

WHEN COURTS SHOULD IGNORE STATUTORY TEXT

*Jesse M. Cross**

Abstract. Statutory interpreters often rely upon a fundamental assumption: namely, that every word of a statute is meant to be read—and given legal force—by the courts. This assumption unites both textualists and intentionalists, and it has been invoked by Justices as diverse as Chief Justice Marshall, Justice Stevens, and Justice Scalia—the last of whom called it a “cardinal rule of statutory interpretation.” It underpins at least nine separate canons of statutory interpretation, and it even shapes how courts interpret legislative documents beyond statutes. It is difficult to imagine a more central assumption in statutory interpretation.

As this Article shows, however, this assumption is incorrect. Congress routinely inserts language into statutes that it hopes courts will ignore. Rather than addressing courts, this language targets one of three nonjudicial audiences: interest groups, executive agencies, or nonpartisan congressional offices.

This Article—written by a former drafter of congressional statutes—documents this legislative practice. Moreover, it argues that, to the extent that courts want to act as faithful agents of Congress, they should refrain from interpreting and applying this text that Congress intends solely for a nonjudicial audience. The Article outlines a methodology that courts can use to this end—a methodology that can accurately identify statutory text Congress wants courts to ignore.

In addition to showing that courts are reaching incorrect results in important cases—and providing a methodological solution to this problem—the Article’s analysis also holds theoretical lessons for the major schools of thought in statutory interpretation. For intentionalists, it provides a new theory about how courts should weigh legislative materials (including statutory text, appropriations committee reports, and CBO cost estimates). For textualists, it shows that many canons of construction must be modified or discarded, and it also rebuts the foundational notion

* Assistant Professor, University of South Carolina School of Law. Yale Law School, J.D. 2011; University of California, Irvine, M.A. 2006. I wish to thank William Eskridge, Jr., Bruce Ackerman, Nicholas Parrillo, Heather Gerken, John Witt, Derek Black, Maureen Brady, Benjamin Means, and Lisa Eichhorn for the generous and helpful feedback they provided with respect to early drafts of this Article. I also wish to thank my former coworkers at the Office of the Legislative Counsel for the U.S. House of Representatives.

that statutory text can be divorced from intent or audience. And, for public-choice theorists, it challenges the central idea that legislators are mere agents for interest groups—an idea rebutted by the discovery of a drafting practice that purposefully carves out spaces for principled governance in statutes.

TABLE OF CONTENTS

INTRODUCTION.....	456
I. EXPRESSIVE RHETORIC	461
A. <i>Message Bills</i>	461
B. <i>Statutory Redundancies: Congressional Drafters on Expressive Rhetoric</i>	464
C. <i>Titles, Headings, and Obamacare</i>	468
D. <i>Example Clauses and the Rule Against Redundancy</i>	471
1. H.R. 575	472
a. <i>Test #1: Language and Categories Specific to an Interest Group</i>	473
b. <i>Test #2: Comparative Strength of Competing Interpretations</i>	473
i. Interpretation #1: Belt-and-Suspenders Function	474
ii. Interpretation #2: Clarifying Function	474
iii. Interpretation #3: Expressive Function	476
2. Public Law 109-464.....	476
a. <i>Test #1: Language and Categories Specific to Interest Group</i>	478
b. <i>Test #2: Assessing the Comparative Strength of Competing Interpretations</i>	479
i. Interpretation #1: Expressive Rhetoric	479
ii. Interpretation #2: <i>Ejusdem Generis</i> Canon.....	480
E. <i>Implications</i>	480
1. The <i>Ejusdem Generis</i> Canon	480
2. The <i>Expressio Unius</i> Canon.....	481
3. The <i>Noscitur a Sociis</i> Canon.....	482
4. Theories of Legislators	482
II. DIRECTIVE RHETORIC	485
A. <i>Drafting Tactic: Modal Verbs</i>	487
1. Committee Reports for Appropriations Bills.....	487
2. The Mandatory-Permissive Canon and the Congressional “Should”	491
B. <i>Drafting Tactic: Example Clauses</i>	493
III. EXPRESSIVE-DIRECTIVE RHETORIC	496

A.	<i>Denali National Park Improvement Act</i>	496
1.	Test #1: Language and Categories Specific to Interest Group	496
2.	Test #2: Comparative Strength of Competing Interpretations	498
a.	<i>Interpretation #1: Clarifying Function</i>	498
b.	<i>Interpretation #2: Expressive and Directive Function</i>	499
B.	<i>Prenatally and Postnatally Diagnosed Conditions Awareness Act</i>	500
1.	Test #1: Language and Categories Specific to Interest Group	501
2.	Test #2: Comparative Strength of Competing Interpretations	501
a.	<i>Interpretation #1: Clarifying Function</i>	501
b.	<i>Interpretation #2: Expressive and Directive Function</i>	502
IV.	INSTITUTIONALLY INQUISITIVE RHETORIC.....	503
V.	THEORY APPLIED: <i>UNITED STATES V. JICARILLA APACHE NATION</i>	506
A.	<i>Interpretation #1: Operative Legal Rhetoric</i>	507
B.	<i>Interpretation #2: Expressive-Directive Rhetoric</i>	511
	CONCLUSION.....	513

INTRODUCTION

In the field of statutory interpretation, both textualist and intentionalist interpreters consistently rely upon a basic, shared idea: namely, that courts should interpret and enforce every word of a statute.¹ Known as the “surplusage canon,”² the “rule against surplusage,”³ or the “rule against superfluities,”⁴ it is an idea that has received deep and sustained support in the American legal community. It has been invoked by Justices as diverse as Chief Justice Marshall,⁵ Justice Stevens,⁶ and Justice Scalia⁷—the last of whom called it “the cardinal rule of statutory interpretation.”⁸ It underpins at least nine separate canons of statutory interpretation, and it shapes even how courts interpret legislative documents beyond statutes.⁹ It is difficult to imagine a more central rule in the field of statutory interpretation.

Why has this rule garnered such widespread support? For many interpreters, it is justified by the idea that, by applying the rule, they are giving effect to congressional intent.¹⁰ Congress presumably intends for every word

¹ As Caleb Nelson puts it: “[T]extualists (like all other interpreters) embrace the presumption against surplusage.” Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347, 355 (2005). To use the vocabulary of speech-act theory, these interpreters assume that statutory text addresses the courts through what is called an “indirect speech act,” which relies on readers’ background knowledge of constitutional structure to know that the statute, while not explicitly addressing the courts, nonetheless operates as an instruction to the courts to enforce its statutory directives. See JOHN R. SEARLE, *EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS* 30 (1979).

² *E.g.*, ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174 (2012).

³ *E.g.*, TOBIAS A. DORSEY, *LEGISLATIVE DRAFTER’S DESKBOOK: A PRACTICAL GUIDE* 85 (2006).

⁴ *E.g., id.*

⁵ *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 (1819).

⁶ *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 697–98 (1995).

⁷ *Kungys v. United States*, 485 U.S. 759, 778 (1988) (plurality opinion).

⁸ *Id.*

⁹ See SCALIA & GARNER, *supra* note 2, at 107 (Negative-Implication Canon), 112 (Mandatory/Permissive Canon), 132 (Presumption of Nonexclusive “Include”), 174 (Surplusage Canon), 195 (Associated-Words Canon), 199 (*Ejusdem Generis* Canon), 217 (Prefatory-Materials Canon), 221 (Title-and-Headings Canon), 225 (Interpretive-Direction Canon); Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177, 182 (2017) (using the CBO canon as a potential starting point for statutory interpretation); *e.g., infra* note 156.

¹⁰ See, *e.g.*, Melissa Davenport, Comment, *Risky Business: The FDA Bans Ephedra, and Gets a Leg Up on the Dietary Supplement Industry*, 5 GEO. J.L. & PUB. POL’Y 635, 642 (2007) (referring to “the ‘rule against surplusage,’ which suggests a court will better realize congressional intent by giving meaning to every word used in a statute”); Jacob R. Karabell, *The Implementation of “Balanced Diversity” Through the Class Action Fairness Act*, 84 N.Y.U. L. REV. 300, 313 n.82 (2009) (“[T]he rule against surplusage presumes that Congress intends to give every aspect of a statute meaning.”); Brian G. Slocum, Comment, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 827–28 (2010) (“[T]he rule against surplusage[] assumes that Congress intends for each statutory term to have meaning.”).

of its statutory commands to be backed by the threat of judicial enforcement, the logic goes—and so courts, by giving effect to every word, are simply acting as faithful agents of Congress.¹¹ In this way, the rule against surplusage typically is anchored in an assumption that Congress views the courts as the intended audience for every word of its statutes.¹²

As the following pages explain, however, this assumption is incorrect. When Congress drafts statutes today, it frequently inserts passages that it hopes courts will ignore. Indeed, having worked for six years as a drafter of congressional statutes, the Author of this Article personally inserted many such passages into federal legislation.¹³ Rather than addressing the courts, these passages were designed to speak exclusively to nonjudicial audiences.

By interpreting these passages of statutory text as though they were intended to contribute to court-enforceable commands, courts have failed to accurately ascertain the intended import of these passages—a failure that produces contorted interpretations of otherwise straightforward statutes. This failure is problematic, for it prevents courts from acting as faithful agents of Congress—an interpretive ideal that the vast majority of courts claim to embrace.

This Article documents the existence of these passages of statutory text that Congress does not intend for judicial audiences, and it outlines the other audiences that Congress seeks to reach with this text. Specifically, it observes that there are three nonjudicial audiences that Congress regularly addresses via such passages.

The first of these audiences is constituent groups—in particular, special-interest groups. Statutory text aimed exclusively at this audience serves a specific function: it allows these constituent groups to hear their values echoed in the text of congressional statutes. In so doing, the text gives constituent groups the sense that they partake in an ongoing relationship with legislators—a relationship wherein their commitments and values are heard and considered. As such, this text can achieve its desired effect without commanding or binding any party to a certain course of action. Consequently, the text need not be interpreted or enforced by courts in order to achieve its desired effect. In the following pages, this brand of constituent-targeted language will be referred to as *expressive rhetoric*.

The second alternative audience for congressional statutes is executive agencies. As Professor Edward L. Rubin previously has noted, Congress's statutory directives sometimes are intended solely for the agencies that will

¹¹ For a textualist embracing this intent-based logic of the rule against surplusage, see, for example, Nelson, *supra* note 1, at 355.

¹² *See id.* (“The reason for this presumption is simple: the fact that members of [Congress] bothered to include the second provision sheds light on what they probably intended the first provision to mean.”).

¹³ The Author worked as a Counsel in the Office of the Legislative Counsel for the House of Representatives, the main statutory drafting office in the House of Representatives, from 2011 to 2017.

implement the directives.¹⁴ Put differently, Congress does not always intend to use court-enforceable commands as the vehicle by which to direct agency action. There is a simple reason why it does not: agencies are dependent on Congress in many ways. This reality makes agencies attentive not only to the policies that Congress requires the agencies to implement, but also to those policies that Congress merely suggests or directs the agencies to implement. Following Rubin, this suggestion-driven statutory language will be labeled in the following pages as *directive rhetoric*.¹⁵

As this Article shows, Congress uses specific drafting techniques to integrate *directive rhetoric* into statutory text. These techniques, while unanticipated by Rubin, are identical to the techniques Congress uses in the context of *expressive rhetoric*. Importantly, they are techniques that courts can isolate and identify in the effort to parse Congress's intentions more accurately.

The final alternative audience of congressional statutory rhetoric is the collection of nonpartisan offices of Congress—offices that assist (and sometimes intervene in) the legislative process. Statutory text aimed at this audience is not focused on the goal of implementing a particular policy in the real world, but rather on soliciting a certain answer or response from one of these offices. This rhetoric will be referred to in this Article as *institutionally inquisitive rhetoric*.

If courts genuinely wish to discover and enforce congressional intent, this Article will argue, they should refrain from interpreting and enforcing statutory text intended solely for one of these three audiences. To many judges and scholars, however, the idea of acknowledging nonbinding rhetoric in congressional statutes may seem disconcerting. It may seem to invite a world in which judges are empowered to ignore broad swaths of congressional statutes. Once judges may acknowledge the presence of nonoperative rhetoric in statutes, it might be asked, what is to prevent them from using this power dishonestly? What will prevent judges, in other words, from using this power to ignore any statutory provision that conflicts with their policy preferences?

The answer to these concerns is found in the narrow, responsible manner in which Congress addresses its nonjudicial audiences. As the following pages explain, Congress uses its alternative rhetorics only in specific, identifiable statutory locations—namely, in locations in which established drafting conventions have created the inevitability, or at least the high likelihood, of statutory redundancy. In the following pages, these locations are referred to as *redundancy-encouraging features* of statutes. In this use of *redundancy-encouraging features*, Congress takes advantage of redundancies as locations

¹⁴ Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 374 (1989).

¹⁵ When the present Article refers to “directive rhetoric,” it is using the term “directive” in the sense used by Rubin, not in the broader sense used by the speech-act theorist John Searle, despite its occasional reliance upon Searle’s theorizations. *See id.* at 380.

that allow it to bifurcate a single statutory directive, splitting that directive into statutory text aimed at the courts, on the one hand, and statutory text aimed at nonjudicial audiences, on the other hand. Consequently, a power to parse Congress's different rhetorics does not translate into a freewheeling power that would permit courts to ignore any statutory text they find unpalatable. Rather, it would sanction an interpretive methodology endorsed in the following pages—one that, above all, requires courts to bring a new form of interpretive scrutiny to the *redundancy-encouraging features* that populate federal statutes.

In addition to showing that courts have reached incorrect results in important cases, this Article—through its analysis of Congress's different rhetorics—offers several theoretical contributions to the field of statutory interpretation. A few of these are worth noting at the outset. First, it posits a new hierarchy of legislative materials. Under this hierarchy, a court gives weight to those materials that it has reason to believe were drafted with the courts as their intended audience—and it would adopt a new method for investigating whether this belief is valid. Unlike the method adopted by most textualists, this method does not automatically assume that all statutory text is intended to address the courts. Unlike the method adopted by many intentionalists, it does not presume that every congressional expression of intent is meant to operate as a guide to the courts in their interpretive endeavor. Instead, it requires courts to conduct an additional inquiry once they have identified a congressional action or decision (such as the decision to insert a word or phrase into statutory text). They must ask: what type of rhetorical intent motivated this action or decision? Was the action or decision motivated by a *legal* desire to achieve enforcement in the courts? Or did Congress instead pursue this goal purely for *expressive, directive, or institutionally inquisitive* reasons?

Second, the Article suggests that many of the semantic canons are being misapplied by the courts. While many of these canons do seem grounded in legitimate theories about language usage, the canons go astray by layering these linguistic theories upon a false assumption: namely, that every word of a federal statute is designed to contribute to a court-enforceable rule. The result is that seemingly intuitive canons are applied in ways that misconstrue congressional intent. By attempting to redress these misguided efforts, this Article has implications for a host of canons of interpretation which are addressed in the following pages. These include the rule against surplusage, the *ejusdem generis* canon, the *expressio unius* canon, the *noscitur a sociis* canon, the title-and-headings canon, the mandatory/permissive canon, the definitions canon, the presumption of nonexclusive “include” canon, and the CBO canon.¹⁶ In most instances, the lesson is that any court aspiring to act as a faithful agent of Congress should not apply these canons when there is

¹⁶ The abbreviation “CBO” refers to the Congressional Budget Office, an office that provides cost estimates of legislation for Congress. For a discussion of the CBO canon, see *infra* note 231–235 and accompanying text.

compelling evidence that the statutory text at issue was written solely as *expressive, directive, or institutionally inquisitive rhetoric*.

Third, the analysis of *expressive rhetoric* in Part I rebuts a central tenet of public-choice theory—a theory which asserts that legislators are utterly beholden to special-interest groups. As Part I explains, legislators use *expressive rhetoric* to placate interest groups by addressing their rhetorical needs in nonoperative statutory text. In so doing, legislators seek to insulate operative statutory text from these interest group needs—an approach which, ideally, allows this operative text to articulate rules that are more public-regarding. The Article therefore suggests that legislators are attempting to negotiate a world of interest-group politics in a way that still allows them to create spaces for good governance. In this regard, it supports the work of those such as Professor Richard Fenno who have criticized the public-choice model by arguing that legislators do more than simply rubber-stamp the decisions made by interest groups.¹⁷ Further, it observes that when courts disregard this linguistic maneuver by Congress, they not only betray their goal of faithful agency; rather, they also allow interest-group politics to disrupt the national political system even beyond the level deemed acceptable by Congress.

Fourth, the Article rejects a notion that Justice Scalia, in particular, propagated: the idea that the meaning of a statute can be adequately understood in isolation from any analysis of intent or audience. The interpretive theory advocated by Justice Scalia returned to an idea that gained prominence among formalist literary theorists in the 1950s and 1960s: namely, that written texts are autonomous creations that rely on neither author nor audience for their essential meaning.¹⁸ In response to those formalist theorists, a subsequent generation of literary scholars emerged¹⁹—a generation whose work informed this Article. These scholars viewed a text’s cues about its intended audience as inseparable from the “meaning” of that text.²⁰ This Article accepts the insights offered by these subsequent scholars, and it transposes these insights into the field of statutory interpretation. In so doing, this Article rejects Justice Scalia’s formalist methodology, and it offers an alternative to that methodology. To the extent that this alternative methodology produces more compelling interpretations of congressional statutes, it should be taken as evidence of the inseparability of authorial intent, text, and audience—and consequently as a critique of Justice Scalia’s attempt to quarantine these factors from each other.

A number of theoretical insights emerge, therefore, from the vision of congressional statutes espoused in the following pages. According to this

¹⁷ See RICHARD F. FENNO, JR., *CONGRESSMEN IN COMMITTEES* 44 (1973).

¹⁸ See, e.g., W.K. WIMSATT, JR. & MONROE C. BEARDSLEY, *The Intentional Fallacy*, in *THE VERBAL ICON: STUDIES IN THE MEANING OF POETRY* 3, 3 (1954) (“[T]he design or intention of the author is neither available nor desirable as a standard for judging the success of a work of literary art . . .”).

¹⁹ See generally WAYNE C. BOOTH, *THE RHETORIC OF FICTION* (1961); Wolfgang Iser, *The Reading Process: A Phenomenological Approach*, 3 *NEW LITERARY HIST.* 279 (1972).

²⁰ See, e.g., BOOTH, *supra* note 19, at 89–91; Iser, *supra* note 19, at 279.

vision, modern political realities motivate congressional policymakers to use statutory text as a vehicle to address multiple audiences. In so doing, these policymakers become complex rhetorical actors who employ multiple voices in statutes to fulfill the full range of their political needs. If judges genuinely desire to act as faithful agents of Congress, it is imperative for them to hear Congress's multiple voices and discern which of those voices truly is addressed to courts. This Article aims to provide statutory interpreters with the tools necessary to accomplish this interpretive task.

This Article is divided into six Parts. Part I examines Congress's use of *expressive rhetoric*, Part II looks at *directive rhetoric*, Part III examines Congress's tendency to blend *expressive rhetoric* and *directive rhetoric*, and Part IV examines *institutionally inquisitive rhetoric*. Finally, Part V provides an in-depth examination of an illustrative case, *United States v. Jicarilla Apache Nation*,²¹ to demonstrate the need for courts to adopt the methodology outlined in this Article.

I. EXPRESSIVE RHETORIC

A. *Message Bills*

It is widely acknowledged that congressional legislation is designed, at least in some instances, to afford benefits to certain constituent groups.²² According to the traditional account, legislation accomplishes this objective through a three-step process.²³ First, a bill is enacted into law. Second, the bill—because it is enacted into law—instructs the executive and judicial branches to implement and enforce the policies that the bill outlines.²⁴ Third, the implementation of these policies affords benefits to constituents.²⁵ Under this account, courts and executive agencies are the intended audiences of

²¹ 564 U.S. 162 (2011).

²² WILLIAM N. ESKRIDGE, JR. ET AL., *STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND INTERPRETATION IN THE REPUBLIC OF STATUTES* 77–78 (2014); *see also* Trent Lott & John Breaux, *Want a Functioning Legislative Branch? Bring Back Earmarks*, WASH. POST (Jan. 25, 2018), https://www.washingtonpost.com/opinions/want-a-functioning-legislative-branch-bring-back-earmarks/2018/01/24/981b1672-0089-11e8-8acf-ad2991367d9d_story.html (“Members of Congress understandably seek to represent their states and districts in the best way possible—including voting for bills that benefit constituents directly.”).

²³ *See, e.g.*, ESKRIDGE ET AL., *supra* note 22, at 77 (“Under [even] the rosier versions of pluralism, politics is seen as the process by which interest groups seek to satisfy their goals, with each group securing the policies they most intensely desire”)

²⁴ Rubin, *supra* note 14, at 373.

²⁵ MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* 40 (2d ed. 1989).

statutory text, and while constituents benefit from that text, they receive the benefit only via the work of an intermediate actor.²⁶

This traditional account ignores a type of bill that is omnipresent in Congress, however: the “message bill.” As a *New York Times* editorial once observed, message bills are “bills *designed not to become law.*”²⁷ On the floor of Congress, Representative Eleanor Holmes Norton similarly noted of one such bill:

Every Member of the House knows that [the bill under debate] will never see the light of day on the other side of the Congress, in the Senate, and will never become law. It is a message bill. That is all right. Both sides, when they capture the Congress, participate in message bills.²⁸

Message bills cannot afford benefits to constituent groups through the conventional three-step process, in other words, for the simple reason that they are never enacted into law.

Despite this fact, however, it is widely acknowledged that message bills are drafted and introduced to satisfy constituent groups.²⁹ If message bills’ purpose is to provide benefits to constituents, and if they do not accomplish this via the typical three-step process, then how do they accomplish this task?

The answer to this question is embedded in the very label given to these bills: they allow legislators to send a “message” directly to constituents. As Senator Olympia Snowe put it in the *Harvard Journal on Legislation*: “Much of what occurs in Congress today is what is often called ‘political messaging.’ Rather than putting forward a plausible, realistic solution to a problem, members on both sides offer legislation that is designed to make a political statement.”³⁰ For this reason, Members of Congress often analyze the bill by examining “the message it sends” to constituents, not by scrutinizing what the bill would accomplish upon enactment.³¹ As one scholar has observed, messaging is properly evaluated not to discover whether it is supported by

²⁶ See Rubin, *supra* note 14, at 373, 376.

²⁷ Editorial, *The Bills to Nowhere*, N.Y. TIMES (June 7, 2012), <https://www.nytimes.com/2012/06/08/opinion/the-bills-to-nowhere.html> (emphasis added); see also *Federal Research and Development: Hearing Before the Subcomm. on Sci., Tech. & Space of the S. Comm. on Commerce, Sci. & Transp.*, 105th Cong. 12 (1998) (statement of Sen. Rockefeller) (referring to what Sen. Rockefeller “would call a message bill as opposed to a passable bill or . . . appropriations effort”).

²⁸ 160 CONG. REC. H159 (daily ed. Jan. 10, 2014) (statement of Rep. Norton).

²⁹ See Senator Olympia J. Snowe, *The Effect of Modern Partisanship on Legislative Effectiveness in the 112th Congress*, 50 HARV. J. ON LEGIS. 21, 27 (2013).

³⁰ *Id.*

³¹ 144 CONG. REC. H10,178 (daily ed. Oct. 8, 1998) (statement of Rep. Becerra) (analyzing a bill that essentially was a “message bill” that “will not have any practical legal affect [sic] on our laws and how we conduct our affairs” in terms of “the message it sends”); see also Sarah Mimms & Billy House, *House Barely Passes Paul Ryan’s Budget, with 12 Republicans Voting No*, NAT’L J. (Apr. 10, 2014, 8:48 AM), <https://www.nationaljournal.com/s/59374> (quoting Rep. Massie as saying Paul Ryan’s budget bill “is a messaging bill” and analyzing it in terms of “[w]hat it says” to constituents).

solid, implementable policy but rather to determine whether the message “resonates with what Members of Congress (and their constituents) want to hear.”³²

In the case of a message bill, in other words, the text of the bill is *itself* the benefit accorded to constituents. The bill echoes back to constituents the views and values that they find meaningful.³³ As such, message bills seek to communicate directly to these constituents—which is to say, the statutory text of these bills adopts constituents as its directly intended audience.

Message bills send this “message” to constituents in two ways. First, because message bills will never be implemented, these bills can contain policies that are designed purely to appeal to constituent groups, without regard to the practical consequences of implementation. In the following pages, these will be referred to as *expressive policies*. Second, these bills can include language that is chosen solely for its vivid ability to communicate policy goals to constituents, rather than for its ability to communicate precise policy directives to the courts. This will be referred to as *expressive rhetoric*.

Since Congress has unilateral power to draft statutory text, message bills can achieve this communicative goal without any assistance from the executive branch or the courts. This is why message bills do not adopt the coordinate branches as intended audiences—and why they never intend to do so. *Expressive policies* and *expressive rhetoric* only need to speak with a specific, easily achieved illocutionary force: they *express* Congress’s awareness of constituents’ values, and they do so without *directing* or *commanding* that agencies or courts take any action in furtherance of these values.³⁴

The congressional practice of drafting message bills offers two important lessons. First, the fact that Members of Congress expend precious time and resources producing message bills reveals that Members value the opportunity to use statutory text as a vehicle for *expressive policies* and *expressive rhetoric*. It undoubtedly would require less time and effort for Members to address constituent groups by inserting these policies and this rhetoric

³² Shoba Sivaprasad Wadhia, *The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & CIV. RTS. L. REV. 387, 421 (2007); see also *The Bills to Nowhere*, *supra* note 27 (noting that message bills drafted by Republicans were written “to satisfy the ideological desires of conservative voters,” not to enact substantive policies).

³³ In this sense, legislative text becomes one of the many nonlegislative benefits that Congress provides to interest groups, a benefit similar to others that Professor Morris Fiorina has documented. Cf. FIORINA, *supra* note 25, at 40.

³⁴ The distinction between the illocutionary force of a statement, as opposed to the content of that statement, has been laid out in detail by speech-act theorists. See generally J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 105–06 (2d ed. 1975). Summarizing Professor Austin’s insights, scholars have said: “[E]lementary illocutionary acts are of the form F(P): they are composed of a force F and of a proposition P. On the one hand, sentences like ‘Please, help me!’ and ‘You will help me’ . . . express . . . the same propositional content but different forces. On the other hand, elementary sentences like ‘Is it snowing?’ and ‘Are you coming?’ . . . express . . . the same force but different propositional contents.” ESSAYS IN SPEECH ACT THEORY 5 (Daniel Vanderveken & Susumu Kubo eds., 2001).

into nonlegislative texts (such as press releases). Yet these Members consistently expend the effort necessary to use statutory text as the vehicle for these *expressive* elements, drafting and introducing many message bills in each Congress.³⁵ The prevalence of this practice shows that, for Members, the insertion of these *expressive* elements into statutory text is a distinct and valuable benefit that they can offer to constituents.

Second, message bills reveal a particular strategy used by Members to achieve this *expressive* goal. This strategy consists of two parts. First, in the effort to avoid addressing courts or agencies, these legislators make use of a location in statutory text where Congress knows that its rhetoric will not be buttressed by an institutional enforcement mechanism. Here, that location is *the text of statutes that will never be enacted into law*. Second, that location is used as a hiding place for rhetoric that speaks directly to constituents—and in terms that are meaningful to them.

B. *Statutory Redundancies: Congressional Drafters on Expressive Rhetoric*

To many judges and scholars, the notion that Congress includes *expressive rhetoric* and *expressive policies* in message bills is neither troubling nor surprising. After all, this notion does not challenge the basic idea that, when it comes to *enacted* statutes, Congress speaks solely in what, in the following pages, will be described as *operative legal rhetoric*—which is to say, in rhetoric that Congress intends courts to interpret and enforce.

Interpreters who adopt this perspective clearly are correct in one sense: Members of Congress do not have the luxury of inserting *expressive policies* into enacted statutes. Regardless of any suspicions that a policy was designed to appeal directly to a nonjudicial audience, courts and agencies simply will not ignore entire sections of enacted statutes.³⁶ This is precisely what would be required for *expressive policies* to speak directly to constituents and evade enforcement by the courts. Congress undoubtedly is aware of this fact, and there is little reason to presume that Congress is including entire provisions in enacted statutes that it expects the courts to overlook.

However, there is strong evidence—in recent drafter interviews, as well as in statutory text itself—to support the idea that Congress is inserting

³⁵ In recent years, some have accused Congress of drafting *only* message bills. *See, e.g.*, 160 CONG. REC. H159 (daily ed. Jan. 10, 2014) (statement of Rep. Norton) (“The problem with the majority in the House today is that it only does message bills.”); *The Bills to Nowhere*, *supra* note 27 (“This is now the pattern of business in the House of Representatives: Spend most of the time passing bills designed not to become law . . .”).

³⁶ Scalia and Garner note that “[l]awyers rarely argue that an entire provision should be ignored—but it does happen.” SCALIA & GARNER, *supra* note 2, at 175. They cite *Fortec Constructors v. United States*, 760 F.2d 1288 (Fed. Cir. 1985), as an instance of lawyers making such an argument. *See id.* Scalia and Garner add that “[t]he court correctly rejected this argument.” *Id.* at 176.

expressive rhetoric into strategic locations in enacted statutes.³⁷ First, consider the evidence found in drafter interviews. In their recent survey of congressional drafters, Professors Abbe Gluck and Lisa Schultz Bressman observed:

[R]espondents [to the survey] . . . pointed out that the *political interests* of the audience often demand redundancy. They told us, for example, that “sometimes politically for compromise they must include certain words in the statute—that senator, that constituent, that lobbyist wants to see that word”; similarly, they said that “sometimes the lists are in there to satisfy groups, certain phrases are needed to satisfy political interests and they might overlap” or that “sometimes you have it in there because someone had to see their phrase in the bill to get it passed.” One example provided was a statute drafted to cover “medical service providers” that had to be amended to include a specific (and redundant) reference to “hospitals” to satisfy stakeholders. . . .

[W]hat respondents told us was . . . that even in short statutes—indeed, even within single sections of statutes—that terms are often *purposefully redundant to satisfy audiences other than courts*.³⁸

In this passage, Gluck and Bressman reveal a congressional drafting practice of inserting language into statutes that displays the two hallmarks of *expressive rhetoric*.³⁹ These hallmarks, it will be recalled, were that (1) the inserted language is designed to speak to constituents, not courts; and (2) the language is inserted into a statutory location that Congress hopes, and reasonably expects, will allow that rhetoric to evade enforcement by courts.⁴⁰

Consider the first of these hallmarks: that the statutory text at issue is designed to speak to constituents, not courts. The respondents to Gluck and Bressman’s survey suggest that, on occasion, Congress uses statutory text to address an intended audience “other than courts,” an audience that instead comprises “constituent[s],” “lobbyist[s],” “[outside] groups,” and “political interests.”⁴¹ This is precisely the intended audience of message bills.

Skepticism likely exists, however, as to whether Gluck and Bressman’s respondents also point toward statutory text that satisfies the second hallmark of *expressive rhetoric*: namely, that this rhetoric is inserted into a statutory location that Congress hopes and expects will evade judicial enforcement. To skeptical interpreters, the insertion of a term or phrase into the text of an enacted statute inevitably signals a congressional intent to have this term interpreted and enforced by the courts.

Yet the respondents to Gluck and Bressman’s survey describe a practice of inserting this rhetoric specifically into a strategic set of locations within

³⁷ See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 934–35 (2013).

³⁸ *Id.* (footnotes omitted).

³⁹ See *id.* at 934–36.

⁴⁰ See *id.* at 934–35.

⁴¹ *Id.* (emphasis removed).

statutory text: locations of statutory redundancy.⁴² As Gluck and Bressman put it, their respondents pointed toward a drafting practice that involves the insertion of “terms [that] are often *purposefully redundant*” into statutes.⁴³ There is no legal reason, of course, why this language must be redundant. If constituents insist upon inserting certain terminology into a statute, that terminology could simply be used as the sole articulation of the relevant idea in the legislation, rather than in addition to redundant text located elsewhere in the bill. Yet Gluck and Bressman’s respondents describe a different drafting practice. Why might that be?

If there is one type of statutory text that Congress might reasonably expect courts to grudgingly treat as surplusage, it would be redundant text. As Justice Scalia and Professor Garner have observed, situations in which judges—even textualist judges—must treat statutory terms as redundancies are “lamentably common.”⁴⁴ Put differently, if Members of Congress felt obligated to insert rhetoric into statutory text that they intended exclusively for an audience other than the courts, it makes sense that these Members would do so in redundant passages of these statutes, since these passages are frequently acknowledged by courts as redundant and therefore as lacking independent legal effect. As such, Gluck and Bressman’s survey raises the possibility that Congress uses statutory redundancies specifically because redundancies provide a statutory location that is best able to satisfy the second hallmark of *expressive rhetoric*: it provides a location to insert text that might evade enforcement by the courts.

Why, then, is Congress adding text to statutes that displays both hallmarks of *expressive rhetoric*? Gluck and Bressman’s respondents provide an answer: these redundancies, they explain, are built into statutory text because “that constituent, that lobbyist wants to see that word” and “because someone had to see their phrase in the bill.”⁴⁵ This is exactly the function that was identified in the context of message bills: the function of allowing certain constituent groups, either instead of receiving a legally enforceable benefit or in addition to receiving such a benefit, to obtain the distinct *expressive* benefit of observing their values and terminology reflected in statutory text.⁴⁶

It is possible, of course, that the constituent “wants to see [a specific] word”⁴⁷ in a statute not because the constituent seeks an *expressive* benefit, but because the constituent believes that the word will have operative legal effect that is unforeseen by Congress. Even if this is the case, though, it should have little bearing on statutory interpretation. The task of the courts is not to discern the intent of constituents. Rather, to the extent that courts

⁴² *Id.*

⁴³ Gluck & Bressman, *supra* note 37, at 935.

⁴⁴ SCALIA & GARNER, *supra* note 2, at 177.

⁴⁵ Gluck & Bressman, *supra* note 37, at 934.

⁴⁶ *See id.*

⁴⁷ *Id.*

understand themselves to be operating as “faithful agents” of Congress, their task is to reconstruct the intent of this legislative body.⁴⁸ Gluck and Bressman’s respondents reveal this intent with regard to certain statutory redundancies: it is an intent, their respondents explain, to insert gratuitous text into statutes in order to award to constituents the distinct benefit of “see[ing] their phrase in the bill.”⁴⁹ In this sense, it is an intent to give an expressive benefit directly to constituents and without regard to the courts.⁵⁰

An awareness that Congress might be using *expressive rhetoric* in enacted statutes inevitably raises the question: can (and should) this awareness inform or alter the practice of statutory interpretation in the courts? In their article, Gluck and Bressman express skepticism on this front, saying:

Whether this “audience” issue should have an effect on how courts interpret statutes is a different matter—after all, how will courts be able to discern when drafters are talking to them as opposed to other audiences? A fictitious interpretive rule may be required precisely *because* investigating the intended audience would be too difficult.⁵¹

Is it true, however, that it would be prohibitively difficult to isolate and identify those instances in which Congress inserts *expressive rhetoric* into statutes? An interpretive methodology certainly can be developed that looks for the two hallmarks of *expressive rhetoric*, after all. If both hallmarks are found in the text of a statute, the interpreter can conclude (quite reasonably) that Congress inserted this rhetoric into the statute for an *expressive purpose*—a purpose analogous to that found in message bills and one that accords with the purpose detailed by Gluck and Bressman’s respondents.

Such a methodology for identifying *expressive rhetoric* would consist of a two-step process. First, the interpreter would search the statute for locations of potential redundancy. In particular, the interpreter would seek out *redundancy-encouraging features* of statutes (i.e., structural features of statutes that almost inevitably invite redundancies). A number of these features exist, and they are easily identified within a statute. Titles and headings, for example, are *redundancy-encouraging features*, since these features are redundant with the operative provisions that they label. Similarly, defined

⁴⁸ For the idea that faithful agency implies a search for legislative intent, see, for example, *id.* at 958 n.188 (explaining that “courts fulfill their duties as faithful agents when correcting obvious typos in the statute that Congress never could have intended”); Andrew S. Gold, *Absurd Results, Scrivener’s Errors, and Statutory Interpretation*, 75 U. CIN. L. REV. 25, 50 (2006) (“A view of courts as faithful agents of Congress is longstanding and seems to require enforcement of actual legislative intent.”). *But see* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2395 (2003) (observing that “[t]he Court has long emphasized that, as faithful agents of Congress, federal courts have a constitutional duty to implement Congress’s ‘intent’” but also objecting to this understanding of faithful agency).

⁴⁹ Gluck & Bressman, *supra* note 37, at 934.

⁵⁰ *See id.* at 934–35.

⁵¹ *Id.* at 935.

terms are redundant with their definitions, and examples are redundant with the rules they illustrate.

In the second step of this methodology, the interpreter would search the text found in the *redundancy-encouraging feature* for persuasive evidence that it is adopting identifiable constituent groups (rather than the courts) as its intended audience.

In the case where the interpreter identifies statutory text that satisfies both steps of this methodology, the interpreter could reasonably conclude that the statutory text was meant to operate analogously to message bills, just as Gluck and Bressman's respondents assert it does.⁵² The interpreter could conclude, in other words, that Congress drafted this redundancy with the distinct intention of awarding an *expressive* benefit directly to a constituent group, not with the intention of addressing the courts regarding the implementation of a policy.

C. *Titles, Headings, and Obamacare*

To appreciate the utility of this two-step methodology, consider its application to the congressional use of the term "Obamacare." As of February 2018, not a single bill introduced in Congress had used the term "Obamacare" as a substantive term in its operative text.⁵³ By contrast, seventy-four bills had used the term in a short title, five in a long title, and eight in a heading.⁵⁴ Within each of these bills, the reference to "Obamacare" in a title or heading was paired with a more legally precise citation in the operative text of the bill.⁵⁵ By using the term "Obamacare" only within titles and headings, therefore, Congress used the term only within redundant portions of statutory text. In this regard, Congress used the term in a manner that displays one hallmark of *expressive rhetoric*: it inserted this term solely into statutory locations that Congress might plausibly expect to evade enforcement by the courts.

The other hallmark of *expressive rhetoric*, it will be recalled, is that statutory text appears addressed primarily to constituents. How is the interpreter to find statutory text that meets this criterion? For one thing, if *expressive rhetoric* is understood as having constituents as its intended audience, then it makes sense that this rhetoric would adopt the language and categories that are meaningful to these constituents, even at the expense of legal clarity. One commonsense strategy, therefore, is to look for rhetoric that sacrifices legal clarity in order to achieve expressive force with constituents.

⁵² *See id.* at 934.

⁵³ Based on a search of <https://www.congress.gov> on Feb. 20, 2018.

⁵⁴ *E.g.*, H.R. 562, 115th Cong. § 1 (2017) (using the term "Obamacare" in the short title).

⁵⁵ *E.g.*, H.R. 4004, 115th Cong. (2017) (using the term "Obamacare" in the title and the "Patient Protection and Affordable Care Act" in the body of the bill).

The term “Obamacare” clearly meets this criterion. It is a term that has potent meaning for specific constituent groups. As a *New York Times* article explained, “[t]he act is often called ‘Obamacare,’ primarily by Republicans, as a term of disdain.”⁵⁶ A cultural anthropology textbook has noted it as a paradigmatic example of politically charged rhetoric.⁵⁷ In the current political landscape, “Obamacare” clearly is a term that carries great expressive—and partisan—meaning.

Moreover, “Obamacare” is a term that achieves this expressive force only through a sacrifice in legal clarity. According to the drafting manual used by the Office of the Legislative Counsel for the House of Representatives, citations in legislative text should strive for clarity and precision; they ideally should “identify briefly a law *in an unambiguous manner*.”⁵⁸ Any citation to “Obamacare” plainly does not achieve this goal. Does such a citation refer only to the freestanding provisions of the Patient Protection and Affordable Care Act, for example? Or does it include amendatory provisions as well—provisions such as those that simply insert text into the Public Health Service Act or the Social Security Act?⁵⁹ Does it refer only to the Patient Protection and Affordable Care Act, or does it also include the Health Care and Education Reconciliation Act of 2010, the companion vehicle used to incorporate changes into the health care bill immediately upon enactment?⁶⁰ Citations to short titles or public law numbers—as the Legislative Counsel drafting manual recommends⁶¹—would provide clarity to interpreters who must parse the language of a statute and determine its precise scope. In so doing, however, the citation would sacrifice the expressive value found in the term “Obamacare.”

In its use of the term “Obamacare,” therefore, Congress sacrifices legal clarity in order to achieve expressive force with constituents, and it does so in redundant passages of statutory text. This usage suggests that Congress is inserting *expressive rhetoric* for constituents into the titles and headings,

⁵⁶ Amanda Cox et al., *Fighting to Control the Meaning of “Obamacare,”* N.Y. TIMES (Mar. 25, 2012), <https://archive.nytimes.com/www.nytimes.com/interactive/2012/03/25/us/politics/fighting-to-control-the-meaning-of-obamacare.html?mcubz=2>.

⁵⁷ GARRICK BAILEY & JAMES PEOPLES, ESSENTIALS OF CULTURAL ANTHROPOLOGY 51 (3d ed. 2014).

⁵⁸ OFFICE OF THE LEGISLATIVE COUNSEL, U.S. HOUSE OF REPRESENTATIVES, HOUSE LEGISLATIVE COUNSEL’S MANUAL ON DRAFTING STYLE 47 (1995), http://legcounsel.house.gov/HOLC/Drafting_Legislation/draftstyle.pdf [hereinafter DRAFTING MANUAL] (emphasis added).

⁵⁹ For sections that are largely or entirely amendatory, see the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1001, 124 Stat. 119, 130 (2010) (amending the Public Health Service Act); *id.* § 1201, 124 Stat. at 154 (amending the Public Health Service Act); and *id.* § 10,501, 124 Stat. at 993 (amending the Social Security Act and the Public Health Service Act).

⁶⁰ See generally BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS 213–30 (4th ed. 2012).

⁶¹ DRAFTING MANUAL, *supra* note 58, at 48.

while it inserts *operative legal rhetoric* intended for the courts elsewhere in the text of the statute.

This is not the only interpretation available to the statutory interpreter, however. Indeed, the conventional view of titles and headings counsels toward a different interpretation. Prevailing theories of statutory interpretation likely would explain these references to “Obamacare” in titles and headings not by reference to the expressive quality of the term “Obamacare,” but rather by reference to a different virtue of the term: its brevity. The Supreme Court has endorsed the idea that titles and headings deviate from statutory text simply for reasons of brevity, describing these statutory features as providing “but a short-hand reference” to the policies outlined in the statute’s operative provisions.⁶² Based on this view of titles and headings, Scalia and Garner defend a “Title-and-Headings Canon” that views these statutory features as “permissible indicators of meaning.”⁶³ The Court shares this view of their permissibility, reiterating it as recently as the 2015 case of *Yates v. United States*,⁶⁴ albeit without articulating its theoretical underpinnings.⁶⁵ From this perspective, Members of Congress who use the term “Obamacare” in titles and headings deploy this term simply because proper citations would prevent the title or heading from being sufficiently succinct.

There are several difficulties with this conventional interpretation, however. First, there are more precise alternatives available if Congress’s goal is simply to achieve brevity—alternatives that Congress has employed elsewhere in introduced bills.⁶⁶ Second, if the term “Obamacare” was being chosen for its brevity rather than for its expressive capacity, then there should not be a partisan divide in the use of this term. By contrast, all eighty-two of the bills that deployed the term “Obamacare” were introduced by Republicans.⁶⁷ Third, several of the bills that employ the term “Obamacare” surround the term with additional rhetoric that plainly is meant to highlight the expressive nature of this term.⁶⁸ In the “Stop Obamacare’s Risky Provisions Act”⁶⁹ and the “Safeguarding Children Harmed by Obamacare’s Onerous Levies

⁶² Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co., 331 U.S. 519, 528 (1947). Scalia and Garner describe this case as “[t]he classic statement about the use of statutory titles and headings in American law.” SCALIA & GARNER, *supra* note 2, at 221.

⁶³ SCALIA & GARNER, *supra* note 2, at 221.

⁶⁴ 135 S. Ct. 1074 (2015).

⁶⁵ *See id.* at 1083.

⁶⁶ *E.g.*, S. 1642 § 1, 113th Cong. (2013) (referring to “the Affordable Care Act” in the short title); H.R. 45, 113th Cong. § 1 (2013) (referring to “Health Care-Related Provisions in the Health Care and Education Reconciliation Act of 2010” in section and subsection headings); H.R. 5417, 111th Cong. § 1 (2010) (referring to “PPACA and HCERA” in the section heading).

⁶⁷ *E.g.*, H.R. 4004, 115th Cong. (2017) (amending “the Patient Protection and Affordable Care Act to require employees of the White House to enroll in Obamacare”; introduced by Rep. Bill Posey, R-FL).

⁶⁸ *E.g.*, H.R. 3985, 113th Cong. (2014) (using the short title “Stop Obamacare’s Risky Provisions Act”).

⁶⁹ H.R. 3985, 113th Cong. (2014).

Act,”⁷⁰ for example, the descriptions of the Act’s provisions as “risky” and “onerous” clearly are designed to underscore and extend the expressive quality of the term “Obamacare.”⁷¹

Consequently, there is good reason to think that the term “Obamacare” was chosen for its *expressive* quality, not for its *operative legal* quality—the same quality that was the impetus behind the “message bills” discussed in the foregoing pages. Meanwhile, since the references to the health care law in the operative text of these bills are more legally precise but less expressive, it is reasonable to assume that these references were intended as *operative legal rhetoric*—which is to say, as an attempt to translate the concept of “Obamacare” into a precise citation to be applied by the courts.

In this regard, bills referencing “Obamacare” are not anomalous. Consider two examples that were enacted into law: the “Animal Enterprise Terrorism Act”⁷² and the “Helping Heroes Fly Act.”⁷³ Each of these Acts provides a short title that contains a highly expressive but legally imprecise term (“terrorism” and “heroes,” respectively⁷⁴), and neither Act uses that expressive term in operative text.

As such, the use of “Obamacare” in titles and headings, alongside the use of “Public Law 111-148” and “Patient Protection and Affordable Care Act” in operative text, begins to illustrate a new view of statutes. According to this view, bills sometimes appear as fractured texts. They are internally divided—using several different forms of rhetoric, each of which addresses a different intended audience.

D. *Example Clauses and the Rule Against Redundancy*

Another *redundancy-encouraging feature* of statutes similarly is worth examining: example clauses. Example clauses serve a specific function: they provide one or more concrete examples to illustrate a general rule that is stated elsewhere in the statutory text.⁷⁵ As such, example clauses are structural features that invite redundancy, thus satisfying one step of the two-step methodology used to identify *expressive rhetoric* in statutes. (Moreover, they were specifically mentioned by a statutory drafter in Gluck and Bressman’s survey as a location for *expressive rhetoric*.⁷⁶) Under the two-step

⁷⁰ H.R. 2443, 113th Cong. (2013).

⁷¹ See H.R. 3985 § 1; H.R. 2443 § 1.

⁷² Pub. L. No. 109-374, 120 Stat. 2652 (2006).

⁷³ Pub. L. No. 113-27, 127 Stat. 503 (2013).

⁷⁴ See Helping Heroes Fly Act § 1, 127 Stat. at 503; Animal Enterprise Terrorism Act § 1, 120 Stat. at 2652.

⁷⁵ See ESKRIDGE ET AL., *supra* note 22, at 454–56 (explaining the purpose of example clauses but referring to them as “statutory lists”).

⁷⁶ Gluck & Bressman, *supra* note 37, at 934 (quoting a drafter who said that “sometimes the lists are in there to satisfy groups”).

methodology, therefore, it is necessary to ask of any example clause: does its rhetoric indicate that its drafters intended it to address constituents rather than courts?

To illustrate the process that interpreters can use to answer this question, the following pages examine two pieces of congressional legislation. For each piece of legislation, the following pages ask two questions. First, do the example clauses in the legislation, at the expense of legal clarity, uses language and categories that are meaningful to a specific interest group? Second, does the most commonsense and compelling interpretation emerge when the example clause is viewed as *expressive rhetoric*? By answering these questions, the following pages aim to show, interpreters can check whether an example clause contains language that its drafters hoped would address constituents, not courts.

1. H.R. 575

Consider the example clauses found in H.R. 575,⁷⁷ as introduced in the 113th Congress. While this bill was not reported out of committee, it nonetheless provides a helpful illustration of the drafting practices in the modern Congress. It focuses upon a specific concern: the worry that participation by the United States in international agreements and organizations might somehow compromise the rights afforded to individuals by the Constitution.⁷⁸ The bill addresses this concern in two different ways. First, it expresses the sense of Congress that, *inter alia*, “the United States should not adopt any treaty that . . . abridges the rights guaranteed by the United States Constitution, such as the right to keep and bear arms.”⁷⁹ Second, it conditions United Nations funding upon a presidential certification that the United Nations has not made any effort to “restrict . . . or otherwise adversely infringe on the rights of individuals in the United States to possess a firearm or ammunition . . . or abridge any of the other constitutionally protected rights of citizens of the United States.”⁸⁰

Each of these two references to Second Amendment rights—references to “the right to keep and bear arms” and to the right “to possess a firearm or ammunition”—operates as an example clause, since each illustrates a broader legal rule that applies to all rights under the Constitution. Does the text found in these example clauses, then, provide persuasive evidence that the intended audience of this text was constituents, not courts?

⁷⁷ Second Amendment Protection Act of 2013, H.R. 575, 113th Cong. (2013).

⁷⁸ *Id.* § 2.

⁷⁹ *Id.* § 2(b).

⁸⁰ *Id.* § 3(b).

a. *Test #1: Language and Categories Specific to an Interest Group*

The foregoing pages have outlined one test that can be used to answer this question. According to this test, when the rhetoric employed in a *redundancy-encouraging feature* speaks in the language and categories that are uniquely meaningful to a constituent group, even at the expense of legal clarity, this signals the possibility that the rhetoric is directed toward that constituent group rather than toward the courts.

In the case of H.R. 575, each example clause specifically references a topic—the Second Amendment—that is extremely important to a formidable partisan constituent group (namely, the gun lobby). The National Rifle Association, for example—which has been described in the *New York Times* as “the fiercest lobby in Washington”⁸¹—describes itself as “America’s foremost defender of Second Amendment rights.”⁸² Another member of the gun lobby, Gun Owners of America, similarly describes itself as “a non-profit lobbying organization formed . . . to preserve and defend the Second Amendment rights of gun owners.”⁸³ In H.R. 575, the Member who introduced the bill twice chose to include an example that made explicit mention of this Second Amendment right,⁸⁴ even though these references bear an unclear relationship to the broader reference to “rights guaranteed by the United States Constitution,” thereby decreasing the legal clarity of the bill. The example clauses in H.R. 575, therefore, use the language and categories that are deeply meaningful to a specific constituent group, and they do so at the expense of the legal clarity of the bill.

b. *Test #2: Comparative Strength of Competing Interpretations*

A second test also is useful in the effort to determine the intended audience for example clauses. According to this test, competing interpretations of the redundant provision are placed side-by-side: on the one hand, any interpretations that presume the provision to address the courts (as *operative legal rhetoric*), and on the other hand, a competing interpretation that views the provision as addressed to constituent groups (as *expressive rhetoric*). Comparing these options, the interpreter then selects the more logical, compelling, and commonsense interpretation.

⁸¹ Gail Collins, *Congress, up in Arms*, N.Y. TIMES (May 5, 2010), <https://www.nytimes.com/2010/05/06/opinion/06gcollins.html>.

⁸² *A Brief History of the NRA*, NAT’L RIFLE ASS’N, <https://home.nra.org/about-the-nra/> (last visited Oct. 15, 2018).

⁸³ *About Gun Owners of America*, Gun Owners of Am., <http://gunowners.org/protect.htm> (last visited Oct. 15, 2018).

⁸⁴ 159 CONG. REC. H412 (daily ed. Feb. 6, 2013) (statement of Rep. Stockman).

i. Interpretation #1: Belt-and-Suspenders Function

What interpretations are available, then, of the example clauses in H.R. 575? According to one interpretation—which might be described as the “belt-and-suspenders” interpretation—these example clauses serve no independent purpose at all. This interpretive possibility has been outlined by Scalia and Garner, who assert that “[s]ometimes drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill-conceived but lamentably common belt-and-suspenders approach.”⁸⁵ Even at its most generous, this interpretive approach finds only a nominal purpose in *redundancy-encouraging features*; it views these features as misguided efforts to address an anxiety that stating a legal rule once will not suffice. As such, the “belt-and-suspenders” interpretation accepts the fact that some statutory text lacks operative legal effect, but it refuses to consider the possibility that this rhetoric is successfully serving other rhetorical purposes in the statute.

When applied to H.R. 575, this interpretive approach views the bill’s example clauses as serving no independent function in the statute—and thus as violating the rule against surplusage. In order to explain this breakdown of a semantic canon, this interpretation essentially relies on an accusation that, in the case of H.R. 575, sloppy drafting occurred; it assumes that this redundant text resulted from a “flawed sense of style” or an “ill-conceived” drafting approach on the part of the statute’s drafters.⁸⁶ When an interpretation must take recourse to accusations of sloppy drafting in order to redeem its interpretive methodology, however, it raises serious questions of whether it might be the methodology, not the statute, that is the core problem.

ii. Interpretation #2: Clarifying Function

A second interpretation views the example clauses in H.R. 575 as clarifying some potential ambiguity that exists in the statute’s operative legal rule. According to this interpretation, the drafters of H.R. 575 entertained apprehensions that the reference to “rights guaranteed by the United States Constitution” did not clearly apply to the Second Amendment. In response to this apprehension, the argument goes, the drafters inserted the example clauses into the statute. This interpretation views the example clauses in H.R. 575 as *operative legal rhetoric*, and because it discovers an operative

⁸⁵ SCALIA & GARNER, *supra* note 2, at 176–77.

⁸⁶ See also Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 812 (1983). (“No one would suggest that judicial opinions or academic articles contain no surplusage; are these documents less carefully prepared than statutes? There is no evidence for this improbable proposition; what evidence we have, much of it from the statutes themselves, is to the contrary.”).

function that these clauses perform, it avoids accusations of redundancy. In this regard, the interpretation relies upon an idea also commonly seen in the application of the *ejusdem generis* canon: the idea that examples are nonredundant when they clarify some aspect of a broader operative legal rule.⁸⁷

What ambiguity might exist in the reference to “rights guaranteed by the United States Constitution,” however, that could be clarified by an additional reference to the “right to keep and bear arms”? The only serious possibility, it would seem, is that the statute’s drafters were concerned that there might be ambiguity as to whether the reference to “the United States Constitution” applied to successful constitutional amendments. According to this interpretation, the drafters included the reference to Second Amendment rights in order to clarify that they did, in fact, intend to refer also to these amendments.

There are several reasons why this interpretation is not compelling, however. First, it interprets Congress as having devised a circuitous and unclear way to communicate a simple idea. Congress easily could have referred to “the United States Constitution (including amendments made to such Constitution),” for example. Moreover, this interpretation ignores the fact that, in the context of statutes, the House of Representatives follows a drafting practice whereby any reference to a statute is presumed to include amendments made to that statute, even in the absence of a clarifying parenthetical.⁸⁸ This presumption would be heightened only for constitutional amendments, since the Constitution directs that such amendments “shall be valid to all Intents and Purposes, as Part of this Constitution.”⁸⁹

Second, this interpretation is troublingly out of step with the real-world context that produced H.R. 575. According to the Center for Responsive Politics, a nonprofit organization that compiles documents filed by organizations regarding their lobbying activities, three groups lobbied with respect to H.R. 575: Gun Owners of America, National Association for Gun Rights, and the National Rifle Association (NRA).⁹⁰ This bill was a reintroduction of a 2011 bill, and three groups had lobbied with respect to that earlier version: the NRA, Gun Owners of America, and Citizens Committee for the Right to Keep and Bear Arms.⁹¹ In other words, every organization that lobbied Congress with respect to H.R. 575 is an organization that focuses specifically on the right that is referenced in the example clauses. This perfect congruence between lobbying activity and statutory text is unlikely to be coincidence, and an interpretation that cannot account for it ought to be considered unconvincing.

⁸⁷ See SCALIA & GARNER, *supra* note 2, at 199–200.

⁸⁸ DRAFTING MANUAL, *supra* note 58, at 49.

⁸⁹ U.S. CONST. art. V.

⁹⁰ *Clients Lobbying on H.R.575: Second Amendment Protection Act of 2013*, OPENSECRETS.ORG, <https://www.opensecrets.org/lobby/billsum.php?id=hr575-113> (last visited Oct. 15, 2018).

⁹¹ *Clients Lobbying on H.R.3594: Second Amendment Protection Act of 2011*, OPENSECRETS.ORG, <https://www.opensecrets.org/lobby/billsum.php?id=hr3594-112> (last visited Oct. 15, 2018).

iii. Interpretation #3: Expressive Function

Finally, the example clauses in H.R. 575 can be interpreted as *expressive rhetoric*. Unlike the interpretation that views the example clauses in H.R. 575 as serving a clarifying function, this interpretation is able to account for the overlap between statutory text and lobbying activity. According to this interpretation, rhetoric relating to the Second Amendment was inserted into the statute in order to afford a distinct nonlegislative benefit to the groups that lobbied with respect to H.R. 575—the benefit of seeing their specific concern echoed in statutory text.

At the same time, an interpretation that views the example clauses in H.R. 575 as *expressive rhetoric* does not suffer from the weakness observed in the “belt-and-suspenders” interpretation, as the former does not violate the basic principle that animates the rule against surplusage. The linguistic insight behind the rule against surplusage, it must be recalled, is that every word and phrase generally is intended to achieve a distinct *rhetorical* effect, not a distinct *legal* effect.⁹² It is only when we layer this commonsense insight upon another presumption—the presumption that the only rhetorical effects statutes seek to achieve are operative legal effects—that we get the oft-repeated interpretive rule. The interpretation of the example clauses in H.R. 575 as *expressive rhetoric* does not attribute any distinctive legal effect to these clauses. However, it does discover a unique rhetorical purpose that is fulfilled by these clauses—a purpose that was not fulfilled by the legal rule in the statute. In this regard, the interpretation of these example clauses as *expressive rhetoric* respects the basic linguistic idea behind the rule against surplusage. This is something that the “belt-and-suspenders” interpretation is not able to accomplish—and, for this reason, the interpretation of the example clauses in H.R. 575 as *expressive rhetoric* should be viewed as preferable.

2. Public Law 109-464

Finally, it is worthwhile to consider a subset of example clauses: multiple-item example clauses that precede a broader rule. Among statutory interpreters, this subset is treated uniquely. The *ejusdem generis* canon is applied to these clauses, a canon that directs: “[W]hen a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed.”⁹³

Why have interpreters embraced this canon? The answer to this question is found, once again, in the rule against surplusage. The *ejusdem generis*

⁹² See SCALIA & GARNER, *supra* note 2, at 174 (“This is true not just of legal texts but of all sensible writing: ‘Whenever a reading arbitrarily ignores linguistic components or inadequately accounts for them, the reading may be presumed improbable.’” (quoting E.D. HIRSCH, *VALIDITY IN INTERPRETATION* 236 (1967))).

⁹³ *Ejusdem Generis*, BLACK’S LAW DICTIONARY (10th ed. 2014).

canon ostensibly assigns a distinct operative legal function to both a broader rule and an example clause: the rule establishes an unclear category, while the multiple-item example clause clarifies which of the possible interpretations of the rule was intended. As such, this canon begins with a *redundancy-encouraging feature*—an example clause—and it discovers an interpretation of this feature that renders it nonredundant.

However, this Article has advanced another interpretive strategy that is similarly able to interpret example clauses as nonredundant. According to this interpretation, the example clause sends an expressive message to constituents—a function that the comprehensive statutory rule, as *operative legal rhetoric*, does not accomplish. Interpreters must choose, therefore, between two different interpretive options, each of which can explain this subset of example clauses in a nonredundant fashion.

The two-step methodology, as outlined above, provides a reasoned way for interpreters to make this choice. This methodology directs interpreters to interpret statutory text as *expressive rhetoric* if it meets the following criteria⁹⁴:

- (1) It is located in a redundancy-encouraging feature of the statute.
- (2) It is designed to speak to constituents, not courts, as proven by passing the following tests:
 - (a) It speaks in language that is meaningful to relevant constituent groups, and thereby sacrifices legal clarity; and
 - (b) A side-by-side comparison of competing interpretations finds that the interpretation as expressive rhetoric produces a more logical, compelling, and commonsense interpretation than does any interpretation as operative legal rhetoric.

Consider the application of this methodology to Public Law 109-464. This statute serves primarily to prohibit protests and other disruptions of funerals and memorial services for veterans and active members of the military.⁹⁵ The Act specifies locations within which these disruptions are not permitted, including: “a road, pathway, or other route of ingress to or egress from the location of such funeral.”⁹⁶ In this passage, Congress provides a list of two specific examples: a “road [or] pathway” to a funeral.⁹⁷ At the same

⁹⁴ See *supra* Section I.B.

⁹⁵ 18 U.S.C. § 1388(a) (2012).

⁹⁶ *Id.* § 1388(a)(1)(A)(ii).

⁹⁷ *Id.*

time, Congress also provides a broader rule referring to “route[s] of ingress to or egress from” such a funeral.⁹⁸ The statute thus uses a *redundancy-encouraging feature*, thereby satisfying step one of the two-step methodology.

This leads to the question posed by step two of the methodology: is there persuasive evidence that the example clause is intended to address a constituent group rather than the courts? To answer this question, it first is necessary to identify a constituent group that might plausibly be the audience for this Act. In most instances, the constituent group will be a special-interest group; after all, the general public usually does not have an adequate level of interest to look into the details of specific bills, nor does the public (or even its translators in the press) necessarily have the capacity to sort through the technical details of these statutes. Public Law 109-464 may provide an exception to this general rule, however. This Act provided Congress’s response to a phenomenon that had received extensive national news coverage and that had provoked national outrage: the phenomenon whereby members of the Westboro Baptist Church, an organization that viewed the death of American soldiers as a divine rebuke of America’s tolerance of homosexuality, would stage loud, visible protests at military funerals while carrying signs with slogans such as “Thank God for Dead Soldiers” and “God Hates Fags.”⁹⁹ As such, Public Law 109-464 responded not to the preferences or concerns of a narrow interest group, but rather to widespread public indignation at the practices of the Westboro Baptist Church.¹⁰⁰ In this regard, the constituent group addressed by Public Law 109-464 consisted of a public that had learned about the protests staged by this church through various news reports.¹⁰¹

a. *Test #1: Language and Categories Specific to Interest Group*

Is there compelling evidence, then, that the examples provided in the statute are designed to address the public rather than the courts? For one thing, the provided examples do, in fact, speak in the language and categories that were meaningful to a public that had learned about the Westboro Baptist Church protests through national news coverage. The examples provided in Public Law 109-464 applied to protests staged on “road[s] [and] pathway[s].”¹⁰² In the national news coverage of these protests, the iconic images repeatedly presented to the public depicted Westboro Baptist Church

⁹⁸ *Id.*

⁹⁹ HISTORIC DOCUMENTS OF 2011, 147–48 (Heather Kerrigan ed., 2013).

¹⁰⁰ See 152 CONG. REC. H9198–99 (daily ed. Dec. 8, 2006).

¹⁰¹ At least one Member of Congress made this context explicit on the floor, mentioning the Westboro Baptist Church by name. See *id.*

¹⁰² 18 U.S.C. § 1388(a)(1)(A)(ii).

protesters lining the roads and sidewalks that led to and from military funerals.¹⁰³ These reports described protesters taunting bereaved family members as they journeyed toward funeral sites on these pathways.¹⁰⁴ Statutory references to “roads [and] pathways” conjured these powerful images that the media had been depicting to the public. Moreover, these terms spoke in the everyday language that members of the public use to describe these routes—a rhetorical contrast with the stilted reference to “ingress . . . or egress” found in the statute’s general rule.¹⁰⁵

It seems logical, therefore, that the examples found in Public Law 109-464 adopted language and categories that were designed to resonate with a public that thought in those terms—and that had learned about the issue addressed by the Act through unsettling images of protesters at those specific sites. Further, this expressive quality was achieved only through a sacrifice in legal clarity. In particular, the reference to “pathways” is remarkably imprecise. In these regards, it is reasonable to conclude that these examples were written with constituents, not the courts, as the intended audience.

b. *Test #2: Assessing the Comparative Strength of Competing Interpretations*

Another strategy for identifying the intended audience of statutory text is to conduct a side-by-side comparison of competing interpretations. What does this strategy reveal about Public Law 109-464?

i. *Interpretation #1: Expressive Rhetoric*

An interpretation that regards the examples in Public Law 109-464 as *expressive rhetoric* produces a commonsense interpretation that does indeed respect the semantic canons. According to this interpretation, the examples speak in *expressive rhetoric* to a general public that had become outraged by news reports of the church’s protests, while the broader rule spoke in *operative legal rhetoric* to the courts. This interpretation suggests that Congress produced a commonsense legal rule—namely, that protests would not be allowed on “route[s] of ingress to or egress from” military funerals—and it did not violate the rule against redundancy in the process.

¹⁰³ See, e.g., Lizette Alvarez, *Outrage at Funeral Protests Pushes Lawmakers to Act*, N.Y. TIMES (Apr. 17, 2006), <https://www.nytimes.com/2006/04/17/us/17picket.html> (describing Westboro Baptist Church protesters “[s]tanding on the roadside outside [a military] funeral”); Alan Feuer, *Revvng Their Engines, Remembering a War’s Toll*, N.Y. TIMES (May 29, 2006), <https://www.nytimes.com/2006/05/29/nyregion/29patriot.html> (depicting roadways as the site of a battle between Westboro Baptist Church protesters and motorcycle groups attempting to drown out those protesters).

¹⁰⁴ See Alvarez, *supra* note 103; Feuer, *supra* note 103.

¹⁰⁵ 18 U.S.C. § 1388(a)(1)(A)(ii).

ii. Interpretation #2: *Ejusdem Generis* Canon

At the same time, the *ejusdem generis* canon also produces a commonsense interpretation that respects the semantic canons. According to this interpretation, the examples of “roads [and] pathways” are intended to limit the broader category of “route[s] of ingress . . . or egress.” For example, since both roads and pathways are routes across land, it might be concluded that these examples were intended to limit the legal rule to territorial routes of ingress or egress. This might have implications for funerals and memorial services held at sea, for example. Through this interpretation, the *ejusdem generis* canon would have produced another commonsense interpretation of the statute: that it prohibited protests on all overland routes of ingress to, or egress from, military funerals. Moreover, it also arrives at this interpretation without violating the rule against redundancy.

Both interpretations are plausible, therefore—but between these two options, the interpretation as *expressive rhetoric* seems more compelling. After all, the *ejusdem generis* interpretation presumes that Congress took a remarkably circuitous drafting approach in order to express a relatively straightforward concept. If Congress wanted to apply a statutory rule to overland routes, why would it not simply state this? Simply because this interpretation renders the examples nonredundant does not mean that it also renders the interpretation reasonable. The category of overland routes is not such an ethereal, abstract notion that Congress would have difficulty articulating this rule without pointing to it obliquely through a set of examples. Put differently, the interpretation based on the *ejusdem generis* canon views the statutory text as bearing only a distant, imprecise connection to the legal rule it is trying to articulate. By contrast, the interpretation as *expressive rhetoric* suffers from no such difficulty.

E. *Implications*

1. The *Ejusdem Generis* Canon

As the analysis of Public Law 109-464 illustrates, an awareness of *expressive rhetoric* in statutes—and especially in example clauses—casts the *ejusdem generis* canon in a new light. In most books and articles that discuss the canons of statutory interpretation, the *ejusdem generis* canon is the only interpretive strategy that is offered as a way to interpret the relationship between an example clause and a rule that follows it.¹⁰⁶ Since this canon gains its persuasive force primarily from its ability to explain example clauses

¹⁰⁶ See generally CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 657–70 (William N. Eskridge Jr. et al. eds., 5th ed. 2014); SCALIA & GARNER, *supra* note 2, at 199–213.

without assuming that Congress violated the rule against redundancy, these books and articles create the impression, whether intentionally or not, that the *ejusdem generis* canon is unique in this ability to avoid accusations of drafting redundancy, and that it should therefore be privileged above other interpretive options. Once an interpreter is aware of Congress's strategic use of *expressive rhetoric*, however, the *ejusdem generis* canon loses its privileged status. Instead, this canon becomes one of several viable interpretive strategies, each of which is capable of redeeming example clauses from accusations of redundancy.

2. The *Expressio Unius* Canon

The presence of *expressive rhetoric* in statutory text also undermines the validity of another canon: the *expressio unius* canon. As *Black's Law Dictionary* describes it, this canon directs: "[T]o express or include one thing implies the exclusion of the other."¹⁰⁷ Scalia and Garner argue that this canon reflects a more general principle of language usage; according to these authors, the canon gains much of its persuasiveness from the fact that it "validly describes how people express themselves and understand verbal expression."¹⁰⁸ Other scholars, meanwhile, have disputed this claim, arguing that it is not an accurate reflection of everyday language usage.¹⁰⁹

Even if the *expressio unius* canon is based upon an accurate presumption about the ways that people use words, however, that presumption contains an important limit: it will be true *only with respect to the rhetorical end that the word or phrase is designed to serve*. When a legislator chooses to include the phrase "right to keep and bear arms" in a statute as *expressive rhetoric*, for example, a statutory interpreter may be justified in concluding that the legislator intended to award an expressive benefit only to Second Amendment-oriented groups, and that the legislator consequently meant to exclude other groups (such as groups focused on First Amendment rights) from sharing in that expressive benefit. However, this does not tell the interpreter anything about whether the legislator intended to award a legally operative benefit those latter groups. The application of the *expressio unius* canon to *expressive rhetoric* does not tell courts anything about the proper scope of a statute's legally operative rule, in other words—and when courts apply this canon to *expressive rhetoric* in the effort to glean some insight into the statute's *operative legal* rule, they are consistently led astray.

¹⁰⁷ *Expressio Unius Est Exclusion Alterius*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹⁰⁸ SCALIA & GARNER, *supra* note 2, at 107.

¹⁰⁹ See, e.g., REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 234 (1975).

3. The *Noscitur a Sociis* Canon

The congressional practice of including *expressive rhetoric* in statutes also undermines the *noscitur a sociis* canon. This canon directs: “The meaning of a word is to be judged by the company it keeps.”¹¹⁰ In the field of statutory interpretation, this has been translated into a specific directive that, in the words of Justice Stevens, “words grouped in a list should be given related meaning.”¹¹¹

Presumably, the *noscitur a sociis* canon is used because statutory interpreters believe that the canon accurately describes a strategy that Congress is using to communicate to its intended audience. Insofar as the canon requires an interpreter to construe a term in light of a surrounding list, this canon therefore presumes that Congress thinks about the entire list as having a single intended audience that will construe the list holistically. An awareness of Congress’s use of *expressive rhetoric* reveals this presumption to be incorrect, however. Congress frequently intends that each item in a statutory list be received by a different special-interest group, with each listed item speaking in the language and categories that are meaningful to that specific group. In such a situation, the *noscitur a sociis* canon misconstrues the intent of statutory text that is written as *expressive rhetoric*, and the canon should be discarded when there is persuasive evidence that Congress is using this form of rhetoric.

4. Theories of Legislators

Among scholars who study the legislative process, there is ongoing debate about how best to conceptualize the relationship that exists between legislators and special-interest groups.¹¹² Within this debate, no school of thought has garnered more attention than public-choice theory.¹¹³ According to public-choice theory, special-interest groups are the primary actors within the political system; these groups seek benefits from legislators in order to further their self-interests, and they constantly jockey and negotiate with other interest groups to reach political compromises.¹¹⁴ By contrast,

¹¹⁰ Hugh P. Macmillan, Law and Language, Presidential Address to the Holdsworth Club of the Students of the Faculty of Law in the University of Birmingham, May 1931, in *LAW & OTHER THINGS* 166 (1937). Lord Macmillan famously explained this as “words of a feather flock together.” *See id.*

¹¹¹ *Third Nat’l Bank in Nashville v. Impac Ltd., Inc.*, 432 U.S. 312, 322 (1977).

¹¹² *See* Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 396 (1983) (noting that “successful modeling has been an elusive goal,” despite the numerous political-sector models that have been crafted).

¹¹³ *See id.* at 371–72 (noting some of the many scholars who have contributed to public-choice theory).

¹¹⁴ *See, e.g., id.* at 372; JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 287 (1962).

legislators are viewed as relatively marginal and powerless actors—individuals who do little more than formalize and validate the compromises reached by these special-interest groups.¹¹⁵

Several scholars have responded to the theory's vision of legislators by arguing that it is reductive.¹¹⁶ Legislators also have interests, these critics argue, and these interests (such as a desire to make positive contributions to public policy) often are distinct from those held by special-interest groups.¹¹⁷

The congressional practice of inserting *expressive rhetoric* into statutes supports these critics, and it undermines the claims of the more strident public-choice theorists. It reveals that legislators have developed drafting tactics that can insulate operative provisions of statutes from the expressive needs of interest groups—drafting tactics that, by addressing interest group needs in one portion of statutory text, thereby open up spaces elsewhere in legislative text for legislators to engage in more principled policymaking.

To appreciate this point, recall the example of H.R. 575 from the 113th Congress.¹¹⁸ Three interest groups registered as having lobbied with regard to that bill, and all three were groups that focused exclusively upon defending and promoting Second Amendment rights.¹¹⁹ It is not difficult to imagine that these groups desired a bill that made specific reference to Second Amendment rights. If this indeed were the case, then the legislator would be faced with several options. One option would be simply to produce a bill that created a legal rule that applied exclusively to Second Amendment rights. This would be in strict accordance with public-choice theorists' understanding of the behavior of legislators. Instead, however, the legislator chose a different option: Representative Stockman inserted the rhetoric that the interest group desired into a *redundancy-encouraging feature* of the statute.¹²⁰ In so doing, he opened up a space within the statute—in its *operative legal rhetoric*—wherein he had some autonomy to develop good policy independent of the relevant interest groups. As Part III will further illustrate, this is indeed how many example clauses find their way into enacted bills.

In this way, drafting strategies that make use of statutory redundancies can be useful to legislators. Moreover, by repeatedly capitalizing on this usefulness, legislators shed light on their own goals and interests—and, in so doing, they reveal the inadequacy of public-choice theorists' vision of legislators. As these drafting strategies reveal, legislators possess a concern for good governance that is in tension with their perceived need to be responsive to interest groups. By dividing statutory text into *expressive rhetoric* and

¹¹⁵ See, e.g., Becker, *supra* note 112, at 372; MICHAEL T. HAYES, LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS 60 (1981).

¹¹⁶ See, e.g., JOHN H. ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA 39–40 (1995).

¹¹⁷ See, e.g., FENNO, *supra* note 17, at 1–2.

¹¹⁸ See *supra* Section I.D.1.

¹¹⁹ See *supra* Section I.D.1.b.ii.

¹²⁰ See H.R. 575, 113th Cong. (2013).

operative legal rhetoric, legislators make this tension manifest in the text of statutes. And they also reveal the strategy that they have adopted in the effort to manage this tension responsibly.

Once *expressive rhetoric* is understood as a strategy by which legislators attempt to carve out locations for good policymaking in statutes, several interpretive canons that were criticized in the foregoing pages become even more worrisome. In the effort to interpret all statutory text as *operative legal rhetoric*, several of these canons instruct courts to interpret Congress's *expressive rhetoric* as limiting or modifying Congress's *operative legal rhetoric*. As this Part has argued, such an interpretation fails to accurately capture congressional intent. Even more troubling, this interpretation consistently fails in one particular direction: it undermines the legislator's attempt at good governance (as expressed in the statute's *operative legal rhetoric*) by construing the statute in light of the goals sought by specific special-interest groups (as echoed in the statute's *expressive rhetoric*). Consequently, the current interpretive practices of many courts undo congressional efforts at good governance, as these practices allow interest group politics to bleed into portions of statutory text that legislators hope to insulate from such politics. To statutory interpreters who view interest group politics as a troubling aspect of our political system—and, admittedly, not all scholars view it this way—the fact that certain canons unintentionally amplify the role of these politics should be particularly disconcerting.

Finally, viewing *expressive rhetoric* in relation to public-choice theory casts new light upon another institution within Congress: the Offices of the Legislative Counsel. Some scholars have criticized the public-choice model by arguing that it fails to account for institutional changes that affect the behavior of legislators, thereby underappreciating new features that reduce the impact of special-interest groups.¹²¹ Viewed from this perspective, Congress's choice to create the Offices of the Legislative Counsel, and to continue using these offices for drafting, can be viewed as an institutional adaptation by Congress that reduces the impact of interest groups upon statutory text. By having its Members consult with drafting offices that are insulated from policymaking (and therefore from the pressure of special-interest groups), Congress has effectively created an institutional mechanism that prods its Members, during the drafting process, to step back from the *expressive rhetoric* that interest groups provide and to consider the use of drafting tactics that create opportunities for principled lawmaking. In this regard, Legislative Counsel can be understood as a structure of deliberation that Congress has created for itself that pushes it away from a dependence upon interest groups and toward principled deliberation.¹²²

¹²¹ See, e.g., ALDRICH, *supra* note 116, at 205 (on the complicating role of political parties).

¹²² This view builds on “republican” theories that emphasize the need to structure government so as to incentivize or require principled deliberation. See, e.g., Frank I. Michelman, *The Supreme Court 1985 Term, Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 58–59 (1986).

This is a very different view of Legislative Counsel from the one offered by Professors Abbe Gluck and Lisa Schultz Bressman in their two-part article on congressional drafting.¹²³ For these scholars, the fact that Legislative Counsel has no policymaking authority is troubling.¹²⁴ They believe that this lack of authority introduces a problematic disconnect into the legislative process—a disconnect between policy and statutory text.¹²⁵

For one thing, this concern underestimates the extent to which Legislative Counsel is in dialogue with policymakers during the drafting process. More to the point, however: since policymaking now exposes institutional actors to relentless interest-group pressure, Congress may actually view the retention of drafting offices that lack policymaking authority as a way to institutionalize its interest in insulating statutory text from direct interest-group pressure. If so, then the non-policy-making quality of Legislative Counsel should be viewed as essential to its role in facilitating the principled elaboration of policy, not as a hindrance to that effort.

II. DIRECTIVE RHETORIC

Part I argued that congressional text should be understood as using a distinct rhetoric when it displays two important traits: it addresses a unique (and nonjudicial) intended audience, and it speaks with a unique (and non-binding) illocutionary force. Moreover, Part I observed that *expressive rhetoric* satisfies these criteria. Twenty-five years ago, meanwhile, Professor Edward L. Rubin identified another type of congressional statutory rhetoric that sometimes satisfies both of these criteria: a rhetoric that, in keeping with Rubin's terminology, might be referred to as *directive rhetoric*.¹²⁶

Since the rise of the administrative state, Rubin observes, congressional statutes have commonly operated as “directives” that are aimed toward a particular intended audience: executive agencies.¹²⁷ Sometimes, Rubin adds, Congress realizes that it can ensure agency compliance with these directives even when they cannot be enforced in courts.¹²⁸ After all, Rubin points out, Congress has other ways of achieving agency compliance with its wishes—strategies that arise from the fact that agencies are dependent upon future

¹²³ Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 737–39 (2014).

¹²⁴ *Id.* at 738.

¹²⁵ *Id.* at 737–39.

¹²⁶ Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 396–97 (1989). Professor Rubin describes a statute that “is cast as a pure directive to the agency, offering suggestions and examples without resorting to fixed rules.” *Id.* at 421.

¹²⁷ *E.g., id.* at 374 (“[T]he primary implementation mechanism for most modern statutes is an administrative agency . . .”).

¹²⁸ *See id.* at 377.

congressional action in many ways.¹²⁹ This means that Congress has a power to reward or punish agencies in the future based on the extent to which the agencies comply with Congress's present wishes. This dynamic translates into a distinct form of congressional power—a power to direct agencies to take actions through rhetoric that Congress knows, or at least strongly suspects, will not be treated as legally binding by courts.

In practice, Rubin therefore observes, Congress sometimes drafts directives that do not adopt the courts as an intended audience at all.¹³⁰ Furthermore, he observes that this rhetoric sometimes speaks with an illocutionary force that is weaker than that of a binding command.¹³¹ As Rubin puts it, Congress sometimes is willing to address agencies through “suggestions” and “exhortations,” even though these expressions carry a weak illocutionary force and therefore “bear no resemblance to court-enforceable rules.”¹³² This weaker illocutionary force can be understood, of course, as a natural outgrowth of the fact that this rhetoric does not adopt the courts as an intended audience.

In addition to identifying the existence of this *directive rhetoric* in congressional statutes, Rubin also identifies a few features of statutory text that seem to signal Congress's intent to speak in this distinct rhetoric in statutes.¹³³ One such feature is the presence or absence of a judicial review provision.¹³⁴ He also notes that the insertion of text into a preamble (such as in a findings section, or a statement of congressional purpose), as opposed to in an operative provision, might be taken to signal a congressional intent that its directives be interpreted merely as “nonbinding suggestions.”¹³⁵ Beyond this, however, Rubin mostly discusses *directive rhetoric* as a congressional reality without providing guidance to interpreters who seek to pinpoint its presence within statutes.¹³⁶

This Part updates and revises Rubin's observations, revealing the unnoticed drafting tactics that Congress uses to signal its switch into *directive rhetoric*. Here, it shows that Congress often oscillates between *operative legal rhetoric* and *directive rhetoric* within a single provision of a statute. It also shows that Congress sometimes signals its use of *directive rhetoric*

¹²⁹ As Rubin says: “Every year, the SEC must come to Congress for its funding and with its money there naturally come a fair number of instructions. This basic power of Congress over the agencies it has created is supplemented by an array of others: the power to enact amending legislation that runs counter to the agency's interests; to refuse to enact amending legislation that the agency desires; to confirm, reject, or hassle presidential nominees to the agency; and to subject the members of the agency to agonizing oversight hearings. All these possibilities enable the members of Congress to exercise considerable power over the agency's operations and thus over the substantive area of the initial legislation.” *Id.* at 392.

¹³⁰ *Id.* at 380.

¹³¹ *Id.* at 381.

¹³² Rubin, *supra* note 126, at 420.

¹³³ *See id.*

¹³⁴ *See id.* at 415.

¹³⁵ *Id.* at 411.

¹³⁶ *See id.* at 420–22.

through its use of modal verbs that, by their plain meaning, only communicate the illocutionary force of a nonbinding directive. In this regard, Congress uses statutory text in much the same way that it uses committee reports for appropriations bills—reports that similarly speak only with the force of a nonbinding suggestion. Finally, this Part argues that Congress sometimes uses the same drafting tactics to insert *directive rhetoric* into statutes as it uses to insert *expressive rhetoric* into these statutes: it is making use of *redundancy-encouraging features*.

A. *Drafting Tactic: Modal Verbs*

Congress has developed several drafting tactics that it uses to signal its intent to speak in *directive rhetoric*. One such tactic is relatively straightforward: Congress communicates the nonbinding character of its directives through the use of verbs that, to borrow a term from linguistics, have the modality of a nonbinding directive. Within linguistics, *modality* is the term used to describe the illocutionary force that, by its plain meaning, attaches to a verb phrase.¹³⁷ For example, the terms *shall*, *should*, and *may* differ in their modality.¹³⁸ Similarly, the terms *commands*, *suggests*, and *permits* describe actions that vary in their modality.¹³⁹ When Congress uses verb phrases that express a nonbinding modality, there is good reason to think that Congress does not intend for the provisions that are introduced by the verb phrase to be implemented by the courts as binding legal rhetoric.

Generally, these verb phrases not only express the modality of a nonbinding directive, but they also are addressed to the executive agencies over which Congress has suggestive power. In such instances, it is reasonable to think that Congress indeed attempts to offer a nonbinding directive or recommendation to the agency—which is to say, that Congress intends to speak in *directive rhetoric*.

1. Committee Reports for Appropriations Bills

This interpretation of nonbinding modalities in congressional statutes gains support from their use in another type of congressional text: the committee reports that accompany appropriations bills. As several scholars have observed, committee reports assume a unique importance in Congress when

¹³⁷ Speech-act theorists would refer to verbs with different modalities as “illocutionary force indicating devices[s]”—which is to say, as verbs that intrinsically carry and communicate a distinct illocutionary force. JOHN R. SEARLE & DANIEL VANDERVEKEN, FOUNDATIONS OF ILLOCUTIONARY LOGIC 2 (1985).

¹³⁸ *See id.* at 100–01 (discussing degrees of strength in directives).

¹³⁹ *See id.*

they are produced for appropriations bills.¹⁴⁰ In many instances, the appropriations committee wishes to specify how appropriated funds are to be spent by the agencies that will receive these funds. This objective is not easily realized, however, because such specification is considered a new act of legislation, and House and Senate rules prohibit the insertion of new legislation into appropriations bills.¹⁴¹ As a result, a practice has emerged whereby Congress regularly uses committee reports as a location in which to express its preferences for how appropriated funds will be used by agencies.¹⁴²

Importantly, multiple nonpartisan congressional offices routinely advise Congress that these committee reports do not function as *operative legal rhetoric*. The Government Accountability Office (“GAO”), for example, has advised:

The rule, simply stated, is this: Restrictions on a lump-sum appropriation contained in the agency’s budget request or in legislative history are not legally binding on the department or agency unless they are carried into (specified in) the appropriation act itself, or unless some other statute restricts the agency’s spending flexibility.¹⁴³

Similarly, the Congressional Research Service (“CRS”) repeatedly has advised Congress that, as one CRS report put it: “Committee reports and managers’ statements do not have statutory force; departments and agencies are not legally bound by their declarations.”¹⁴⁴

Appropriations committees clearly are aware of this prevailing view. The aforementioned CRS report is available through the Senate’s website, for example, and the GAO volume asserts (and provides evidence to support its claim) that “Congress is fully aware of these dynamics.”¹⁴⁵

If Congress does not believe that the specifications found in these committee reports will be legally binding, then why does it repeatedly insert this language into the committee reports? The GAO answers this question by pointing toward the main implementation mechanism that Rubin identifies:

¹⁴⁰ Gluck & Bressman, *supra* note 37, at 980–82; Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 132–34 (2012).

¹⁴¹ CLERK OF THE H.R., 115TH CONG., RULES OF THE HOUSE OF REPRESENTATIVES XXI(2); STANDING RULES OF THE SENATE XVI(2), S. DOC. NO. 113-18 (2013).

¹⁴² See, e.g., H.R. REP. NO. 113-416, at 16 (2014) (four times urging the Department of Defense to use appropriated funds for specific purposes).

¹⁴³ 2 U.S. GEN. ACCOUNTING OFFICE, GAO-06-382SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 6-6 (3d ed. 2004), <http://www.gao.gov/special.pubs/d06382sp.pdf>.

¹⁴⁴ SANDY STREETER, CONG. RESEARCH SERV., 98-518 GOV, EARMARKS AND LIMITATIONS IN APPROPRIATIONS BILLS 2 (2004), <https://archives-democrats-rules.house.gov/archives/98-518.pdf>; see also CLINTON T. BRASS ET AL., CONG. RESEARCH SERV., RL34648, BUSH ADMINISTRATION POLICY REGARDING CONGRESSIONALLY ORIGINATED EARMARKS: AN OVERVIEW 3 (2008), <https://digital.library.unt.edu/ark:/67531/metadc795680/> (stating that committee reports by appropriations committees are “not legally binding”).

¹⁴⁵ U.S. GEN. ACCOUNTING OFFICE, *supra* note 143, at 6–7.

the threat that Congress might, at a later date, exact retribution against the agency for such noncompliance through the denial of funding.¹⁴⁶ In support of this answer, the GAO volume quotes from (among other sources) a 1973 House Appropriations Committee report that made this dynamic between Congress and executive agencies explicit, which said:

“In a strictly legal sense, the Department of Defense could utilize the funds appropriated for whatever programs were included under the individual appropriation accounts, but the relationship with the Congress demands that the detailed justifications which are presented in support of budget requests be followed. To do otherwise would cause Congress to lose confidence in the requests made and probably result in reduced appropriations or line item appropriation bills.”¹⁴⁷

The CRS report similarly adds: “[These committee reports] frequently have effect because departments and agencies must justify their budget requests annually to the Appropriations Committees.”¹⁴⁸

The nonpartisan offices of Congress therefore interpret these committee reports as *directive rhetoric*. These offices understand the committee reports to speak with the illocutionary force of a threatening suggestion, not of a binding command, and they view the agencies, not courts, as the sole audience of the reports. To the extent that Congress is believed to take seriously the opinions of its nonpartisan offices, therefore, Congress ought to be viewed as using these committee reports as a location for *directive rhetoric*.

Several important lessons emerge from this understanding of appropriations committee reports. For example, consider the intentionalist argument recently advanced by Professor Victoria Nourse,¹⁴⁹ and also by Professors Abbe Gluck and Lisa Schultz Bressman.¹⁵⁰ These scholars have noted that committee reports serve as an important location wherein Congress expresses its intent regarding appropriations.¹⁵¹ Based solely on this observation, these scholars have suggested that courts ought to give legal force to the preferences expressed in these committee reports.¹⁵² Each article has justified this

¹⁴⁶ *Id.* (reprinting a quote from ALLEN SCHICK, THE FEDERAL BUDGET: POLITICS, POLICY, AND PROCESS 238 (2000)).

¹⁴⁷ *Id.* at 6–8 (quoting REPORT OF THE HOUSE COMMITTEE ON APPROPRIATIONS OF THE 1974 DEFENSE DEPARTMENT APPROPRIATION BILL, H.R. REP. NO. 93-662, at 16 (1973)).

¹⁴⁸ STREETER, *supra* note 144, at 2.

¹⁴⁹ Nourse, *supra* note 140, at 133–37.

¹⁵⁰ Gluck & Bressman, *supra* note 37, at 980, 982. Gluck and Bressman are careful not to embrace the intentionalist model that they outline; rather, they argue that, to the extent an interpreter believes in the faithful agent theory of the judicial role in statutory interpretation, that interpreter should reach certain conclusions based on the results of their study. *Id.* at 988 (explaining that “[f]aithful agency . . . does provide a helpful lens through which to view our findings”).

¹⁵¹ *Id.* at 980–82.

¹⁵² *See id.* at 988–89.

suggestion by arguing that, in so doing, courts would capture congressional intent.¹⁵³

This suggestion makes sense if every expression of congressional intent is taken to be an expression of *operative legal* intent. Once it is understood that Congress uses legislation (and its accompanying materials) to speak to different audiences with different illocutionary forces, by contrast, it becomes clear that these committee reports, even if they do express one type of congressional intent, do not actually aim to address the courts as their intended audience. As such, an awareness of Congress's *directive rhetoric* reveals that the Court's disregard for appropriations committee reports, as seen in landmark cases such as *Tennessee Valley Authority v. Hill*,¹⁵⁴ is actually more faithful to congressional intent than these scholars suggest.¹⁵⁵

Committee reports for appropriations bills can be instructive for interpreters of statutory text, moreover, as they reveal the drafting tactics that Congress uses to signal a switch into *directive rhetoric*. In these reports, Congress does not use language that attempts to speak in an *operative legal rhetoric* that, according to GAO and CRS, these reports cannot bear. Instead, these reports consistently articulate their directives with verbs that, by their plain meaning, express a modality of nonbinding suggestion. In each report, the appropriations committee "urges,"¹⁵⁶ "encourages,"¹⁵⁷ and "recommends"¹⁵⁸ certain uses of funds. Similarly, these reports do not prohibit non-specified uses of funds; instead, they usually observe that the committee "is concerned" by past agency practices that have used the funds to different ends.¹⁵⁹

The use of a suggestive modality in these committee reports offers an important lesson to statutory interpreters. It teaches that Congress associates this modality with *directive rhetoric*—and, specifically, with the alternative, nonjudicial means of enforcing that rhetoric that Congress has at its disposal.

¹⁵³ See *id.* at 989.

¹⁵⁴ 437 U.S. 153 (1978). Put differently, the Court in *Tennessee Valley Authority* perhaps shows an appropriate level of deference to the committee report, even though it may arrive at this deference for the wrong reasons.

¹⁵⁵ See Gluck & Bressman, *supra* note 37, at 981–82; Nourse, *supra* note 140, at 133.

¹⁵⁶ See, e.g., H.R. REP. NO. 113-416, at 16 (2014) <https://www.congress.gov/113/crpt/hrpt416/CRPT-113hrpt416.pdf> (four times "urg[ing]" the Department of Defense to use funds in specified ways).

¹⁵⁷ See, e.g., *id.* at 40–41 (six times "encourag[ing]" the Department of Veterans Affairs to use funds in specified ways).

¹⁵⁸ See, e.g., *id.* at 25 ("recommend[ing]" that the Department of Defense use funds in specified ways).

¹⁵⁹ See, e.g., *id.* at 17 (twice mentioning that Congress "is concerned" by Department of Defense actions).

2. The Mandatory-Permissive Canon and the Congressional “Should”

Congress does not confine its use of these verbs (i.e., verbs that express a nonbinding modality) to committee reports. These verbs also are present within the operative text of congressional statutes. In particular, Congress uses a specific modal auxiliary verb: “should.”¹⁶⁰ Despite its location within statutory text, this verb clearly echoes the use of similar verbs in appropriations committee reports, where its use reflects Congress’s awareness that it is addressing agencies through *directive rhetoric*.

Consider the example found in the National Foundation on Fitness, Sports, and Nutrition Establishment Act, a statute that establishes a nonprofit corporation focused on physical fitness.¹⁶¹ The Act specifies that the corporation it created “shall have a governing Board of Directors” that “shall consist of 9 members each of whom shall be a United States citizen.”¹⁶² At the same time, it also provides that three of these board members “should be knowledgeable or experienced”¹⁶³ in physical fitness and that six of the board members “should be leaders in the private sector.”¹⁶⁴ It similarly provides: “The membership of the Board, to the extent practicable, should represent diverse professional specialties relating to the achievement of physical fitness through regular participation in programs of exercise, sports, and similar activities, or to nutrition.”¹⁶⁵ Here, Congress is distinguishing traits the Board shall possess from those it should—a distinction that is underscored by Congress’s mention that the Secretary ought to pursue the final item only “to the extent practicable.”¹⁶⁶ Congress continues this distinction, moreover, stating: “Within 90 days from the date of enactment of this Act, the members of the Board shall be appointed by the Secretary in accordance with this subsection. In selecting individuals for appointments to the Board, the Secretary should consult with [majority and minority leaders of Congress].”¹⁶⁷

In this statute, the proximity of the terms “shall” and “should” underscores that the variation in modality is intentional. As textualist scholars acknowledge, the rule of consistent usage (along with its companion, the rule of meaningful variation) is most compelling when the statutory terms at issue

¹⁶⁰ For examples of this use of “should” in statutes enacted in the 115th Congress, see 22 U.S.C. §§ 2152j-1(c), 7814(a)(6) (2012); John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 226(b)(3), 132 Stat. 1636, 1686 (2018).

¹⁶¹ National Foundation on Fitness, Sports, and Nutrition Establishment Act, Pub. L. No. 111-332, § 2(a)–(b), 124 Stat. 3576, 3576 (2010).

¹⁶² *Id.* § 3(a), 124 Stat. at 3576 (emphasis added).

¹⁶³ *Id.* § 3(a)(1), 124 Stat. at 3576 (emphasis added).

¹⁶⁴ *Id.* § 3(a)(2), 124 Stat. at 3577 (emphasis added).

¹⁶⁵ *Id.* § 3(a), 124 Stat. at 3577 (emphasis added).

¹⁶⁶ *Id.* (emphasis added).

¹⁶⁷ § 3(b), 124 Stat. at 3577 (emphasis added).

are proximate to each other.¹⁶⁸ In statutes such as the National Foundation on Fitness, Sports, and Nutrition Establishment Act, where Congress oscillates between two terms even within the same subsection, it must be presumed that Congress included this variation for a reason. Yet the only variation between these two terms is their modality—one uses a modality that speaks with the illocutionary force of a command, while another speaks with the force of suggestion.

Another example is found in the National Fish Hatchery System Volunteer Act of 2006.¹⁶⁹ Section 6(b) of the Act provides that “the Secretary of the Interior *may* . . . develop or enhance hatchery educational programs as appropriate.”¹⁷⁰ Here, the context is a broad delegation of authority to an agency; the Secretary is not required to develop these educational programs, and in the event that the Secretary decides to develop the programs, the Secretary has broad latitude to do so “as appropriate.”¹⁷¹ Against this broadly permissive backdrop, § 6(b) then adds: “In developing and implementing each program, the Secretary *should* cooperate with State and local education authorities, and *may* cooperate with partner organizations in accordance with subsection (d).”¹⁷²

Here, the proximity of the terms “may” and “should” once again underscores the intentional way in which Congress varies the modality of its auxiliary verbs. In this instance, Congress highlights the distinction between a grant of permission (as denoted by the verb “may”) and a directive (as denoted by the verb “should”). Once again, the conclusion must be that Congress is using the latter term to achieve an intermediate illocutionary force—one that *directive rhetoric* can bear in statutes on account of Congress’s non-judicial enforcement mechanisms.

This use of “should” also highlights another point: that Congress commonly uses *directive rhetoric* in situations in which Congress is otherwise providing an agency with great flexibility in its task of carrying out a statutory program. In this regard, *directive rhetoric* is a drafting tactic that Congress has developed as a response to a feature of post–New Deal statutes identified by Rubin. In the modern administrative state, Rubin notes, the effectiveness of a statute often is determined primarily by its effectiveness in providing clear, workable instructions to an agency, a goal not always best achieved through rhetoric that has the specificity of binding legal rhetoric.¹⁷³ In the pairing of broad *operative legal rhetoric* with more specific *directive rhetoric*, Congress uses a drafting tactic that responds to this reality by attempting to strike a unique balance between guidance and flexibility in its instructions to agencies.

¹⁶⁸ See, e.g., SCALIA & GARNER, *supra* note 2, at 172–73.

¹⁶⁹ 16 U.S.C. § 760aa-4 (2012).

¹⁷⁰ *Id.* § 760aa-4(b) (emphasis added).

¹⁷¹ *Id.*

¹⁷² *Id.* (emphasis added).

¹⁷³ See Rubin, *supra* note 14, at 388.

For those who continue to neglect Rubin's observations about modern legislation, meanwhile, this congressional use of the term "should" once again disproves the presumption that all statutory text is written as *operative legal rhetoric*. This point is nicely distilled in the way that Congress's use of the term "should" responds to the canon of construction that Justice Scalia and Professor Bryan A. Garner label as the "Mandatory/Permissive Canon."¹⁷⁴ According to this canon, Scalia and Garner explain, attention to the terms "shall" and "may" allows statutory interpreters to "identify[] which words are mandatory and which permissive."¹⁷⁵ In the textualist world inhabited by Scalia and Garner, it seems, statutory text always speaks in one of these two voices; consequently, the authors perceive the interpreter's task simply as the sorting of one voice from the other. As such, the "Mandatory/Permissive Canon" cannot account for Congress's use of an intermediate level of illocutionary force in statutory text—a use clearly seen in the insertion of the term "should" into congressional statutes. By contrast, if we presume that Congress is using *directive rhetoric* in its use of the term "should," then passages employing this term become easily explicable.

B. *Drafting Tactic: Example Clauses*

There is another drafting tactic that Congress uses to insert *directive rhetoric* into statutes—a tactic that, as Part I illustrated, Congress also uses with *expressive rhetoric*. Using *redundancy-encouraging features*, Congress bifurcates its statutory directive—in this case, to address the courts through *operative legal rhetoric* and to guide an agency with *directive rhetoric*. In particular, Congress often will use a specific *redundancy-encouraging feature*—the example clause—to accomplish this bifurcation.

A useful example of this drafting tactic is found in the Ricky Ray Hemophilia Relief Fund Act of 1998.¹⁷⁶ This Act required the Secretary of Health and Human Services to make payments, to the extent that funds were available, to individuals who had contracted HIV through the administration of a contaminated antihemophilic factor.¹⁷⁷ Section 1(a) of the Act specified the individuals who were to receive these payments, and it included any individual who "has any form of blood-clotting disorder, such as hemophilia," and who was treated with antihemophilic factor during a specified period.¹⁷⁸ In this provision, Congress therefore provided a single-item example clause (found in its reference to "hemophilia"). How should this example clause be interpreted?

¹⁷⁴ SCALIA & GARNER, *supra* note 2, at 112.

¹⁷⁵ *Id.*

¹⁷⁶ Pub. L. No. 105-369, 112 Stat. 3368 (1998).

¹⁷⁷ *Id.* § 102(a), 112 Stat. at 3369.

¹⁷⁸ *Id.*

Consider an interpretation that acknowledges Congress's use of *directive rhetoric*. According to this interpretation, Congress used *operative legal rhetoric* to outline a broad legal rule applying to all individuals with "blood-clotting disorder[s]." At the same time, Congress used *directive rhetoric* to suggest its core concern and preferred application to the implementing agency—an application that prioritized treatment for individuals with "hemophilia." From this perspective, Congress is seen as affording the agency the flexibility to apply the program to individuals beyond those who are Congress's core concern—namely, to individuals who are similarly situated to hemophiliacs, but who technically possess a different form of blood-clotting disorder (and, indeed, the agency did ultimately apply this policy to individuals with at least one analogous disorder).¹⁷⁹ At the same time, Congress *directed* the agency toward its preferred application to hemophiliacs.

This is a superior interpretation from both textualist and intentionalist perspectives. First, consider the textualist perspective. Textualists likely would apply the semantic canons of interpretation to this passage, thereby hoping to discover an interpretation that accords with the principles of everyday language usage. The textualist interpreter might wonder: is it possible that the example of "hemophilia" clarifies an ambiguity in the term "blood-clotting disorder"? If so, this example would serve a clarifying function that would redeem it from redundancy. Unfortunately for the textualist, however, hemophilia is the paradigmatic example of a blood-clotting disorder, not a contestable, borderline application. The National Institutes of Health, for example, defines hemophilia as a "bleeding disorder in which the blood doesn't clot normally."¹⁸⁰ This would leave only the conclusion that the statute violates the rule against redundancy.

By contrast, an interpretation that views the reference to hemophiliacs as *directive rhetoric* not only makes sense of the statutory text, but it also does so while presuming that Congress did not violate the everyday language practices that are distilled in the semantic canons. Indeed, notice how the canons of interpretation fall into place once the example clause is treated as *directive rhetoric*. First, this interpretation respects the plain meaning of Congress's broad statement that its policy applies to "*any form* of blood-clotting disorder."¹⁸¹ In this regard, it differs from any interpretation that attempts to use the reference to "hemophilia" to narrow the legally binding rule relating to individuals with blood-clotting disorders.

Second, it respects the rule on meaningful variation, as it acknowledges Congress's decision not to introduce its example clause with the term "including," but rather to speak of blood-clotting disorders "*such as*

¹⁷⁹ Ricky Ray Hemophilia Relief Fund Program, 42 C.F.R. § 130.2(c) (2016) (describing application to von Williebrand's disease).

¹⁸⁰ *Hemophilia*, NAT'L HEART, LUNG & BLOOD INST., <https://www.nhlbi.nih.gov/health-topics/hemophilia> (last visited Oct. 18, 2018).

¹⁸¹ § 102(a)(1), 112 Stat. at 3369 (emphasis added).

hemophilia.” In congressional drafting, the phrase “such as” is specifically used in distinction to the phrase “including.”¹⁸² As Scalia and Garner’s “Presumption of Nonexclusive ‘Include’” canon explains, the term “including” is commonly understood to be binding with respect to those items that are specifically mentioned in the statute as “included” within a catchall.¹⁸³ By contrast, the phrase “such as” suggests no such binding quality.¹⁸⁴ In this regard, while “including” carries a legal force equivalent to “shall,” the phrase “such as” carries a suggestive force equivalent to that found in the term “should.”

Third, this interpretation respects the rule of consistent usage, since Congress *only* inserted references to hemophilia into *redundancy-encouraging features* within the statute. These references appear only in the short title of the Act, in title and section headings, in the name of the relief fund the Act creates, and in example clauses.¹⁸⁵ Finally, this interpretation respects the rule against surplusage, as it discovers a distinct rhetorical function that is performed by each portion of statutory text.

Moreover, interpreting the reference to individuals with “hemophilia” as *directive rhetoric* also produces a superior interpretation from an intentionalist perspective. According to the committee report, the central goal of the Act is to provide “assistance to the *hemophilia* community,” not necessarily to a larger population of individuals with blood-clotting disorders.¹⁸⁶ At the same time, however, this report also said that payments would be available under the Act to “an individual *with a blood-clotting disorder* who used anti-hemophilic factor.”¹⁸⁷ According to the committee’s own account, therefore, the committee possessed a policymaking intent to address a core concern regarding the hemophiliac community—yet it was consciously approving statutory text that it understood to create a broader legal rule relating to individuals with blood-clotting disorders.¹⁸⁸

Any interpretation that presumes policymakers to possess a single “intent,” and that turns to committee reports of this Act in search of that intent, will struggle to make sense of this legislative history. An interpretation that views these policymakers as oscillating between *operative legal* intent and *directive* intent, however, can easily understand this legislative history as a faithful explication of the policies embedded in the statutory text.

¹⁸² From the Author’s experience drafting legislation in the House of Representatives, this rule is taught as part of the training of new drafting attorneys. See also DRAFTING MANUAL, *supra* note 58, at 62 (“In definitions, ‘means’ should be used for establishing complete meanings and ‘includes’ when the purpose is to make clear that a term includes a specific matter.”).

¹⁸³ SCALIA & GARNER, *supra* note 2, at 132.

¹⁸⁴ Cf. DRAFTING MANUAL, *supra* note 58, at 62–63 (describing “such” as demonstrative and generally avoided, while defining “include” as “to make clear”).

¹⁸⁵ See §§ 1(a), 101(a), 102(a)(1), 112 Stat. at 3368–69.

¹⁸⁶ H.R. REP. NO. 105-465, pt. 1, at 7 (1998) (emphasis added) (providing a detailed narrative of the conditions that gave rise to the legislation and speaking exclusively about individuals with hemophilia).

¹⁸⁷ *Id.* at 5 (emphasis added).

¹⁸⁸ See *id.*

III. EXPRESSIVE-DIRECTIVE RHETORIC

In some instances, Congress also drafts an example clause that is designed to serve an *expressive-directive* function—which is to say, an example clause that is designed to operate as both *expressive rhetoric* and *directive rhetoric*.

A. Denali National Park Improvement Act

Consider an example from the Denali National Park Improvement Act.¹⁸⁹ Among other things, this Act authorized the Secretary of the Interior to issue permits for certain hydroelectric projects—referred to in the Act as “microhydro projects”—within the Denali National Park and Preserve.¹⁹⁰ In the Act, the definition of “microhydro projects” specifies that this term includes “intake pipelines, including the intake pipeline located on Eureka Creek, approximately ½ mile upstream from the Park Road.”¹⁹¹ In this definitional phrase, the reference to the specific intake pipeline on Eureka Creek provides an example clause, since it illustrates the operative legal rule relating generally to “intake pipelines.” Consequently, it is located in a *redundancy-encouraging feature* of a statute. This raises the question: does the clause also display the second hallmark of *expressive rhetoric* by appearing to address constituents, not courts? Moreover, does it display the second hallmark of *directive rhetoric*—appearing to make suggestions to agencies, not binding rules for judges?

1. Test #1: Language and Categories Specific to Interest Group

First, consider the possibility that this example clause contains *expressive rhetoric*. The initial inquiry is whether the example clause uses language and categories that are meaningful to specific interest groups, and whether it does so at the expense of legal clarity. To answer this question, consider a statement made by Stephen E. Whitesell, an employee of the National Park Service, regarding an early draft of the Act. In 2011, Whitesell offered a statement to a subcommittee of the Senate Energy and Natural Resources Committee.¹⁹² In that statement, Whitesell acknowledged that efforts to ratify

¹⁸⁹ Pub. L. No. 113-33, 127 Stat. 514 (2013).

¹⁹⁰ *Id.* § 2(b), 127 Stat. at 514.

¹⁹¹ *Id.* § 2(a)(4)(B)(i), 127 Stat. at 514.

¹⁹² *Various National Parks Bills: Hearing Before the Subcomm. on Nat'l Parks of the Comm. on Energy and Nat. Res.*, 112th Cong. 21 (2011) (statement of Stephen E. Whitesell, Assoc. Dir., Park Planning, Facilities, and Lands, Nat'l Park Serv., Dep't of the Interior), <https://www.gpo.gov/fdsys/pkg/CHRG-112shrg70701/pdf/CHRG-112shrg70701.pdf> [hereinafter *Various National Parks Bills Hearing*].

hydroelectric projects in Denali National Park and Preserve had begun as an attempt to appease a special-interest group: a company named Doyon Tourism, Incorporated (Doyon).¹⁹³ This company, Whitesell explained, had “requested permits from the [National Park Service] to install a micro-hydroelectric project on Eureka Creek,” permits that the Park Service did not have authority to grant.¹⁹⁴ Whitesell then explained that certain elements of the statute’s text clearly were tailored to this specific interest group—including the element defining “micro-hydro projects.”¹⁹⁵ How did this early version of the Act, then, define “microhydro projects” in the effort to cater to this special-interest group? It did so by referring exclusively to the site at which Doyon wanted to install its project, defining “microhydro projects” as projects that used “the intake pipeline located on Eureka Creek, approximately ½ mile upstream from the Park Road, as depicted on the map.”¹⁹⁶ In other words, the definition in the early version of the bill contained *only* the example clause found in the final Act. According to Whitesell, it did so because this language was specifically tailored to the interests of a special-interest group.¹⁹⁷ Quite clearly, then, the example clause in the final version of the Act—a clause that retained this early draft language verbatim—spoke in the language and categories that were meaningful to a special-interest group.

Moreover, Whitesell observed, this definitional language in the early version of the bill addressed Doyon’s specific interest only at the expense of the legal clarity of the bill.¹⁹⁸ As Whitesell explained, language elsewhere in the bill suggested that the Park Service would have broader authority to permit hydroelectric projects in the park beyond the one sought by Doyon.¹⁹⁹ By defining “microhydro projects” by reference to the specific pipeline to be used for the Doyon project, Whitesell feared, the reference to this Eureka Creek pipeline might confuse or undermine the Park Service’s broader authority.²⁰⁰ This would be equally true when the phrase was retained as an example clause, of course. The result was an example clause that sacrificed legal clarity in order to use terms that were meaningful to a specific interest group—a hallmark of *expressive rhetoric*.

¹⁹³ *Id.* at 31.

¹⁹⁴ *Id.* (emphasis added).

¹⁹⁵ As Whitesell put it, “various elements of the bill as introduced appear to apply solely to a project by Doyon.” *Id.* at 32.

¹⁹⁶ § 2(a)(4)(B)(i), 127 Stat. at 514.

¹⁹⁷ See *Various National Parks Bills Hearing*, *supra* note 192, at 32 (statement of Stephen E. Whitesell).

¹⁹⁸ *Id.*

¹⁹⁹ See *id.* at 31–32.

²⁰⁰ See *id.*

2. Test #2: Comparative Strength of Competing Interpretations

This interpretation of the example clause as *expressive rhetoric* is reinforced by the second interpretive strategy for identifying this rhetoric: the strategy of assessing the comparative strength of various competing interpretations.

a. Interpretation #1: Clarifying Function

Two possible interpretations view the example clause as serving a clarifying function. Under one such interpretation, the example clause and the legal rule work in tandem to make clear that the fixture located at Eureka Creek was to be regarded as an intake pipeline. This can be referred to as the “Eureka-clarifying interpretation.” Under another, the example clause clarifies that only fixtures substantially similar to the Eureka Creek fixture are to be regarded as intake pipelines. This can be referred to as the “pipeline-clarifying interpretation.” According to these interpretations, the example clause would settle a debate, or resolve an ambiguity, either about the scope and meaning of the term “intake pipeline” or about the proper categorization of the pipeline at Eureka Creek. In either instance, the example clause would thereby be transformed into nonredundant *operative legal rhetoric*.

There are problems with each of these interpretations, however. First, consider the Eureka-clarifying interpretation. This interpretation relies on the mistaken idea that there were ambiguities or uncertainties about whether the pipeline at Eureka Creek would constitute an “intake pipeline.” Doyon clearly felt that the Eureka Creek pipeline was an “intake pipeline,” since its preferred statutory language labeled it as such.²⁰¹ The Park Service obviously agreed with this assessment, since a Park Service representative stated in subcommittee testimony that a simple reference to “intake pipelines” would allow for permits to be awarded to Doyon.²⁰² In other words, there was consensus, not ambiguity, about whether the Eureka Creek pipeline constituted an “intake pipeline.” Moreover, there was no reason for Doyon to fear that a more hostile administration might later reverse this interpretation—the statute gave the Secretary of the Interior discretion to decide whether to award permits at all.²⁰³ So if a hostile Secretary wished to avoid issuing permits to Doyon, such a Secretary would not need to adopt a narrow interpretation of “intake pipelines” in order to achieve this end. Consequently, an interpretation that views the example clause as an attempt to clarify an ambiguity about the status of the Eureka Creek pipeline is grounded in a false theory about the concerns that shaped this clause.

²⁰¹ *Cf. id.* at 31–32.

²⁰² *See id.* at 32.

²⁰³ Denali National Park Improvement Act, Pub. L. No. 113-33, § 2(b)(1), 127 Stat. 514, 515 (2013).

Next, consider the pipeline-clarifying interpretation. This interpretation views the reference to the Eureka Creek pipeline as narrowing the broader reference to “intake pipelines,” restricting that reference so that it applies only to pipelines that are substantially similar to the pipeline at Eureka Creek. This interpretation is troubling because it assigns to the statute an odd policy that none of the relevant parties were requesting. As the foregoing pages explained, Doyon sought a policy that would have allowed the Park Service to grant a permit at the Eureka Creek intake pipeline. Meanwhile, Whitesell explained, the Park Service also wanted the authority to pursue other hydroelectric projects in Denali Park.²⁰⁴ In the effort to effectuate that policy, Whitesell proposed striking the specific reference to the intake pipeline located on Eureka Creek and replacing it with a simple, broad reference to “intake pipelines.”²⁰⁵

Consider Congress’s situation in light of these facts. It had a special-interest group clamoring for the right to conduct a specific project. It had an agency requesting broader authority so that it not only could allow that special-interest group’s project to proceed, but also could also award permits for all projects relating to “intake pipelines.” According to the interpretation of the example clause as narrowing the broader legal rule, Congress settled on a middle-ground policy that none of the parties were requesting—a policy whereby the broad category of “intake pipelines” was somehow to be limited by the example of the Eureka Creek pipeline. This interpretation of congressional intent is not entirely farfetched. Yet it does not present Congress as possessing a policy intent that was responsive, in a nuanced and detailed manner, to the feedback it was receiving from agencies and interest groups. In this regard, it is not compelling.

b. *Interpretation #2: Expressive and Directive Function*

Another possible interpretation views the example clause as *expressive-directive rhetoric*. According to this interpretation, Congress used *operative legal rhetoric* to award the Park Service with broad permitting authority that extended to all “intake pipelines” located within Denali National Park and Preserve, including the Eureka Creek pipeline. At the same time, Congress wanted to assure the special-interest group whose project had given rise to the bill that its project would not be neglected or delayed due to this broader policy decision. Consequently, Congress added a specific reference to this interest group’s project in an example clause. In so doing, it inserted *directive rhetoric* that sent a message to the Park Service, informing the agency that Congress expected to see the special-interest group’s project given priority and unique attention within the permitting process. At the same time, this language also functioned as *expressive rhetoric*, allowing the special-interest

²⁰⁴ *Various National Parks Bills Hearing*, *supra* note 192, at 31–32.

²⁰⁵ *Id.* at 32.

group to see its specific language incorporated into law—thereby assuring this group that Congress was attentive to its interests, was responsive, and was monitoring the agency to ensure that the group received the permit.

Under this interpretation, Congress gave each entity precisely what it sought. The Park Service received categorical authority to issue permits regarding intake pipelines. At the same time, Doyon received not only a pathway to obtain its requested permit, but also statutory reassurance that its permit would be given priority by the Park Service.

Unlike the Eureka-clarifying interpretation, this *expressive-directive* interpretation is not predicated upon a false theory about statutory ambiguities that troubled the statute’s drafters and key beneficiaries. Unlike the pipeline-clarifying interpretation, this *expressive-directive* interpretation credits Congress with developing a policy that responded intelligently to the feedback it received from the two interested parties (the Park Service and Doyon). In this sense, a side-by-side comparison of competing interpretations reveals that, once the example clause is viewed as *expressive-directive rhetoric*, a more compelling and commonsense interpretation of the example clause emerges—one that credits Congress with responsive, nuanced policymaking and with error-free statutory drafting.

B. *Prenatally and Postnatally Diagnosed Conditions Awareness Act*

Another example clause that contains *expressive-directive rhetoric* is found in the Prenatally and Postnatally Diagnosed Conditions Awareness Act.²⁰⁶ This Act amended the Public Health Service Act to permit the Secretary of Health and Human Services to award grants, contracts, or cooperative agreements to provide information to women whose born or unborn children have been diagnosed, in the words of the statute, with “Down syndrome, or other prenatally or postnatally diagnosed conditions.”²⁰⁷ Specifically, the Act sought to provide these women with “up-to-date information on the range of outcomes for individuals living with the diagnosed condition, including physical, developmental, educational, and psychosocial outcomes,” and also to provide these women with “key support services.”²⁰⁸ In this Act, the reference to “Down syndrome” operates as an example clause illustrating the statutory rule relating to “prenatally or postnatally diagnosed conditions.”²⁰⁹

²⁰⁶ Pub. L. No. 110-374, 122 Stat. 4051 (2008).

²⁰⁷ *Id.* § 2(1), 122 Stat. at 4051.

²⁰⁸ *Id.*

²⁰⁹ “Down syndrome” also is a defined term in the statute—a fact which means that this term is used in two different *redundancy-encouraging features* (since defined terms are redundant with the definitions of those terms). *See* sec. 3, § 399R(a)(1), 122 Stat. at 4051.

1. Test #1: Language and Categories Specific to Interest Group

Does the statutory text, then, adopt the language and categories of special-interest groups—in particular, of groups that took an interest in the bill prior to its passage? According to its website, the National Down Syndrome Society “spearheaded the effort to help pass” the Act.²¹⁰ Similarly, Down Syndrome Affiliates in Action, a collection of five organizations that each focuses specifically on Down syndrome, advocated on behalf of funding for the bill in the wake of its passage,²¹¹ as did the National Association for Down Syndrome.²¹² Clearly, a host of special-interest groups were interested in this bill—groups that had a unique investment in the specific category of “Down syndrome.”

2. Test #2: Comparative Strength of Competing Interpretations

What additional light is shed on this example clause, then, by a side-by-side comparison of the two competing interpretations of the reference to Down syndrome?

a. *Interpretation #1: Clarifying Function*

First, consider an interpretation that regards the example of “Down syndrome” as *operative legal rhetoric*. In this instance, each key term in the legal rule—“prenatally diagnosed condition” as well as “postnatally diagnosed condition”—is a defined term in the statute.²¹³ This fact undercuts any argument that Congress inserted the example of “Down syndrome” to clarify or narrow the terms found in the legal rule, since Congress already relied on a different drafting tactic to clarify these concepts.

Additionally, the drafting history of this Act reveals that the focus on Down syndrome was a starting point for this legislation, not a focus that was added to clarify a preexisting concept.²¹⁴ The impetus for the Act came from several articles written by Brian Skotko, the Co-Director of the Down

²¹⁰ *Our History*, NDSS: NAT’L DOWN SYNDROME SOC’Y, <http://www.ndss.org/About-NDSS/NDSS-History/> (last visited Oct. 22, 2018).

²¹¹ *Affiliates in Action*, DOWN SYNDROME AFFILIATES IN ACTION, 1 (Feb. 26, 2009), <https://memoris.house.gov/uploads/February2009AIAPolicySummary.pdf>.

²¹² *Prenatally and Postnatally Diagnosed Conditions Awareness Act*, NAT’L ASS’N FOR DOWN SYNDROME, <https://www.nads.org/programs/governmental-affairs/prenatally-and-postnatally-diagnosed-conditions-awareness-act/> (last visited Oct. 14, 2018).

²¹³ 42 U.S.C. §§ 280g-8(a)(3) to (4) (2012).

²¹⁴ See 154 CONG. REC. H9919 (daily ed. Sept. 25, 2008) (statement of Rep. Ryan).

Syndrome Program at Massachusetts General Hospital,²¹⁵ and from articles in the *Wall Street Journal*²¹⁶ and the *New York Times*.²¹⁷ These articles suggested that women who received a prenatal diagnosis of Down syndrome often were provided with a bleak portrait of the life that awaited them and their children.²¹⁸ The articles linked this bleak portrait to the exceedingly high percentage of such women who elect to terminate the pregnancy.²¹⁹ These articles apparently were brought to the attention of Senator Brownback, a famously pro-life Senator, who drafted and introduced the Act as a response to these findings.²²⁰ This suggests that the reference to “Down syndrome” in the Act was not inserted to clarify a larger category of conditions. Rather, it suggests that this reference was inserted because of a specific and intense interest in this particular issue.

b. *Interpretation #2: Expressive and Directive Function*

By contrast, an interpretation that views the example of “Down syndrome” as *expressive rhetoric* easily explains the distinct rhetorical purpose of this term. There is good reason, therefore, to conclude that the reference to “Down syndrome” was intended to operate as *expressive rhetoric*.

Moreover, there is equally compelling evidence to conclude that this reference was intended to function simultaneously as *directive rhetoric*. First, the example clause appears within a statute that awards a broad delegation of authority to an agency; even the decision of whether to pursue the program at all is left to the discretion of the agency.²²¹ As Part II explained, *directive*

²¹⁵ Brian G. Skotko, MD, MPP, MASSGENERAL HOSP. FOR CHILDREN, <https://www.massgeneral.org/children/doctors/doctor.aspx?id=19069#> (last visited Oct. 14, 2018).

²¹⁶ Amy Dockser Marcus, *Agonizing Choice: A Brother's Survey Touches a Nerve in Abortion Fight*, WALL ST. J. (Oct. 3, 2005), <https://www.wsj.com/articles/SB112829903217058110>.

²¹⁷ Amy Harmon, *Prenatal Test Puts Down Syndrome in Hard Focus*, N.Y. TIMES (May 9, 2007), <https://www.nytimes.com/2007/05/09/us/09down.html>.

²¹⁸ As the American Medical Association additionally put it, the information required by the Act “should provide a powerful corrective to the ‘bad news’ typically delivered to pregnant women whose fetuses are diagnosed with the tested conditions. A body of research suggests that much of the information now supplied is heavily biased, outdated, highly inaccurate, and almost always narrowly clinical.” Adrienne Asch & David Wasserman, *Informed Consent and Prenatal Testing: The Kennedy-Brownback Act*, 11 AMA J. ETHICS 721, 721 (2009).

²¹⁹ See, e.g., Harmon, *supra* note 217 (“About 90 percent of pregnant women who are given a Down syndrome diagnosis have chosen to have an abortion.”).

²²⁰ LETICIA VELASQUEZ, *Down, Hero Dad and Palin*, in A SPECIAL MOTHER IS BORN 215, 215 (2011); see also 154 CONG. REC. S1267 (daily ed. Feb. 27, 2008) (statement of Sen. Brownback) (specifically mentioning the high termination rates discussed in these articles in his statement on the Senate floor in support of the bill); 154 CONG. REC. H9919 (daily ed. Sept. 25, 2008) (statement of Rep. Ryan citing the same statistic); Kristin E. Blagg, *Grad Student Inspires New Bill*, HARV. CRIMSON (Mar. 17, 2005), <http://www.thecrimson.com/article/2005/3/17/grad-student-inspires-new-bill-pregnant/>.

²²¹ 42 U.S.C. § 280g-8(b)(1) (2012).

rhetoric often appears in precisely these instances of otherwise broad delegation to agencies. Second, the legislative history of the Act reveals that Members of Congress consistently described the statute in a bifurcated manner.²²² On the one hand, they described the statute as containing a broad legal rule that would apply to a woman who receives a diagnosis of a “prenatally or postnatally diagnosed condition[.]”²²³ or, more generally, a “disability.”²²⁴ On the other hand, whenever these Members turned to anecdotes or origin stories designed to communicate the core policy concern that animated the Act, they invariably discussed the example of Down syndrome.²²⁵ An interpretation that views the statutory reference to “Down syndrome” as *directive rhetoric* captures this bifurcated policy intent—something other interpretations fail to accomplish.

IV. INSTITUTIONALLY INQUISITIVE RHETORIC

A final type of rhetoric in congressional statutes is *institutionally inquisitive rhetoric*. This is inserted into statutes in order to solicit opinions from the nonpartisan offices of Congress that provide feedback to Members and committees during the legislative process. Statutory text directed at these offices is “institutionally inquisitive” in that it operates as a question to these nonpartisan offices; it is Congress’s way of asking these offices to provide an answer to a question about the details of a bill.

Two of these nonpartisan offices are particularly notable. The first is the Congressional Budget Office (“CBO”), an office that calculates the anticipated amount that a bill, if enacted, will cost in expenditures by the federal government.²²⁶ As Professor Barbara Sinclair has observed, these cost estimates can give rise to a procedural point of order and “can become powerful political weapons”; consequently, they have become a delicately managed part of the legislative process.²²⁷ Since the CBO cost estimate is based on statutory text, this means—as Professors Abbe Gluck and Lisa Schultz Bressman phrased it—that “the congressional budget score has an enormous impact on statutory language.”²²⁸ Statutory text often is designed specifically to alter the CBO cost estimate, in other words. In this regard, statutory text that

²²² See 154 CONG. REC. H9919 (daily ed. Sept. 25, 2008) (statement of Rep. Ryan) (speaking generally about prenatally and postnatally diagnosed conditions but highlighting Down syndrome with emphasis); 154 CONG. REC. S1267 (daily ed. Feb. 27, 2008) (statement of Sen. Brownback) (speaking generally about various conditions but highlighting the large number of pregnancies terminated after a Down syndrome diagnosis).

²²³ 154 CONG. REC. H9919 (daily ed. Sept. 25, 2008) (statement of Rep. Ryan).

²²⁴ 154 CONG. REC. S1267 (daily ed. Feb. 27, 2008) (statement of Sen. Brownback).

²²⁵ *E.g.*, 154 CONG. REC. H9919 (daily ed. Sept. 25, 2008) (statement of Rep. Ryan).

²²⁶ SINCLAIR, *supra* note 60, at 127.

²²⁷ *Id.* at 127–28.

²²⁸ Bressman & Gluck, *supra* note 123, at 728.

impacts the cost estimate of the bill frequently is addressed, at least primarily, to this nonpartisan office.

The second noteworthy audience for *institutionally inquisitive rhetoric* consists of the Offices of the Parliamentarian in the House and Senate. Each of these offices makes the important determination of which committee (or committees) will have jurisdiction over the bill in its respective chamber.²²⁹ Certain details often are included in statutory text in an effort to alter or influence these determinations.²³⁰ In these instances, statutory text is drafted primarily with committee referral, not court enforcement, in mind.

Institutionally inquisitive rhetoric therefore addresses a unique intended audience (a nonpartisan office of Congress), and it does so with a unique illocutionary force (the force of a question).

Unlike the other forms of *nonoperative rhetoric*, however, Congress does not insert *institutionally inquisitive rhetoric* into locations of statutory redundancy, or into any comparable statutory feature that might predictably evade enforcement by the courts. It can be concluded, therefore, that Congress does not use pure *institutionally inquisitive rhetoric* in enacted statutes—and so courts are not warranted in refusing to interpret or enforce this rhetoric. Instead, Congress inserts rhetoric that is designed to serve a dual function: it is designed to direct the courts regarding the enforcement of a policy (an *operative legal* function) and to solicit an answer from a nonpartisan office (an *institutionally inquisitive* function). In the following pages, this dual-purpose rhetoric will be referred to as *operative-inquisitive rhetoric*.

How should the courts interpret *operative-inquisitive rhetoric* in statutes? Bressman and Gluck provided an interesting answer to this question. These scholars argue on behalf of a “CBO canon,” which would direct the courts in cases of statutory ambiguity to construe *operative-inquisitive rhetoric* in a manner that would render the implementation of this rhetoric consistent with the presumptions that CBO relied on when developing its cost estimate.²³¹ In other words, they argue for construing this rhetoric in a manner consistent with CBO assumptions about how the *operative-inquisitive rhetoric* would be implemented.²³²

In defense of this canon, Bressman and Gluck argue that it would accurately capture congressional intent in a way that current interpretive practice does not.²³³ Bressman and Gluck believe that the CBO canon is faithful to congressional intent because, to their minds, Congress’s overriding goal

²²⁹ See DAVID C. KING, TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION 7–8 (1997).

²³⁰ For a discussion of these drafting tactics, see *id.* at 8 (discussing the tactic of “amending a law that is already in their committee’s jurisdiction”); *id.* at 116 (discussing the tactic of “clever drafting of bill titles and preambles”); *id.* at 117 (discussing the tactic of “shift[ing] agency oversight of an issue”).

²³¹ Bressman & Gluck, *supra* note 123, at 782.

²³² *Id.*; see also Gluck, *supra* note 9, at 182.

²³³ Bressman & Gluck, *supra* note 123, at 782.

when inserting *operative-inquisitive rhetoric* into statutes is to limit the real-world cost of a bill's implementation.²³⁴ In support of this point, Bressman and Gluck point toward a slightly different observation, however: they observe that the overriding goal of many policymakers when inserting *operative-inquisitive rhetoric* is the solicitation of a desired cost estimate from CBO.²³⁵ As such, the CBO canon is founded upon an unstated assumption: namely, that Congress solicits CBO cost estimates due to its desire to limit the real-world costs of implementing this statutory text.

In effect, this is an argument that the *institutionally inquisitive* dimension of *operative-inquisitive rhetoric* is not an end in itself. Instead, it suggests not only that this rhetoric is designed to solicit a CBO cost estimate, but also that this score itself is then meant to serve a further purpose. This further purpose, it presumes, is an *operative legal* purpose: namely, the purpose of limiting real-world implementation costs, including through enforcement by the courts. In this regard, the CBO canon repeats the basic interpretive move that has been the focus of this Article: it observes a congressional action (the production of statutory text that solicits a desired estimate from CBO), and it assumes that Congress undertook this action for *operative legal* reasons (to constrain the costs of the bill's real-world implementation, and to use the courts in service of this goal).

One of this Article's goals is to illustrate the insufficiency of this interpretive move. This Article has argued that interpreters cannot simply assume that a congressional action or decision is motivated by an operative legal intent, even when that action or decision relates directly to statutory text. Instead, it has argued that it is necessary in this instance to ask what Congress's underlying motivation is for using *operative-inquisitive rhetoric* to solicit desired CBO cost estimates. Does Congress pursue this goal as part of a larger *operative* desire to control actual implementation costs, including through the courts? Does it instead pursue this goal with a *directive* desire, merely to suggest to agencies the preferred amount of expenditures that this rhetoric will produce? Or does Congress merely possess an *expressive* desire to send a message of fiscal responsibility to constituents—a desire that might be entirely disconnected from any concern for controlling real-world implementation costs?

A broader political analysis would be necessary in order to discover the answers to these questions. The Author of this Article suspects that, in many instances, Congress solicits specific cost estimates solely for *expressive* reasons. Regardless, the need for further analysis underscores the central point of this Article: that interpreters cannot simply rely on the unstated presumption that congressional actions, simply because they are related to statutory text, are animated by *operative legal* motivations.

²³⁴ *Id.* (“Given the centrality of the CBO score to the drafting of that statute, construing the statutory ambiguity consistently with the assumed score . . . seems an obvious, and more easily ascertainable, way for a court to reflect the legislative bargain.”).

²³⁵ *See id.* at 764.

V. THEORY APPLIED: *UNITED STATES V. JICARILLA APACHE NATION*

To highlight the impact that the theory of Congress’s four rhetorics can have on the courts, consider the case of *United States v. Jicarilla Apache Nation*.²³⁶ In *Jicarilla*, the Court needed to decide whether the “fiduciary exception” to the attorney–client privilege allowed Native American tribes to access certain legal documents from the federal government—documents the government had obtained pursuant to its management of trust funds on behalf of the tribes.²³⁷ The Court held that the “fiduciary exception” would apply only if the Jicarilla Apache Nation could identify a specific statutory provision that signaled Congress’s desire for the federal government to assume a set of trust responsibilities akin to those seen in the context of common-law trusts.²³⁸ Whether such a provision existed, the Court said, ultimately depended on the proper interpretation of section 101 of the American Indian Trust Fund Management Reform Act of 1994.²³⁹ In that section, Congress had specified: “The Secretary’s proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following: (1) Providing adequate systems for accounting for and reporting trust fund balances. . . . (8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.”²⁴⁰

Jicarilla, therefore, would be determined by an issue of statutory construction: the issue of whether the catchall reference to “the trust responsibilities of the United States” in the lead-in to paragraphs (1) through (8) was intended to reference a broad fiduciary duty (i.e., a duty akin to that found in the context of common-law trusts).²⁴¹

Writing for the Court, Justice Alito found that the catchall term did not, and could not, refer to such a broad fiduciary duty.²⁴² In defense of this holding, the Court said:

When Congress provides specific statutory obligations, we will not read a “catchall” provision to impose general obligations that would include those specifically enumerated. “As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment

²³⁶ 564 U.S. 162 (2011).

²³⁷ *Id.* at 174 (specifying that “that trust is defined and governed by statutes rather than the common law”).

²³⁸ *Id.* at 178 (“[T]he Tribe must point to a right conferred by statute or regulation.”). Justice Sotomayor’s dissent vigorously objected to this holding. *See id.* at 206. (Sotomayor, J., dissenting) (“The upshot of that decision, I fear, may very well be to reinvigorate the position of the dissenting Justices in *White Mountain Apache* and *Mitchell II*, who rejected the use of common-law principles to inform the scope of the Government’s fiduciary obligations to Indian tribes.”).

²³⁹ *See id.* at 178.

²⁴⁰ American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, § 101, 108 Stat. 4239, 4240 (codified at 25 U.S.C. § 162a(d) (2012)).

²⁴¹ *See Jicarilla*, 564 U.S. at 177–78.

²⁴² *Id.* at 185–86.

which renders superfluous another portion of that same law.” Reading the statute to incorporate the full duties of a private, common-law fiduciary would vitiate Congress’ specification of narrowly defined disclosure obligations.²⁴³

In other words, the specific responsibilities listed in paragraphs (1) through (8) are responsibilities that trustees are expected to perform in the context of common-law trusts. Consequently, if the reference to “the trust responsibilities of the United States” in the lead-in to paragraphs (1) through (8) referred broadly to all the responsibilities of common-law trustees, then those paragraphs would add nothing to the statute as *operative legal rhetoric*. Relying on the rule against surplusage, then, the Court rejected the construction sought by the Jicarilla Apache Nation.²⁴⁴ In doing so, it effaced many of Congress’s goals in drafting the statute—goals that attentiveness to alternative statutory rhetorics would have made apparent.

A. *Interpretation #1: Operative Legal Rhetoric*

As with the statutes analyzed in the foregoing pages, a side-by-side comparison of competing interpretations can reveal the congressionally intended meaning of the American Indian Trust Fund Management Reform Act of 1994—as well as the shortcomings of the Court’s interpretation in *Jicarilla*. First, consider an interpretation of paragraphs (1) through (8) that is consistent with the Court’s premises. The proper interpretation of those paragraphs, the Court suggested, must view them as *operative legal rhetoric* that contributes a nonredundant idea or rule to the statute.²⁴⁵ The Court did not endorse a specific interpretation of paragraphs (1) through (8); rather, it simply asserted that the proper interpretation, whatever it might be, must accord with these rhetorical premises.²⁴⁶

These premises are so utterly out of step with the realities of the statute’s production, however, that it is nearly impossible to discover a viable interpretation that accords with them. Taken as *operative legal rhetoric*, paragraphs (1) through (8) contain a legion of statutory redundancies—redundancies that plainly were not scrivener’s errors, but rather were intended by the statute’s drafters. These redundancies are so numerous and significant that it is impossible to locate any clarifying function or distinct legal meaning that the paragraphs might contribute as *operative legal rhetoric*.

Consider paragraph (1) that was added by section 101 of the Act in question. One of the requirements of this paragraph obligates the Secretary

²⁴³ *Id.* (citations omitted) (quoting *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988)).

²⁴⁴ *Id.*

²⁴⁵ *See id.*

²⁴⁶ *Id.*

to “[p]rovid[e] adequate systems for accounting for . . . trust fund balances.”²⁴⁷ Members of Congress involved in the Act’s drafting and passage plainly did not view this as the articulation of a new, nonredundant legal requirement. For one thing, this “accounting” requirement is redundant with a provision that appears on the very same page of the statute. Under section 102(a) of the Act, the Secretary of the Interior “shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian.”²⁴⁸ The paragraph (1) accounting requirement differs from this 102(a) requirement only in that it requires the Secretary to provide “adequate systems” to achieve this accounting-related goal, an additional element that adds nothing to the statutory directive.²⁴⁹ Given the proximity of these redundant provisions, Congress must have been aware of the statutory overlap, yet it included both.

This is just the beginning of the ways in which paragraph (1) fails to articulate a nonredundant legal requirement. The Act’s legislative history contains clear evidence that Congress understood the paragraph (1) accounting requirement to be redundant with preexisting provisions in the United States Code.²⁵⁰ A report by the Committee on Government Operations that directly shaped the Act’s trust-related provisions²⁵¹ emphasized that “[t]he Federal Government is *obligated by statute and treaty* to properly discharge all its fiduciary responsibilities to native Americans, *including accounting for Indian trust funds.*”²⁵² The report was able to make this assertion despite being written two years before the enactment of paragraph (1), a fact that illustrates the Committee’s understanding that paragraph (1) would be redundant with preexisting federal laws. Importantly, this understanding also was reiterated by Representative Synar, who ostensibly drafted the statutory text found in paragraph (1).²⁵³

What, then, about the statutory overlap that was at issue in *Jicarilla*: namely, the potential overlap between the paragraph (1) accounting requirement and the lead-in reference to “the trust responsibilities of the United States”? Time and again, important Members and committees of Congress described the paragraph (1) accounting requirement as one of the federal government’s already existing “fiduciary responsibilities” or “trust

²⁴⁷ American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, § 101, 108 Stat. 4239, 4240 (codified at 25 U.S.C. § 162a(d)(1)).

²⁴⁸ § 102(a), 108 Stat. at 4240 (codified at 25 U.S.C. § 4011(a)).

²⁴⁹ Compare § 101, 108 Stat. at 4240, with § 102(a), 108 Stat. at 4240.

²⁵⁰ See H.R. REP. NO. 102-499, at 57 (1992) (finding that the government is already “obligated by statute and treaty to properly discharge all its fiduciary responsibilities”).

²⁵¹ H.R. REP. NO. 103-778, at 30 (1994) (“[T]o improve the investment services delivered to the trust account owners, we are incorporating suggestions made in the April 1992 report.”).

²⁵² H.R. REP. NO. 102-499, at 57 (emphasis added).

²⁵³ See *Bureau of Indian Affairs’ Management of the \$2 Billion Indian Trust Fund: Hearing Before the Env’t, Energy, and Nat. Res. Subcomm. of the H. Comm. on Gov’t Operations*, 102d Cong. 64–65 (1991) (statement of Rep. Synar) [hereinafter *Indian Trust Fund Hearing*].

responsibilities.”²⁵⁴ The aforementioned committee report said, for example: “The *most fundamental fiduciary responsibility* of the government, and the Bureau, is *the duty to make a full accounting* of the property and funds held in trust for the 300,000 beneficiaries of Indian trust funds.”²⁵⁵ Representative Synar was careful to clarify this overlap in meaning in an exchange with an official from the General Accounting Office at a hearing—and to do so in the precise language of paragraph (1). The following exchange ensued:

[Mr. SYNAR.] Can you tell the subcommittee whether the BIA’s internal *system for accounting* for and reporting the trust fund balances are *adequate*?

Mr. STEINHOFF. They are not. . . .

Mr. SYNAR. Those responsibilities of reporting and accounting for those trust funds are *critical to their fiduciary responsibilities*?

Mr. STEINHOFF. Yes.²⁵⁶

It is difficult to locate any meaningful sense in which these “fiduciary responsibilities” might differ from the “trust responsibilities” mentioned in the statute—and, indeed, the Bureau of Indian Affairs used these descriptions interchangeably.²⁵⁷ It seems clear that the individuals most deeply involved in the drafting and passage of the Act at issue in *Jicarilla* understood the plain meaning of the reference to “trust responsibilities” in the lead-in to be redundant with the paragraph (1) accounting requirement.

Meanwhile, the Court in *Jicarilla* identified only one possible interpretation of this lead-in reference to “the trust responsibilities of the United States” that could redeem it from accusations of redundancy²⁵⁸—and this interpretation plainly failed to provide the redemption that the Court sought. According to this interpretation, the reference to “the trust responsibilities of the United States” referred not to a common-law fiduciary duty, but instead to the additional statutory obligations of the federal government.²⁵⁹ Yet, as Representative Synar’s statement and the aforementioned congressional report make clear, the drafters and supporters of the Act understood even a reference to the government’s preexisting statutory obligations to be redundant with paragraph (1). In this regard, it seems unavoidable that the lead-in reference to “the trust responsibilities of the United States” was, as a legal matter, intentionally redundant with paragraph (1).

²⁵⁴ *E.g., id.* at 44; H.R. REP. NO. 102-499, at 7.

²⁵⁵ H.R. REP. NO. 102-499, at 7 (emphasis added).

²⁵⁶ *Indian Trust Fund Hearing, supra* note 253, at 44 (emphasis added).

²⁵⁷ *Id.* at 220.

²⁵⁸ *See* United States v. *Jicarilla Apache Nation*, 564 U.S. 162, 185–86 (2011).

²⁵⁹ *See id.*

According to the drafters and ratifiers of paragraph (1), therefore, the “accounting” requirement found in this paragraph was intentionally redundant in at least three different respects. House Report 102-499 summarized this state of affairs: the Bureau of Indian Affairs, it said, already had been the target of repeated “congressional directives designed to provide a full and accurate accounting.”²⁶⁰ The problem was not that binding legal statements had not been issued to the Bureau that would create an accounting requirement. Rather, the problem was that “[t]he Bureau has repeatedly ignored directives to undertake needed management reform measures.”²⁶¹

Similar redundancies can easily be found throughout paragraphs (1) through (8). The additional paragraph (1) requirement relating to “reporting trust fund balances” was redundant with paragraph (5),²⁶² with the lead-in reference to “trust responsibilities,”²⁶³ and with existing legal requirements.²⁶⁴ Indeed, Justice Sotomayor noted in her dissent: “[N]ot even the Government argues that it had no disclosure obligations with respect to Indian trust funds prior to the enactment of the 1994 Act.”²⁶⁵ Paragraph (3) was redundant with existing legal requirements.²⁶⁶ Paragraph (7) was redundant with paragraph (1) and with section 102(a) of the Act.²⁶⁷ Indeed, it is more difficult to identify a nonredundant provision in paragraphs (1) through (8) than it is to locate a duplicative one.

These abundant, intentional redundancies plainly undermine the Court’s interpretation of the statute in *Jicarilla*. The Court had ruled out the construction of the statute offered by the Jicarilla Apache Nation, and it had done so simply because that interpretation would have prevented paragraphs (1) through (8) from serving a nonredundant purpose as *operative legal*

²⁶⁰ H.R. REP. NO. 102-499, at 2.

²⁶¹ *Id.* at 3.

²⁶² Paragraph (5) requires the reporting of trust fund balances, American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, § 101(5), 108 Stat. 4239, 4240 (codified at 25 U.S.C. § 162a(d)(5) (2012)), and paragraph (1) requires the Secretary of the Interior to establish “adequate systems” to report trust fund balances, § 101(1), 108 Stat. at 4240 (codified at 25 U.S.C. § 162a(d)(1)).

²⁶³ *See* H.R. REP. NO. 102-499, at 7 (“The most fundamental fiduciary responsibility of the government, and the Bureau . . . includes the continuing obligation to report to the tribes and individual account holders about the Federal Government’s management of the trust funds.”).

²⁶⁴ *See id.*

²⁶⁵ *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 205 (2011) (Sotomayor, J., dissenting).

²⁶⁶ *See* H.R. REP. NO. 102-499, at 58 (1992) (“The BIA’s continuing refusal to reconcile audit and certify all Indian trust fund accounts was arbitrary, capricious unreasonable and contrary to the clear congressional intent as expressed in five successive Federal laws governing the BIA’s annual appropriations from 1987 to 1991.”). Paragraph (3) stated that one of the responsibilities of the Secretary was “[p]roviding periodic, timely reconciliations to assure the accuracy of accounts.” § 101(3), 108 Stat. at 4240 (codified at 25 U.S.C. § 162a(d)(3)).

²⁶⁷ Paragraph (7) requires “adequate staffing, supervision, and training for trust fund management and accounting.” § 101(7), 108 Stat. at 4240 (codified at 25 U.S.C. § 162a(d)(7)).

rhetoric.²⁶⁸ Yet it appears that Congress had intentionally drafted these paragraphs in a redundant manner. In other words, some aspect of the logic animating the rule against surplusage had broken down in the drafting of paragraphs (1) through (8).

B. *Interpretation #2: Expressive-Directive Rhetoric*

Next, consider an interpretation of paragraphs (1) through (8) that views these paragraphs as *expressive-directive rhetoric*. To begin, notice that these paragraphs provide a paradigmatic instance of *directive rhetoric*. First, they appear within a *redundancy-encouraging feature* of the statute, since these paragraphs operate as example clauses. Second, they are addressed to an executive agency—the very audience that Congress addresses through *directive rhetoric*. Third, they are offered in a context that, much to its chagrin, Congress had discovered was a context of broad delegation. Despite the legal controls that Congress had previously tried to place upon the Bureau of Indian Affairs, it found that as a practical matter, the Bureau almost inevitably operated in a space of broad discretion with respect to its management of trusts.²⁶⁹

Fourth, an interpretation of paragraphs (1) through (8) as *directive rhetoric* is superior from a textualist perspective. As the foregoing pages explained, there is no viable interpretation that views these paragraphs as *operative legal rhetoric* and also respects the rule against redundancy. By contrast, an interpretation of these paragraphs as *directive rhetoric* easily finds a nonredundant rhetorical purpose in these paragraphs. According to this interpretation, the lead-in reference to “the trust responsibilities of the United States” articulated a broad legal rule, while paragraphs (1) through (8) identified the specific subset of these “trust responsibilities” that Congress hoped to see the Bureau of Indian Affairs prioritize in its attempts to address its myriad failures as a trustee.

Fifth, this interpretation is even more compelling from an intentionalist perspective. The committee report mentions paragraphs (1) through (8) only once—describing these paragraphs not as binding legal rules, but rather as “a list of guidelines for the Secretary’s proper discharge of trust responsibilities.”²⁷⁰ This statement establishes two tiers of responsibility for the Secretary. On the one hand, it refers to “responsibilities” of the Secretary—a term which suggests a set of duties that it is incumbent upon the Secretary to perform. On the other hand, it refers to paragraphs (1) through (8) as “a list of guidelines” for the Secretary—a description which suggests that paragraphs

²⁶⁸ See *Jicarilla*, 564 U.S. at 185–86 (“As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.” (quoting *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988))).

²⁶⁹ See *supra* note 266; *infra* notes 271–272 (on BIA ignoring statutory directives).

²⁷⁰ H.R. REP. NO. 103-778, at 15–16 (1994).

(1) through (8) are designed merely to “guide” or steer the Secretary in her efforts to implement those more fundamental responsibilities. Through this bifurcation, the committee report suggests that Congress understood paragraphs (1) through (8) to be serving a different rhetorical function than that performed by the lead-in reference to “trust responsibilities”—a function of guiding the agency, rather than (or in addition to) issuing new binding commands to that agency.

This possibility is reinforced by the fact that Congress did not seem to view the core problem regarding trust fund management as having resulted from a lack of binding legal requirements. To Members of Congress, rather, the problem was that the existence of binding statutory requirements was proving insufficient to spur the Bureau of Indian Affairs to action. Describing the Bureau’s “failure to comply with congressional directives,”²⁷¹ House Report 102-499 observed: “The Bureau has repeatedly ignored [congressional] directives to undertake needed management reform measures.”²⁷² According to the report, Congress’s only success in coercing action by the Bureau had resulted not from its binding legal directives, but instead from a different strategy that Congress possessed with respect to the Bureau.²⁷³ As the report put it: “To the extent the Bureau has made any progress in this area, it appears that the subcommittee’s continuing oversight hearings have been virtually the only reason.”²⁷⁴ If Congress does indeed conceptualize some of its statutory language as akin to a reassertion of the pressure applied in oversight hearings, rather than as a creation new, nonredundant binding obligations, therefore, it makes sense that Congress would take this approach in paragraphs (1) through (8).

Next, consider these paragraphs as *expressive rhetoric*. Quite clearly, there were special-interest groups that were uniquely attentive to the Act at issue in *Jicarilla*: the tribes whose trusts were being managed by the Bureau of Indian Affairs. Representative Synar was explicit about the fact that the Act had been drafted not only with these interest groups in mind, but also in close consultation with them.²⁷⁵ As Synar put it: “[The Act] was prepared with the advice and counsel of many native Americans and tribal officials.”²⁷⁶ Did paragraphs (1) through (8) speak, then, in the language and categories that were meaningful to them? It appears so. In the hearings that preceded the passage of the Act, for example, the controller of the Blackfeet Tribe offered a statement to the congressional subcommittee that was investigating

²⁷¹ H.R. REP. NO. 102-499, at 15; *see also id.* at 56 (“The Bureau of Indian Affairs . . . has failed to fulfill its fiduciary duties to the beneficiaries of the Indian trust fund.”).

²⁷² *Id.* at 3.

²⁷³ *See id.* at 5.

²⁷⁴ *Id.*

²⁷⁵ *See* 139 CONG. REC. E1017 (daily ed. Apr. 22, 1993) (statement of Rep. Synar).

²⁷⁶ *Id.*

the Bureau's trust fund mismanagement.²⁷⁷ In the statement, the controller emphasized three essential areas in which the tribes believed the Bureau should improve: reconciliation of funds, performance of audits, and development and distribution of accurate account balances.²⁷⁸ These topics are central to paragraphs (1) through (8); they are addressed by paragraphs (1), (3), (4), and (5) of the statutory text at issues in *Jicarilla*. As such, these paragraphs spoke directly to the concerns that the tribes had voiced to Congress prior to the Act's passage, thereby acknowledging that Congress had heard the tribes' concerns and would prioritize them during its continuing oversight of the Bureau. In this regard, paragraphs (1) through (8) also seem to have been intended as *expressive rhetoric*.

Once paragraphs (1) through (8) are understood to be *expressive-directive rhetoric*, the Court's logic in *Jicarilla* falls apart. The reference to "the trust responsibilities of the United States" certainly can refer to the broader set of fiduciary duties that are incumbent upon common-law trustees, and it can do so without "render[ing] superfluous another portion of that same law," as the Court put it.²⁷⁹ Indeed, such an interpretation would fulfill the vision of Representative Synar, the ostensible author of paragraphs (1) through (8), whose core frustration was that Congress had previously "been unable to get the responsiveness that we need out of the BIA to perform the basic fiduciary responsibilities which we expect out of any trustee."²⁸⁰ Instead of seriously considering this interpretation, however, the Court simply relied on the fiction that Congress had drafted paragraphs (1) through (8) as nonredundant *operative legal rhetoric*. It is an interpretation that cannot be taken seriously by a Court that understands itself to be a faithful agent of Congress—and the sooner this presumption is discarded, the sooner courts will begin to genuinely fulfill this professed interpretive duty.

CONCLUSION

For much of our nation's legal history, the rule against surplusage has been regarded as a central tenet of statutory interpretation. By and large, this treatment has been warranted; the rule expresses a laudatory deference to the specific word choices that Congress makes when it drafts a statute and often leads to accurate and commonsense interpretations of federal statutes. When

²⁷⁷ See generally *Indian Trust Fund Hearing*, *supra* note 252, at 98–108.

²⁷⁸ See *id.* at 99. As the Controller put it: "[The increasing control of tribes over trust funds] in no way diminishes BIA's trust responsibility. The reconciliation and audit of these funds to a specific point in time by a contractor will correct the cumulative effects of the BIA's poor management up to that date, but the accuracies of those account balances from that point in time into the future is dependent upon the BIA's success in developing and implementing a comprehensive management plan staffed by competent and experienced personnel." *Id.*

²⁷⁹ *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011) (quoting *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988)).

²⁸⁰ 140 CONG. REC. H10,488 (daily ed. Oct. 3, 1994) (statement of Rep. Synar) (emphasis added).

the rule is applied without any understanding of Congress's four rhetorics, however, it predictably leads interpreters astray. In response, this Article has attempted to shine a light on these different congressional rhetorics. In so doing, it hopefully will lead interpreters to constructions of federal statutes that are more logical, more nuanced, and more faithful to congressional intent.