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Out of Many, One: Discovering the Shared Statutory Speech Community Through Corpus Linguistics

Justin A. Miller

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Clarity depends on context, which legislative history may illuminate. The process is objective; the search is not for the contents of the authors' heads but for the rules of language they used.[1]

– Judge Frank Easterbrook

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1. *In re* Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989).

INTRODUCTION

Law is communication,[2] and communication requires the participation of two or more parties. In the legal context, these parties are the legislature and the public. The language that the national legislature (i.e., Congress) produces, including floor statements, debates, bills, resolutions, and motions proposed, is conveniently collected in the *Congressional Record*.[3] But this record is often controversial—causing perhaps the deepest divide in judicial philosophy for at least the past half-century—as judges, attorneys, and academics debate the merits of turning to this legislative history.

One of the chief criticisms of using legislative history to form interpretive opinions is that it amounts to little more than "looking over a crowd and picking out your friends."[4] And some of the most vehement criticism is reserved for the assumption that Congress

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2. *See, e.g.*, Mark Greenberg, *Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 217 (Andrei Marmor & Scott Soames eds., 2011). *But see* Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. REV. 1613, 1614 (2014) (noting that asserting law is communication is an incomplete theory). While "[s]ome have suggested that statutes are particular kinds of communicated meanings—commands to judges and citizens"—this theory is "true but incomplete" because "[s]uch a view imagines law made from 'nowhere.'" *Id.* Every statute is surrounded by "an electoral and procedural context." *Id.* (emphasis omitted). Thus, "[i]t is no exaggeration to say that, without that context, democracy evaporates. A statute's legitimacy in our constitutional order depends upon context: that the law is the product of an elective, democratic process rather than autocratic fiat." *Id.*

3. *The Congressional Record*, U.S. SENATE, https://www.senate.gov/legislative /congrecord.htm (last visited Jan. 19, 2019) [hereinafter *Congressional Record*].

4. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting Judge Harold Leventhal).

had any intent on a specific issue, the argument being that meaning is found "not in the subjective, multiple mind of Congress but in the understanding of the objectively reasonable person."[5]

On one extreme of this debate, a minority advocates never consulting legislative history; on the other, another minority advocates always consulting it, even if the text is otherwise plain.[6] The vast majority of interpreters, however, fall somewhere between these two extremes. Because most of these interpreters acknowledge that the text is the primary source of law and the clearest indication of legislative intent,[7] the debate surrounding statutory interpretation has focused principally on just one of the communicating parties—the public, as measured by ordinary public meaning—to the neglect of the other party—the legislature, as measured by legislative intent.[8]

But legislative intent can be approximated without focusing on the more controversial aspects of using legislative history. Specifically, the interpreter can more closely approximate legislative intent by focusing on the semantic context contained in legislative history. Indeed, a better understanding of speech communities reveals that merely focusing on the ordinary public meaning is unnecessary and insufficient.

Still, for the vast majority of interpreters, legislative history is a helpful supplement in cases of statutory ambiguity. In such instances, some uses of legislative history are more controversial than others. Perhaps the most controversial use is to determine the actual meaning Congress intended the statute to have, even if the statutory text is otherwise plain. A less controversial use is to have

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5. Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 32 (1997) ("That a majority of both houses of Congress . . . entertained *any* view with regard to such issues is utterly beyond belief. For a virtual certainty, the majority was blissfully unaware of the *existence* of the issue, much less had any preference as to how it should be resolved.").

6. LINDA D. JELLUM & DAVID CHARLES HRICIK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES 222 (2d ed. 2009).

7. *Id.*

8. There are legitimate reasons for focusing on the public: "[I]t assures notice to the public, protects reliance interests, assures consistency of application, and respects the will of the legislative body." Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 793 (2018).

legislative history determine the context surrounding the debate and passage of the statute.[9]

This Note highlights an important but neglected contextual use of legislative history—determining the semantic usage employed by Congress when passing a law. This Note also proposes that this is simultaneously the use of legislative history least subject to criticism and most likely to illuminate the meaning of the text. True, these uses are still subject to other criticisms of legislative history, such as "salt[ing] the record."[10] So a better approach for determining semantic context might be to look at more than just the debate immediately surrounding the statute in question.[11] When a speaker is involved in a debate, the speaker will be more careful about word choice, which means the speaker's word choice is less likely to convey meaning in the ordinary sense.[12] Thus, looking to the way Congress uses the disputed word or phrase in other debates may illuminate an ordinary congressional usage, or at least

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9. *See* Nourse, *supra* note 2, at 1614.

10. "[T]o the degree that judges are perceived as grasping at any fragment of legislative history for insights into congressional intent, to that degree will legislators be encouraged to salt the legislative record with unilateral interpretations of statutory provisions they were unable to persuade their colleagues to accept." JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION & REGULATION 153–54 (2d ed. 2013) (quoting Int'l Bhd. of Elec. Workers, Local Union No. 474 v. NLRB, 814 F.2d 697, 717 (D.C. Cir. 1987)). Justice Kavanaugh expanded on the salting the record criticism: "as a functional matter, committee reports and floor statements too often reflect an effort by a subgroup in Congress—or, worse, outside of it—to affect how the statute will subsequently be interpreted and implemented, in ways that Congress and the President may not have intended." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2149 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

11. Many judges have looked to the term's usage in the broader statutory scheme to understand the congressional meaning of the term. For example, Judge Easterbrook, an ardent textualist, admits that "legislative intent is a vital source of meaning even though it does not trump the text[,]" in situations when "doubt about the meaning of a term found in the statute could well be resolved by harmonizing that provision with the structure of the rest of the law, understood in light of a contemporaneous explanation." *In re* Sinclair, 870 F.2d 1340, 1344 (7th Cir. 1989).

12. An analysis of the speaker's language outside the debate could be much more fruitful. *Cf.* Jennifer L. Mascott, *The Dictionary as a Specialized Corpus*, 2017 BYU L. REV. 1557, 1558–59 (noting that dictionaries define words (the debate) but also use those same words to define other words (usage outside debate)). Dictionary definitions are subject to bias on the part of the definer. Similarly, a congresswoman might alter language, even inadvertently, in a given situation, but there would be no alteration in the course of a different conversation.

help determine the range of possible congressional usages of the term.

In this manner, the legislative history can be treated as a specialized dictionary of possible congressional lexical usage, just as a dictionary lists the possible usages for a given word. But by using the *Congressional Record* to determine ordinary congressional usage, the interpreter runs the risk of falling into the same fallacies as those who use dictionaries to determine ordinary meaning.[13] So what is the weary traveler in search of statutory meaning to do? Comb the vast desert of the *Congressional Record* for other uses of the disputed term? This would be a monumental task, at best, and an invitation for the interpreter to scan over the crowd looking for friends, at worst.

This Note proposes that the *Congressional Record* be used as a mini-corpus[14] as part of the emerging field of law and corpus linguistics.[15] Thus far, corpus linguistics in the legal setting has principally been used to study the public's speech community to determine the ordinary *public* meaning.[16] So, this Note proposes studying the legislature's speech community with a corpus of the

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13. *See id.* at 1558 ("The idea is that by studying the context of how a word is used in natural language the interpreter can acquire a more unbiased picture of 'ordinary meaning' than by consulting dictionaries—written for the express purpose of inviting 'linguistic scrutiny.'" (footnotes omitted)).

14. *See id.* at 1559, for a discussion on the benefits of "mini-corpora." A mini-corpus focuses on a specific speech community, as opposed to a general corpus, which "contain[s] a wide variety of documents such as letters, newspapers, pamphlets, and speeches—representing the language usage of a large community." *Id.* Thus, a mini-corpus is "*specialized*, focusing just '*on a particular linguistic community*, such as a particular region, *type of language user*, or genre of language.'" *Id.* (citation omitted) (emphasis added); *see also* Lee & Mouritsen, *supra* note 8, at 830–31 ("Special corpora are limited to a particular genre, register, or dialect[,]" while general corpora "represent the language used by a broad (often national) speech community." (emphasis omitted)).

15. Lee & Mouritsen, *supra* note 8, at 863–64 ("We have not sought to study intended meaning in our corpus analysis. But as noted above we think such a study is possible. One approach would be to think of *interpreter* as a term used by lawmakers, and to look for evidence of usage in this speech community. If we assembled such evidence, then we could have the debate flagged above—as to whether intended meaning should win out over public meaning, or whether they ought to collapse together as a matter of theory.").

16. Ordinary public meaning corpora include the Corpus of Historical American English (COHA) and the Corpus of Contemporary American English (COCA), among others. CORPUS HIST. AM. ENG., https://corpus.byu.edu/coha (last visited Jan. 19 2019) [hereinafter COHA]; CORPUS CONTEMP. AM. ENG., https://corpus.byu.edu/coca (last visited Jan. 19, 2019) [hereinafter COCA].

Congressional Record to determine ordinary *congressional* meaning.[17] And just as some have proposed using the dictionary as a corpus,[18] my proposed *Congressional Record* as Corpus (CRAC) would provide the interpreter with an empirically based range of possible ordinary meaning.[19] Thus, the interpreter avoids scanning over a crowd to pick out friends because the crowd's disparate voices unite into a single reference point.[20]

By comparing and contrasting the public's speech community with the legislature's speech community, the interpreter can study the resulting shared statutory speech community. By checking the respective public and congressional registers, we can know if a term is more "ordinary" or more "congressional." Hopefully, the term will have similar senses in the respective registers;[21] however, even if each register offers a distinct sense of the term, comparing the two registers still promotes transparency[22] in interpretation by clearly showing the interpreter that a choice must be made between two competing and overarching values: promoting notice or respecting legislative intent.[23]

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17. While the theory has been noted in passing by other authors, a method for implementing a corpus based on congressional meaning has not been proposed until now. *See supra* note 15.

18. *See* Mascott, *supra* note 12.

19. The difference between a non-corpus versus a corpus approach to ordinary meaning is significant: "The first scenario is a metaphysical debate; the second is an empirical one. . . . [T]he corpus method removes the determination of ordinary meaning from the black box of the judge's mental impression and renders the discussion of ordinary meaning one of tangible and quantifiable reality." Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning* 2010 BYU L. REV. 1915, 1970 (2010).

20. Similar to how a dictionary's disparate definitions can be united into a single mini-corpora. *See* Mascott, *supra* note 12, at 1559.

21. *Cf.* Lee & Mouritsen, *supra* note 8, at 875 (noting that corpus analysis is contextual within a particular register at a particular time). Ideally the two senses of meaning—intended meaning and public meaning—overlap completely.

22. *See id.* at 858 ("[W]e will simply say for now that transparent answers are better than opaque ones. Further thinking on this problem is needed. Yet surely we will be better off with an open, transparent discussion about whether (and when) to give primacy to intended meaning and when to credit public meaning. Once we speak more carefully about the meaning we are looking for and proceed more reliably in trying to measure it, we can have a better dialogue about these difficult questions of legal theory.")

23. Such weighing of competing values, interests, and rights is the reason technological tools such as corpus linguistics will never replace judges. *Cf.* Carissa Byrne Hessick, *Corpus Linguistics and Criminal Law*, 2017 BYU L. REV. 1503, 1517 (2017) ("[J]ustice may only

Part I of this Note explains how congressional intent fits within interpretive theory. It also analyzes why congressional intent is important and how it differs from ordinary public meaning. Part II explores contextual uses of legislative history—one of the main evidences of congressional intent—for those uses that help reveal the context surrounding a given statute. Part III advocates using the *Congressional Record* as a mini-corpus, which will optimize the use of legislative history while potentially resolving textualist criticisms of its use. In Part IV, this congressional meaning mini-corpus is applied to *Muscarello v. United States*[24] and then compared with the results of an ordinary public meaning corpus. This Note concludes by encouraging the creation of a full congressional meaning corpus to analyze the shared statutory speech community.

I. STATUTORY INTERPRETATION: WHY BOTH PUBLIC MEANING AND CONGRESSIONAL INTENT MATTER

Communication is the "process by which information is exchanged between individuals through a common system of symbols, signs, or behavior[.]"[25] Statutory law is fundamentally a form of communication—Congress speaks, and the public hears.[26] And as communication, law shares its "fundamental problem": "reproducing at one point either exactly or approximately a message selected at another point."[27] This reproduction problem in the legal context is called interpretation—the process of

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be meted out by people. By replacing the case-by-case exercise of human judgment with a mechanical calculus, we do not judge better or more objectively, nor do we judge worse. Instead, we cease to judge at all." (footnote omitted) (internal quotation marks omitted)). Corpus linguistics merely increases transparency and highlights interpretive questions that have previously remained hidden. Only humans are capable of passing "the test of a first-rate intelligence[:] the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function." F. Scott Fitzgerald, *The Crack-Up*, ESQUIRE: CLASSIC (Feb. 1, 1936), https://classic.esquire.com/the-crack-up.

24. Muscarello v. United States, 524 U.S. 125 (1998).

25. *Communication*, MERRIAM-WEBSTER, https://www.merriam-webster.com/diction ary/communication (last visited Jan. 9, 2019).

26. *See* Lee & Mouritsen, *supra* note 8, at 815–16; Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 485–86 (2013).

27. C.E. Shannon, *A Mathematical Theory of Communication*, 27 BELL SYS. TECH. J. 379, 379 (1948).

understanding what the author(s) intended to communicate.[28] Statutory interpretation is a search for the meaning of a text, and "[t]o assess meaning, . . . we must also take into account the relevant speech community . . . ."[29] These laws are made up of individual words that only gather meaning through context.[30]

In other words, language does not exist in a vacuum; it requires a common group of speakers and hearers known as a speech community. A speech community is any group of people sharing a common set of linguistic norms and expectations about how their language should be used.[31] Just as language requires a speech community, statutes require an interpretive community. This shared statutory speech community is comprised of both the congressional speech community and the public speech community. The judiciary is then tasked with interpreting the shared statutory speech community's conversations, specifically the legislature's statutory "symbols." When doing so, the judiciary has traditionally focused on determining meaning through what an ordinary member of the public would understand.[32]

Focusing on ordinary meaning requires an initial choice: whose ordinary meaning to choose? In this context, the question is which speech community's ordinary meaning to choose—the public's or the legislature's?[33] The promotion of either community offers a

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28. Larry Alexander, *Originalism, the Why and the What*, 82 FORDHAM L. REV. 539, 539 (2013).

29. Lee & Mouritsen, *supra* note 8, at 818.

30. John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 70 (2006). Thus, language correlates to many legal principles, because it likewise cannot exist in a vacuum. For example, property rights only exist in relation to another person. Just like a castaway's "property rights" are illusory, so too are any "statutes" that the castaway might create. *See* WILLIAM LILLIE, AN INTRODUCTION TO ETHICS 259 (2003).

31. GEORGE YULE, THE STUDY OF LANGUAGE 284 (6th ed. 2016).

32. Gibbons v. Ogden, 22 U.S. 1, 188 (1824) ("The enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 69 (2012) ("The ordinary-meaning rule is the most fundamental semantic rule of interpretation.").

33. Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027, 2059–60 (2005). This decision has enormous "implications for the selection of a relevant corpus[,]" because "[i]f we are trying to measure intended meaning, we might want to gather data from a corpus of a community of speakers who look demographically like Congress. Yet if we are interested in public meaning, we would want to turn to a broader corpus." Lee & Mouritsen, *supra* note 8, at 858.

distinct benefit: analyzing the public promotes "the notice function of the law" while analyzing the legislature promotes "deference to the presumed intent of the lawmaker."[34] But focusing exclusively on either speech community is incomplete. Only by comparing the two halves of the shared statutory speech community can the interpreter accurately capture ordinary meaning.

A. Ordinary Public Meaning

The law is "a solemn expression of legislative will. It orders and permits and forbids. It announces rewards and punishments. Its provisions generally relate not to solitary or singular cases, but to what passes in the *ordinary* course of affairs."[35] It is neither merely a passive hearing on the part of the audience nor a vain expression on the part of the legislature. Rather, it is a declaration that is meant to be obeyed. Thus, what the audience understands by a given statute is vital to determining what that statute means.

There are two main reasons judges and scholars have tended to focus only on ordinary *public* meaning. First, preserving notice values requires that meaning be determined by the public's ordinary vernacular and usage.[36] Second, relying on ordinary public meaning avoids the problem of searching for the collective intent of a multimember body.[37] Justice Frankfurter wrote that

> [i]f a statute is written for ordinary folk, it would be arbitrary not to assume that Congress intended its words to be read with the minds of ordinary men . . . . And so we assume that Congress uses

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34. Lee & Mouritsen, *supra* note 8, at 788. There are many additional reasons for using the ordinary public meaning. Using ordinary public meaning "assures notice to the public, protects reliance interests, assures consistency of application, and respects the will of the legislative body." *Id.* at 793. But it is important to note that textualists do not advocate the plain or ordinary meaning as part of "a silly belief that texts have timeless meanings divorced from their many contexts[.]" *In re* Sinclair, 870 F.2d 1340, 1344 (7th Cir. 1989). Nor do they "assum[e] that what is plain to one reader must be clear to any other (and identical to the plan of the writer)[.]" *Id.* Rather, the use of ordinary meaning rests "on the constitutional allocation of powers." *Id.*

35. *Law*, BLACK'S LAW DICTIONARY (3d ed. 1933) (emphasis added) (quoting L.A. CIV. CODE arts. 1, 2 (1933)).

36. Alexander, *supra* note 28, at 541–42.

37. *Id.* at 542.

common words in their popular meaning, as used in the common speech of men.[38]

Thus, ordinary public meaning is important because the public, as Congress's audience, is required to obey the statutes passed. Passing and enforcing a law that is substantively or practically unintelligible to the public is unconscionable.

The traditional understanding of ordinary meaning is that it is an absolute term which does not permit multiple "ordinary meanings" in a given context, although there may be several possible meanings. And ordinary meaning has traditionally been viewed as more important than possible meaning. Justice Scalia stated that the Court's job "is to determine . . . the ordinary meaning[,]" rather than to "'scavenge the world of English usage to discover whether there is any possible meaning.'"[39] He also lamented that "[t]he Court does not appear to grasp the distinction between how a word *can be* used and how it *ordinarily* is used."[40] The problem is that "[l]egal interpretation is binary in nature and requires a 'yes' or 'no' answer to resolve the legal dispute at issue."[41]

Recent scholarship, however, has advocated searching for ordinary meanings in the plural. One scholar, Jennifer Mascott, has queried, "Perhaps the proper question . . . [is] not whether English language speakers more frequently associate [a term] with [one meaning or another]. Maybe instead the court should have asked, what are all of the ordinary meanings of [the term] that fit properly within the statutory context?"[42] This "multiple ordinary meanings

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38. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947). But the audience is not always "ordinary folk." Compare Justice Frankfurter's statement in the same article: "If they are addressed to specialists, they must be read by judges with the minds of the specialists." *Id.*

39. Mouritsen, *supra* note 19, at 1953 (quoting Chisom v. Roemer, 501 U.S. 380, 410 (1991) (Scalia, J., dissenting)) (emphasis removed).

40. *Id.* at 1948 n.185 (quoting Smith v. United States, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting)).

41. Stefan Th. Gries & Brian G. Slocum, *Ordinary Meaning and Corpus Linguistics*, 2017 BYU L. REV 1417, 1435 (2017). This binary nature at times conflicts with linguistic understanding: "If, for example, the dispute involves a matter of categorization (e.g., is a Segway a vehicle?), the court must give a definitive answer even if language experts indicate that category membership among ordinary language users is properly viewed as a matter of degree." *Id.*

42. Mascott, *supra* note 12, at 1557.

approach" poses significant ramifications for statutory inter-pretation. If both senses of a term are ordinary, then perhaps the statute encompasses both.[43] "In other words," Mascott continues, "ordinary meaning might not mean picking the most common use of a term but rather, identifying the full range of actions encom-passed by the permissible meanings of that term."[44] But whether the interpreter is looking for a single ordinary meaning or a range of meaning, ordinary meaning is, in essence, "an empirical question—about the sense of a word or phrase that is most likely implicated in a given linguistic context."[45]

The interpretive framework that most limits inquiry into congressional intent is textualism,[46] which is closely tied to ordinary public meaning.[47] Textualism can be broken down into two propositions: (1) there is no such thing as an authorial intent beyond the words of a statute, and (2) the only intent we should attribute to Congress is what the reasonable person would understand from the words of that statute.[48] I readily agree with the former proposition. After all, the statutory text is unique in having survived the constitutionally mandated procedures of bicameral-ism and presentment.[49] But I disagree with the second proposition—

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43. *See id.*; *see also* Lee & Mouritsen, *supra* note 8, at 804–05 (discussing the dissent's opinion in Taniguchi v. Kan Pacific Saipan, Ltd., 566 U.S. 560 (2012) that either of two common senses of a term could count as ordinary).

44. Mascott, *supra* note 12, at 1588.

45. Lee & Mouritsen, *supra* note 8, at 795.

46. William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1516 (1998) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997)) ("I don't care what [the legislature's] intention was. I only want to know what the words mean.").

47. *Id.* at 1512.

48. *See* Manning, *supra* note 30, at 73.

49. *See* U.S. CONST. art. I, § 7; *see also* Easterbrook, *supra* note 5, at 65 ("Imagine how we would react to a bill that said, 'From today forward, the result of any opinion poll among members of Congress shall have the effect of law.' We would think the law a joke at best, unconstitutional at worst. This silly 'law' comes uncomfortably close, however, to the method by which courts deduce the content of legislation when they look to subjective intent."). Justice Scalia wrote that

> [t]he greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators. As the Court said in 1844: "The law as it passed is the will of the majority of both houses, *and the only mode in which that will is spoken is in the act itself* . . . ."

Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (quoting Aldridge v. Williams, 44 U.S. 9, 24 (1844)).

limiting our inquiry to what the reasonable person would understand from the words of a statute—for two reasons.

First, Congress may have a different vernacular and word usage than the ordinary public. Second, if we also care about the will of the lawmaker and not just about protecting reliance interests and giving notice, we should care about any possible distinct language usage between the congressional speech community and the public speech community. Focusing on either half of the shared statutory speech community to the exclusion of the other is problematic because our concern for determining the shared understanding of a text means that the relevant speech community encompasses *both* the public and the legislature. The public does not pass its own laws, and the legislature does not pass laws merely for its own benefit.

B. Ordinary Congressional Meaning

The judiciary has traditionally focused on determining meaning through what an ordinary member of the public would understand. But by focusing on one-half of the speech community—the public—the interpreter forgets that the shared statutory speech community also includes Congress, not just the public. Thus, this Note proposes that the ordinary congressional meaning better incorporates another of statutory interpretation's primary goals—giving effect to the will of the lawmaker.

Congressional intent is central to interpretation in several aspects. First, our judicial system has traditionally focused on giving credit to the will of the lawmaker.[50] Indeed, the statutory

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50. *See* Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 13 (1981) ("The key to the inquiry is the intent of the Legislature."); Gilead Sciences, Inc. v. Lee, 778 F.3d 1341, 1348 (Fed. Cir. 2015) ("In an effort to discern Congress's intent, this court looks to 'traditional tools of statutory construction.'") (citation omitted); 1256 Hertel Ave. Assocs., LLC v. Calloway, 761 F.3d 252, 259 (2d Cir. 2014) ("[I]t is also 'fundamental . . . to effectuate the intent of the Legislature.'") (citation omitted); Jensen v. Pressler & Pressler, 791 F.3d 413, 418 (3d Cir. 2015) ("Congress's intent guides our interpretation of statutes."); Cruz v. Abbott, 849 F.3d 594, 599 n.8 (5th Cir. 2017) ("Texas courts aim to give effect to legislative intent . . . ."); Grand Trunk W. R.R. Co. v. U.S. Dep't of Labor, 875 F.3d 821, 829 (6th Cir. 2017) ("[I]n construing statutes, our primary goal is to *effectuate legislative intent*.") (citation omitted); Sutula-Johnson v. Office Depot, Inc., 893 F.3d 967, 976 (7th Cir. 2018) ("We turn to the general rules of statutory interpretation in Illinois, where the 'fundamental rule of

interpretation debate is really about the best way of reaching Congress's intent. Whether the Court finds Congress's intent in the text, the legislative history, or the legislative purpose, the Court's goal is always to give effect to the will of the lawmaker.[51]

Second, the will of the lawmaker is important as a matter of social contract theory[52]—the sovereign (the people) grants authority to a body (a constitutional convention, Congress, etc.) to enact rules.[53] Those rules (representing the sovereign's will) are meaningless if that body's intent is not carried out.

Further, focusing on the speaker as well as the hearer is important,[54] in part because the public expects Congress to speak as Congress and not as an ordinary person.[55] Indeed, "'[t]here may

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statutory construction is to ascertain and give effect to the legislature's intent.'") (citation omitted); Heavenly Hana LLC v. Hotel Union & Hotel Indus. of Haw. Pension Plan, 891 F.3d 839, 844 (9th Cir. 2018) ("[W]e examine the legislative history, the statutory structure, and 'other traditional aids of statutory interpretation' in order to ascertain congressional intent.") (citation omitted); Obduskey v. Wells Fargo, 879 F.3d 1216, 1220 (10th Cir. 2018) ("[I]t is our primary task in interpreting statutes to determine congressional intent . . . .") (citation omitted). *But see* SCALIA & GARNER, *supra* note 32, at 397 ("Intentionalist theorists and courts promote the idea that enacted texts merely evoke or suggest—as opposed to state—what the true law is. This [is a] fallacy . . . ."). At the risk of offending the legal citation pantheon, I am choosing to leave this string cite organized by circuit rather than year. However, I am not yet ready to join the angry mob in "burn[ing] all copies of the *Bluebook*[.]" Richard A. Posner, *What Is Obviously Wrong with the Federal Judiciary, Yet Eminently Curable*, 19 GREEN BAG 2d 187, 193 (2016).

51. *See* cases cited *supra* note 50, for various approaches to reaching the legislature's intent.

52. *See generally* THOMAS HOBBES, LEVIATHAN (1651) (positing that to avoid a "solitary, poor, nasty, brutish and short" life, free men enter into a social contract to subject themselves to a sovereign, either a single person or an assembly); JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (1690) (noting that people delegate some rights to government to preserve the rights of all); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES (1762) (noting that laws created by governments must be in accordance with general will of sovereign populace).

53. "In free Governments the rulers are the servants, and the people their superiors & sovereigns." BENJAMIN FRANKLIN, THE POLITICAL THOUGHT OF BENJAMIN FRANKLIN 398 (Ralph L. Ketcham ed., 1965).

54. "[T]he notion of speaker's meaning derived from the philosophy of language, which focuses on the meaning the speaker intended to convey to her audience based on the audience's recognition of the speaker's communicative intentions." Nourse, *supra* note 2, at 1624 n.44; *see* H.P. Grice, *Utterer's Meaning, Sentence-Meaning, and Word-Meaning*, *in* 4 FOUNDATIONS OF LANGUAGE 225, 225, 230 (1968).

55. The "ordinary person" is, of course, a legal fiction. *Cf.* Weinbaum v. City of Las Cruces, 541 F.3d 1017, 1031 (10th Cir. 2008) ("The objective or reasonable observer is kin to the fictitious 'reasonably prudent person' of tort law."). Or, from a more colloquial source:

be good reasons for a legal system to prefer' either public meaning or intended meaning. And 'neither has to win every time,' because the 'right' answer 'depends on our reasons' for the resort to ordinary meaning 'in the first place.'"[56] Language is inherently tied to context. For example, we interpret language differently when interviewing for a job as compared to speaking with a friend, just as we interpret language differently when reading Shakespeare as compared to reading Dr. Seuss—depending on the context, we expect a different conversation. So if Congress has a different vernacular and usage than the general public, and if we care about the will of the lawmaker—not just protecting reliance interests and notice—we should care about those possible distinctions in language usage.

The choice between ordinary public meaning and ordinary congressional meaning has real-world consequences: "When the legal system decides to rely on the ordinary meaning of a word, it must also determine which interpretive community's under-standing it wishes to adopt."[57] The two principal communities are the public and the legislature. The public's speech community is likely to be reflected in articles, newspapers, books, conversations, etc. But where does the interpreter find Congress's speech community represented? The congressional speech community is found in the legislative history surrounding the creation of laws, which includes the legislature's publications and conversations. The search for Congress's intent leads through the valley of the shadow of legislative history.

"There's a notion I'd like to see buried: the ordinary person. Ridiculous. There is no ordinary person." ALAN MOORE & DAVE GIBBONS, WATCHMEN: THE DELUXE EDITION 379 (2013).

    56. Lee & Mouritsen, *supra* note 8, at 817 nn.127–28 and accompanying text (quoting William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1090–91 (2017)).

    57. "This choice is made tacitly in legal analysis but becomes overt when the analysis involves linguistic corpora, because the software displays the provenance of the usage on a screen in front of the researcher." LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION 78 (2010).

C. *Toward a More Perfect Statutory Interpretation*

As noted above, defining ordinary meaning is one of the more difficult questions of statutory interpretation: What does *ordinary meaning* mean?[58] There are several possible answers: First, it could be the ordinary congressional meaning—what Congress intended; second, it could be the ordinary public meaning—what the public heard. These are the traditional answers. This Note proposes a third answer: ordinary meaning is not merely what Congress *said* or what the public *heard*, but rather something in the middle: what they together *understood*.[59] This is the ideal situation—when the public and intended meanings overlap completely. Analyzing the ideal statutory situation requires acknowledging that language only has meaning in a specific context and speech community. Thus, the shared statutory speech community must include both Congress and the public.

II. Contextual Uses of Legislative History

When interpreting a statute, the Court looks first to the enacted text. When the statute is clear, "[a]ll judges follow a simple rule . . .

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58. Mouritsen noted, "When jurists speak of 'ordinary meaning,' they simply are not always talking about the same thing." Mouritsen, *supra* note 19, at 1952; *see generally* Lee & Mouritsen, *supra* note 8, at 798 ("Ironically, we have no ordinary meaning of 'ordinary meaning.' The same goes for 'plain meaning.'") (footnote omitted).

59. Mouritsen stated that "[o]rdinary meaning has been characterized as 'what . . . words would mean in the mouth of a normal speaker of English' or how words 'sound in the mind of a skilled, objectively reasonable user of words.'" Mouritsen, *supra* note 19, at 1953 (footnote omitted). Thus, "[t]hese two characterizations are not identical. The skilled user of words and the normal speaker of English are not necessarily the same person." *Id.* These two characterizations' differences do not end with the respective skill of the user. There is a difference between "what . . . words . . . mean in the mouth" and how they "sound in the mind[.]" *Id.* Mouritsen also noted "both of these characterizations are grounded in the same principle, that ordinary meaning can be understood and analyzed in the context of ordinary usage." *Id.* Yet while ordinary meaning and ordinary usage are so closely related that they are frequently compounded—they are not synonymous. "Almost certainly without intending to, judges who have invoked this 'ordinary-meaning-as-common-usage' characterization have implicated not merely a theory of ordinary meaning, but also a method for its analysis." *Id.* at 1954. Unlike more qualitative notions of ordinary meaning, "the question of the 'common usage' of a statutory term may be answered quantifiably through a linguistic methodology called corpus linguistics." *Id.*

apply it."[60] The Supreme Court has held that "[a]s always, we begin with the text of the statute."[61] Clear texts, however, are seldom litigated. Rather, the texts that make it to court are "ambiguous, or conflict[ed], or are so old that a once-clear meaning has been lost because of changes in the language or legal culture."[62] When the text is unclear, additional context is required to interpret the text.

In fact, the text's meaning can never be determined if divorced completely from context.[63] And one of the most important ways to determine a statute's context is by using legislative history: "[S]tatutes first gain meaning within the context that gave them life: the give and take of the legislative process[, so] we must read [them] within the context of the legislative process, which is reflected in the statute's legislative history."[64] Whereas the text is the law enacted by the legislature, context merely attempts to help the interpreter see how the legislature understood the language it used.

Legislative history can provide two different contexts relevant to statutory interpretation: policy-based context (how a reasonable person solves problems) and semantic context (how a reasonable

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

61. Limtiaco v. Camacho, 549 U.S. 483, 488 (2007); *see also* Neb. Dep't of Revenue v. Loewenstein, 513 U.S. 123, 128 (1994).

62. Easterbrook, *supra* note 60, at 61.

63. *See* Manning, *supra* note 30, at 70. It is important to distinguish searching for the context in which words are used from searching for the intent of the author. Justice Oliver Wendell Holmes said that "[w]e do not inquire what the legislature meant; we ask only what the statute means." Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899). Textualists have found an uneasy compromise with using legislative history by emphasizing its use as a revealer of context, but not of intent. Easterbrook noted, "Legislative history helps us learn what Congress meant by what it said, but it is not a source of legal rules competing with those found in the U.S. Code." *In re* Sinclair, 870 F.2d 1340, 1344 (7th Cir. 1989).

64. Paul E. McGreal, *Slighting Context: On the Illogic of Ordinary Speech in Statutory Interpretation*, 52 U. KAN. L. REV. 325, 328 (2004).

person uses words).[65] While each context is valuable,[66] they are given different weight by the competing interpretive camps.[67] Purposivists favor policy-based context, while textualists lend greater weight to semantic context.[68]

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65.   Manning, *supra* note 30, at 92–96. There may be other forms of context that do not precisely follow these forms. *See, e.g.*, Nourse, *supra* note 2, at 1615–16 (detailing Professor Nourse's theory of procedural context). "When Congress passes a statute, it does so against a background context of rules, procedures and deliberation. That context does not exist in anyone's head: it is public and constitutionally sanctioned. For years, we have called this context by the term 'legislative history.'" *Id.* Thus, a group, such as Congress, recognizes as a group action that which has been "authorized by the group or part of that group's organization or procedure." *Id.* at 1626. The group's intent is manifested by its actions as determined by its procedures. In a similar vein, a criminal case focuses on the accused's actions to determine intent. *Id.* at 1628. Thus, groups may have an intent through the procedures the group has created. The creation of documents in the legislative history are governed by procedural rules and reveal an intent as a series of decisions culminating in the creation of a law.

66.   For example, when the eighth-grade student in Anytown, U.S.A., is frustrated by one of Charles Dickens's texts, the ever-patient English teacher tirelessly instructs her in the context of Dickens's world. The distinction between policy-based context and semantic context is the difference between understanding the horrors of the Industrial Revolution that Dickens excoriated (policy-based) and the way Victorian English was used (semantic).

67.   For example, Justice Sotomayor said that legislative history can be a "particularly reliable source to which we can look to ensure our fidelity to Congress' intended meaning." Dig. Realty Tr., Inc. v. Somers, 138 S. Ct. 767, 782 (2018) (Sotomayor, J., concurring) (citing Garcia v. United States, 469 U.S. 70, 76 (1984)). But Justice Thomas retorted that "Even assuming a majority of Congress read the Senate Report, agreed with it, and voted for [the bill] with the same intent, "we are a government of laws, not of men, and are governed by what Congress enacted rather than by what it intended." *Id.* at 783 (quoting Lawson v. FMR LLC, 571 U.S. 429, 459–60 (2014) (Scalia, J., concurring in part and concurring in judgment)). Newcomers Justices Gorsuch and Kavanaugh seem to share Justice Thomas's concern. Justice Gorsuch wrote, "while pre-enactment practice 'can be relevant to the interpretation of an ambiguous text' it has no force when the text is clear" because "whatever the legislative history may or may not suggest about Congress's collective 'intent' (putting aside the difficulties of trying to say anything definitive about the intent of 535 legislators and the executive . . .), the *law* before us that survived the gauntlet of bicameralism and presentment couldn't be plainer." United States v. Games-Perez, 695 F.3d 1104, 1118 (10th Cir. 2012) (denying reh'g en banc) (Gorsuch, J., dissenting). Justice Kavanaugh introduces an additional nuance to the legislative history debate: his principal concern seems to be that "[t]he clarity-versus-ambiguity trigger for resorting to legislative history in the first place means that the decision is often indeterminate. That, in turn, greatly exacerbates the problems with the use of legislative history." Brett Kavanaugh, *The Role of the Judiciary in Maintaining the Separation of Powers*, HERITAGE FOUND. (Feb. 1, 2018), https://www.heritage.org/courts/report/the -role-the-judiciary-maintaining-the-separation-powers.

68.   Few interpreters will exclusively rely on legislative history, acknowledging that the text is the primary source of law and the clearest indication of legislative intent. JELLUM & HRICIK, *supra* note 6, at 222. Still, legislative history has been much maligned by textualist judges. *See, e.g.*, Robert Barnes, *Divining Congress's Intent*, WASH. POST (Apr. 22, 2012),

A. Policy-based Context

The search for policy-based context reflects Justice Marshall's statement that "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived . . . ."[69] Policy-based context includes evidence such as public knowledge of the evil the legislators intended to address; policies reflected in a statute's preamble, title, or structure; and policies expressed in similar statutes.[70] This evidence may also be found in the legislative history.

For example, the majority in *Muscarello* used statements from the floor debates to advance their argument that the statute in question, 18 U.S.C. § 924(c)(1), was passed "'to persuade the man who is tempted to commit a Federal felony to leave his gun at home.'"[71] These statements included one representative who said that the statute would apply to "the man who goes out taking a gun to commit a crime"[72] Another representative said, "Of course, what we are trying to do by these penalties is to persuade the criminal to leave his gun at home."[73] Still another stated, "We are concerned . . . with having the criminal leave his gun at home."[74] The *Muscarello* Court assumed these statements adequately represented the statute's policy-based context. The Court then aligned its definition of the relevant term, *carry*, with these statements.

("Scalia says that 'examining the entrails of legislative history' is a fool's errand. He has denounced the practice of looking at committee reports, floor debates and legislative pronouncements for decades. Several years ago he offered a distillation of his view that judges should look only to the language of the law Congress passed. 'The statute is what Congress voted on, not what some committee member said he thought it meant,' Scalia said. 'I don't care what he thought it meant, since the rest of the Congress didn't know what he thought it meant when they voted for the law.'"). Even to the point that consultation of legislative history in Supreme Court opinions as a whole has decreased drastically since the 1980s. James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220, 220 (2006).

69. United States v. Fisher, 6 U.S. (1 Cranch) 358, 386 (1805).

70. Manning, *supra* note 30, at 93.

71. Muscarello v. United States, 524 U.S. 125, 132 (1998) (citing 114 CONG. REC. 22,231 (1968) (statement of Rep. Poff)).

72. 114 CONG. REC. 22,243–44 (1968) (statement of Rep. Hunt).

73. *Id.* at 22,244 (statement of Rep. Randall).

74. *Id.* at 22,236 (statement of Rep. Meskill).

Two of the chief criticisms textualists raise against using legislative history for policy-based context are that (1) legislative history is not actually the law, and (2) even if it were the law, Congress has no single intent—rather, it is best described as a "they" not an "it."[75] First, textualists assert that legislative history is not actually the law, and "it is not to be supposed that, in signing a bill the President endorses the whole Congressional Record."[76] After all, if interpreters did care about subjective congressional intent, it would violate notice. One frequently cited example in support of this theory is a legend surrounding the infamous Roman emperor Caligula who ordered that his laws be written in tiny print and posted on high pillars, thus preventing the Roman citizens from knowing the laws to which they were subject.[77]

Second, some of the most vehement criticism of legislative history is in response to the assumption that Congress had any intent on a specific issue,[78] the argument being that meaning is found "not in the subjective, multiple mind of Congress but in the understanding of the objectively reasonable person."[79] In short, the battle cry of the textualists could be summed up in the statement: "Congress is a 'they,' not an 'it.'"[80] Finally, there is also the worry that legislative history is susceptible to manipulation or "salting the

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75. Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts*, 80 Marq. L. Rev. 161, 162–63 (1996). *But see* Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 Yale L.J. 70, 73 (2012) (Comparing legislative history to case law, Professor Nourse responds by stating that "[n]o lawyer would confuse a dissent with a majority opinion, or pleadings with jury instructions, and yet the equivalent occurs regularly in standard judicial and scholarly legislative histories. Scholars and law students dismantle congressional reports and debates as if early reports (at the pleading stage) were interchangeable with much-altered bills (jury instructions) and as if statements of those who lost the debate (dissenting opinions) amount to authoritative statements of meaning (majority opinions).").

76. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396 (1951) (Jackson, J., concurring).

77. Peter Hay, The Book of Legal Anecdotes 236 (1989).

78. Justice Holmes remarked that "[w]e do not inquire what the legislature meant; we ask only what the statute means." Holmes, *supra* note 63.

79. *See* Easterbrook, *supra* note 5, at 65.

80. Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 Int'l Rev. L. & Econ. 239, 244 (1992).

record."[81] One of the chief criticisms of using legislative history to form interpretive opinions is that it amounts to little more than scanning over a crowd to find one's friends.[82] Indeed, the Supreme Court has characterized legislative history as "murky, ambiguous, and contradictory."[83]

B. Semantic Context

Although the legislative history surrounding a given statute may appear "murky, ambiguous, and contradictory"[84] when trying to divine a policy or purpose, it is much clearer when uncovering the semantic meaning. So even when James Madison decried using the legislative history surrounding the drafting of the Constitution to determine meaning, he acknowledged that it might still be "presumptive evidence of the general understanding at the time of the language used."[85] Legislative history thus has "semantic value when the materials are cited as evidence of how terms were used and what assumptions were made" by the legislature.[86] These assumptions are reflected in the legislative history by the legislature's usage and habits of speech,[87] "[b]ecause legislators and their staff study how language can be manipulated, [and] that knowledge shapes the meaning of the text chosen."[88] Thus, looking to semantic context is similar to turning to a dictionary for a definition. In fact,

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81. *See* MANNING & STEPHENSON, *supra* note 10, at 153–54. If the legislative history is expanded beyond the statute in question to include the entire *Congressional Record*, the probability of someone salting the record across multiple debates becomes an exceedingly unlikely, and indeed, Herculean effort.

82. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting Judge Harold Leventhal).

83. Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005).

84. *Id.*

85. Letter from James Madison to M.L. Hurlbert (May 1830), *reprinted in* 9 THE WRITINGS OF JAMES MADISON 372 (Gaillard Hunt ed., 1910). The *Congressional Record* collects the language Congress produces, including floor statements, debates, bills, resolutions, and motions proposed. *Congressional Record*, *supra* note 3.

86. William N. Eskridge, Jr., *Should the Supreme Court Read* The Federalist *but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1315 (1998).

87. As proponents of legislative history assert, "[i]f the legislative process has its own assumptions and word usages, the process itself should be the context within which we seek a statute's meaning." McGreal, *supra* note 64, at 373.

88. JELLUM & HRICIK, *supra* note 6, at 235.

some interpreters have referred to the legislative history—and thus the *Congressional Record*—as a specialized dictionary.[89]

Turning to the legislative history in this manner "at least may alert the interpreter to the possible complexities of the language used in the statute."[90] This is true because "[e]ven if the proper aim of statutory interpretation is to seek 'objective meaning' rather than 'subjective intent,' knowing the legislative and other history surrounding enactment inevitably affects conclusions about what those words—even . . . seemingly clear [words]—'objectively' mean."[91] In other words, this use of legislative history represents "meta-intent, or background understandings about language and terminology (relevant to *textualists*) as well as values and norms (relevant to *normativists*)."[92]

One aspect of congressional usage is reflected in the fact that legislators "try to leave as little meaning to context as possible, at times creating *word usages that have no parallel in ordinary conversation*."[93] Thus, the practice of arguing about meaning and looking to the legislative history might encourage legislators to adopt usages that are not employed by the ordinary public. Further, "[i]gnoring legislative history" may actually "prevent[] the interpreter from understanding the context in which the legislator used the words written into the statutory text."[94] The interpreter is prevented from understanding the meaning of the legislature's words by ignoring the history of the subject matter that "even without the legislative history of the Act, helps inform our understanding of the way in which the legislators used [the terms] in the statute."[95]

A common example of using the legislative history to determine semantic context is to decide whether Congress used a term in its ordinary or technical sense. In *Nix v. Hedden*,[96] the Supreme

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89. Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 Geo. L.J. 1113, 1187 (2003).

90. Carol Chomsky, *Unlocking the Mysteries of* Holy Trinity: *Spirit, Letter, and History in Statutory Interpretation*, 100 Colum. L. Rev. 901, 952 (2000).

91. *Id.*

92. Eskridge, *supra* note 46, at 1537.

93. McGreal, *supra* note 64, at 373 (emphasis added).

94. Chomsky, *supra* note 90, at 952.

95. *Id.*

96. Nix v. Hedden, 149 U.S. 304 (1893).

Court analyzed the classic fifth-grader's question: Is a tomato a vegetable or a fruit? Surprisingly, the Supreme Court determined that a tomato is actually a vegetable for the purposes of the Tariff Act of March 3, 1833.[97] The Court noted, "Botanically speaking, tomatoes are the fruit of a vine, just as are cucumbers, squashes, beans, and peas. But in the common language of the people, whether sellers or consumers of provisions, all these are vege-tables."[98] In response to the Court's holding, one might question whether the Court should have looked to the legislative history to see if members of Congress understood themselves to be using terms such as "'fruit'" in their ordinary or technical sense.

Looking for the context in which words are used is also a familiar practice to determine trade usage in contracts. Judge Easterbrook described trade usage as "meanings that members of the trade or calling out of which the contract arose would attach to apparently clear words, phrases, or sentences[.]"[99] These meanings "may be different from the meaning that these 'clear' terms bear in ordinary discourse[.]"[100] When a community beyond just the two contracting parties uses a term in a specific manner, the usage becomes "objectively verifiable" and "is evidence about what words, phrases, etc. mean to a community, not merely to a pair of individuals; it is evidence about a public, not a private, language— evidence that is the equivalent, really, of a *specialized dictionary*."[101]

This "specialized dictionary" use is another way that legislative history can be used to study semantic context.[102] Like a dictionary, however, legislative history may provide a range of possible mean-ings while still failing to provide a determinant ordinary meaning of the term. While dictionaries may be used without controversy as

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97. The Court noted a similar question of whether beans were seeds: "Both are seeds in the language of botany or natural history, but not in commerce nor in common parlance." *Id.* at 307 (citing Robertson v. Salomon, 130 U.S. 412, 414 (1889)).

98. *Id.*

99. Bristow v. Drake St. Inc., 41 F.3d 345, 352 (7th Cir. 1994).

100. *Id.*

101. *Id.* (emphasis added).

102. Kesavan & Paulsen, *supra* note 89, at 1186–89.

a matter of judicial notice,[103] the definitions provided by legislative history may not always be so reliable. Finally, dictionaries themselves have recently come under criticism when relied upon to determine ordinary public meaning.[104]

Using legislative history is vulnerable to many of the same pitfalls as using a dictionary. The problems inherent in using dictionaries have been duly noted in the academic literature.[105] One such problem is confirmation bias.[106] While many think that the dictionary is an infallible fortress of meaning, it is important to remember that each definition was selected by a person making a conscious decision subject to confirmation bias. This conscious decision is similar to asking a person on the street for the objective meaning of a word. It may be difficult to get an accurate, representative definition from that one person. It is far easier to walk down the street and listen for the way that word is repeatedly used in context.[107] In fact, this is the way children first acquire most of their language.

Ironically, the usages given in the debate surrounding the actual statute are the ones most likely to be distorted.[108] This distortion may be inadvert or it may be the result of the congressional speech community trying to "salt the record" to

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103. Dictionaries may be used as a matter of judicial notice to define unknown terms or to determine that a proposed definition is in fact a recorded linguistic possibility. Mouritsen, *supra* note 19, at 1921 n.44 and accompanying text.

104. *See generally id.* (expounding criticisms of using dictionaries to determine ordinary meaning).

105. *See id.*; A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71, 72 (1994).

106. "[O]ur tendency [is] to selectively look for information that conforms to our hypothesis and to overlook information that argues against it." E. BRUCE GOLDSTEIN, COGNITIVE PSYCHOLOGY: CONNECTING MIND, RESEARCH, AND EVERYDAY EXPERIENCE 374 (3d ed. 2011).

107. This, of course, oversimplifies this method of language acquisition. Some words are seldom said or are even restricted to narrow speech communities. Some words are even restricted to specific streets. This is a problem that is frequently overlooked in our Internet age that carries over into the problem of selecting a proper corpus. Have our speech communities shrunk as widespread communication has increased?

108. *See supra* note 12. For this reason, the usage surrounding other statutes within the same two-year congressional term more objectively reflects congressional usage. See discussion *infra* Section IV.A.1.b for a more-detailed discussion of why the two-year congressional term adequately reflects the congressional speech community while avoiding the likelihood of distortion mentioned here.

favor a particular interpretation when judges or agencies seek to understand a statute. Indeed, the *Congressional Record* may contain more than just the language of Congress. Justice Scalia warned that committee reports are written "at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform . . . Congress what the bill meant . . . but rather to influence judicial construction."[109] For these reasons, meaning can usually be most accurately determined if the "definer" is unaware that she is being observed in her language usage.[110] Legislative history's best use for interpretation is thus not to discover how Congress *defines* a term, but rather how Congress *uses* a term.[111]

Words only have meaning in a specific community and context. If the shared statutory speech community is to be understood, legislative history is a necessary piece of the puzzle, together with public meaning. Ordinary congressional meaning is not just how two parties (or two legislators) use a term, but rather how a community (Congress) uses a term.[112] If this is true, then it follows that there is a strong chance that there are hidden nuggets of congressional semantic meaning in the legislative record; the problem is that interpreters cannot always distinguish the fool's gold from the genuine article.[113]

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109. Blanchard v. Bergeron, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring).

110. During contract formulation, however, the precise definition is determined while the drafter is keenly aware of being observed.

111. Similarly, corpus linguistics analyzes how a word is *used*, not the definition it is given. For example, finding the definition of the word "_____" in the dictionary as compared to Professor Mascott's using the dictionary as a corpus to find how the dictionary uses "_____" to define other words. Mascott, *supra* note 12, at 1558–59.

112. See Bristow v. Drake St. Inc., 41 F.3d 345, 352 (7th Cir. 1994), for Judge Posner's discussion of trade usage.

113. These mistakes may be innocent or insidious. For example, in *Muscarello v. United States*, Justice Breyer searched a newspaper database. 524 U.S. 125, 129 (1998). Other judges have done likewise; Judge Richard Posner "recognized the deficiencies of standard methods—principally, dictionaries—in answering" which sense is most ordinary, "[s]o he proceeded to a search for data, and he did so using the tool that is perhaps most familiar to us today. He performed a Google search." Lee & Mouritsen, *supra* note 8, at 799–800. Yet this use is still susceptible to picking friends out of a crowd.

III. FINDING A UNIFIED CONGRESSIONAL INTENT
THROUGH CORPUS LINGUISTICS

I believe that many of the concerns with using legislative history to inform context—such as the difficulty of finding the intent of a multimember body or having the record subject to manipulation—can be resolved by looking at legislative history data as a whole instead of referring to isolated data points. Thus, the first step for interpreters seeking to resolve the selective use of legislative history is to select and organize the appropriate body of language, or corpus (plural corpora), into a lexical database. One method of organizing a lexical database is through corpus linguistics. These corpora can be created relatively simply with freely available software, and lexical databases representing the ordinary public meaning have already been created. These corpora include the Corpus of Contemporary American English (COCA),[114] the Corpus of Historical American English (COHA),[115] and the Corpus of Founding Era American English (COFEA).[116]

As noted above, while the ordinary public meaning is the most traditional measure of congressional intent, it may not be the most accurate. In fact, one criticism of these ordinary public meaning corpora is that while the "point of a large data set is to avoid basing conclusions on a few speakers' idiosyncrasies . . . the idiosyncrasies of the [legislature] constitute the rule of law[.]"[117] This results in "ignor[ing] the only speaker that matters" in an "attempt to eschew the influence of any one speaker."[118]

Two leaders in the law and corpus linguistics movement, Utah Supreme Court Justice Thomas R. Lee and Stephen C. Mouritsen, theorized that there might be a corpus that "would reflect dialogue

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114.   COCA, *supra* note 16.

115.   COHA, *supra* note 16.

116.   *Corpus of Founding Era American English (COFEA)*, BYU LAW: LAW & CORPUS LIN-GUISTICS, https://lawcorpus.byu.edu/cofea (last visited Jan. 19, 2019) [hereinafter COFEA].

117.   State v. Rasabout, 2015 UT 72, ¶ 21, 356 P.3d 1258, 1266 (internal quotations omitted).

118.   *Id.* The majority's assertion is an overstatement. Surely ordinary public meaning matters to those governed by the law. And even for finding the meaning intended by Congress, ordinary public meaning provides at least some evidence.

among the 535 members [of the Congress] that voted on [a particular statute]."[119] They continued on to posit that

> [i]f we had such a corpus, and if it recorded extensive discussion among [the members of Congress] about the [term] they were talking about when they enacted this statute, we might be able to get data of relevance to the intended meaning of this provision. Perhaps it would reveal only examples of [one sense] and never of [the other]. If so, that might tell us that the intended meaning is limited to the former.[120]

If the *Congressional Record* were converted into a corpus, it would allow an interpreter to empirically analyze ordinary congressional word usage. Creating and analyzing this database is possible through the nascent field of law and corpus linguistics.[121] However, our expectations for corpus linguistics in general, and this tool specifically, should be tempered, since "[e]mpirical analysis of common usage will not by itself solve thorny questions of statutory interpretation . . . ."[122] Rather, corpus linguistics (and the CRAC specifically) should be seen as just one of many useful tools of statutory interpretation to help the interpreter make a more informed decision.[123]

A. The Congressional Record *as a Corpus*

The *Congressional Record* contains "a substantially verbatim account of the remarks made by senators and representatives while they are on the floor of the Senate and the House of Representatives. It also includes all bills, resolutions, and motions proposed, as well as debates and roll call votes."[124] If it were possible to turn the *Congressional Record* into a database, then this database would

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119. Lee & Mouritsen, *supra* note 8, at 854.

120. *Id.*

121. For a brief introduction to corpus linguistics in the legal context, *see* Mouritsen, *supra* note 19, at 1954–66.

122. *The Supreme Court 1997 Term, Leading Cases*, 112 HARV. L. REV. 122, 365 (1998).

123. *Id.*

124. *Congressional Record*, *supra* note 3.

be helpful in determining congressional usage,[125] since it is a near-complete record of the congressional speech community.[126]

However, sifting through the entire legislative record to find words in context is an infeasible, if not insurmountable, task. This process can be simplified through corpus linguistics. "[I]t cannot be denied," notes one scholar, "that corpus linguistics is also frequently associated with a certain outlook on language. At the center of this outlook is that the rules of language are usage-based and that changes occur when speakers use language to communicate with each other."[127] However, this outlook "must be analyzed within some framework or understanding of ordinary meaning."[128] The understanding of ordinary meaning posited above requires a specialized corpus focused on the congressional speech community.

In light of the lengthy list of corpora that already exist, a specialized congressional corpus may seem superfluous. However,

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125. This process is similar to the process of creating a dictionary: "The editors make up this record by collecting examples of uses of the word to be defined, studying each use in context, and then forming a judgment about the meaning in that context." HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1190 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994). It might be helpful to imagine the *Congressional Record* similarly: The interpreter "make[s] up this record by collecting examples" of the legislators' uses of the word in question, "studying each use in context" (whether debate, committee report, etc.) before "forming a judgment about the meaning in that context." *See id.*

126. While the vast majority of the *Congressional Record* reflects the speech of Congress, there are also some segments that come from congressional staffers, or even the public (e.g., letters from constituents). The potential for these sources to pollute the corpus is briefly addressed in the conclusion. *See* Conclusion *infra.*

127. HANS LINDQUIST, CORPUS LINGUISTICS AND THE DESCRIPTION OF ENGLISH 1 (2009).

128. See Gries & Slocum, *supra* note 41, at 1441–42, for a discussion on some of the ordinary meaning frameworks particularly relevant to corpus linguistics ("The concept underlying corpus linguistics is also consistent with the idea that an ordinary meaning is one that, in some sense, is general and cuts across contexts. Corpus-linguistic analyses are 'always based on the evaluation of some kind of frequencies,' and frequency is a crucial aspect of what distinguishes an ordinary meaning from some meaning that is perhaps grammatical but unordinary. Corpus linguistics can illustrate not only the number of senses (i.e., meanings) a linguistic expression may have but also which meaning is most frequently used. It can provide clues as to what the most prototypical meaning of an expression might be based on various factors [highest frequency, most even dispersion, earliest acquired, central in network of senses, meaning with the highest number of features with the highest cue validities] . . . . Of course, corpus linguistics requires a (testable) conceptual leap from frequencies to the issue being researched by the user. Thus, any corpus findings must be analyzed within some framework or understanding of ordinary meaning.").

these generalized corpora may not be ideally suited for all purposes: "For example, . . . a general corpus of online language would be a poor choice if a researcher is interested in the technical legal meaning of [a] term . . . ."[129] If statutory interpretation requires only what the statute means in the ear of the ordinary person, then a generalized public meaning corpus is most likely adequate to represent ordinary public meaning. But if statutory meaning is more accurately represented by a shared statutory speech community that includes ordinary congressional usage, then a more specialized corpus is also needed.

B. Making a Corpus

Currently, "[l]inguistic corpora can be built from the ground up using text or speech from any given speech community or register."[130] A basic understanding of what goes into creating a corpus is essential to evaluating the applicability of a particular corpus to a given problem of statutory interpretation.[131] When creating a corpus, some of the most important characteristics to consider are representativeness (or content) and size.[132]

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129. James C. Phillips & Jesse Egbert, *Advancing Law and Corpus Linguistics: Importing Principles and Practices from Survey and Content-Analysis Methodologies to Improve Corpus Design and Analysis*, 2017 BYU L. REV. 1589, 1595 (2017). "While it is not necessarily problematic to reuse a corpus for more than one study, it is critical to understand that a corpus that is representative for one research purpose may be entirely the wrong corpus for a different purpose." *Id.*

130. Lee & Mouritsen, *supra* note 8, at 832. For the purposes of this Note, corpora for both sessions of the 90th Congress (1967 and 1968) were created using a freely available corpus development software called AntConc. *See AntConc Homepage*, LAURENCE ANTHONY'S WEBSITE, http://www.laurenceanthony.net/software/antconc (last visited Jan. 19, 2018); 113 CONG. REC. (1967) (90th Cong., 1st Sess.); 114 CONG. REC. (1968) (90th Cong., 2d Sess.).

131. Phillips & Egbert, *supra* note 129, at 1593–94. In addition, creating a corpus is not out of reach for the average judge or attorney: "freely available software, such as AntConc, enables researchers to analyze their own modestly-sized corpus." *Id.* at 1593. Indeed, creating a corpus is often intuitive, and a better understanding of corpus linguistics will offer a marked improvement in determining meaning over mere intuition.

132. *See* Edward Finegan, *Comments on James C. Phillips & Jesse Egbert, Advancing Law and Corpus Linguistics: Importing Principles and Practices from Survey and Content-Analysis Methodologies to Improve Corpus Design and Analysis*, 2017 BYU L. REV. 1297, 1302–03 (2017); Douglas Biber, *Using Register-Diversified Corpora for General Language Studies*, *in* 19 COMPUTATIONAL LINGUISTICS 219, 240 (1993).

1. Representativeness

A corpus should represent a given speech community. The measure of representativeness in a corpus is "the extent to which a sample includes the full range of variability in a population."[133] Representativeness is a daunting ideal, but it is not "all-or-nothing."[134] Some scholars remind us that "[j]ust because it may not be possible to design a perfectly representative corpus does not mean we should not strive for that ideal . . . ."[135]

Following the insights gained from communications theory,[136] the relevant speech community for statutory interpretation must include both the public and Congress. Seeing as current corpora focus on broader speech communities representing the ordinary public meaning,[137] it is propitious to create a legislative corpus to use in conjunction with corpora such as COCA, COHA, or COFEA.[138] In fact, COFEA already approaches this ideal, including documents such as "letters, diaries, sermons, speeches, debates, . . . government materials, [and] legal documents" from the founding members of Congress.[139]

Thus, at the very least, any corpus purporting to represent the shared statutory speech community should include the *Congressional Record in addition to* "ordinary"[140] texts such as transcripts of

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133. Douglas Biber, *Representativeness in Corpus Design*, *in* 8 LITERARY & LINGUISTIC COMPUTING 243, 243 (1993).

134. Phillips & Egbert, *supra* note 129, at 1594.

135. *Id.*

136. *See supra* Part I.

137. For example, "the NOW Corpus records the language use of a single, large speech community (the United States) in a single linguistic register (newsprint)." Lee & Mouritsen, *supra* note 8, at 834. Further, Lee and Mouritsen hypothesize that "if the interpretation of a federal statute requires us to consider the linguistic norms and conventions of the citizens subject to that statute, then U.S. newsprint may be the appropriate speech community and register." *Id.*

138. Or in the words of Dr. Seuss, "If I can't *find* a [legislative corpus], I'll *make* one instead!" *Cf.* DR. SEUSS, HOW THE GRINCH STOLE CHRISTMAS 15 (1957) (noting that if one cannot find something, one should make it).

139. James C. Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. F. 21, 30 (2016). COFEA also contains nonlegislative materials including "newspapers, court opinions, . . . pamphlets, broadsides, non-fiction books, and fiction writing from the Founding Era." *Id.* These different registers, however, can be excluded from any search.

140. COCA, *supra* note 16.

spoken English and written "fiction, popular magazines, news-papers, and academic texts."[141] Otherwise, only one side of the conversation is being represented.

2. Size

One of the most important considerations when creating a corpus is size: "Corpus size is incredibly important, in terms of the richness of the corpus data. A tiny one million word corpus is extremely limited in terms of the phenomena that it can study—compared to a 400 million word corpus, where there might be 400 times as much data."[142] For example, one of the most popular corpora,[143] the Corpus of Contemporary American English (COCA) "contains more than 560 million words of text (20 million words each year 1990–2017) and it is equally divided among spoken [English], fiction, popular magazines, newspapers, and academic texts."[144] Another corpus, the Corpus of Founding Era American English (COFEA), contains more than 150 million words.[145]

The *Congressional Record* could be used as a corpus by breaking it into individual speech communities of two years. The two-year interval is most adequate because the senators and representatives comprising the speech community change every two years.[146] The *Congressional Record* begins when the new legislators are sworn in and a new session of Congress begins. While the body of Congress may change slightly in the interim due to resignations or deaths, I am assuming that those changes are relatively infrequent and insignificant. On each page of the *Congressional Record* there are

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141. *Id.* Advocating the inclusion of the *Congressional Record* with natural language documents is similar to Jennifer L. Mascott's idea to include Founding Era dictionaries in the Corpus of Founding Era American English. *See* Mascott, *supra* note 12, at 1588. ("As COFEA is developed, founding era dictionaries perhaps should be included alongside the corpus's natural language documents.").

142. *Size*, CORPUS.BYU.EDU, https://corpus.byu.edu/size.asp (last visited Jan. 19, 2019).

143. "The Corpus of Contemporary American English (COCA) is the largest freely-available corpus of English, and the only large and balanced corpus of American English. COCA is probably the most widely-used corpus of English, and it is related to many other corpora of English that we have created, which offer unparalleled insight into variation in English." COCA, *supra* note 16.

144. *Id.*

145. COFEA, *supra* note 116.

146. *See* U.S. CONST. art. I, § 2.

approximately 1385 words. Multiplied by approximately 25,951 pages per volume[147] equals about 36,000,000 words per volume. With two sessions in each year of Congress, the *Congressional Record* contains approximately 70,000,000 words per year. Finally, the composition of legislators changes every two years, so the speech community is valid for two-year periods, creating a corpus of approximately 140,000,000 words. Thus, each two-year mini-corpus would include approximately 140,000,000 words.

C. Possible Criticisms of the Congressional Record as Corpus Approach[148]

This approach is not without its flaws. Some of these flaws are common to all corpora, others to legislative history, and still others arise because of uniting the two. First, various criticisms of corpus linguistics in general have been advanced. One scholar mentioned several of these criticisms; namely, that a corpus (1) cannot present a full picture of the speech community analyzed, (2) may be anachronistic, and (3) may not be representative.[149] While many of these criticisms break down when applied to using the *Congressional Record* as a corpus, new potential problems arise to take their place. These will also be considered.

1. Full picture of speech community analyzed

The first of these criticisms is that no corpus can present a full picture of the speech community analyzed. Mouritsen counters this criticism by noting that this is only a valid concern when the legislature "has regulated certain conduct using highly specialized language."[150] In other words, the assumption is that the legislature speaks, or at least should be interpreted, in terms the ordinary person would readily understand.

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147. The number of pages per volume has varied over time. For example, the first volume of the *Congressional Record* contains 5500 pages. 1 CONG. REC. (1874).

148. See Lee & Mouritsen, *supra* note 8, at 865–73, for a thorough discussion of various criticisms of law and corpus linguistics. ("The criticisms that we have considered fall into three categories: proficiency, propriety, and practicality. Each concern has an element of viability but crumbles under careful scrutiny.").

149. Mouritsen, *supra* note 19, at 1966–70.

150. *Id.* at 1967.

Using the *Congressional Record* as a corpus resolves this concern even more conclusively because the *Congressional Record* is actually a rare occurrence of a near-complete record of the speech community analyzed: "The *Congressional Record* is a substantially verbatim account of the remarks made by senators and representatives while they are on the floor of the Senate and the House of Representatives. It also includes all bills, resolutions, and motions proposed, as well as debates and roll call votes."[151]

2. Anachronism

The second concern is that certain corpora may be anachronistic.[152] While this concern has largely been remedied with the introduction of COHA, as a broader corpus than COCA, COHA still contains fewer words.[153] While COCA contains a great number of words (spanning only from 1990 to the present), COHA covers a much longer period of time. One possible reason for a corpus to become anachronistic is that corpora must be updated regularly to stay current. The CRAC does not face this challenge because each two-year mini-corpus will represent the complete usage for that period. Even as new congressional sessions come every year, keeping the corpora divided into relevant two-year chunks will ensure they never become anachronistic.

3. Representativeness

The third criticism combines with the first with respect to the CRAC. For most corpora, it is clear that a full picture of the speech community analyzed is impossible, so representativeness is a measure of how accurate the chosen sample will be. In the CRAC,

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151. *Congressional Record*, *supra* note 3.

152. Inexplicably, this does not seem to be a concern when turning to a dictionary. *See* Mouritsen, *supra* note 19, at 1945–46 ("[D]ictionary editors . . . are likely to 'give disproportionate attention to uncommon [uses],' and to favor the language use—likely the anachronistic language use—of 'prestigious authors' (like the *Muscarello* Court's Defoe and Melville).").

153. Before COHA, one critic wrote that "[u]ntil this deficit is supplied, the [corpus] approach . . . is not practicable for old statutes." Rickie Sonpal, Note, *Old Dictionaries and New Textualists*, 71 FORDHAM L. REV. 2177, 2219 (2003).

the entire record of the speech community is included. Thus, the sample size is also the entire community.

Yet while the CRAC may contain all the official written and oral transcripts of Congress, technically it is nevertheless still incomplete.[154] This is because "[g]iven the infinite permutability of human language, the corpus can never capture every possible human utterance." This remains true "even in a narrowly-defined speech community,"[155] such as the United States Congress. Thus, the language that remains unrecorded will obviously not be represented in the corpus.

IV. APPLICATION: *MUSCARELLO V. UNITED STATES*

Corpus linguistics is most helpful in cases of lexical, as opposed to structural, ambiguity involving two (or more) competing definitions. *Muscarello v. United States*,[156] is perhaps the quintessential example of the ideal candidate for corpus analysis.[157] The debate in *Muscarello* surrounded part of the Omnibus Crime Control and Safe Streets Act of 1968, which states in part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or *carries a firearm*, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years . . . .[158]

Muscarello faced a five-year minimum for purchasing marijuana while his handgun remained locked in his glovebox.[159] The prosecution insisted that *carries a firearm* includes conveying it

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154. There may be additional ways to expand the database of congressional usage—members of Congress's tweets, posts, articles, etc. But these outside statements may not be representative of congressional speech if a congresswoman is only a congresswoman when acting officially. In other words, it might be most representative to limit congressional speech to what occurs in the constitutionally mandated processes and not on social media.

155. Mouritsen, *supra* note 19, at 1969.

156. Muscarello v. United States, 524 U.S. 125 (1998).

157. *Muscarello* has been extensively analyzed beginning with Mouritsen's article. *See* Mouritsen, *supra* note 19. Lee and Mouritsen then followed up on Mouritsen's initial analysis in a subsequent article. *See* Lee & Mouritsen, *supra* note 8.

158. 18 U.S.C. § 924(c)(1) (1994) (emphasis added).

159. *Muscarello*, 524 U.S. at 125–26.

in a vehicle. Muscarello argued that the phrase is limited to carrying it on one's person.[160]

The Supreme Court engaged in a battle of meaning, with the majority firing off with the King James Bible, *Robinson Crusoe*, and *Moby Dick*, as well as two electronic newspaper databases and several unabridged dictionaries.[161] The dissent's answering salvo included a legal dictionary, several alternative translations of the Bible, and works of poetry.[162] Their barrage continued with television and movie quotes from *The Magnificent Seven*, *M*A*S*H*,[163] and even *Sesame Street*.[164] When the dust settled, the majority declared that "the phrase 'carries a firearm' is [not] limited to the carrying of firearms on the person," but extends to "a person who knowingly possesses and conveys firearms in a vehicle[.]"[165] Perhaps not unsurprisingly, this war of the words left many unsatisfied, including some on the Court: "Unlike the Court, I do not think dictionaries, surveys of press reports, or the Bible tell us, dispositively, what 'carries' means embedded in § 924(c)(1)."[166]

A. Analyzing Ordinary Public Meaning in Muscarello Using COCA, COHA, and NOW

One scholar, Stephen Mouritsen, expressed doubts about the methodology in *Muscarello*.[167] Using corpus linguistics and the COCA and COHA, he determined that the Court's broad interpretation, *carry in a vehicle* (*carry*$_1$), is in fact less commonly used than the narrow interpretation, *carry on a person* (*carry*$_2$).[168] Mouritsen found that "[v]irtually all of the concordance lines returned . . . featured uses of *carry* related to the physical carrying of an object, though it could not always be determined whether

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160. *Id.*
161. *Id.* at 129–30.
162. *Id.* at 143–44 (Ginsburg, J., dissenting).
163. *Id.* at 144 n.6.
164. *Id.* at 147 n.11.
165. *Id.* at 126–27 (majority opinion).
166. *Id.* at 142–43 (Ginsburg, J., dissenting) (internal quotation marks omitted).
167. *See generally* Mouritsen, *supra* note 19.
168. *Id.* at 1964–65.

carry₁, or *carry₂*, was intended."[169] So Mouritsen grouped his results into four categories: *carry₁*, *carry₂*, either, and neither.[170]

Figure 1 — COCA[171]

	carry₁	*carry₂*	either	neither
firearm(s)	0	28	20	2
gun(s)	0	35	13	2
handgun(s)	1	24	24	1
rifle(s)	0	41	8	1
pistol	2	15	7	1
total	3	143	72	7

Figure 2 — COHA[172]

	carry₁	*carry₂*	either	neither
firearm(s)	0	2	1	0
gun(s)	0	47	7	5
rifle(s)	0	26	1	0
pistol	0	10	2	0
total	0	85	11	5

Drawing upon this data, Mouritsen noted, "It is important to pause here and observe what these data do and do not tell us."[173] He asserts that it would be "arbitrary" to conclude that § 924(c) should be interpreted as *carry₂* just because it is the most frequent use.[174] While *carry₂* is arguably the ordinary public meaning, that doesn't necessarily mean Congress intended *carry₂*. Again, corpus linguistics does not resolve questions on the battlefield of interpretive theory, it just clears the fog of war.

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169. *Id.* at 1964.
170. *Id.*
171. *Id.*
172. *Id.* at 1968.
173. *Id.* at 1964.
174. *Id.*

Since the purpose of the legislation (at least in the mind of one senator) was to "persuade the man who is tempted to commit a federal felony to leave his gun at home,"[175] perhaps Congress intended a broader meaning of *carry*. The imperative, *do not carry a firearm*, may thus include both *carry*$_1$ and *carry*$_2$. If the purpose is to decrease gun violence, it makes little difference to the legislature whether the gun is in the felon's hand, purse, or glovebox. On the other hand, Congress's purpose may have been narrower: to deter the kind of carrying most likely to lead to violence.[176] Although the public is likely to use *carry* only to refer to carrying a firearm on one's person—it does not follow that the public expects a sophisticated speaker like Congress to use the term in the same way. In fact, Mouritsen and Lee found in a subsequent article, using the News on the Web (NOW) corpus, that while *carry*$_2$ is the most common public use, *carry*$_1$ is also a possible use (albeit far less common).[177]

B. Analyzing Ordinary Congressional Meaning
in Muscarello Using CRAC

While *carry*$_2$ may be the more ordinary *public* meaning,[178] it is not necessarily the more ordinary *congressional* meaning. To answer this question, I created a corpus from the *Congressional Record*. The first step was to download the *Congressional Record* for both sessions of the 90th Congress, 1967 and 1968, from HeinOnline.[179] I then plugged this data for the 90th Congress into AntConc, a freely available tool for analyzing corpora. Clicking the *word list* tab revealed that this particular corpus contains 323,667 different words (word types) and 118,522,349 individual words (word tokens).

One challenge with creating a custom corpus is that it is not tagged like COCA or COHA would be. This means that more specialized, time-saving searches are not possible. Instead of being

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175. Muscarello v. United States, 524 U.S. 125, 133 (1998).

176. *Id.* at 144–45 (Ginsburg, J., dissenting).

177. Lee & Mouritsen, *supra* note 8, at 848.

178. If the interpreter can even decide what ordinary meaning means. *See supra* note 59.

179. The downloaded files for 1967 and 1968 are collected here: https://tinyurl.com/outofmanyonecorpusdata.

able to limit to verb uses (search term is "[carry].[v*]"), I had to manually comb through the 54,118 concordance lines to find 1080 concordance lines using *carry* as a verb with a firearm of some sort (including the term *weapon(s)*). From these lines, I randomly selected 100 lines to review more closely. I limited these lines to those in which *carry* (or one of its derivatives) co-occurred with words such as *firearm(s)*, *gun(s)*, *pistol(s)*, *handgun(s)*, or *rifles(s)*.[180] Like Mouritsen, I grouped the results into four categories: $carry_1$, $carry_2$, either, and neither. The results are included below in *Figure 3*.

Figure 3 — CRAC[181]

	$carry_1$ vehicle	$carry_2$ person	either	neither
firearm(s)	6	7	25	0
gun(s)	4	5	11	0
rifle(s)	1	2	1	0
pistol	2	7	11	0
weapon(s)	0	2	9	0
total	13	25	62	0

C. Analyzing Ordinary Statutory Meaning in Muscarello Using Both Ordinary Public Meaning and Ordinary Congressional Meaning Corpora

When the COCA, COHA, NOW, and CRAC corpora are compared, both usages of *carry* are frequent. In fact, as compared

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180. Mouritsen excluded *weapon(s)*, "even though the term appears among the top-hundred collocates of *carry*. Though all firearms are weapons, the reverse is not true and a preliminary examination of *weapon(s)* in the corpus suggested that many if not most of the weapons referenced were not firearms." Mouritsen, *supra* note 19, at 1963 n.250. In my corpus, however, because nearly all the weapon(s) referenced were firearms, I did not exclude the term. Also, I included the terms *derringer*, *six-shooter*, and *handgun* with *pistol(s)*; the terms *carbine* and *shotgun* with *rifle(s)*; the term *long gun* with *gun(s)*; and the term *arm(s)* with *firearm(s)*. There were also seven concordance lines that included more than one term. I counted these in the overall total of whether the line best supported $carry_1$, $carry_2$, either, or neither. But I did not assign the lines to an individual term.

181. *See supra* note 180. The concordance lines are available here: https://tinyurl.com /outofmanyonecorpusdata.

to the ordinary public meaning results represented in *Figure 1* and *Figure 2*, the ordinary congressional usage of *carry*$_1$ and *carry*$_2$ is roughly equal. Thus, while it may be more colloquial to use *carry* to refer to carrying a firearm on one's person, Congress is equally likely to use either meaning. If the congressional and public meanings had aligned, then the interpreter would have a strong argument for choosing the aligned meaning. But even though there has been a communication breakdown between the congressional speech community and the public speech community, comparing ordinary public meaning and ordinary congressional meaning corpora is helpful.

Since Congress is just as likely to use either meaning, and the public favors *carry*$_2$ as the most common meaning, the interpreter might conclude that *carry*$_2$ is the best meaning. On the other hand, since the public also recognizes *carry*$_1$ as a possible meaning, the interpreter could conclude the statutory meaning should encompass both terms. Ultimately, the interpreter is left with a pure choice of interpretive legal theory. Since there is not a clear consensus of meaning, the interpreter must choose between focusing on promoting notice with the more ordinary meaning of *carry* referring to just on one's person, or the congressional meaning of carrying on either one's person or in a vehicle. But comparing the corpora in this way still empirically demonstrates that there is not a clear consensus between the public and Congress on what *carry* means. Thus, when the interpreter decides on a normative preference, it will at least be a transparent decision.[182]

CONCLUSION

As the field of law and corpus linguistics continues to develop, different corpora can be created to represent and compare different speech communities. And these corpora can help academics and judges be transparent in fundamental decisions of legal theory involving notice and congressional intent. Thus, anyone on the ideological statutory interpretation spectrum can benefit by carefully considering what corpus linguistics has to offer.

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182.   *See supra* note 22.

It is important to note that the CRAC corpus is polluted to some extent. The corpus should reflect the relevant speech community, which at a minimum is the 535 members of Congress and at the maximum might include the entire congressional staff.[183] Yet the *Congressional Record* contains some documents that are not authored by Congress, such as letters from the public that are occasionally appended to the *Congressional Record*. I attempted to filter them out manually, but it is clear that for this to be a viable project going forward, a more carefully constructed corpus with all texts from the ordinary public removed must be created. However, I hope that this Note's contribution sparks further analysis and scholarship on the interplay between ordinary public meaning and ordinary congressional meaning. Harmonizing them will allow interpreters to study the shared statutory speech community and more accurately define and describe ordinary meaning.

Justin A. Miller[*]

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* J.D. candidate, April 2019, J. Reuben Clark Law School, Brigham Young University.