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# Are Statutes Really Legislative Bargains - the Failure of the Contract Analogy in Statutory Interpretation

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# ARE STATUTES REALLY “LEGISLATIVE BARGAINS”? THE FAILURE OF THE CONTRACT ANALOGY IN STATUTORY INTERPRETATION

MARK L. MOVSESIAN\*

*Recent scholarship draws an analogy between contract and statutory interpretation. In this Article, Professor Movsesian explores and rejects that analogy. There are key differences between contracts and statutes, he argues; the intentionalism of contemporary contract law is inappropriate in the context of statutory interpretation. After critically examining the literature on the topic and demonstrating the operative distinctions between contracts and statutes, Professor Movsesian provides a useful illustration in the form of the famous case of Church of the Holy Trinity v. United States. Professor Movsesian shows how a comparison of contract and statutory interpretation sheds light on a number of interesting questions, including the character of third-party beneficiary contracts, the nature of political representation, the role of bicameralism and presentment in the legislative process, and the ongoing debate about the use of legislative history in determining the meaning of statutory language.*

INTRODUCTION.....	1146
I. THE CONTRACT ANALOGY IN STATUTORY	
INTERPRETATION .....	1150
A. <i>The Contract Analogy According to McNollgast</i> .....	1150
B. <i>The Contract Analogy According to Farber</i> .....	1153
II. THE ELEMENTS OF CONTRACT INTERPRETATION.....	1157
A. <i>Classical Contract Interpretation</i> .....	1157
B. <i>Intentionalism in Contract Interpretation</i> .....	1162
III. THE FAILURE OF THE CONTRACT ANALOGY .....	1167

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A. <i>An Illustration: Church of the Holy Trinity v. United States</i> .....	1167
B. <i>Statutes and Third Parties</i> .....	1171
C. <i>The Problematic Concept of Legislative Intent</i> .....	1181
D. <i>Coda: Church of the Holy Trinity v. United States</i> .....	1188
CONCLUSION .....	1190

## INTRODUCTION

Contemporary legislation scholarship finds inspiration in a variety of sources. Nothing is too remote or esoteric: statutory interpretation today draws on everything from literary criticism to microeconomics.<sup>1</sup> In part, this eclecticism reflects a wider movement toward interdisciplinary analysis in American law.<sup>2</sup> In part, it reflects an assumption that one can usefully compare the interpretation of statutes and the interpretation of other texts: "chain novels,"<sup>3</sup> for

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1. On the relationship between statutory interpretation and literary criticism, see, for example, GARY MINDA, *POSTMODERN LEGAL MOVEMENTS* 149-50, 156-57, 159, 163-64, 166 (1995); Kenneth S. Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, 32 *RUTGERS L. REV.* 676 (1979); James Boyd White, *Law As Language: Reading Law and Reading Literature*, 60 *TEX. L. REV.* 415, 415 (1982); and R. Shep Melnick, *Statutory Reconstruction: The Politics of Eskridge's Interpretation*, 84 *GEO. L.J.* 91, 93 (1995) (reviewing WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994)). For an application of microeconomics in statutory interpretation, see, for example, Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 *HARV. L. REV.* 4, 15-16 (1984); and William N. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 *J.L. & ECON.* 875, 877 (1975). Contemporary legislation scholarship draws from other disciplines as well. See, e.g., William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 *COLUM. L. REV.* 609 (1990) (continental philosophy); McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 *GEO. L.J.* 705 (1992) (positive political theory); Symposium, *What Is Meaning in a Legal Text?*, 73 *WASH. U. L.Q.* 769 (1995) (linguistics). The extent to which the new eclecticism has influenced courts is doubtful. See Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 *SUP. CT. REV.* 231, 231 ("The Justices have not been reading their Derrida."); see also David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 *N.Y.U. L. REV.* 921, 921-22 (1992) ("While academics vigorously debate the merits and applicability of deconstructionism, public choice theory, purposive analysis, and various theories of 'dynamic' statutory interpretation, justices of the Supreme Court are attempting with missionary zeal to narrow the focus of consideration to the statutory text and its 'plain meaning.' " (footnote omitted)).

2. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 *MICH. L. REV.* 34 (1992); Symposium, *Legal Education*, 91 *MICH. L. REV.* 1921 (1993); Symposium, *Writing Across the Margins*, 53 *WASH. & LEE L. REV.* 941 (1996).

3. See RONALD DWORKIN, *LAW'S EMPIRE* 228-32, 313 (1986). A "chain novel"—an "artificial genre of literature" that Dworkin derives in part from English parlor games—is one written by several authors seriatim. "[E]ach novelist in the chain

example, or personal correspondence.<sup>4</sup>

Until recently, relatively little scholarship has attempted to draw comparisons between the interpretation of statutes and the interpretation of other *legal* texts.<sup>5</sup> In the last few years, however, a number of articles have suggested an analogy between statutes and contracts.<sup>6</sup> Unlike the earlier law-and-economics literature, which contended that statutes should be understood as bargains between

interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on." *Id.* at 229. The analogy relates primarily to Dworkin's description of the common-law method, *see id.* at 238, but he makes clear that it applies in the context of statutory interpretation as well, *see id.* at 313.

4. See William N. Eskridge, Jr., "*Fetch Some Soupmeat*," 16 CARDOZO L. REV. 2209 (1995) (discussing illustration devised by nineteenth-century legal scholar Francis Lieber).

5. See Daniel A. Farber, *Legislative Deals and Statutory Bequests*, 75 MINN. L. REV. 667, 667 (1991). Farber believes that scholarly specialization accounts for this fact, at least in part. "Few . . . legislation scholars teach courses like property or contracts," he points out, and "of those few, most probably regard these courses as pedagogical chores rather than potential sources of inspiration." *Id.* at 668.

6. Three of the more thorough discussions are Farber, *supra* note 5, McNollgast, *supra* note 1, and Kenneth A. Shepsle, *Congress Is a 'They,' Not an 'It': Legislative Intent As Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992). For other suggestions of analogies between contract and statutory interpretation, see ESKRIDGE, *supra* note 1, at 122-23, DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 93-94 (1991), CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION* 150 (1990), Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 60 (1988), Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 597 (1996), McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, LAW & CONTEMP. PROBS., Winter 1994, at 3, 9-10, 19-20, Courtney Simmons, *Unmasking the Rhetoric of Purpose: The Supreme Court and Legislative Compromise*, 44 EMORY L.J. 117, 134 & n.70 (1995), W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 416, 419-20 (1992), George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 346 n.112 (1995), George H. Taylor, *Textualism at Work*, 44 DEPAUL L. REV. 259, 319 n.250 (1995) [hereinafter Taylor, *Textualism at Work*], Jason Scott Johnston, *Not So Cold an Eye: Richard Posner's Pragmatism*, 44 VAND. L. REV. 741, 750-51 & n.59 (1991) (reviewing RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990)), and Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 555-57 (1997) (reviewing A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997) [hereinafter A MATTER OF INTERPRETATION]). Cf. Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567, 618-22 (1996) (discussing agreements among legislators to vote in blocs). For earlier attempts, see Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419-20 (1899), and Charles B. Nutting, *The Ambiguity of Unambiguous Statutes*, 24 MINN. L. REV. 509, 516-17, 520 (1940).

Some recent judicial opinions also draw analogies between contract and statutory interpretation. *See, e.g.*, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 595 (1995) (Thomas, J., dissenting); *United States v. National Steel Corp.*, 75 F.3d 1146, 1149 (7th Cir. 1996) (Posner, J.); *AM Int'l, Inc. v. Graphic Management Assocs., Inc.*, 44 F.3d 572, 575-76, 577 (7th Cir. 1995) (Posner, J.); *Terra Int'l Inc. v. Mississippi Chem. Corp.*, 922 F. Supp. 1334, 1373 n.25 (N.D. Iowa 1996). *But cf.* *Auto Club Ins. Ass'n v. DeLaGarza*, 444 N.W.2d 803, 807 (Mich. 1989) (distinguishing between contract and statutory interpretation).

legislatures and private interest groups,<sup>7</sup> these more recent articles envision statutes as bargains among the legislators themselves. For purposes of interpretation, they argue, courts should treat statutes like contracts: in determining the meaning of statutory language, courts should employ the interpretive method of contract law.

This Article explores, and rejects, the contract analogy. It focuses on a problem familiar to contract and legislation scholars alike. Suppose that the words of a text bear an objective meaning. Suppose, that is, that a reasonable person, with an appropriate understanding of linguistic conventions, would understand the words in a certain way. Suppose further that the history of the text's drafting demonstrates that the drafters understood the words in a way that differs from the objective meaning. Suppose, finally, that a court is called upon to interpret the text. Which should prevail, the objective meaning of the words or the drafters' subjective intent?

The answer, as this Article demonstrates, depends on whether

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7. Landes and Posner offer a classic description of this view of legislation:

In the economists' version of the interest-group theory of government, legislation is supplied to groups or coalitions that outbid rival seekers of favorable legislation. . . . Payment takes the form of campaign contributions, votes, implicit promises of future favors, and sometimes outright bribes. In short, legislation is "sold" by the legislature and "bought" by the beneficiaries of the legislation.

Landes & Posner, *supra* note 1, at 877 (footnote omitted). Some versions of interest-group theory, strongly influenced by pluralism, treat legislators "more like notary publics . . . who merely record the deal struck" by private interest groups. Marci A. Hamilton, *Discussion and Decisions: A Proposal to Replace the Myth of Self-Rule with an Attorneyship Model of Representation*, 69 N.Y.U. L. REV. 477, 498 (1994); cf. Easterbrook, *supra* note 1, at 18 ("If statutes are bargains among special interests, they should be enforced like contracts."). Interest-group theories of legislation have been the subject of extensive commentary, see, e.g., FARBER & FRICKEY, *supra* note 6, at 12-37; Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 226, 233-40 (1986); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 541, 562-65, 568-71 (1988); cf. Levmore, *supra* note 6 (exploring various "contractual commitments" legislators might make to constituents with regard to legislators' voting), but they are not the focus of this Article.

Eskridge has suggested yet another contract analogy, contending that one might view legislation as a contract between the legislature and the judge who implements the statute. See William N. Eskridge, Jr., *Cycling Legislative Intent*, 12 INT'L REV. L. & ECON. 260, 262 (1992); William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 321, 326 (1989); cf. Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 347-48 (1990) (viewing legislation as a relational contract between the legislature and administrative agency). The assertion that courts are agents of the legislature is, of course, controversial, see Macey, *supra*, at 236 n.56, and a matter beyond the scope of this Article.

the text is a contract or a statute. Contract interpretation is properly intentionalist: in interpreting a contract, a court properly looks to the shared intent of the parties rather than the objective meaning of the written agreement. A contract, after all, is a private agreement that binds only the parties who make it.<sup>8</sup> It exists independently of any writing the parties have adopted to memorialize it: the writing is not the contract, but merely evidence of the contract.<sup>9</sup> In traditional form, moreover, a contract comprises just two parties and a limited subject matter.<sup>10</sup> Given all this, intentionalism is a sensible interpretive strategy. Concerns about notice to third persons do not exist; the writing bears little formal significance; and there is small chance that examining a contract's negotiating history will present great practical burdens.

But a statute differs from a contract in fundamental ways. A statute is not a private agreement that binds only the legislators who enact it, but a public document that establishes rules of conduct for people outside the legislature—rules those people must follow, in many instances, on pain of fine or imprisonment.<sup>11</sup> A statute does not exist apart from its written text; as a constitutional matter, a statute *is* its written text.<sup>12</sup> Unlike a contract, moreover, a statute typically addresses numerous subjects and involves hundreds of “parties,” most of whom vote without ever explaining their understanding of the legislation.<sup>13</sup> In this context, the intentionalism of contract law is incongruous. Given the concern with notice to third persons, the formal significance of the statutory text, and the practical difficulty of discovering the collective intent of hundreds of legislators, there is little reason to allow legislative intent to prevail over the objective meaning of a statutory text.

The failure of the contract analogy reveals much about the essential, and essentially different, qualities of contracts and statutes. In addition, as we shall see, a comparison of contract and statutory interpretation yields insights on a number of difficult and timely issues, including the character of third-party beneficiary contracts,<sup>14</sup> the nature of political representation (in particular, the question

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8. *See infra* text accompanying notes 127-30.

9. *See infra* text accompanying notes 121-22.

10. *See infra* text accompanying note 123.

11. *See infra* note 167 and accompanying text.

12. *See infra* text accompanying notes 214-21.

13. *See infra* text accompanying notes 234-37.

14. *See infra* text accompanying notes 174-83.

whether legislators serve as their constituents' "agents"),<sup>15</sup> and the role of bicameralism and presentment in our constitutional system.<sup>16</sup> Finally, a comparative study of contract and statutory interpretation supplies a useful context for evaluating the ongoing debate about the appropriate use of legislative history in determining the meaning of statutory language.<sup>17</sup>

This Article proceeds in three parts. Part I considers two of the more thorough expositions of the contract analogy, McNollgast's *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*,<sup>18</sup> and Daniel Farber's *Legislative Deals and Statutory Bequests*.<sup>19</sup> Part II describes the objectivism of classical contract interpretation<sup>20</sup> and demonstrates why contract law has largely rejected that approach in favor of its present intentionalism.<sup>21</sup> Part III examines the failure of the contract analogy in statutory interpretation. After providing a famous illustration,<sup>22</sup> it explores the reasons for the analogy's failure, focusing particularly on the problem of third-party effects<sup>23</sup> and the troublesome concept of legislative intent.<sup>24</sup> Part III closes with some further words on the illustration with which it began.<sup>25</sup> Finally, the Article concludes with some more general observations about legal interpretation.<sup>26</sup>

## I. THE CONTRACT ANALOGY IN STATUTORY INTERPRETATION

### A. *The Contract Analogy According to McNollgast*

A good place to begin exploring the contract analogy is McNollgast's 1992 article, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*.<sup>27</sup> In McNollgast's view, a statute is essentially a contract about public policy; its parties, the "members

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15. See *infra* text accompanying notes 184-209.

16. See *infra* text accompanying notes 224-30.

17. See *infra* text accompanying notes 233-52.

18. McNollgast, *supra* note 1; see *infra* Part I.A. For the uninitiate, "McNollgast" refers to Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast.

19. Farber, *supra* note 5; see *infra* Part I.B.

20. See *infra* Part II.A.

21. See *infra* Part II.B.

22. See *infra* Part III.A (discussing *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892)).

23. See *infra* Part III.B.

24. See *infra* Part III.C.

25. See *infra* Part III.D.

26. See *infra* text following note 264.

27. McNollgast, *supra* note 1. McNollgast develops some of these themes further in McNollgast, *supra* note 6.

of the legislative coalition that enact[s]" it.<sup>28</sup> Like contract interpretation, therefore, statutory interpretation should be intentionalist: a court should attempt to discover and give effect to the parties' actual agreement.<sup>29</sup> The statutory text will provide some evidence. If the text failed to render at least a reasonably reliable sense of the legislative bargain, McNollgast explains, the legislators would not have voted for it.<sup>30</sup> But statutory language is likely to be imprecise. Rational legislators, with many other responsibilities, will not spend the time necessary to state a bargain with perfect clarity or to provide for every eventuality.<sup>31</sup> To capture the complete agreement, therefore, a court must search the statute's legislative history for "implicit bargains," relating to interpretation and other matters, that do not appear in the statutory text.<sup>32</sup>

But how, precisely, to discover those implicit bargains? McNollgast concedes that "the interpretive problem is much more difficult for legislation than for contracts," both because of the larger number of parties involved and because courts have not developed a coherent understanding of the legislative process.<sup>33</sup> But, McNollgast argues, positive political theory can "make a significant contribution to overcoming" these "difficulties."<sup>34</sup> Positive political theory views

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28. McNollgast, *supra* note 1, at 705.

29. *See id.* at 705 n.3, 709-10; McNollgast, *supra* note 6, at 5, 7, 8. In describing this interpretive strategy, McNollgast occasionally employs the term "statutory intent." McNollgast, *supra* note 1, at 706. According to McNollgast, "the intent of a statute is to codify the agreement of the enacting coalition with respect to the policy adopted, in part so that members of the enacting coalition can know more precisely the nature of their agreement and in part to convey instructions to agencies and courts." *Id.* at 706-07.

30. *See* McNollgast, *supra* note 1, at 714; *see also* McNollgast, *supra* note 6, at 12 ("[L]egislation must be regarded by relevant political actors as a reasonably reliable determinant of policy outcomes.").

31. *See* McNollgast, *supra* note 1, at 714-15.

32. *See id.* at 718 (arguing that the "policy bargain" comprises statutory text and "implicit agreements over ambiguous provisions and how the explicit bargain will be applied to unforeseen circumstances"); *id.* at 738.

33. *Id.* at 710. "[W]hile contracts typically reflect a bargain between two parties having conflicting interests," McNollgast writes, "legislation usually results from bargaining among numerous parties having a wider diversity of purposes." *Id.* at 710-11.

34. *Id.* at 706. The "core general presumption" of positive political theory, Mashaw observes, is that one can explain "political behavior . . . as the outcome of rational (and often strategic) action by relevantly situated individuals within some set of defined institutionalized boundaries." Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development*, J.L. ECON. & ORG., Special Issue 1990, at 267, 280; *see also* Daniel A. Farber & Philip P. Frickey, *Foreword: Positive Political Theory in the Nineties*, 80 GEO. L.J. 457, 462 (1992) (defining positive political theory as a set of "non-normative, rational-choice theories of political institutions" (emphasis omitted)). *See generally* Symposium, *Positive Political Theory and Law* (pts. 1 & 2), 68 S. CAL. L. REV. 1447 (1995), 69 S. CAL. L. REV. 431 (1996)



the legislative process as a series of "veto gates" through which a statute must pass in order to become law:<sup>35</sup> subcommittee, committee, conference committee, and, in the usual course, the President.<sup>36</sup> In the enactment of any statute, the crucial actors are the ones who "approve[] the legislation at each of the veto points."<sup>37</sup> Positive political theory suggests, therefore, that the proper goal of statutory interpretation is to determine the intentions of the "veto players":<sup>38</sup> to uncover the implicit agreements, reached among veto players, that underlie the explicit language of the statute.<sup>39</sup>

McNollgast proposes four canons to assist a court in this endeavor.<sup>40</sup> Two, in particular, are important for our purposes.<sup>41</sup> The first, "consequential statements and actions have priority over inconsequential ones,"<sup>42</sup> follows from what we have already discussed: the preferences of veto players take priority over the preferences of other legislators.<sup>43</sup> The second canon attempts to assist a court in identifying who the veto players were. "[T]he totality of the legislative history," it teaches, "conveys important information about whose preferences were most consequential in shaping the

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(discussing various implications of positive political theory). McNollgast likens the role of positive political theory in statutory interpretation to "the basic principles of economics that underlie contract law." McNollgast, *supra* note 1, at 738.

35. See McNollgast, *supra* note 1, at 720.

36. See *id.* at 721, 724-25.

37. *Id.* at 721.

38. See *id.* at 707, 725.

39. See *id.* at 707.

40. See *id.* at 736-37, 707-08.

41. McNollgast summarizes the total set of canons as follows:

The first canon of evaluating legislative history should be that consequential actions have priority over inconsequential ones. The second canon, following from the first, is that decisions by legislators to reject language provide useful negative inferences about statutes. The third canon is that the totality of legislative history conveys important information about whose preferences were most consequential in shaping the coalitional agreement. That is, in the sequence of veto points through which a statute must pass, some are likely to be much closer calls than others, and it is at these stages where the details of the coalitional agreement are most profoundly shaped. The fourth canon is that, because both statutes and the Constitution give a role to the President in the legislative process, statutory interpretation must take the President's preferences into account and must accord them considerable weight if the President possessed a credible veto threat over the statute in question.

*Id.* at 736-37. One can see that the second and fourth canons are really only corollaries to the first and third.

42. *Id.* at 707, 736.

43. McNollgast cautions that a court should discount merely "strategic" actions, like presidential signing statements, for which the veto players cannot be held accountable by other participants in the process. See *id.* at 725-27. For more on presidential signing statements, see ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 784-85 (1995).

coalitional agreement.”<sup>44</sup> The relative importance of veto points, after all, differs for every statute. For one, the objections of a committee chair may pose the greatest obstacle to enactment; for another, the threat of presidential veto.<sup>45</sup> According to McNollgast, a careful examination of legislative history can help identify which players most profoundly influenced a statute’s passage, and, consequently, whose intentions carry the most weight.<sup>46</sup>

Thus the contract analogy according to McNollgast: armed with the insights of positive political theory, a court should attempt to discover and enforce the actual legislative bargain—the agreement the relevant legislators “thought they were making.”<sup>47</sup> McNollgast anticipates that textualists might find the contract analogy “inappropriate,” but ultimately dismisses their concerns.<sup>48</sup> In the end, McNollgast writes, “textualism’s prohibition on the use of legislative history makes it less likely that the court[] will choose the interpretation that would have been chosen by the act’s enacting coalition.”<sup>49</sup> But why should a court give effect to a “bargain” that fails to appear in the statutory text? With regard to a contract, we shall see, there are good reasons to give effect to the shared intent of the parties, whatever the language of the written memorial of their agreement.<sup>50</sup> Do those reasons apply with regard to a statute?

### B. *The Contract Analogy According to Farber*

Before turning to that question, though, consider another thoughtful exposition of the contract analogy, Daniel Farber’s *Legislative Deals and Statutory Bequests*.<sup>51</sup> Like McNollgast, Farber

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44. McNollgast, *supra* note 1, at 736.

45. *See id.* at 724-25, 736.

46. *See id.* at 737. In a later article, McNollgast relies on the principles of “signaling behavior” to help in “identifying the pivotal political actors who formed a majority coalition in enacting a bill, and . . . detecting the actions that reveal their policy preferences.” McNollgast, *supra* note 6, at 7.

47. *See* McNollgast, *supra* note 6, at 7.

48. One reason why “legal scholars and judges” reject the contract analogy, McNollgast writes, is that they simply fail to understand positive political theory as well as they do the “basic principles of economics that underlie contract law.” McNollgast, *supra* note 1, at 738.

49. *Id.* (emphasis omitted).

50. *See infra* Part II.B.

51. Farber, *supra* note 5. Farber modestly describes this piece, which also addresses analogies between wills and statutes, *see id.* at 671-78, as merely a “tentative effort.” *Id.* at 668. In fact, it constitutes the first really systematic exploration of the connections between private- and public-law interpretation. *Cf.* Johnston, *supra* note 6, at 751 n.59 (describing Farber’s article as an “important initial stab at developing the contract analogy”).

believes that "contract models capture an important aspect of statutory interpretation."<sup>52</sup> Like contracts, statutes are drafted by people whose preferences differ and whose interests conflict, at least in part.<sup>53</sup> As a result, Farber contends, contract law can illuminate questions of statutory interpretation.<sup>54</sup> Specifically, contract law can offer guidance on the question whether, in interpreting the language of a statute, a court should consider extrinsic evidence of the legislators' intent.<sup>55</sup>

Whether a court should look to extrinsic evidence, Farber argues, depends on the "parties' " sensitivity to risk. To illustrate, he poses two hypothetical cases. The first involves a contract between two publicly held corporations, the terms of which provide that one shall have a fifty-percent share of the other's "profits."<sup>56</sup> The parties to this contract, Farber explains, will be "fairly indifferent" to the risk that a court will misinterpret the term "profits" in the context of a lawsuit between them: their shareholders will have protected themselves against such risk by holding diversified equity portfolios.<sup>57</sup> As a result, Farber contends, the parties will prefer to leave the term vague and avoid the transaction costs they would incur in negotiating more specific contractual language.<sup>58</sup> For the same reason, he suggests, they would disfavor the use of extrinsic evidence—the agreement's negotiating history—in the contract's interpretation. Creating such evidence raises transaction costs at the time the parties draft the contract and litigation costs later.<sup>59</sup>

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52. Farber, *supra* note 5, at 678. To be fair, Farber concedes at the outset that the contract analogy is not exact. Unlike the parties to a contract, for example, legislators cannot "breach" a statute, and pay damages to other legislators, if they decide they do not approve the way a statute is being administered. *See id.*; *cf.* Levmore, *supra* note 6, at 621-22 (conjecturing that courts would not "enforce an agreement among . . . legislators to vote up or down when deciding on some future program").

53. *See* Farber, *supra* note 5, at 679.

54. *See id.* Farber limits his attention to the "simplest kind of interpretation problem: that in which the drafters had a particular situation in mind and adopted language addressing it, so that the interpretation problem is caused only by an ambiguous or vague text." *Id.* at 668-69.

55. *See id.* at 670. Farber also discusses the implications of the contract analogy on the question of *stare decisis* in statutory cases, *see id.* at 682-83, 686-87, a matter that this Article does not address.

56. *See id.* at 679.

57. *See id.* at 680-81; *see also* RICHARD A. BREALEY & STEWART C. MYERS, *PRINCIPLES OF CORPORATE FINANCE* 153-56 (5th ed. 1996) (describing how portfolio diversification reduces risk). Farber assumes that the parties "are sophisticated and fully informed about possible biases" on the part of the court. Farber, *supra* note 5, at 680.

58. *See* Farber, *supra* note 5, at 681.

59. *See id.* at 683.

Farber likens this hypothetical contract to a "classic regulatory statute[]," the Natural Gas Act, which provides that pipeline companies may exact only "reasonable" charges for the transportation of natural gas.<sup>60</sup> Farber suggests that one can understand this statute as a bargain between legislators who supported the interests of pipeline companies and legislators who supported the interests of petroleum producers.<sup>61</sup> Rather than spend the time necessary to hammer out a detailed compromise on transportation charges, the legislators agreed to a vague term—"reasonable"—to which agencies (and courts, presumably) could give specific content. Farber concludes that the legislators would "have little reason to favor the use of extrinsic evidence to interpret their bargain."<sup>62</sup> Creating and employing legislative history is expensive, after all, and it simply would not be "worthwhile to incur . . . transaction costs in the hope of a more accurate interpretation of the statute."<sup>63</sup> Shareholders of both pipeline and petroleum companies would have neutralized the risk of misinterpretation by holding diversified stock portfolios.<sup>64</sup>

Farber's second illustration involves a contract between parties that are averse to risk. Farber poses a hypothetical divorce settlement in which the husband agrees to give the wife half the "profits" from a small business he runs.<sup>65</sup> Just as in the first hypothetical, there is a risk that a court will ultimately misinterpret the vague term "profits." But while publicly held corporations will be neutral with regard to such a risk, individuals will not be indifferent. Unlike the corporations' shareholders, neither husband nor wife can easily minimize the consequences of misinterpretation by diversifying their equity holdings. As a result, Farber explains, the parties to this contract "have a strong incentive to . . . sharpen[] the definition of profits."<sup>66</sup> In addition, despite transaction costs, they have an interest in maintaining a record of the contract's negotiation for use in its eventual interpretation.

The statutory analogue to this model, Farber contends, is legislation that "resolve[s] important conflicting interests between

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60. See *id.* at 682; 15 U.S.C. § 717c(a) (1994).

61. See Farber, *supra* note 5, at 682.

62. *Id.* at 683.

63. *Id.*

64. See *id.* at 682.

65. See *id.* at 684.

66. *Id.*

groups of individuals.”<sup>67</sup> As an example, Farber gives Title VII, the federal statute that prohibits discrimination in employment.<sup>68</sup> Farber paints Title VII as a deal between those legislators who supported anti-discrimination legislation and those who wished to protect the seniority of unionized workers.<sup>69</sup> Neither minorities nor unionized workers felt indifferent to the risk of losing employment, and so the legislators could not settle for a vague term that courts might misinterpret.<sup>70</sup> Instead, they worked out a detailed compromise on seniority rights that courts largely have enforced, Farber writes, “even at the expense” of Title VII’s “overall purpose.”<sup>71</sup> Farber contends that the concern about misinterpretation should cause parties to a legislative compromise like Title VII to favor a court’s use of legislative history, “despite some higher transaction costs.”<sup>72</sup>

Farber’s analysis is insightful and, in some respects, persuasive. He demonstrates quite effectively that differently situated “parties” have different incentives regarding the use of negotiating history in the interpretation of a text. But this returns us to the question we asked with regard to McNollgast<sup>73</sup>—a question that Farber, too, anticipates.<sup>74</sup> Does it make sense, whatever the “parties’ ” incentives, to equate the role of intent in contract and statutory interpretation? Do the justifications for intentionalism in contract law make sense when it comes to a statute?<sup>75</sup>

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67. *Id.*

68. *See id.*; 42 U.S.C. §§ 2000e-2000e17 (1994).

69. *See* Farber, *supra* note 5, at 684.

70. *See id.* (“Because of the central economic importance of employment for most people, employment-related risks are often large and not easily diversifiable.”).

71. *Id.*

72. *Id.* at 686.

73. *See supra* text following note 49.

74. Farber concedes that his analysis “glide[s] past an important normative question.” Farber, *supra* note 5, at 669. Contract law, he writes, “is largely dedicated to facilitating private ordering, so that people can enter into beneficial transactions.” *Id.* “Depending on what we think of legislators,” he observes, “we might or might not want to design interpretive rules that will further their purposes.” *Id.*; *see also id.* at 688 (noting that his contract models “assume, rather naively, that the normative goal is to implement the desires of the enacting legislature”).

75. This is a good place to note a third interesting version of the contract analogy, Slawson’s *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*. Slawson, *supra* note 6. Like McNollgast and Farber, Slawson believes that one can draw useful comparisons between contract and statutory interpretation. *See id.* at 416, 419-20, 421. Unlike them, though, Slawson proceeds on the assumption that contract interpretation is itself non-intentionalist. *See id.* at 421. Slawson finds, in the objective theory of contracts, support for a textualist approach to statutory interpretation. *See id.*; *see also* Holmes, *supra* note 6, at 419-20 (arguing that contracts and statutes should both receive an objective interpretation). The problem, though, is that contemporary contract

## II. THE ELEMENTS OF CONTRACT INTERPRETATION

To see why contract analogies of the sort proposed by McNollgast and Farber fail, one must appreciate some fundamental principles of contract interpretation. There are basically two approaches to interpretation in American contract law: a "classical" approach, which holds that interpretation is essentially a matter of determining the objective meaning of the words the parties have used, and an intentionalist approach, which holds that interpretation is essentially a matter of discovering the shared intent of the parties.<sup>76</sup> These two approaches have more or less coexisted since at least the turn of the century, with one or the other gaining a temporary advantage among judges and scholars.<sup>77</sup> Nonetheless, one can understand the history of twentieth-century contract interpretation largely as a shift from classicism to intentionalism.<sup>78</sup> To understand contract interpretation, then, one must appreciate why contract law has come to reject the classical model in favor of its present intentionalist approach.

### A. Classical Contract Interpretation

The classical approach, whose advocates included Samuel Williston, Oliver Wendell Holmes, and Learned Hand, dominated American contract law in the late nineteenth and early twentieth centuries.<sup>79</sup> Classicism stressed the need for objectivity in the

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interpretation has largely abandoned the objective approach—something Slawson himself acknowledges. See Slawson, *supra* note 6, at 421 n.172; see also *infra* Part II.B (discussing contemporary contract interpretation). Thus, while I support Slawson's approach to statutes, see *infra* Parts III.B-C, I do not believe it can be based on an analogy to contract law.

76. See Melvin Aron Eisenberg, *Expression Rules in Contract Law and Problems of Offer and Acceptance*, 82 CAL. L. REV. 1127, 1130-35 (1994) [hereinafter Eisenberg, *Expression Rules*] (contrasting "classical" and "modern" contract interpretation); Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1108 (1984) [hereinafter Eisenberg, *Responsive Model*] (contrasting subjective "will" model and objective "classical" model); cf. David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1826-27 (1991) (contrasting "formalist" and "contextualist" modes of contract interpretation).

77. See Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 306-07 (1985); cf. Ralph James Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1148 (1995) (arguing that contemporary courts are rejecting intentionalism and returning to the earlier classical contract model).

78. See *infra* Part II.B.

79. See Eisenberg, *Expression Rules*, *supra* note 76, at 1130. Classicism itself supplanted an earlier approach, reflected in eighteenth- and nineteenth-century cases, that was more intentionalist in nature. See Eisenberg, *Responsive Model*, *supra* note 76,

interpretation of a written contract.<sup>80</sup> Where the parties had adopted a writing to reflect their agreement, it held, their subjective intentions were essentially irrelevant. The only thing that mattered, at least in the absence of some ambiguity, was the meaning that a reasonable observer, familiar with trade usage and surrounding circumstances, would give the parties' language.<sup>81</sup> That meaning prevailed even where one could demonstrate that the parties had shared a contrary intent.<sup>82</sup> As Williston explained,

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at 1108 & n.1; see also Goetz & Scott, *supra* note 77, at 306 n.118 (discussing nineteenth-century "will" theory); Samuel Williston, *Mutual Assent in the Formation of Contracts*, 14 ILL. L. REV. 85, 85 (1919) ("[N]ear the end of the eighteenth century, and for the ensuing half-century, the prevalent theory of contract evidently involved as a necessary element actual mental assent."). For a good introduction to classicism in American law generally, see Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 495-97 (1996) (book review).

80. See Eisenberg, *Expression Rules*, *supra* note 76, at 1131 ("Classical contract law adopted a theory of interpretation that was purely, or almost purely, objective."). The classical model treated oral contracts differently. See *infra* note 94 and text accompanying notes 89-90.

81. See RESTATEMENT OF CONTRACTS § 230 & cmt. a (1932); 2 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 607 (1920); Eisenberg, *Expression Rules*, *supra* note 76, at 1133; see also *Moore v. Stevens Coal Co.*, 173 A. 661, 662 (Pa. 1934) ("[T]he terms of the contract, where unambiguous, are conclusive . . . the question being, not what intention existed in the minds of the parties, but what intention is expressed by the language used." (quoting 13 C.J. *Contracts* § 485, at 524-25 (1917))). When the words of the writing were ambiguous, a court could examine the parties' subjective understanding to determine whether they "attached one appropriate meaning to their words, rather than another equally appropriate meaning." 2 WILLISTON, *supra*, § 630, at 1218. Even then, Williston cautioned,

it should be observed that it is not primarily the intention of the parties which the court is seeking . . . . The fact that the parties intended their words to bear a certain meaning, would be immaterial were it not for the fact that the words either normally or locally might bear such meaning.

2 *id.* § 613, at 1186.

82. See 2 WILLISTON, *supra* note 81, §§ 607, 611; Eisenberg, *Expression Rules*, *supra* note 76, at 1133.

Again, it is worth noting that the triumph of objectivism was never quite complete, even during the classical period. A good example is a standard first-year contracts case, *Embry v. Hargadine, McKittrick Dry Goods Co.*, 105 S.W. 777 (Mo. Ct. App. 1907), decided around the turn of the century. In that case, Embry told McKittrick, his employer, that he would quit unless McKittrick agreed to retain him for another year. McKittrick responded by saying, "Go ahead, you're all right. . . . [D]on't let that worry you." *Id.* at 777. McKittrick subsequently discharged Embry, and Embry sued for breach. The trial court instructed the jury that a contract for reemployment would exist if the jury found that both Embry and McKittrick had intended to make such a contract. See *id.* at 778. The appeals court reversed: what mattered was not what McKittrick intended, but what a reasonable person in Embry's position would have understood. See *id.* at 779. The appeals court took pains to note, though, that Embry's subjective understanding was also relevant. There would be a contract, the court held, only "if what McKittrick said would have been taken by a reasonable man to be an employment, and Embry so understood it." *Id.* (emphasis added); see also *id.* at 780 (noting that there

[i]f a written contract is entered into, the meaning and effect of the contract depends on the construction given the written language by the court, and the court will give that language its natural and appropriate meaning; and, if it is unambiguous, will not even admit evidence of what the parties may have thought the meaning to be.<sup>83</sup>

An illustration may be helpful. Consider the following hypothetical case, taken from the commentary to the *Restatement (Second) of Contracts*.<sup>84</sup> Seller and Buyer enter into a written contract that provides that Seller will sell goods to Buyer "F.O.B. the place of destination." Under common commercial understanding, the term "F.O.B. the place of destination" signifies that the seller bears the risk of damage to the goods up to that point.<sup>85</sup> Nonetheless, the parties' correspondence shows that, during negotiations, Seller lowered the price in exchange for Buyer's agreement to bear the risk of damage to the goods during transit. The goods sustain damage during transit and Buyer argues that the contract requires that Seller pay for the loss. What result?

Under the classical approach, Buyer would prevail.<sup>86</sup> A reasonable person, familiar with trade usage, would read the written contract as requiring that Seller bear the risk of damage to the goods during transit. That is the meaning the term "F.O.B. the place of destination" would have to such a person; there is no ambiguity whatever. To be sure, the negotiating history demonstrates that the parties shared an understanding at odds with the language of the written agreement. But that, under the classical approach, would be irrelevant. The language of the writing, not the shared intention of

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would be a contract if Embry understood that he was employed). For more on the subjective elements of *Embry*, see Eisenberg, *Responsive Model*, *supra* note 76, at 1125-26.

83. 1 WILLISTON, *supra* note 81, § 95, at 181-82; see also 2 *id.* § 611, at 1178 (observing that few cases allow meaning to depend on understandings attached to the contract by the parties themselves). Holmes, as usual, put it aphoristically. "I do not suppose that you could prove," he wrote, "that the parties to a contract orally agreed that when they wrote five hundred feet it should mean one hundred inches, or that Bunker Hill Monument should signify Old South Church." Holmes, *supra* note 6, at 420.

84. RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. c, illus. 1 (1981).

85. The Uniform Commercial Code provides:

Unless otherwise agreed the term F.O.B. (which means 'free on board') at a named place . . . is a delivery term under which . . . when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them . . . .

U.C.C. § 2-319(1)(b) (1992); see 1 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 252-53 (4th ed. 1995).

86. See Eisenberg, *Responsive Model*, *supra* note 76, at 1124.



the parties, would prevail.<sup>87</sup>

What arguments could justify holding parties to the language of a written "agreement" that contradicted their shared understanding? Supporters of the classical approach emphasized formal distinctions and extolled the values of certainty and predictability.<sup>88</sup> Williston, for example, pointed to a conceptual difference between oral and written contracts. In the typical oral contract, he argued, the parties do not pay great attention to the words they use; the words are only convenient "symbols" the parties employ to reflect their interior mental states.<sup>89</sup> For that reason, Williston argued, a court interpreting an oral contract should look beyond the symbols to the realities they represent. A court, that is, should attempt to determine what the parties had actually intended in making the agreement.<sup>90</sup>

A written contract, by contrast, posed an entirely different case. Where parties take the trouble to "incorporate their agreement into a writing," Williston argued, they do not simply "assent by means of symbols to certain things."<sup>91</sup> Rather, they "assent[] to the writing as the adequate expression of the things to which they agree."<sup>92</sup> For Williston, the parties' act of approving a writing superseded whatever their intent may have been in making the agreement; the writing was important, not simply as a reflection of underlying intent, but in itself.<sup>93</sup> The proper standard of interpretation was therefore objective. In interpreting a written contract, a court should attempt to determine only what the words of the writing would mean to a reasonable observer, without considering the parties' actual intent.<sup>94</sup>

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87. See *id.*

88. See Daniel Farber, *The Ages of American Formalism*, 90 NW. U. L. REV. 89, 91 (1995); Lawrence M. Friedman, *Law, Rules, and the Interpretation of Written Documents*, 59 NW. U. L. REV. 751, 776-77 (1965); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 32 (1983); Grey, *supra* note 79, at 495-96.

89. See 2 WILLISTON, *supra* note 81, § 606, at 1165 ("In an ordinary oral contract . . . the minds of the parties are not primarily addressed to the symbols which they are using; they are considering the things for which the symbols stand.").

90. See 2 *id.* § 605.

91. 2 *id.* § 606, at 1165.

92. 2 *id.*

93. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 3-11, at 170 (3d ed. 1987) (explaining that, under Williston's theory, a written contract "acquires a life and meaning of its own"); see also Friedman, *supra* note 88, at 775-76 (discussing the "goal of documentary autonomy" in classical contract law).

94. See 2 WILLISTON, *supra* note 81, § 610, at 1177. Williston suggested that an objective standard might also be appropriate in the "very unusual" case "where the parties to the oral agreement assent to a particular form of words as the definite and conclusive statement of their agreement." *Id.* § 604, at 1162-63; see also *id.* § 606, at 1165 n.12 (noting "[t]he theoretically possible case of an oral promise where it is agreed that

But classicism rested on more than just this conceptual distinction. Its advocates believed that classicism's certainty and predictability promoted the security of transactions.<sup>95</sup> Some emphasized evidentiary concerns.<sup>96</sup> An objective approach to interpretation, they argued, reduced litigation costs and minimized the opportunities for perjury and fraud.<sup>97</sup> Under the classical model, after all, a party who had signed an unambiguous writing need not spend resources litigating a claim that the parties had, in fact, meant something different. Courts, moreover, need not struggle to "divine[]" the parties' intent "from self-serving testimony offered by partisan witnesses" with "hazy" memories and "conflicting interests."<sup>98</sup>

In addition, by discouraging inconsiderate action, the classical model performed what Lon Fuller referred to as a "cautionary" function.<sup>99</sup> It was all a matter of incentives. Parties who knew that a resort to extrinsic evidence would be impossible would deliberate thoroughly before signing any document and make sure that the words they chose accurately reflected their agreement. As a consequence, its advocates believed, the classical approach fostered business planning and prevented many disputes from arising.<sup>100</sup> If parties did neglect to pay close attention to the writing they approved, moreover, they had only themselves to blame. "[I]n commercial transactions," Learned Hand chided, "it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves."<sup>101</sup>

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the particular spoken words, whatever their legal meaning may be, shall fix the rights of the party").

95. See Eisenberg, *Expression Rules*, *supra* note 76, at 1134; Friedman, *supra* note 88, at 776-77.

96. On the evidentiary function of contract formalities generally, see Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941).

97. See 2 WILLISTON, *supra* note 81, § 611, at 1179; Eisenberg, *Responsive Model*, *supra* note 76, at 1109.

98. *Trident Ctr. v. Connecticut Gen. Life Ins. Co.*, 847 F.2d 564, 569 (9th Cir. 1988) (Kozinski, J.).

99. See Fuller, *supra* note 96, at 800.

100. As Judge Easterbrook has written:

The objective approach is an essential ingredient to allowing the parties jointly to control the effect of their document. If . . . secret intents could bind, parties would become wary, and the written word would lose some of its power. The ability to fix the consequences with certainty is especially important in commercial transactions that are planned with care in advance.

*Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 815 (7th Cir. 1987).

101. *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344, 346 (2d Cir. 1933). Interestingly, Hand took an intentionalist approach to statutory interpretation. See Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1006,

### B. *Intentionalism in Contract Interpretation*

Thus the classical approach. One sees examples of it even now; indeed, at least one commentator has argued that we are witnessing a renaissance in classical contract law.<sup>102</sup> Yet, in significant respects, contemporary contract interpretation has come to reject the classical model.<sup>103</sup> Under contemporary principles, contract interpretation is not principally a search for the objective meaning of a text, but rather a search for the shared intent of the parties.<sup>104</sup> To be sure, the words of the parties' written agreement will be probative of their intent; in most cases, in fact, the words will provide conclusive evidence. But the goal, as Arthur Corbin once explained, "is the ascertainment of the intention of the parties (*their* meaning), and not the meaning that the written words convey . . . to any third persons, few or many, reasonably intelligent or otherwise."<sup>105</sup> Under contemporary principles, where extrinsic evidence shows that the parties shared an intent at odds with the objective meaning of the written agreement, their intent, not the writing, prevails.<sup>106</sup>

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1012-14 (1992).

102. See Mooney, *supra* note 77, at 1148-71. For an example of a contemporary case that advocates the classical approach, see *Trident Center*, 847 F.2d at 569.

103. See Eisenberg, *Expression Rules*, *supra* note 76, at 1131-35; Eisenberg, *Responsive Model*, *supra* note 76, at 1110, 1126; see also Margaret N. Kniffin, *A New Trend in Contract Interpretation: The Search for Reality As Opposed to Virtual Reality*, 74 OR. L. REV. 643, 643 (1995) (noting a "continuing trend in which an increasing number of courts have . . . acknowledged that extrinsic evidence relating to context should always be admissible").

104. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (1981) ("Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning."); E. ALLAN FARNSWORTH, CONTRACTS § 7.9, at 504 (2d ed. 1990); Eisenberg, *Expression Rules*, *supra* note 76, at 1134.

105. Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 164 (1965); see also E. Allan Farnsworth, "Meaning" in the Law of Contracts, 76 YALE L.J. 939, 951 (1967) ("The object of contract law is to protect the justifiable expectations of the contracting parties themselves, not those of third parties, even reasonable third parties.").

106. See *AM Int'l, Inc. v. Graphic Management Assocs., Inc.*, 44 F.3d 572, 576 (7th Cir. 1995) (Posner, J.); Eisenberg, *Expression Rules*, *supra* note 76, at 1133-34; Eisenberg, *Responsive Model*, *supra* note 76, at 1126.

A word about the parol evidence rule may be helpful. The rule bars, in certain circumstances, the introduction of extrinsic evidence to contradict or supplement the terms of a written agreement. See *CALAMARI & PERILLO*, *supra* note 93, § 3-2, at 135-36. In contemporary understanding, the rule does not apply to questions of interpretation: extrinsic evidence, including the contract's negotiating history, is admissible to show that the parties shared an intent at odds with the language of the writing. See FARNSWORTH, *supra* note 104, § 7.12, at 522-23. An earlier view, associated with the classical model, allowed the introduction of such evidence only where the language of the writing was ambiguous. See *id.* § 7.12, at 520-22; see also *supra* notes 80-83 and accompanying text (discussing the classical approach). For an argument that the classical view of the parol

Again, an illustration may be helpful. Return to the hypothetical case discussed earlier, in which a written contract provides that Seller will sell goods to Buyer "F.O.B. the place of destination."<sup>107</sup> Recall that while trade usage makes clear that the phrase "F.O.B. the place of destination" signifies that the seller bears the risk of damage to the goods up to that point, the parties' correspondence reveals that they intended that Buyer bear that risk.<sup>108</sup> Under the classical approach, we saw, a court would hold that Seller bears the risk under the contract.<sup>109</sup> Under contemporary principles, the result would be precisely opposite.<sup>110</sup> As the negotiating history makes clear, the parties' shared intent was that Buyer bear the risk of damage to the goods during transit. The writing might signify something different to a reasonable observer; but, in case of conflict, the shared intent of the parties, not the language of the writing, controls.<sup>111</sup>

Why this shift in approach? In its rejection of the classical model, and its embrace of intentionalism, contemporary contract interpretation reflects the influence of that collection of movements known as American legal realism.<sup>112</sup> Generalizations about realism are difficult.<sup>113</sup> The realists made a variety of broad, often conflicting claims about the nature of law and the legal process, some of which have stood the test of time better than others.<sup>114</sup> With respect to contract law, though, the realists had a central, and fruitful, insight: the law should forgo formal abstractions and conform to commercial

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evidence rule is making a comeback, see Mooney, *supra* note 77, at 1148, 1170.

107. See *supra* text accompanying notes 84-87.

108. See *supra* text following note 85.

109. See *supra* text accompanying notes 86-87.

110. See RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. c, illus. 1 (1981); *id.* § 212.

111. See FARNSWORTH, *supra* note 104, § 7.9, at 504; Eisenberg, *Expression Rules*, *supra* note 76, at 1134.

112. On American legal realism generally, see AMERICAN LEGAL REALISM (William W. Fisher III et al. eds., 1993), MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 169-92 (1992), and WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973).

113. Neil Duxbury writes that "[r]ealism was more a mood than a movement." NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 69 (1995); see also *id.* at 65 (noting the "indeterminacy" of realism's "conceptual and thematic boundaries"); William Twining, *Talk About Realism*, 60 N.Y.U. L. REV. 329, 347 (1985) (observing that "generalizations about [the realists'] ideas are dangerous").

114. See James J. White, *Promise Fulfilled and Principle Betrayed*, 1988 ANN. SURV. AM. L. 7, 7-15; see also DUXBURY, *supra* note 113, at 68 ("Legal realists, one of their number once observed, 'do not constitute a "school" in any useful sense of that term, for they differ too much among themselves on too many matters.'" (quoting Walter Wheeler Cook, Book Review, 35 COLUM. L. REV. 1154, 1161 (1935))).

practice.<sup>115</sup> In resolving contract disputes, the realists argued, courts should look to the way people in the market actually behave, and refrain from applying essentially "autonomous legal conventions."<sup>116</sup>

Consider, in this regard, Williston's distinction between a written and an oral contract.<sup>117</sup> Williston, recall, argued for an objective approach to a written contract on the ground that the parties' approval of a writing supersedes whatever their intent may have been in making the underlying agreement.<sup>118</sup> It is a plausible argument.<sup>119</sup> The problem, as Farnsworth points out, is that there is little evidence that real-world parties actually view a writing as having an importance independent of the underlying agreement.<sup>120</sup> Accordingly, under contemporary principles, a writing is significant only as a reflection of the parties' subjective intent: strictly speaking, the writing is not the contract, but merely evidence of the contract.<sup>121</sup> Under contemporary principles, the parties' shared intent, not their approval of a written memorial of that intent, "is the operative fact in [a] contract's creation."<sup>122</sup>

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115. See K.N. Llewellyn, *Our Case-Law of Contract: Offer and Acceptance* (pt. 2), 48 YALE L.J. 779, 785 (1939); Eugene F. Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213, 217-19 (1966); Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 TEX. L. REV. 169, 170-71 & n.10 (1989); see also HORWITZ, *supra* note 112, at 187 ("All Realists shared one basic premise—that the law had come to be out of touch with reality.").

116. See Eisenberg, *Responsive Model*, *supra* note 76, at 1109.

117. See *supra* text accompanying notes 89-94.

118. See *supra* text accompanying note 93.

119. Williston's argument is particularly powerful where the writing includes a provision, known generically as a "merger clause," that states that the writing constitutes the parties' "entire agreement." See FARNSWORTH, *supra* note 104, § 7.3, at 476. The classical approach honored such clauses, "though in recent years there has been a tendency to deny such clauses conclusive effect," *id.*—another example of the shift to intentionalism.

120. See Farnsworth, *supra* note 105, at 962 (noting that the "basis for [Williston's] assumption does not appear").

121. See, e.g., 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1.3, at 12 (Joseph M. Perillo ed., rev. ed. 1993); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 8, at 17 (3d ed. 1990); Mark L. Movsesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 41, 54 (1995); John E. Murray, Jr., *The Parol Evidence Process and Standardized Agreements Under the Restatement (Second) of Contracts*, 123 U. PA. L. REV. 1342, 1342 (1975).

122. Movsesian, *supra* note 121, at 55. Indeed, as a general matter, a contract need not be in writing at all. See RESTATEMENT (SECOND) OF CONTRACTS § 4 (1981) ("A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct."). In some circumstances, statutes of frauds allow a party to avoid enforcement of a contract where he has failed to sign a written memorandum of its contents. See *id.* § 110; see also FARNSWORTH, *supra* note 104, § 6.8, at 435 (discussing signature requirement). But the contract still exists: a party who has failed to sign a

The realists also understood that an intentionalist approach, wisely applied, does not impair the security of transactions. Examining the negotiating history of a traditional contract, with two parties and a limited subject matter, will not ordinarily present a court, or litigants, with great burdens.<sup>123</sup> Allowing parties to introduce evidence of prior negotiations, moreover, does not mean that such evidence will necessarily trump the written agreement. The more remote the interpretation suggested, the more persuasive the evidence must be; at some point, as Corbin observed, a prudent court will "cease listening to testimony that white is black and that a dollar is fifty cents."<sup>124</sup> Finally, the notion that an objective approach will encourage business planning, and thereby prevent contract disputes from arising, is doubtful. What empirical evidence there is, as Eisenberg points out, "strongly suggests that private actors, taken as a class, have little or no significant knowledge of contract law."<sup>125</sup> In

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written memorandum can enforce a contract against a party who has. See FARNSWORTH, *supra* note 104, § 6.8, at 435; see also *id.* § 6.10, at 445 (noting that an agreement that fails to comply with the statute of frauds is still a "contract"). For more on these matters, see Movsesian, *supra* note 121, at 54 n.92.

123. An important body of scholarship argues that the traditional model reflects a limited understanding of the nature of contract in the real world. A truer model, it teaches, is the "relational" contract: an agreement that comprises multiple subjects and numerous parties with vague, evolving goals. See Peter Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 ANN. SURV. AM. L. 139, 155-60; Richard E. Speidel, *Article 2 and Relational Sales Contracts*, 26 LOY. L.A. L. REV. 789, 798-804 (1993). The leading exponent of this view of contract is Ian Macneil. See IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT* 10-35 (1980); Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974); Ian R. Macneil, *Restatement (Second) of Contracts and Presentation*, 60 VA. L. REV. 589, 595-96 (1974).

Whether relational-contract scholarship correctly critiques the traditional model is beyond the scope of this Article. As I have explained elsewhere, though, the relational-contract model does approximate legislation to a much greater degree than the traditional model, and some analogies between the interpretation of relational contracts and statutes may exist. See Movsesian, *supra* note 121, at 71 n.191; see also Strauss, *supra* note 7, at 328 (suggesting analogy between some statutes and relational contracts); Taylor, *Textualism at Work*, *supra* note 6, at 319 n.250 ("If the analogy between contract and statutory interpretation were to be pursued, it would be worthwhile to analyze concepts of relational contract . . ."). The key question, in my view, would be whether relational contracts raise the same concerns about notice to third parties that statutes do. See *infra* Part III.B (discussing statutes' effect on third parties).

124. Arthur L. Corbin, *The Parol Evidence Rule*, 53 YALE L.J. 603, 623 (1944); cf. Corbin, *supra* note 105, at 170-71 (distinguishing "interpretation" and "contradiction" of a writing). Some intentionalist courts have required that the extrinsic evidence be "relevant to prove a meaning to which the language of the instrument is reasonably susceptible." Kniffin, *supra* note 103, at 653 (quoting *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 644 (Cal. 1968)). Others have permitted the introduction of extrinsic evidence without this restriction. See *id.* at 660.

125. Eisenberg, *Responsive Model*, *supra* note 76, at 1109.

the real world, most parties are unaware of the incentives the classical model purports to create.

To be sure, not all parties are so ignorant. Many are sophisticated businesspeople; many, too, retain counsel who can explain to them the rules of classical contract interpretation. Even if parties know those rules, though—even if they pay close attention to the words of the written agreement—the realities of communication suggest that they will occasionally miss the mark. Words, however carefully negotiated, may fail to capture the essence of an agreement.<sup>126</sup> And here one must appreciate another important insight that underlies contemporary contract interpretation: a contract binds only the parties who make it.<sup>127</sup> Third persons remain unaffected. A contract cannot impose obligations upon them,<sup>128</sup> nor can it confer benefits upon them where they object.<sup>129</sup> In the context of a contract dispute—putting aside for the moment the matter of third-party beneficiaries<sup>130</sup>—third persons are simply disinterested bystanders.

As a consequence, an intentionalist approach to contract interpretation is entirely appropriate. Objectivism would make a great deal of sense if a contract were directed at third persons. By assigning the words of a contract the meaning that a reasonable observer would give them, a court would protect the expectations of persons who might rely on the language the parties had used. But, as a contract does not bind third persons, a court need not worry about those expectations: there is no danger that strangers to the transaction will be misled by a contract's language, or surprised by

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126. Even under the classical model, courts could reform a writing in case of certain errors in expression—typographical or computational mistakes, for example. *See, e.g.*, 3 WILLISTON, *supra* note 81, §§ 1547-1549; *see also* Holmes, *supra* note 6, at 420 (distinguishing between “construction” and “avoidance” of contract). On the equitable remedy of reformation today, *see* RESTATEMENT (SECOND) OF CONTRACTS § 155, and FARNSWORTH, *supra* note 104, § 7.5. *See also* Slawson, *supra* note 6, at 423-24 (describing reformation in contract law and suggesting possible analogy in statutory interpretation).

127. *See* Movsesian, *supra* note 121, at 45, 53.

128. *See id.* at 53 & nn.81-82. A party to a contract can promise action on the part of a third person, of course. In such a case, the third person has no contractual obligation: in the event of breach, the promisee's action lies against the promisor himself. *See* 1 CORBIN, *supra* note 121, § 1.13, at 36-37.

129. “A beneficiary who has not previously assented to the promise for his benefit may in a reasonable time after learning of its existence and terms render any duty to himself inoperative from the beginning by disclaimer.” RESTATEMENT (SECOND) OF CONTRACTS § 306; *see* CALAMARI & PERILLO, *supra* note 93, § 17-11, at 715.

130. *See infra* text accompanying notes 174-83 (discussing third-party beneficiary contracts).

the parties' secret agreement.<sup>131</sup> As Farnsworth puts it, contemporary contract law properly seeks "to protect the justifiable expectations of the contracting parties themselves, not those of third parties, even reasonable third parties."<sup>132</sup>

### III. THE FAILURE OF THE CONTRACT ANALOGY

Having examined the elements of contract interpretation, we are now in a position to appreciate the failure of the contract analogy in statutory interpretation. As this Part demonstrates, statutes and contracts differ in fundamental ways; their interpretation cannot be assimilated. Exploring why this is so sheds light on the essential qualities of both statutes and contracts. In addition, as we shall see, a comparison of contract and statutory interpretation illuminates a number of difficult and timely questions, including the character of third-party beneficiary contracts,<sup>133</sup> the nature of political representation,<sup>134</sup> and the role of bicameralism and presentment in our constitutional system.<sup>135</sup> It also provides a richer context for evaluating the ongoing debate about the appropriate use of legislative history in determining the meaning of statutory language.<sup>136</sup>

#### A. *An Illustration: Church of the Holy Trinity v. United States*

Once again, an illustration may help to focus discussion. One need not look far. Consider *Church of the Holy Trinity v. United States*,<sup>137</sup> one of the most famous—or, depending on one's view of things, infamous—cases in the history of American statutory interpretation.<sup>138</sup> At issue was a federal statute that made it unlawful

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131. See Movsesian, *supra* note 121, at 53.

132. Farnsworth, *supra* note 105, at 951.

133. See *infra* text accompanying notes 174-83.

134. See *infra* text accompanying notes 184-209.

135. See *infra* text accompanying notes 224-25.

136. See *infra* text accompanying notes 233-52.

137. 143 U.S. 457 (1892).

138. *Church of the Holy Trinity* is "[t]he earliest Supreme Court case commonly cited for the use of legislative history to construe a statute." Bradley C. Karkkainen, "Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction, 17 HARV. J.L. & PUB. POL'Y 401, 434 n.132 (1994). The commentary on the case is extensive. See, e.g., REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 80 (1975); ESKRIDGE, *supra* note 1, at 208-09, 210; MIKVA & LANE, *supra* note 43, at 828-34; William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 629 (1990); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation As Practical Reasoning*, 42 STAN. L. REV. 321, 360-62 (1990); Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241,



to encourage or assist the immigration of an alien " 'under contract . . . to perform labor or service of any kind in the United States.' " <sup>139</sup> The United States brought a prosecution under the act against the Church of the Holy Trinity, an Episcopal church located in New York City.<sup>140</sup> The church had entered into an employment contract with one E. Walpole Warren, "an alien residing in England," the terms of which provided that Warren would move to New York and take up a position as the church's rector.<sup>141</sup> The circuit court held that the contract fell within the terms of the act and allowed the prosecution to proceed.<sup>142</sup>

In a unanimous decision, the Supreme Court reversed.<sup>143</sup> The Court conceded that the church's contract with Warren fell within the express terms of the statute. "[T]he relation of rector to his church is one of service," the Court observed, and the statutory prohibition applied to contracts " 'to perform labor or service of any kind.' " <sup>144</sup>

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247 (1992); Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, 769 (1991); William D. Popkin, *Law-Making Responsibility and Statutory Interpretation*, 68 IND. L.J. 865, 879 (1993); Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION, *supra* note 6, at 3, 18-23; Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 986-87 (1995); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. (forthcoming 1998) (unpublished manuscript on file with the *North Carolina Law Review*); Sunstein, *supra* note 6, at 542-50.

139. *Church of the Holy Trinity*, 143 U.S. at 458 (quoting Act of Feb. 26, 1885, ch. 164, § 1, 23 Stat. 332, 332, repealed by Act of June 27, 1952, ch. 477, § 403(a)(2), 66 Stat. 163, 279-80). In full, section 1 of the act provided:

[I]t shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia.

Act of Feb. 26, 1885, ch. 164, § 1, 23 Stat. at 332.

140. See *Church of the Holy Trinity*, 143 U.S. at 458. The prosecution was apparently "a nonadversarial suit" designed "to test the applicability of the statute." Vermeule, *supra* note 138, at 7. On the church's denomination, see Daniel A. Farber, *The Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective*, 81 CORNELL L. REV. 513, 514 n.7 (1996) (book review).

141. See *Church of the Holy Trinity*, 143 U.S. at 458. The church also provided for Warren's transportation to the United States. See Eskridge & Frickey, *supra* note 138, at 360.

142. See *United States v. Rector of the Church of the Holy Trinity*, 36 F. 303, 303-06 (C.C.S.D.N.Y. 1888), *rev'd*, 143 U.S. 457 (1892).

143. See *Church of the Holy Trinity*, 143 U.S. at 472.

144. *Id.* at 458 (emphasis added) (quoting Act of Feb. 26, 1885, ch. 164, § 1, 23 Stat. at

Yet it was "a familiar rule," the Court continued, "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers."<sup>145</sup> It was "absurd" to suppose that Congress had intended to criminalize contracts for the employment of foreign clergy.<sup>146</sup> Americans were "a religious people," and Congress could not have meant "to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation."<sup>147</sup>

In addition, the Court believed, the legislative history revealed that the legislators had not intended such a result.<sup>148</sup> Records of committee hearings on the legislation, for example, suggested that the legislators' goal had been to exclude unskilled workers.<sup>149</sup> The committees had heard testimony that the immigration of "an ignorant and servile class of foreign laborers" was driving down domestic wages,<sup>150</sup> no one, the Court noted, had testified that the United States possessed "a surplus of brain toilers," or that the American market for Christian ministers "was depressed by foreign competition."<sup>151</sup> The report of the House Committee on Labor, moreover, addressed only the problem of unskilled immigrants, and their "tendency . . . to degrade American labor, and . . . reduce it to the level of . . . imported pauper labor."<sup>152</sup>

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332). In addition, the Court noted, the statute made exceptions for "professional actors, artists, lecturers, singers, and domestic servants," thereby "strengthen[ing] the idea that every other kind of labor and service was intended to be reached." *Id.* at 458-59.

145. *Id.* at 459.

146. *See id.* A traditional canon teaches that a court should refrain from giving a statute its literal meaning where doing so would produce "absurd" results. *See* *Public Citizen v. United States*, 491 U.S. 440, 454 (1989). For more on this aspect of *Church of the Holy Trinity*, see Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 136 & n.36 (1994), Farber, *supra* note 140, at 514 & n.7 (tracing the origin of the absurd-results canon in American law to *Church of the Holy Trinity*), and Symposium, *supra* note 1, at 872 (comments of Bill Eskridge). *See also infra* text accompanying notes 259-63 (discussing the absurd-results canon and its possible application to *Church of the Holy Trinity*).

147. *Church of the Holy Trinity*, 143 U.S. at 465, 471; *see also id.* at 471 (noting that "this is a Christian nation"). On the controversial nature of the Court's reasoning on this point, see *Public Citizen*, 491 U.S. at 473-74 (Kennedy, J., concurring in the judgment), and Eskridge, *supra* note 138, at 629 n.30.

148. For an argument that the Court misread the legislative history in *Church of the Holy Trinity*, see Vermeule, *supra* note 138, at 5, 13-26.

149. *See Church of the Holy Trinity*, 143 U.S. at 464.

150. *Id.* at 463 (quoting *United States v. Craig*, 28 F. 795, 798 (C.C.E.D. Mich. 1886)). For a summary of testimony before the House Committee on Labor, see 15 CONG. REC. 6065-67 (1884) (quoting H.R. REP. NO. 48-444 app. at 8-12 (1884)).

151. *Church of the Holy Trinity*, 143 U.S. at 464.

152. *Id.* at 465 (quoting 15 CONG. REC. at 5359 (quoting H.R. REP. NO. 48-444 at 2)).

An even more "singular circumstance, throwing light upon the intent of Congress," appeared in the report of the Senate Committee on Education and Labor.<sup>153</sup> That report demonstrated that, despite the clear import of the statutory text, the committee had intended the act to apply only to unskilled labor. The report acknowledged that the phrase "labor or service" might be too broad, given the legislation's objectives, and that an amendment narrowing the statute's application to "'manual labor' or 'manual service'" might be desirable.<sup>154</sup> But such an amendment would have delayed enactment, and the committee, on the understanding that the statute would "'be construed as including only those whose labor or service is manual in character,'" had "'reported the bill without change.'" <sup>155</sup>

*Church of the Holy Trinity* provides a good illustration of the contract analogies described in Part I.<sup>156</sup> In McNollgast's version, recall, a court must search a statute's legislative history for implicit agreements among veto players, relating to interpretation and other matters, that underlie the statutory text.<sup>157</sup> In that way, a court can discover and give effect to the bargain the veto players actually "thought they were making."<sup>158</sup> While the notion of veto players would have been foreign to it, the Court conducted just such a search in *Church of the Holy Trinity*. Approval by the Senate Committee on Education and Labor was surely a crucial step in the statute's adoption—a veto gate, as it were—and the committee's report demonstrated that the members understood that the statute would

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In introducing the bill in the House, Representative Foran explained that "[i]ts object" was to prevent employers "from importing into this country large bodies of foreign laborers to take the places of and crowd out American laborers." 15 CONG. REC. at 5349 (statement of Rep. Foran); see also *id.* at 5358 (statement of Rep. O'Neill) (explaining that the bill's purpose was to "prevent[] pauper laborers from being brought here from abroad for the purpose of breaking down the efforts of the workingmen of this country to secure their just rights").

153. *Church of the Holy Trinity*, 143 U.S. at 464. For the full text of the report, see S. REP. NO. 48-820 (1884).

154. *Church of the Holy Trinity*, 143 U.S. at 464 (quoting 15 CONG. REC. at 6059 (quoting S. REP. NO. 48-820 at 1)); see also 15 CONG. REC. at 6059 (statement of Sen. Blair) (discussing the Senate Report).

155. *Church of the Holy Trinity*, 143 U.S. at 464-65 (quoting 15 CONG. REC. at 6059 (quoting S. REP. NO. 48-820 at 1)). The legislation's scope occasioned considerable discussion in the Senate. See 16 CONG. REC. at 1622-25, 1633, 1635-36 (1885).

156. I am not the first to note an interesting irony. *Church of the Holy Trinity* adopted an intentionalist approach—the approach of today's contract law—at a time when contract law itself stressed objectivity and the formal text. See ESKRIDGE, *supra* note 1, at 209; see also *supra* Part II.A (discussing classical contract interpretation).

157. See *supra* Part I.A (discussing McNollgast).

158. McNollgast, *supra* note 6, at 7.

apply only to manual labor.<sup>159</sup> Consulting the legislative history allowed the Court to “choose the interpretation that would have been chosen by” the statute’s “enacting coalition.”<sup>160</sup>

Recall, too, Farber’s discussion of legislation that “resolve[s] important conflicting interests between groups of individuals.”<sup>161</sup> Farber argues that a court considering such legislation should pay close attention to the legislative history, as that is the approach the risk-averse drafters would favor.<sup>162</sup> One can see the immigration statute at issue in *Church of the Holy Trinity* as just such legislation:<sup>163</sup> legislation that resolved a conflict among various management and labor interests over the recruitment and employment of foreign workers.<sup>164</sup> On this view, the Court did exactly what Farber believes it should have done. It examined the statute’s legislative history to make sure that it correctly understood the compromise the drafters had reached.

### B. Statutes and Third Parties

The question, though, is whether contract analogies like McNollgast’s and Farber’s are appropriate. They are not. Contracts and statutes are fundamentally different sorts of legal texts; the intentionalist approach of contract law is incongruous in the context of statutory interpretation. Recall, for example, one persuasive argument for intentionalism in contract interpretation. As we saw in Part II, a contract binds only the parties who make it: a contract can

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159. See *supra* text accompanying notes 153-55.

160. McNollgast, *supra* note 1, at 738.

161. Farber, *supra* note 5, at 684.

162. See *supra* text accompanying notes 67-72.

163. Farber cautions that his article does not address circumstances where the legislators “simply fail[] to consider a possible situation.” Farber, *supra* note 5, at 669. Because the legislators “had a particular situation in mind and adopted language addressing it,” *id.*, I take it that *Church of the Holy Trinity* presents the sort of interpretive problem that Farber’s article does address.

164. Its Senate sponsor claimed that the bill was

designed to prevent the combination of capital for the purpose of introducing into the American civilization, in direct collision and competition with the ordinary American producer, a foreigner who can not naturally get here, who is brought here by a combination of capital for the express and sole purpose of reducing the natural and ordinary compensation which the American laborer is to receive for his toil.

16 CONG REC. at 1626 (1885) (statement of Sen. Blair). For more on the “interest” nature of the legislation, see *id.* at 1622 (colloquy between Sens. Blair and Hawley), *id.* at 1632 (statement of Sen. Morgan), *id.* at 1785 (statement of Sen. Call), and *id.* at 1793 (statement of Sen. Morgan). See also *United States v. Rector of the Church of the Holy Trinity*, 36 F. 303, 304 (C.C.S.D.N.Y. 1888) (describing the objectives of the legislation’s advocates), *rev’d*, 143 U.S. 457 (1892).

neither impose obligations on third persons nor confer benefits on them where they object.<sup>165</sup> Concerns about notice to third persons are therefore unnecessary. A contract is not directed at outsiders, and a court need not worry that the language might create expectations, or encourage reliance, on the part of strangers to the transaction.<sup>166</sup>

A statute *is* directed at third persons, however. That is the essential point about a statute. A statute is not a private arrangement that affects only the legislators who enact it, or the convenient memorial of an inside deal among members of a legislative coalition. Rather, a statute is a public document that establishes rules of conduct for persons outside the legislature—rules those persons must follow, in some instances, on pain of fine or imprisonment.<sup>167</sup> Notice to third persons is thus of critical importance. If a statute is to guide the conduct of people outside the legislature, those people must know what the statute requires.<sup>168</sup> Fairness counsels that they not be held to the terms of an implicit understanding that fails to appear in the statutory text.<sup>169</sup>

Now, one might object to an attempt to draw a distinction between contracts and statutes on the basis of third-party effects.<sup>170</sup>

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165. See *supra* text accompanying notes 127-29.

166. See *supra* text accompanying note 131; see also Movsesian, *supra* note 121, at 53 (arguing that a court interpreting a contract "need not worry about expectations the contract's language may create in the minds of strangers to the transaction").

167. See WILLIAM D. POPKIN, *MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS* 326 (1993) (describing statute as a "political document"); Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 447 (1990) ("Laws are designed to control the conduct of strangers to the transaction[]"); Movsesian, *supra* note 121, at 67; see also *INS v. Chadha*, 462 U.S. 919, 952 (1983) (describing the "essentially legislative" character of a provision that "had the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch").

168. See Easterbrook, *supra* note 167, at 447; Movsesian, *supra* note 121, at 68.

169. See Movsesian, *supra* note 121, at 69. "Statutes are thought to be rules 'to which individuals may refer for guidance in planning their conduct, and private citizens can hardly be expected to make reference to committee reports and other legislative records.'" OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, *USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION* 51 (1989) [hereinafter *LEGISLATIVE HISTORY*] (quoting Harry Willmer Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U. L.Q. 2, 21 (1939)); cf. Eskridge & Frickey, *supra* note 138, at 340 (noting "rule-of-law value that citizens ought to be able to read the statute books and know their rights and duties"); William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 57 (1994) (noting "traditional rule-of-law view that statutory text should be the key source of statutory meaning").

170. McNollgast does object, though only in an aside. The asserted difference

Some contracts do affect third persons, after all: familiar doctrine allows "third-party beneficiaries" to enforce contract provisions.<sup>171</sup> Perhaps courts should view statutes as third-party beneficiary contracts, made by legislators for the benefit of the public, and interpret them accordingly. Alternatively, one might question whether members of the public should be seen as "third parties" at all. The public elects its legislators; as a result, one might view legislators as their constituents' "agents."<sup>172</sup> Principals are normally bound by what their agents understand in the context of a contract negotiation.<sup>173</sup> Perhaps members of the public should be bound by what their legislators understand as well.

Neither of these objections is ultimately very persuasive. Take first the analogy to third-party beneficiary contracts. As the name suggests, these are contracts made for the benefit of non-parties: contracts in which a promisor agrees to perform a service for a non-party,<sup>174</sup> for example, or agrees to pay a debt the promisee owes to someone else.<sup>175</sup> Under present law, non-parties have the right to enforce such contracts.<sup>176</sup> If the promisor fails to perform the service,

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"between market exchange and legislative exchange," McNollgast writes, "is less one of kind than of quantitative magnitude, for third-party effects or economic externalities are an explicit part of the law governing market transactions." McNollgast, *supra* note 1, at 739.

171. See RESTATEMENT (SECOND) OF CONTRACTS ch. 14 (1981); FARNSWORTH, *supra* note 104, § 10.3; MURRAY, *supra* note 121, at 751-83. For a history of the law governing third-party beneficiaries, see Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358, 1360-74 (1992), and Anthony Jon Waters, *The Property in the Promise: A Study of the Third Party Beneficiary Rule*, 98 HARV. L. REV. 1109, 1116-72 (1985).

172. See *infra* text accompanying notes 184-85.

173. The *Restatement (Second) of Agency* provides an illustration: "A, as agent for P, enters into a written contract with T, knowing that T does not understand the instrument and that it does not correspond to the agreement to which T consents. P is bound by A's knowledge and cannot enforce the contract against T." RESTATEMENT (SECOND) OF AGENCY § 272 cmt. c, illus. 1 (1958); see also *id.* § 144 cmt. d ("The principal is subject to liability upon a contract made by the agent acting within his authority to the same extent as if the contract had been made by him in person."); *id.* § 272 cmt. a (stating that liability of the principal may be affected by the agent's knowledge where the agent makes a contract for the principal).

174. In these circumstances, the non-party is sometimes referred to as a "donee beneficiary." See Eisenberg, *supra* note 171, at 1389. The *Restatement (Second) of Contracts* avoids the use of this term on the ground that it is confusing. See RESTATEMENT (SECOND) OF CONTRACTS ch. 14 introductory note.

175. In these circumstances, the non-party is sometimes referred to as a "creditor beneficiary." See Eisenberg, *supra* note 171, at 1391. Again, the *Restatement (Second) of Contracts* abandons this term to avoid confusion. See RESTATEMENT (SECOND) OF CONTRACTS ch. 14 introductory note.

176. See RESTATEMENT (SECOND) OF CONTRACTS § 304; FARNSWORTH, *supra* note 104, § 10.7, at 765. Of course, the promisee retains an independent right against the

or fails to pay the debt, the third-party beneficiary can bring suit against the promisor for breach.<sup>177</sup> But the parties to the contract must have intended to confer a "right to performance in the beneficiary."<sup>178</sup> "Incidental beneficiaries"—those not within the contemplation of the parties—cannot bring suit to enforce the contract.<sup>179</sup>

Whether the parties to a contract intended to confer a right to performance in non-parties is a matter of interpretation to be resolved, generally speaking, in conformity with the principles discussed in Part II.<sup>180</sup> But third-party beneficiary contracts present a problem in this regard that other contracts do not. Because they affect the interests of persons other than the parties, third-party beneficiary contracts create the potential for unfair surprise. Third persons, who presumably lack information about private understandings between the parties, may rely on the contract's language in planning their own affairs. In these circumstances, giving priority to the shared intent of the parties poses the risk of substantial hardship.

As a result, the intentionalism of contemporary contract interpretation is relaxed a bit when it comes to third-party beneficiary contracts. Courts do attempt to discover, as a general

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promisor. See FARNSWORTH, *supra* note 104, § 10.7, at 767.

177. See RESTATEMENT (SECOND) OF CONTRACTS § 304 cmt. d ("Where the promisee manifests an intention to make a gift of the promised performance to a beneficiary . . . the beneficiary has available for his own benefit the usual remedies for breach of contract."); *id.* § 304 cmt. c ("Where the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary . . . the beneficiary is allowed a direct action against the promisor without joining the promisee.").

178. *Id.* § 302(1). Courts have differed on whether one or both parties must intend to confer a benefit on the third party. See Jean Fleming Powers, *Expanded Liability and the Intent Requirement in Third Party Beneficiary Contracts*, 1993 UTAH L. REV. 67, 73-74; see also Eisenberg, *supra* note 171, at 1378 ("The test in most common use has been whether the promisee—or, in some formulations, the parties to the contract—intended to benefit the third-party beneficiary."). The *Restatement (Second) of Contracts* suggests that both parties must intend to confer a benefit on the third party, see RESTATEMENT (SECOND) OF CONTRACTS § 302; FARNSWORTH, *supra* note 104, § 10.3, at 749, and I refer to that test here. But *cf.* Eisenberg, *supra* note 171, at 1382-83 (arguing that the *Restatement (Second)* is unclear whether one or both parties must intend to confer benefit); David M. Summers, Note, *Third Party Beneficiaries and the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 880, 895-96 (1982) (same).

179. See RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. e, § 315.

180. See FARNSWORTH, *supra* note 104, § 10.3, at 752-54; see also *supra* Part II.B (discussing contemporary contract interpretation). Some courts apparently require that the "intent to benefit the third party be found in the language of the contract itself," Eisenberg, *supra* note 171, at 1379, though this view is out of keeping with modern contract doctrine, see *id.*

matter, the shared intent of the parties.<sup>181</sup> But they also take into account the possibility that the contract's language might create expectations on the part of non-parties.<sup>182</sup> Indeed, the commentary to the *Restatement (Second) of Contracts* advises that, whatever the intention of the parties, a third party can enforce a contract where he "would be reasonable in relying on [it] as manifesting an intention to confer a right on him."<sup>183</sup> Objectivism thus plays a significant role in the interpretation of third-party beneficiary contracts: if anything, the analogy to such contracts counsels against importing intentionalism wholesale into statutory interpretation.

What about the claim that legislators should be seen as their constituents' "agents"? On this understanding, members of the public are not third parties, but principals: persons who have engaged others to negotiate contracts in their behalf and who are bound, in matters of interpretation, by what their agents actually understand.<sup>184</sup> It is, in some ways, a compelling vision. We expect, after all, that our legislators will act in our behalf—that they will, in questions of policy, consult our interests and behave accordingly.<sup>185</sup>

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181. See FARNSWORTH, *supra* note 104, § 10.3, at 752-54; see also Eisenberg, *supra* note 171, at 1379 (stating that better-reasoned cases reject the idea that intent to benefit a third party must be found in the language of the contract itself); Harry G. Prince, *Perfecting the Third Party Beneficiary Standing Rule Under Section 302 of the Restatement (Second) of Contracts*, 25 B.C. L. REV. 919, 930 (1984) (noting that many courts allow extrinsic evidence of intent to benefit a third party); cf. Summers, *supra* note 178, at 898 (arguing that intent to benefit a third party need not appear in an express contractual provision). Courts have not been uniform on the admissibility of extrinsic evidence of intent to benefit the third party. See Eisenberg, *supra* note 171, at 1379.

182. See FARNSWORTH, *supra* note 104, § 10.3, at 756; see also Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and Third Parties*, 42 SW. L.J. 931, 948 (1988) ("[M]ost . . . courts specifically considering the matter allow a third party's reliance to play some role in determining that party's rights under the contract.").

183. RESTATEMENT (SECOND) OF CONTRACTS § 302 cmt. d. The commentary's lack of clarity has caused some consternation. See, e.g., Eisenberg, *supra* note 171, at 1383-84; Metzger & Phillips, *supra* note 182, at 947-48; Prince, *supra* note 181, at 987-90. Note that actual reliance by the third-party beneficiary is not required. See Eisenberg, *supra* note 171, at 1383.

184. See *supra* note 173 and accompanying text. McNollgast makes a similar argument with regard to the relationship between legislators and the legislative leadership. See McNollgast, *supra* note 6, at 11 n.23, 19-20. At one point, McNollgast argues that the relationship between legislators and the leadership is akin to that between shareholders and corporate managers. See *id.* at 19-20. I discuss the shareholder metaphor further. See *infra* notes 188, 209.

185. As Belloc and Chesterton observed,

Either the representative must vote as his constituents would vote if consulted, or he must vote in the opposite sense. In the latter case, he is not a representative at all, but merely an oligarch; for it is surely ridiculous to say that a man represents Bethnal Green if he is in the habit of saying "Aye" when the people of Bethnal Green would say "No."



But the nature of legislative representation is in fact far more complicated.<sup>186</sup> Difficulties inherent in the relationship between legislator and constituent make the agency metaphor inapposite.

The difficulties have to do with the potential for shirking by legislators.<sup>187</sup> In some sense, of course, these difficulties exist in every agency relationship. There is always a risk that the interests of principal and agent will diverge, and that the agent will attempt to advance his own, rather than his principal's, goals.<sup>188</sup> That is why,

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HILAIRE BELLOC & CECIL CHESTERTON, *THE PARTY SYSTEM* 17 (1911). One irate constituent admonished his congressman in similar terms: "We didn't send you to Washington to make intelligent decisions. We sent you to represent us." ROGER H. DAVIDSON & WALTER J. OLESZEK, *CONGRESS AND ITS MEMBERS* 9 (5th ed. 1996).

186. There is, of course, a longstanding conceptual debate on the nature of political representation. See HANNAH FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 4 (1967) (characterizing the debate as a "vexing and seemingly endless controversy"); Levmore, *supra* note 6, at 567 (noting the "old and familiar debate"). See generally MIKVA & LANE, *supra* note 43, at 503-07 (discussing nature of representative relationship). One theory—what Pitkin calls the "mandate" theory—holds that legislators must follow, without variation, the wishes of their constituents. See PITKIN, *supra*, at 145. Another, associated most prominently with Edmund Burke, teaches that legislators must exercise independent judgment in deciding what will best serve the interests of their constituents. See Edmund Burke, *Speech to the Electors of Bristol*, in EDMUND BURKE ON GOVERNMENT, POLITICS AND SOCIETY 156, 157 (B.W. Hill ed., 1976) ("Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion."); see also Levmore, *supra* note 6, at 567 (discussing Burke's notion of "trusteeship"). Pitkin argues persuasively for an intermediate formulation that combines elements of both these theories. See PITKIN, *supra*, at 209-10 (arguing that a representative must act so that there is normally no "conflict between representative and represented about what is to be done").

For our purposes, it is unnecessary to settle this debate. Whatever the conceptual resolution, there exist practical difficulties that distinguish political representation from the standard agency model. See *infra* text accompanying notes 187-209. It is perhaps instructive to note, though, if only as an aside, that Burke's attempt to put his theory into practice cost him his parliamentary seat. See CONOR CRUISE O'BRIEN, *THE GREAT MELODY: A THEMATIC BIOGRAPHY AND COMMENTED ANTHOLOGY OF EDMUND BURKE* 71-86 (1992) (recounting how Burke's unpopular views on policy toward Ireland forced him to withdraw his candidacy for reelection).

187. I use the term "shirking" to refer to an agent's acting in accord with his own preferences rather than those of his principal. See FARBER & FRICKEY, *supra* note 6, at 27; Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279, 282 (1984) (citing Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972)). Some scholars use the term to refer to an agent's simple neglect of his duties—slacking. See Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1471 (1989); Saul Levmore, *Monitors and Freeriders in Commercial and Corporate Settings*, 92 YALE L.J. 49, 60 n.45 (1982).

188. See Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1427 n.61 (1985); Eisenberg, *supra* note 187, at 1471; see also FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 9-11 (1991) (discussing agency costs in context of firm). Indeed, the

among other reasons, the law gives the principal an absolute right of control over the agent: unlike other fiduciaries, agents must always follow instructions and remain subject to dismissal at any time.<sup>189</sup> Indeed, as Victor Brudney has observed, traditional agency law assumes that the principal will continually monitor the agent's activities and remain "involve[d] ... in the operation of the enterprise."<sup>190</sup>

The difficulties are far more serious in the context of political representation, however. The incentives for shirking by legislators are great, and the capacity for effective control by constituents, small. Take first the incentives for legislators. Even if one rejects the more dismal versions of public choice theory, which hold that legislators simply sell their votes to well-funded interest groups,<sup>191</sup> the factors that go into legislators' voting decisions are much more complicated than the agency model suggests.<sup>192</sup> Constituents' views undoubtedly are important.<sup>193</sup> But legislators' decisions are subject to many other

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proper response to this risk in the shareholder-manager relationship is a question that occupies much contemporary corporations scholarship. See Manuel A. Utset, *Towards a Bargaining Theory of the Firm*, 80 CORNELL L. REV. 540, 550 n.32 (1995) (collecting authorities); *infra* note 209.

189. See RESTATEMENT (SECOND) OF AGENCY § 14 & cmt. a (1958); *id.* § 118 cmt. b; HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* § 5, at 12 (2d ed. 1990); Daniel J.H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021, 1038 (1996). The agent retains the right to bring an action for wrongful discharge. See RESTATEMENT (SECOND) OF AGENCY § 118 cmt. b.

190. Brudney, *supra* note 188, at 1428. Brudney describes "the classic agency relationship" as one "in which the principal is familiar with the scope of, and often actively monitors, the agent's discretion." *Id.* at 1429.

191. See FARBER & FRICKEY, *supra* note 6, at 23 (describing public choice models); Hamilton, *supra* note 7, at 495 ("Legislators are depicted as mere salespeople of votes."); Landes & Posner, *supra* note 1, at 877 ("In short, legislation is 'sold' by the legislature and 'bought' by the beneficiaries of the legislation."). "Payment takes the form of campaign contributions ... implicit promises of future favors, and sometimes outright bribes." Landes & Posner, *supra* note 1, at 877. The starker interest-group theories of legislation are subject to increasing question. See Hamilton, *supra* note 7, at 491 n.49 (collecting authorities). Even so, it seems clear that interest groups play a significant role in the legislative process. See FARBER & FRICKEY, *supra* note 6, at 24 & n.52.

192. See FARBER & FRICKEY, *supra* note 6, at 21, 33 (discussing legislators' interconnected goals); PITKIN, *supra* note 186, at 219-21 (same). For one attempt to order the complexity, see JOHN W. KINGDON, *CONGRESSMEN'S VOTING DECISIONS* 242-81 (3d ed. 1989).

193. See KINGDON, *supra* note 192, at 67-68; see also MIKVA & LANE, *supra* note 43, at 503 ("What can be observed is that legislators reflect the dominant attitudes and status of their constituents and believe they are responsible for expressing the same in the legislative arena."); Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 CORNELL L. REV. 623, 684 & n.202 (1996) (arguing that legislators' voting records "appear[] to be relatively consistent with [their] constituents' interests").

influences as well:<sup>194</sup> concerns about loyalty to colleagues,<sup>195</sup> demands of the party leadership,<sup>196</sup> criticism from the media,<sup>197</sup> and the persuasions of interest groups.<sup>198</sup> The legislators' ideology and moral commitments may also play a large role.<sup>199</sup>

With respect to any given vote, one or more of these factors might outweigh the interests of a legislator's constituents. How to keep the legislator honest? In the classic agency relationship, the principal would provide detailed instructions and keep a close watch; if the agent neglected his duty, the principal would fire him.<sup>200</sup> But our constitutional system rejects the idea that constituents can "instruct" their legislators.<sup>201</sup> Moreover, collective-action

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194. See MIKVA & LANE, *supra* note 43, at 503 ("A legislator may . . . have a variety of allegiances, concerns, and sensibilities on any given issue that he or she factors into the making of a particular decision."); PITKIN, *supra* note 186, at 219 ("The modern representative acts within an elaborate network of pressures, demands, and obligations.").

195. See KINGDON, *supra* note 192, at 105-06; PITKIN, *supra* note 186, at 220. Speaker Sam Rayburn once observed that "[a] congressman has two constituencies—he has his constituents at home, and his colleagues here in the House." DAVIDSON & OLESZEK, *supra* note 185, at 7.

196. See DAVIDSON & OLESZEK, *supra* note 185, at 270-74; PITKIN, *supra* note 186, at 220. In the congressional context, "[p]arty affiliation is the strongest single correlate of members' voting decisions, and in recent years it has reached surprisingly high levels." DAVIDSON & OLESZEK, *supra* note 185, at 270. Opinions differ on whether party cohesion derives from leadership tactics or other factors. See *id.* at 273-74. Kingdon, for example, has argued that the leadership's role is not "particularly important." KINGDON, *supra* note 192, at 142.

197. See KINGDON, *supra* note 192, at 222-23. While the media may not be direct factors in congressmen's voting decisions, Kingdon argues, they may have substantial indirect effect, particularly in setting the legislative agenda. See *id.*

198. See FARBER & FRICKEY, *supra* note 6, at 24; see also Hamilton, *supra* note 7, at 495-96 nn.63-64 (collecting authorities acknowledging the importance of interest groups in the legislative process). But cf. MICHAEL T. HAYES, LOBBYISTS AND LEGISLATORS 59 (1981) ("Interest groups tend to be regarded seriously only when they are constituency based . . ."); Garrett, *supra* note 193, at 684-85 ("Although interest groups play prominent roles in the political process, those that exert the greatest influence . . . appear to have agendas that reflect the interests of the lawmaker's constituents.").

199. See, e.g., DAVIDSON & OLESZEK, *supra* note 185, at 276-77; FARBER & FRICKEY, *supra* note 6, at 27, 29-33; PITKIN, *supra* note 186, at 220. Indeed, Judge Abner Mikva and my colleague Eric Lane write that, in their experience, "legislators first respond to proposed legislation on the basis of their own policy views and then, when appropriate, refract them through other relevant prisms such as constituent and party demands. On what basis a decision is made depends on the intensity of each factor." MIKVA & LANE, *supra* note 43, at 503-04. Of course, it is often "tempting to embrace beliefs that are also in one's self-interest." FARBER & FRICKEY, *supra* note 6, at 46.

200. See *supra* text accompanying notes 189-90.

201. "The Framers rejected the idea of allowing the people to 'instruct' their representatives and, since their time, attempts by state legislatures to instruct senators have never been binding." Levmore, *supra* note 6, at 592; see also *id.* at 592-93 n.54 (discussing attempts by state legislatures to instruct legislators).

problems prevent constituents from exercising much effective control.<sup>202</sup> One person's vote can do very little to affect an outcome that depends on the combined votes of millions, after all, and anyway most legislative decisions will have relatively little impact on one's daily life.<sup>203</sup>

As a result, most people, most of the time, lack incentives to obtain the information necessary to monitor their legislator's conduct.<sup>204</sup> The hard facts of contemporary politics bear this out. Fewer than half of eligible voters participate in congressional elections<sup>205</sup>—fewer than forty percent in off years<sup>206</sup>—and studies consistently show that large numbers are mistaken with regard to their legislators' stands on issues.<sup>207</sup> As John McGinnis has written, “[c]itizens have projects other than democratic deliberation and, given the choice, few spend a large amount of time considering social policy.”<sup>208</sup> One must assume, of course, in the absence of some other indication, that most people remain reasonably content with their government. The point, though, is that the active involvement necessary to sustain an agency relationship simply does not exist.<sup>209</sup>

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202. For more on collective-action problems in politics, see FARBER & FRICKEY, *supra* note 6, at 23, MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 9-16 (1971), and MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS* 17-35 (1982) [hereinafter OLSON, *RISE AND DECLINE*].

203. For excellent treatments of these concepts, see John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 125-26 (1996), and John O. McGinnis, *The Partial Republican*, 35 WM. & MARY L. REV. 1751, 1755-56, 1791-93 (1994) (book review) [hereinafter McGinnis, *Partial Republican*].

204. See OLSON, *RISE AND DECLINE*, *supra* note 202, at 26. Some people, of course, will find it useful to obtain information about legislative matters. As Olson writes, “[p]oliticians, lobbyists, journalists, and social scientists”—not to mention law professors—“may earn more money, power, or prestige from knowledge of this or that public business.” *Id.* Knowledge about public affairs may have independent entertainment value. See *id.*; see also McGinnis, *Partial Republican*, *supra* note 203, at 1792 n.140 (noting that “most people follow news for its entertainment value”).

205. See DAVIDSON & OLESZEK, *supra* note 185, at 99 (noting that “fewer than half of voting-age citizens take part in House elections in presidential years”).

206. See *id.*

207. “Researchers have found that a large portion of those claiming to know House incumbents’ stands on issues are wrong and that respondents resort mainly to guesswork when asked to place House or Senate candidates on a liberal-conservative scale.” *Id.* at 110.

208. McGinnis, *Partial Republican*, *supra* note 203, at 1791. Most citizens remain, in other words, “‘rationally ignorant’ about public affairs.” OLSON, *RISE AND DECLINE*, *supra* note 202, at 26.

209. Some of the problems I discuss here arise also in the context of another “agency” relationship: the relationship between shareholders and managers of a corporation. See Brudney, *supra* note 188, at 1428-30; Greenwood, *supra* note 189, at 1038-43. Other constraints, though, including the takeover market and compensation structures, can operate in that context to discipline shirking managers. See Utset, *supra* note 188, at 551,

The reader who has come this far might agree that statutes differ from contracts with respect to third-party effects, but still be left with a lingering question. Is it worthwhile, in the end, to concern ourselves with expectations that statutory language might create on the part of the public?<sup>210</sup> After all, most people do not read statutes on their own. They hire lawyers to explain statutory language to them, and lawyers presumably know enough to consult legislative history to determine what the legislature actually intended.<sup>211</sup> Perhaps, then, we ought not worry too much about holding members of the public to the terms of implicit agreements that fail to appear in the statutory text. Lawyers will ensure that members of the public are neither surprised nor misled.

This is a fair point, but ultimately not too persuasive. Of course members of the public rely on lawyers to explain statutory requirements. But those lawyers are themselves members of the public. They are intermediaries, not lawmakers: when it comes to legislation, lawyers and their clients are all third parties attempting to understand what the legislature has done.<sup>212</sup> Moreover, the claim that

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553 & nn.44-46.

210. See *supra* text accompanying notes 167-69.

211. See Stephen F. Ross, *The Limited Relevance of Plain Meaning*, 73 WASH. U. L.Q. 1057, 1057, 1059 (1995); see also Slawson, *supra* note 6, at 420 ("Laws in our society are read and interpreted almost exclusively by lawyers. Others obtain their understanding of the law from them.").

212. Many of the legislators are themselves lawyers, of course, see Allan Freedman, *Lawyers Take a Back Seat in the 105th Congress*, CONG. Q. WKLY. REP. 27, 29 (Jan. 4, 1997) (noting that roughly 40% of members of 105th Congress are lawyers); see also 51 CONG. Q. ALMANAC B-8 (1995) (noting that lawyers comprise "the biggest single occupational group in Congress"); James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 49 n.194 (1994) (discussing the percentages of lawyers in past Congresses), and all have staff that can monitor and explain the impact of court decisions on statutory interpretation, see Brudney, *supra*, at 49 (noting that in evaluating case law, many members "rely on the initiative and judgment of their . . . staff").

This highlights yet another difference between contract and statutory interpretation. As we have seen, contemporary contract law rejects the claim that objectivism creates incentives for deliberation and careful drafting. See *supra* text accompanying note 125. Incentives can work only where people know they exist, and most people are unfamiliar with the rules of contract law. See *supra* text accompanying note 125. Members of Congress, by contrast, do possess significant legal knowledge and can respond to judicial signals. See Brudney, *supra*, at 49 n.194; William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 334 (1991) (concluding from empirical survey "that Congress and its committees are aware of the Court's statutory decisions, devote significant efforts toward analyzing their policy implications, and override those decisions with a frequency heretofore unreported"). As a result, the incentives argument is much stronger in the statutory context. But cf. Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 629 (1987) ("When I was in Congress, the only 'canons' we talked about were the ones the Pentagon bought that

lawyers should search legislative history for indications of legislative intent raises a number of other concerns—concerns addressed in the next section of this Article.

### C. *The Problematic Concept of Legislative Intent*

The existence of third-party effects is not the only factor that distinguishes statutory from contract interpretation. Another is the problematic nature of legislative intent. Seeking the “intent of the parties” to a legislative “bargain” raises formal and practical difficulties that do not exist in contract interpretation. To begin, the fact that there is a written text takes on far greater significance. In contract law, recall, a writing has importance only as a memorial of the parties’ intent. It has no independent authority: under contemporary principles, the writing is not the contract, but merely evidence of the contract.<sup>213</sup>

A statute, by contrast, does not exist apart from the written text. A statute *is* the written text.<sup>214</sup> This follows from constitutional requirements. While the Constitution confers legislative power on Congress,<sup>215</sup> it does not, in Max Radin’s words, authorize legislators to “impose their will . . . on their fellow-citizens.”<sup>216</sup> Rather, the

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could not shoot straight.”).

213. See *supra* text accompanying note 121.

214. See *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989) (Easterbrook, J.) (“Statutes are law, not evidence of law.”); Movsesian, *supra* note 121, at 69 (arguing that writing is itself the statute, and not merely a reflection or memorial of the statute).

215. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”).

216. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 871 (1930). Note that Radin, a realist, decried intentionalism in statutory interpretation at the same time realism was advocating intentionalism in contract law. See *id.* at 872 (arguing that legislative intent is “undiscoverable in fact, irrelevant if it were discovered”); *supra* text accompanying notes 112-25 (discussing realism’s critique of classical contract interpretation). Morris Cohen, another realist, did the same. See MORRIS R. COHEN, LAW AND THE SOCIAL ORDER 130 (1933) (“[L]egislative intent is an eliminable fiction.”); see also Zechariah Chafee, Jr., *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381, 399-400 (1941) (arguing that intention is more important in interpretation of a contract than a statute). See generally Eskridge, *supra* note 138, at 642-44 (discussing realist critiques of intentionalism in statutory interpretation).

In some sense, then, the realists anticipated a central argument of this Article: intentionalism is appropriate for contracts but not for statutes. Indeed, in this light, one can see “the new textualism” as the true heir of realism in American statutory interpretation. Cf. *id.* at 623 n.11 (coining phrase “new textualism” but arguing that it is “a return to the nineteenth-century treatise approach to statutory interpretation”). But I leave that theme for another day. On Radin’s place in legal realism, see DUXBURY, *supra* note 113, at 113, TWINING, *supra* note 112, at 76, and Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1227 n.18, 1234 n.34 (1931). On Cohen’s, see DUXBURY, *supra* note 113, at 38, and HORWITZ, *supra* note

Constitution grants Congress power to "make . . . [l]aws,"<sup>217</sup> and to do so according to a precise, familiar procedure involving passage by each House and presentment to the President.<sup>218</sup> Each step of that procedure concentrates on the statutory text:<sup>219</sup> it is the text that each House must pass; the text that the President must approve or reject; and the text that each House must pass again, by a two-thirds vote, in the event of a presidential veto.<sup>220</sup>

This mechanism has important implications for statutory interpretation. Because only the text of a statute receives the approval of the relevant actors, only the text can qualify as "law": legislative intent can have no independent authority.<sup>221</sup> To be sure, legislators may vote on a bill without giving the text a very close read. There is evidence, indeed, that legislators pay more attention to committee reports, which are often more comprehensible.<sup>222</sup> But that is not really the point. A statute is authoritative, not because the legislators understood it, but because the legislators enacted it. As Justice Scalia remarked in a recent essay, a statute "has a claim to our attention simply because . . . it has been passed by the prescribed majority (with or without adequate understanding)."<sup>223</sup>

112, at 183. For more on Radin's contribution to statutory interpretation, see *infra* text accompanying notes 238-39.

217. U.S. CONST. art. I, § 8, cl. 18 (conferring power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States").

218. See *id.* art. I, § 7, cl. 2 (describing procedure for enactment of "a Law").

219. See LEGISLATIVE HISTORY, *supra* note 169, at 27 ("[T]he constitutional legislative process necessarily focuses on the text of legislation.").

220. See U.S. CONST. art. I, § 7, cl. 2; see also LEGISLATIVE HISTORY, *supra* note 169, at 27-28 (describing legislative process in more detail).

221. See *In re Sinclair*, 870 F.2d 1340, 1344 (7th Cir. 1989) ("It would demean the constitutionally prescribed method of legislating to suppose that its elaborate apparatus . . . is just a way to create some evidence about the law, while the real source of legal rules [remains] the mental processes of legislators." (emphasis omitted)); LEGISLATIVE HISTORY, *supra* note 169, at 26 ("The Constitution and the structure of the legislative process it establishes assume an approach to statutory interpretation that focuses on the actual rather than the intended meaning of the statutory text."); González, *supra* note 6, at 602-03 (describing "formalist" critique of intentionalism); cf. Slawson, *supra* note 6, at 421 (describing theory of "law as statute," in which "[t]he object of interpretation . . . shall be the meaning of the statutory language").

222. See John F. Manning, *Textualism As a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 690 n.70 (1997) (collecting authorities); see also William N. Eskridge, Jr., *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 377 & n.44 (1990) (citing empirical studies); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 445 & n.79 (1988) (same); cf. FARBER & FRICKEY, *supra* note 6, at 100 (observing that committee reports "often represent the most intelligent exposition available of what the statute is all about").

223. Scalia, *supra* note 138, at 35 (emphasis omitted). A committee report, by

Moreover, a regard for constitutional procedures is not merely ceremonial. As others have pointed out, the bicameralism and presentment requirements serve important functions as checks on state power.<sup>224</sup> By insisting that proposed legislation pass through a series of barriers—by making the legislative process more difficult generally—these requirements encourage deliberation and make ill-conceived laws less likely.<sup>225</sup> In addition, by acting to disperse legislative power among diverse actors with conflicting interests, they help prevent any one “faction” from capturing government and threatening “the liberty and security of the governed.”<sup>226</sup>

Here again the contrast with contract law is instructive. Contract law, too, encourages people to deliberate before entering into agreements.<sup>227</sup> The doctrine of consideration, to give just one example, exists in part to foster caution on the part of those about to

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contrast, has authority only on the assumption that the majority of members read and agreed with it—a questionable assumption. See Manning, *supra* note 222, at 690 n.70; Scalia, *supra* note 138, at 34-35; see also *infra* notes 236-37 and accompanying text (questioning representativeness of committee reports and other items of legislative record).

224. The Framers, of course, understood this. See, e.g., THE FEDERALIST NO. 62, at 378-79 (James Madison) (Clinton Rossiter ed., 1961) (discussing bicameralism); THE FEDERALIST NO. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing presidential veto); see also GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 552-53 (1969) (discussing presidential veto); *id.* at 559-60 (discussing bicameralism). For more recent expositions, see LEGISLATIVE HISTORY, *supra* note 169, at 28-30, 32-33, Manning, *supra* note 222, at 708-09, and Michael B. Rappaport, *Veto Burdens and the Line Item Veto Act*, 91 NW. U. L. REV. 771, 782-83 (1997) (discussing presentment). See also *INS v. Chadha*, 462 U.S. 919, 946-51 (1983) (discussing purposes served by bicameralism and presentment requirements). For an argument that textualism reads too much into the bicameralism and presentment requirements, see Eskridge, *supra* note 138, at 671-73.

225. See LEGISLATIVE HISTORY, *supra* note 169, at 28, 32; Manning, *supra* note 222, at 708-09; see also Saul Levmore, *Bicameralism: When Are Two Decisions Better Than One?*, 12 INT'L REV. L. & ECON. 145, 146, 151-59 (1992) (explaining bicameralism's role as a “stopping mechanism”). As the *Chadha* Court explained: “The President's participation in the legislative process was . . . to protect the whole people from improvident laws. The division of the Congress into two bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings.” *Chadha*, 462 U.S. at 951.

226. Manning, *supra* note 222, at 708; see also Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1249 (1989) (arguing that bicameralism and presentment were Framers' “two antidotes to factionalism”). The fear that “factions”—what we would today call “interest groups”—would subvert government to their own ends was a central element of Federalism. See WOOD, *supra* note 224, at 502-05; cf. Garrett, *supra* note 193, at 683 n.201 (discussing Madison's use of term “faction”).

227. Recall the classical argument that an objective approach to interpretation would serve to encourage deliberation. See *supra* text accompanying notes 99-100.



incur legal obligations.<sup>228</sup> But nothing in contract law even approximates the formalities of bicameralism and presentment.<sup>229</sup> This is understandable when one recalls that the parties to a contract bind only themselves.<sup>230</sup> If they are hasty, they themselves will bear the consequences. When it comes to statutes, though, the "parties" do not bear the risk of their own mistakes. The public does.<sup>231</sup> Arguments for caution are therefore much stronger. Where the interests and liberties of the public are at stake, prudence dictates, and the Constitution mandates, that the "parties" be kept on a tighter rein.

The formal significance of the statutory text, then, makes reliance on legislative intent problematic. In addition, there are substantial practical difficulties associated with identifying that

228. See, e.g., Jay M. Feinman, *The Last Promissory Estoppel Article*, 61 FORDHAM L. REV. 303, 305 (1992); James D. Gordon III, *A Dialogue About the Doctrine of Consideration*, 75 CORNELL L. REV. 987, 992 (1990); Mark B. Wessman, *Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOY. L.A. L. REV. 713, 828 (1996); see also Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 5 (1979) (noting that an informal donative promise is unlikely to be the product of deliberation). The classic exposition of this argument is Fuller, *supra* note 96, at 800. For contrary arguments, see Andrew Kull, *Reconsidering Gratuitous Promises*, 21 J. LEGAL STUD. 39, 54 (1992), and Wessman, *supra*, at 828-29.

229. Indeed, with some notable exceptions involving displays of bad faith or inequality of bargaining power, courts do not do much in the way of policing the negotiating process. See FARNSWORTH, *supra* note 104, §§ 4.1, 4.9 (discussing abuse of bargaining process); *id.* § 4.28, at 332-35 (discussing unconscionability); see also Kull, *supra* note 228, at 54 (arguing that contract law does not display much concern about deliberation); Wessman, *supra* note 228, at 829 ("Except in the sort of exceptional circumstances that justify an application of the defense of unconscionability, the law simply does not police for imprudence where exchange promises are concerned.").

Contract law did, at one time, rely on the ceremony of the seal to encourage deliberation on the part of the promisor. See Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443, 450 (1987); Melvin Aron Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 660 (1982); Eric Mills Holmes, *Stature and Status of a Promise Under Seal As a Legal Formality*, 29 WILLAMETTE L. REV. 617, 627 (1993). The seal was the product of a ritual in which the promisor impressed a personal object, often a signet ring, in hot wax. See Holmes, *supra*, at 622, 630-31. A promise under seal was traditionally enforceable without consideration, see Barnett & Becker, *supra*, at 450, but the seal has largely fallen out of fashion in American jurisdictions. See Eisenberg, *supra*, at 660; Wessman, *supra* note 228, at 833. But see Holmes, *supra*, at 663 (arguing that the law of seals is "vital in at least half of our jurisdictions"). An even earlier example of a ceremony meant to encourage deliberation is the Roman *stipulatio*, a ritual in which the promisor bound himself by answering "*Spondeo*," ("I do pledge it") in response to the formal question, "*Spondesne?*" ("Do you pledge your word?"). Holmes, *supra*, at 627 n.33; see Fuller, *supra* note 96, at 800. For more on the *stipulatio*, see REINHARD ZIMMERMANN, *THE LAW OF OBLIGATIONS* 68-94 (1990).

230. See *supra* text accompanying notes 127-30.

231. For more on third-party effects of statutes, see *supra* Part III.B.

intent—difficulties that do not arise in the context of contract interpretation. A traditional contract, recall, has only two parties and a limited subject matter.<sup>232</sup> Examining the negotiating history of such a contract should not be terribly inconvenient. It should be relatively easy, as a general matter, to research that history and obtain a clearer picture of what the parties actually intended in making the agreement.

Examining legislative history for indications of legislative intent is a far more dubious undertaking.<sup>233</sup> The typical federal statute addresses not one, but numerous topics; often, these topics bear a complex relation to one another.<sup>234</sup> There are not two “parties,” but hundreds, most of whom remain silent during the statute’s “negotiation.”<sup>235</sup> Committee members, sponsors, and floor managers—veto players, in McNollgast’s terms—may comment on proposed legislation, of course. But there is no guarantee that their statements reflect the views of their colleagues.<sup>236</sup> As Slawson observes, the fact that the legislative record fails to note disagreement may reflect other legislators’ indifference, inattentiveness, or even absence.<sup>237</sup>

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232. See *supra* text accompanying note 123. For a discussion of scholarship that questions the validity of the traditional contract model, see *supra* note 123 (describing the concept of “relational” contract).

233. See James E. Westbrook, *A Comparison of the Interpretation of Statutes and Collective Bargaining Agreements: Grasping the Pivot of Tao*, 60 MO. L. REV. 283, 307-08, 313 (1995) (arguing that the use of negotiating history in the interpretation of a collective bargaining contract is simpler than the use of legislative history in the interpretation of a statute).

234. See Movsesian, *supra* note 121, at 72; see also Brudney, *supra* note 212, at 21 & n.78 (noting the “unprecedented length and complexity” of contemporary federal legislation).

235. See Movsesian, *supra* note 121, at 71; see also Radin, *supra* note 216, at 870-71 (noting that most legislators fail to offer an explanation of their views on legislation); cf. Westbrook, *supra* note 233, at 308 (observing that the negotiation of a collective bargaining contract “is simpler and involves fewer players than the legislative process”). But cf. McNollgast, *supra* note 6, at 19 (arguing that the greater number of parties does not provide a basis for distinguishing between contract and statutory interpretation).

236. See Eskridge, *supra* note 222, at 383; see also Eskridge & Frickey, *supra* note 138, at 327 (“Committee members and bill sponsors are not necessarily representative of the entire Congress, and so it is not necessarily accurate to attribute their statements to the whole body.”).

237. See Slawson, *supra* note 6, at 403-04; cf. Chafee, *supra* note 216, at 399-400 (depreciating the importance of intent “in the interpretation of a statute, in writing which hundreds of persons participated with widely varying degrees of attention”). Slawson observes:

An absence of conflicting statements in the record is not convincing evidence that no one disagreed with a particular statement. No body of 435 members, representing a wide variety of political opinions and parochial interests, really

All this should make one skeptical that legislative history can yield an accurate picture of legislative intent. Indeed, as Max Radin argued decades ago, the notion that a collective body has an "intent" at all is itself rather questionable.<sup>238</sup> Individual legislators may have intentions, of course, but it seems extremely unlikely that the hundreds of legislators who make up a legislative majority vote to approve legislation with "exactly the same determinate situations in mind."<sup>239</sup> Recent public choice scholarship tends to confirm doubts about the coherence of legislative intent.<sup>240</sup> Indeed, the starker versions of public choice scholarship maintain that a statute may bear no relation whatever to the preferences of the majority of legislators.<sup>241</sup>

To be sure, public choice theory remains controversial; some have refuted its more troubling assertions about legislative chaos.<sup>242</sup> Even if a thorough examination of legislative history could yield an accurate picture of legislative intent, though, the effort required would be enormous.<sup>243</sup> Consider, for example, the judge who adopts

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has a unanimous intent about anything more controversial than apple pie or motherhood. Absence of disagreement on the record is more likely to represent the other members' inattention, lack of interest, or absence from the forum in which the statement was offered. . . . Even floor statements may have been made when only a handful of other members were present . . . .

Slawson, *supra* note 6, at 403-04.

238. See Radin, *supra* note 216, at 870-71. For good summaries of Radin's argument, see Eskridge, *supra* note 138, at 642, and Manning, *supra* note 222, at 684-85.

239. Radin, *supra* note 216, at 870.

240. See, e.g., Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Although legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice."); Shepsle, *supra* note 6, at 248-50. Much of this scholarship addresses the implications of Arrow's Theorem, which maintains that it is impossible to ensure that a majority vote will reflect the voters' preferences among alternative options. See Shepsle, *supra* note 6, at 241; see also Manning, *supra* note 222, at 685 n.53 (describing Arrow's Theorem). For a more detailed description of the theorem, see FARBER & FRICKEY, *supra* note 6, at 38-39.

241. Judge Easterbrook explains why:

Legislatures customarily consider proposals one at a time and then vote them up or down. This method disregards third or fourth options and the intensity with which legislators prefer one option over another. Additional options can be considered only in sequence, and this makes the order of decision vital. It is fairly easy to show that someone with control of the agenda can manipulate the choice so that the legislature adopts proposals that only a minority support.

Easterbrook, *supra* note 240, at 547; see also FARBER & FRICKEY, *supra* note 6, at 39-42 (discussing implications of cycling, agenda-setting, and strategic behavior).

242. See Abner J. Mikva, *Foreword*, 74 VA. L. REV. 167 (1988) (criticizing reductionism of public choice analysis); see also FARBER & FRICKEY, *supra* note 6, at 47-55 (offering empirical critique of Arrow's Theorem).

243. See, e.g., DICKERSON, *supra* note 138, at 150-51 (noting the difficulty of searching

the approach that McNollgast proposes.<sup>244</sup> In addition to acquiring a working familiarity with positive political theory, the judge must, for every statute, identify the relevant veto players and determine their preferences, making appropriate discounts for merely opportunistic or strategic statements.<sup>245</sup> To do this properly, the judge (or, more likely, his law clerk) must sift through rafts of legislative material: hearings testimony, committee reports, floor statements, and even presidential signing statements.<sup>246</sup>

And the judge will not be alone. If judges make a habit of searching the legislative record, lawyers must do so as well. The communications revolution has made legislative materials more accessible than they were a few decades ago, when Justice Jackson wrote his famous criticism of legislative history,<sup>247</sup> but finding and examining such materials still takes substantial effort, particularly for lawyers in smaller firms or cities.<sup>248</sup> Short cuts are inadvisable: in a vast legislative record, there is no telling where one might find support for an argument about legislative intent.<sup>249</sup> And the whole

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"a long, heterogeneous, and often conflicting legislative history as it relates to a particular issue in a current controversy"); Scalia, *supra* note 138, at 36-37; Slawson, *supra* note 6, at 408-09.

244. See *supra* Part I.A.

245. See McNollgast, *supra* note 6, at 16-29; McNollgast, *supra* note 1, at 718-27. McNollgast provides mathematical models to help the judge in these endeavors. See McNollgast, *supra* note 6, at 23-24; McNollgast, *supra* note 1, at 721-24, 723 fig.1.

246. See Slawson, *supra* note 6, at 408. For a discussion of the controversial nature of presidential signing statements, see MIKVA & LANE, *supra* note 43, at 784-85. On the role of law clerks, see *Conroy v. Aniskoff*, 507 U.S. 511, 527 (1993) (Scalia, J., concurring in the judgment) ("The excerpts [of legislative history] I have examined and quoted were unearthed by a hapless law clerk to whom I assigned the task.").

247. See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396-97 (1951) (Jackson, J., concurring). In part, Jackson wrote:

[T]here are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. Laws are intended for all of our people to live by; and the people go to law offices to learn what their rights under those laws are. . . . Aside from a few offices in the larger cities, the materials of legislative history are not available to the lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole congressional history. . . . To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country.

*Id.* (Jackson, J., concurring); see also Monroe H. Freedman, Book Review, 28 GEO. WASH. L. REV. 503, 503-04 (1960) (citing Justice Jackson's opinion in *Schwegmann*).

248. See Slawson, *supra* note 6, at 408 ("For almost any lawyer who is not in a large firm in a major metropolitan area or in a government agency, the cost of such extensive research is prohibitive."). But see Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 200 (1982) ("Technology has made an anachronism of Justice Jackson's lament . . .").

249. See Slawson, *supra* note 6, at 408 ("Ordinarily all of the material must be read no

process will repeat itself every time someone litigates a new case under a statute.<sup>250</sup> Conscientious lawyers will want to take a fresh look at the legislative record,<sup>251</sup> and one can hardly expect judges to retain the details and nuances of complicated legislative bargains. All this effort in the unlikely hope of discovering an implicit "intent" that the text of a statute fails to reflect: the game hardly seems worth the candle.<sup>252</sup>

#### D. *Coda: Church of the Holy Trinity v. United States*

Contracts and statutes differ, then, in fundamental ways; the contract analogy in statutory interpretation cannot hold. The reader may still be left, though, with a question about *Church of the Holy Trinity v. United States*,<sup>253</sup> the illustration with which this Part began.<sup>254</sup> At issue, recall, was a federal statute that made it unlawful to encourage or assist the immigration of an alien " 'under contract . . . to perform labor or service of any kind in the United States.' "<sup>255</sup> The United States brought a prosecution under the act against a church that had recruited an English minister to serve as its rector. Although the text referred to "labor or service of any kind," the legislative history indicated that the legislators had intended the statute to apply only to manual labor. As a result, the Court reasoned, the church's contract with the minister did not fall within the reach of the statute.<sup>256</sup>

For reasons we have seen, this approach seems clearly wrong. Yet if contract analogies are false, and the Court's intentionalism

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matter what the question is, because there is no way of knowing in advance where something pertinent may be found." Judge Harold Leventhal once quipped that "citing legislative history is . . . akin to 'looking over a crowd and picking out your friends.'" Wald, *supra* note 248, at 214.

250. See Slawson, *supra* note 6, at 409.

251. Justice Scalia, who served as Assistant Attorney General in the Justice Department's Office of Legal Counsel, once estimated that his staff spent 60% of its time "finding, and poring over, the incunabula of legislative history." Scalia, *supra* note 138, at 36-37.

252. "It is not impossible," observed Radin, "that . . . knowledge [of legislative intent] could be obtained. But how probable it is, even venturesome mathematicians will scarcely undertake to compute." Radin, *supra* note 216, at 871.

253. 143 U.S. 457 (1892).

254. See *supra* Part III.A.

255. *Church of the Holy Trinity*, 143 U.S. at 458 (quoting Act of Feb. 26, 1885, ch. 164, § 1, 23 Stat. 332, 332, repealed by Act of June 27, 1952, ch. 477, § 403(a)(2), 66 Stat. 163, 279-80). For the full text of this provision, see *supra* note 139.

256. See *Church of the Holy Trinity*, 143 U.S. at 457-65. For a detailed description of the Court's opinion in *Church of the Holy Trinity*, see *supra* text accompanying notes 143-55.

incorrect, how should one resolve the case? In some sense, that is a question beyond the scope of this Article, which attempts to demonstrate only that contract and statutory interpretation cannot be assimilated. A full-dress theory of statutory interpretation must await another day. At least two possible resolutions to the case suggest themselves, though, and the reader may wish to consider them briefly.

The first would be to apply the statute according to its terms and assess a penalty against the church. That is the approach Justice Scalia has advocated in a recent essay,<sup>257</sup> and, for reasons already discussed, it has much to recommend it. To be sure, a penalty for recruiting a foreign pastor seems harsh. But there is no constitutional bar against harsh statutes, and this statute expressly requires that a penalty be assessed.<sup>258</sup> If the church objects, its best course would be to pursue an amendment to the statute or some other form of political redress.

The second approach is more complicated. A traditional canon teaches that courts should avoid statutory interpretations that produce "absurd" results—results that offend, in a substantial way, notions of reasonableness and common sense.<sup>259</sup> The classic example involves a Bolognian statute that prohibited residents from "'dr[awing] blood in the streets'": under the traditional canon, a court would decline to apply such a statute to a surgeon who had drawn blood while providing emergency medical assistance.<sup>260</sup>

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257. See Scalia, *supra* note 138, at 18-23.

258. There is a constitutional bar against laws that prohibit the free exercise of religion. See U.S. CONST. amend. I, cl. 1. Whether the statute at issue in *Church of the Holy Trinity* is such a law is an interesting question beyond the scope of this Article. Cf. Laurence H. Tribe, *Comment*, in *A MATTER OF INTERPRETATION*, *supra* note 6, at 65, 92 (arguing that Court's conclusion "makes eminent sense in light of the First Amendment"). As Justice Scalia has observed, the canon that courts should construe ambiguous statutes to avoid constitutional questions does not apply where, as in *Church of the Holy Trinity*, the words of the statute are clear. See Scalia, *supra* note 138, at 20 n.22; see also Eskridge & Frickey, *supra* note 169, app. at 101 (discussing canon that courts should avoid interpretations that render a statute unconstitutional, unless the statutory text is clear).

259. See Dougherty, *supra* note 146, at 150-51; Eskridge & Frickey, *supra* note 169, app. at 97; see also Popkin, *supra* note 138, at 879 (explaining that absurdity, in this context, refers to a "statute's substantive content" rather than "textual gibberish"). A version of this canon exists in many countries. See Robert S. Summers & Michele Taruffo, *Interpretation and Comparative Analysis*, in *INTERPRETING STATUTES* 461, 485 (D. Neil MacCormick & Robert S. Summers eds., 1991).

260. See *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 487 (1868); see also 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*60 (discussing Puffendorf's example of Bolognian law); Dougherty, *supra* note 146, at 139 (describing Bolognian example as "archetype" of absurd-results canon). *Kirby* itself provides another famous example: the Court ruled in

Interpreting an immigration law to prohibit the recruiting of foreign clergy, one might argue, is absurd. Indeed, as we have seen, the Court's holding in *Church of the Holy Trinity* derived in part from its belief that such an interpretation would be incompatible with America's heritage as a "Christian nation."<sup>261</sup>

This approach has its problems. For one thing, the theoretical basis for the absurd-results canon is questionable. To the extent the canon derives from presumptions about legislative intent—"the legislators cannot have intended this result"—it raises the difficulties discussed earlier,<sup>262</sup> to the extent it derives from judgments about public policy—"this result is untenable"—it threatens legislative supremacy.<sup>263</sup> Moreover, penalizing a church for recruiting a foreign pastor does not seem absurd in the same way that penalizing a surgeon would be in the Bolognian example, though of course this may simply reflect changing social norms. The Court's observations about America's religious heritage, incongruous today, may have been unremarkable in the legal culture of the nineteenth century. But these are all matters for another day. For our purposes, it suffices to say that the absurd-results canon suggests a possible resolution to *Church of the Holy Trinity* that merits further attention.

### CONCLUSION

Scholars may feel a temptation to construct what Holmes once called "the theory of legal interpretation".<sup>264</sup> a single, comprehensive set of principles for interpreting all legal texts. With respect to contracts and statutes, at least, it is a temptation worth resisting. Contracts and statutes differ in fundamental ways, and their

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that case that a statute prohibiting interference with the mails did "not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder." *Kirby*, 74 U.S. (7 Wall.) at 487.

261. See *Church of the Holy Trinity*, 143 U.S. at 471; *supra* text accompanying notes 146-47.

262. See *supra* Part III.C (discussing problematic concept of legislative intent).

263. See Eskridge, *supra* note 222, at 378; see also *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 474 (1989) (Kennedy, J., concurring in the judgment) (noting the potential of the absurd-results canon "to allow judges to substitute their personal predilections for the will of the Congress"). But cf. Dougherty, *supra* note 146, at 165 (arguing that the tension between the absurd-results canon and legislative supremacy is "dynamic" and "essential to the legal system").

264. See Holmes, *supra* note 6, at 417. Holmes conceded that "[d]ifferent rules conceivably might be laid down for the construction of different kinds of writing," but argued that, in practice, courts did not make such distinctions. *Id.* at 419. Holmes believed that statutes and contracts both required the same interpretive method: objectivism. See *id.*; see also *supra* note 75 (discussing Slawson's contract analogy).

interpretation cannot be assimilated. Importing the intentionalism of contract law into statutory interpretation mistakes the essence of both.

This has some interesting implications for legal interpretation generally. A unified theory, it suggests, one that explains everything from constitutions to wills, is a chimera we should cease chasing. We should focus, rather, on the differences among legal texts, and ask, for each, the following sorts of questions: Whom does the text affect? What formalities constrain its drafting? How complicated is its negotiation? If we pay mind to these things, correct interpretation will follow.



