that agencies invariably face different pressures than courts, and that agency interpretations will be influenced by different sources (e.g., executive orders). Christopher Walker's recent survey confirms that agency rule-drafters see themselves, not courts, as the primary interpreters of statutes—and that some sources of interpretation, such as legislative history, can be more helpful to an agency than to a court.²⁵³ At an even more granular level, some scholars have argued that an agency's choice of policymaking format—rulemaking or formal adjudication—will shape an agency's interpretive practices.²⁵⁴ In response, other scholars have argued that agency statutory interpretation must not diverge from (and is subordinate to) judicial interpretation, particularly under *Chevron* step one.²⁵⁵

The executive's role in legislative drafting provides additional support to the Strauss-Mashaw thesis that agency interpretive practice can and should diverge from judicial interpretive practice. First, Strauss and Mashaw focus primarily on the post-enactment relationship between Congress and agencies,²⁵⁶ but the pre-enactment relationship between Congress and agencies is just as robust. In cases of executive branch authorship, agencies are actually the primary drafters of the legislation.²⁵⁷ In other cases, congressional committees might have agencies participate in the drafting process, working with the committee to develop the policy, providing feedback and participating in discussion. In still other cases, agencies might provide "technical assistance," not just on policy but also on specific statutory language and authorities.²⁵⁸ Each of these features of the legislative drafting process gives the agency substantial pre-enactment information as to the meaning of the legislation. At the minimum, in situations in which the agency engages in statutory interpretation in close temporal proximity to the passage of legislation, it seems reasonable to say that the agency has a greater ability to divine congressional

250 Mashaw, *supra* note 249, at 512; Strauss, *supra* note 249, at 329.

251 Mashaw, *supra* note 249, at 506–07.

252 *Id.* at 507–08.

253 Walker, *supra* note 135, at 1051–52, 1038–40.

254 Kevin M. Stack, *Agency Statutory Interpretation and Policymaking Form*, 2009 MICH. ST. L. REV. 225.

255 Richard J. Pierce, Jr., *How Agencies Should Give Meaning to the Statutes They Administer: A Response to Mashaw and Strauss*, 59 ADMIN. L. REV. 197 (2007).

256 Mashaw, *supra* note 249, at 512 (“Nor are Presidents the only ones who engage in post-enactment political activity relevant to statutory implementation. Agencies are subjected to legislative oversight of their implementing activity.”); Strauss, *supra* note 249, at 329.

257 *See supra* subsection II.C.1.

258 *See supra* Section II.D.

intent, however defined, than do the courts.²⁵⁹ The agency would be likely to understand the reasons for specific statutory language, the context leading to deliberate ambiguities or delegation, and the political pressures operating inside and outside Congress. After all, the agency was in the room.

Second, as some scholars have noted, congressional staff writes legislative history with agencies in mind.²⁶⁰ On this approach, MCs create legislative history to guide and constrain agency action during statutory interpretation and implementation. When the agency is involved in interpretation and implementation, MCs can rely on that legislative history in oversight hearings, letters, and other post-enactment interactions with the agency.²⁶¹ In other words, legislative history is part of an ongoing dialogue between the agency and Congress, one that proceeds relatively seamlessly from drafting to interpretation to implementation. The use of legislative history may therefore be particularly suitable as part of agency interpretive practice.

3. Judicial Review and Deference Doctrines

Another approach to the executive's role in drafting might suggest that, at least in some situations, courts should grant greater deference to agencies. If the executive is involved in drafting legislation, then it will have special insight into what the goals and intentions behind the legislation actually were, what the political and practical compromises were, and how MCs thought about specific problems throughout the legislative process. This could take two approaches.

First, a court could consider the agency's interactions with Congress as part of its review under *Chevron*²⁶² and *State Farm*.²⁶³ In considering the space in which the agency can act under *Chevron*,²⁶⁴ courts could consider whether the agency participated in drafting and whether the challenged interpretation was contemplated in the drafting process. If the agency and Congress considered the interpretation in their deliberations, courts might consider it a reasonable interpretation of the statute under *Chevron*. Similarly, courts might consider agency participation in drafting under *State Farm*

259 Indeed, agencies seem to have made these arguments to the Supreme Court in the late 1930s and 1940s, citing legislative history to support their case. See Parrillo, *supra* note 132, at 367.

260 Bressman & Gluck, *supra* note 18, at 768 (noting that Congress's audience for legislative history is agencies).

261 Indeed, we should expect that the MCs who were highly active in the legislative process on a specific statute would play an important—even oversized—role in later oversight. Legal scholars have suggested this possibility at the committee level but have not generalized the point to adapt to the diversity of legislative processes. See DeShazo & Freeman, *supra* note 242, at 1446–47.

262 *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

263 *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

264 Peter L. Strauss, "Deference" is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight", 112 COLUM. L. REV. 1143 (2012).

as part of the factors they use to evaluate whether agency actions are arbitrary and capricious.²⁶⁵ Evidence that a policy pursued through regulation was contemplated during the drafting process might be a factor that cuts in favor of deference to the agency.²⁶⁶

Second, courts could vary deference based on the temporal proximity of agency action to the legislative action in which the agency participated. In a case of executive drafting, the comparative expertise of the agency will be strongest immediately after the legislation was passed, and it will grow weaker over time. As a result, greater deference might be warranted if agencies interpret or implement legislation soon after it is passed.²⁶⁷ Prior to *Chevron*, courts pursued this course explicitly, granting great weight to agency interpretations issued soon after legislation was passed.²⁶⁸ Some textualists have justified this practice because it provided evidence of the textual or linguistic

265 5 U.S.C. § 706(2)(A) (2012).

266 In recent years, scholars have increasingly argued that courts should also consider political factors in agency decisionmaking. See Katheryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009); cf. Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127 (2010). But see Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U. L. REV. 141 (2012). There is overlap in these arguments, as congressional action is in part a political constraint on the agency.

267 This argument has also been used to justify *Seminole Rock* deference. See Stephenson & Pogoriler, *supra* note 231, at 1454–56. Stephenson notes that greater deference might not be warranted to an interpretation issued close in time to a rule's promulgation because the agency might be "deliberately avoiding coverage of a controversial issue in the regulation" and because an agency will prefer self-delegation in the short run, for fear of long term changes in administration preferences. See *id.* at 1473. It is important to note that these arguments against this approach in the *Seminole Rock* context are less applicable in the context of executive drafting. First, while Congress might be avoiding controversy by delegating to the agency, the agency then must engage the controversial issue during rulemaking. Second, MCs will likely prefer immediate agency interpretations and implementation of a statutory scheme for fear that future agencies and future congresses will drift from the enacting Congress's preferences. Cf. Murray J. Horn & Kenneth A. Shepsle, *Commentary on "Administrative Arrangements and the Political Control of Agencies": Administrative Process and Organizational Form as Legislative Responses to Agency Costs*, 75 VA. L. REV. 499, 503 (1989) (describing legislative drift over time).

268 See, e.g., *United States v. Am. Trucking Ass'ns, Inc.*, 310 U.S. 534, 549 (1940); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933) ("The practice [deference] has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new."); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 368–69 (1986); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 565–67 (1985). For a discussion of recent references to deference based on contemporaneous construction, see Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1289–90 (2007). For a useful overview of the history from 1827 to the present, see Peter L. Strauss, *In Search of Skidmore*, 83 FORDHAM L. REV. 789 (2014).

context at the time of passage,²⁶⁹ but the practice could also be justified based on the agency's participation in the legislative process. Indeed, in the 1930s and 1940s, prior to the expansion of congressional staff, Justice Department lawyers and executive branch officials were frequently ghostwriters for Congress, drafting legislation, speeches, and committee reports.²⁷⁰ Agency lawyers in the early 1940s even argued to the Supreme Court that the Court should defer to the agency's interpretation, citing legislative history describing the agency's role in working with Congress to define statutory goals and terms.²⁷¹

For the most part, of course, the executive role in legislative drafting is not public, so it may be difficult—and inappropriate—to give these non-public interactions much weight in the judicial review process.²⁷² But in some cases, the information is publicly available and potentially helpful. In the private-executive drafting process, common to the FDA's user fee agreement legislation, the FDA actually releases the full text of the legislation they propose to Congress, with explanations for their decisions—and they do so after an extensive notice-and-comment process (in which their reasoning is made available to the public).²⁷³ These documents feed directly into the legislative process and might help provide judges with notice as to changes between drafts—and in particular, might help judges prevent agency drift because the courts could better identify places where Congress rejected an FDA suggestion and rewrote the statute. If the FDA later tried to adopt an interpretation in line with its own suggested language—language that Congress rewrote—that might indicate that the agency is drifting away from congressional command in favor of its own preferences. The FDA's user fee agreements go through a particularly open process, but there are other cases of executive involvement that are public. For example, the Obama Administration has frequently objected to specific language in the National Defense Authorization Acts (NDAA) regarding detainee rules.²⁷⁴ The Administration issued public pronouncements detailing its objections to very specific provisions within the NDAA—and Congress responded by changing the statutory terms.²⁷⁵ While public materials may not always be available, in some cases,

269 Manning, *supra* note 230, at 624 n.65; *see also* Atchison, *Topeka & Santa Fe Ry. Co. v. Peña*, 44 F.3d 437, 445 (7th Cir. 1994) (Easterbrook, J., concurring) (“[A] legal interpretation adopted soon after . . . enactment may be the best evidence of the meaning of the words carried in the legal profession at the time.”).

270 Parrillo, *supra* note 132, at 282.

271 *Id.* at 282, 369–74.

272 For an example of the Supreme Court using (with some disagreement) non-public executive branch materials, see *Kosak v. United States*, 465 U.S. 848 (1984).

273 *See supra* subsection II.C.2.

274 *See, e.g.*, Robert Chesney, *White House Threatens Veto of NDAA*, LAWFARE (June 12, 2013), <http://www.lawfareblog.com/2013/06/white-house-threatens-veto-of-ndaa/>.

275 *See, e.g.*, Benjamin Wittes, *This Year's NDAA: A Big Win for the Administration on Guantanamo*, LAWFARE (Dec. 10, 2013), <http://www.lawfareblog.com/2013/12/this-years-ndaa-a-big-win-for-the-administration-on-guantanamo/>.

they might prove helpful at understanding the back-and-forth between Congress and the executive in the drafting process.

If courts were to adopt the greater deference approach, agencies might also start providing courts with more information about the agency's role in the drafting process and the agency's ongoing communications with congressional sponsors, committees, or others about statutory implementation and interpretation, further facilitating the practice.

CONCLUSION

The origins of legislative drafts are varied, but there are some consistent, predictable patterns. The typology of legislative drafting processes presented here provides the more detailed and thorough description of legislative origins, deepening our understanding of how the legislative process works. This understanding also provides a variety of important implications for statutory interpretation, the use of legislative history, and debates about delegation to agencies and deference to their interpretations. In a Republic of Statutes, the origins of legislation must not be ignored.