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## Legislative History is Dead; Long Live Legislative History

*Misreading Law, Misreading Democracy*

Victoria Nourse (Harvard University Press 2016), 259 pages

Genevieve B. Tung, rev'r\*

*Misreading Law, Misreading Democracy* is a call to rethink everything that most lawyers, judges, and academics think we know about legislative history. Even the term “legislative history,” Nourse argues, should be treated as a misnomer;<sup>1</sup> we should instead seek out evidence of legislative decisionmaking. The book explains several reasons for this shift; prominent among these is that the search for “history” implies the existence of a single story, “as if the final text reflected a straight narrative line from the first draft.”<sup>2</sup> The actual process of American lawmaking is dominated by recursive combat and compromise.

Before becoming a law professor, Victoria Nourse served as counsel to the Senate Iran Contra Committee and later became senior advisor to Senator Joe Biden during his time as chairman of the Senate Judiciary Committee.<sup>3</sup> Professor Nourse’s service to Congress is reflected by her work, both in her detailed knowledge of legislative procedure and by the respect with which she treats her subject. Respect, she argues, is an essential part of statutory interpretation: if we treat the authors of legislation with disdain, we undermine the representative foundations of our democracy.

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<sup>1</sup> VICTORIA NOURSE, *MISREADING LAW, MISREADING DEMOCRACY* 79–80 (2016).

<sup>2</sup> *Id.* at 157.

<sup>3</sup> See *Victoria Nourse*, *GEORGETOWN LAW*, <https://www.law.georgetown.edu/faculty/victoria-nourse/> (last visited June 6, 2018). Professor Nourse later spent a year working as then-Vice President Biden’s Chief Counsel before returning to academia. NOURSE, *supra* note 1, at 247–48.

What is needed, she argues, is for anyone in the business of statutory interpretation to become well-versed in Congress's rules, mores, and motivations. The topic is neglected in many law schools. A realist understanding of how Congress operates should demystify how statutory language comes into being and make the documentation of that statute's legislative journey intelligible. When lawyers can correctly isolate and interpret the meaningful pieces of a legislative record, we can use them for statutory interpretation. We cannot determine what materials are meaningful, or interpret them accurately, without considering when they occur in the sequence of lawmaking, the audience to which they are addressed, and the status of the author—qualities that are determined by Congress's rules.

To begin, Nourse explains that we must appreciate that legislative action is determined by two inescapable realities: legislators' need to satisfy their constituents (the "electoral connection") and the requirement of broad-based consensus to actually accomplish anything (the "supermajoritarian difficulty"). Armed with this knowledge, we can view the process of lawmaking from the perspective of the lawmaker, as opposed to the *ex post* view more commonly taken in law schools and the courts. These structural factors explain why so much legislation is ambiguous, and why a theory of statutory interpretation must be prepared to deal with ambiguity as a feature instead of a bug.

Familiarity with Congress's rules is also critical to Nourse's "legislative decision theory" of statutory interpretation, which responds to flaws she identifies in both textualist, purposivist, and contract theory approaches. Legislative decision theory is predicated on understanding "Congress 101," five basic principles of congressional procedure that inform how legislation develops:

1. "Statutes are Elections" with winners and losers. Before relying on a congressional committee report or member statement to interpret a statute, courts should know if it was generated by the proponents or opponents of the underlying legislation. The best type of such "legislative evidence" are documents that demonstrate bipartisan agreement on core principles.
2. "Statutes Follow a Sequence," and must be "reverse-engineered" in order to determine what legislative evidence is relevant.
3. "Congress's Rules Can Help Interpret Statutes," and these rules can be used as "legislative canons" to solve interpretive puzzles.
4. "Typologies of Legislative History May Mislead," such that traditional hierarchies of legislative material can be worse than useless; no single "type" of document will always be the most reliable evidence of a legislative decision, and focusing on type

without contextual considerations can lead to inefficient, fruitless, or misleading analysis.

5. “What is Unthinkable to a Judge May Be Quite Thinkable to a Member of Congress,” meaning that the congressional rules that govern cloture, reconciliation, or appropriations bills may shape legislators’ decisions in logical and predictable ways, and courts should be cognizant of these rules and their effects.<sup>4</sup>

Nourse elaborates on each of these foundational principles in Chapter 3, illustrating the importance of each with examples of judicial opinions that seriously misunderstood or misapplied legislative material in search of statutory meaning. In *United Steelworkers of America v. Weber*, for example, Justice Rehnquist’s dissenting opinion included a voluminous legislative history of the 1964 Civil Rights Act.<sup>5</sup> Rehnquist’s dissent, Nourse points out, has been praised by some liberal scholars for embracing legislative history in lieu of textualism.<sup>6</sup> But the congressional text Rehnquist relied on, notably a House committee report, was created before the relevant language was incorporated into the legislation, and was a minority report drafted by opponents of the larger bill.<sup>7</sup> As such, she argues, Rehnquist’s narrative “reflects a flawed understanding of legislative process” because it conflates earlier, superseded text with final text, and “risks normative bias against majorities” by allowing the views of bill opponents to speak with equal or greater authority to those of the bill’s proponents.<sup>8</sup>

In Chapter 4, Nourse argues that methods of statutory interpretation that pointedly avoid looking to legislative material, such as “petty textualism” (isolating a disputed term from its surrounding text) and reliance on judicial canons, are inferior both as a practical matter and because they elevate judicial authority over legislative authority.<sup>9</sup> Such “canon textualism,” she argues, is anti-democratic because it allows judges to impose their views (about what constitutes “plain meaning,” or which canons to apply), often in ways that may be shaped by unconscious bias.<sup>10</sup> For example, statutory interpreters may be vulnerable to the “focusing illusion,” in which a person’s focus on a particular aspect of a situation (or,

4 See *id.* at 68–69.

5 443 U.S. 193, 219–55 (1979) (Rehnquist, J., with Burger, C.J., dissenting).

6 NOURSE, *supra* note 1, at 74 (citing Philip P. Frickey, *Wisdom on Weber*, 74 TULANE L. REV. 1169, 1183, 1195 (2000)).

7 *Id.*

8 *Id.*

9 See *id.* at 103–06.

10 See *id.* at 116.

say, a particular phrase in a statute) leads her to overvalue that aspect and undervalue the context in which it arises, which may lead to snap judgments based on inadequate information.<sup>11</sup> Understanding the rules that bind congressional action, and taking the time to read legislative documentation, are both methods that interpreters may use to mitigate their cognitive biases.

By focusing entirely on the timing and significance of legislative materials within their congressional context, Nourse's inquiry steers away from the search for "legislative intent" and looks instead for evidence of legislative decisions.<sup>12</sup> Chapter 5 is entirely devoted to dismantling notions, offered by scholars Max Radin, Ronald Dworkin, Jeremy Waldron, Kenneth Shepsle, and others that a legislature cannot act with "intent" because it is a collective body without a single mind.<sup>13</sup> This skepticism, she argues, is irrelevant: the question "is not whether Congress has a mind but how it decides and what it means by its decision."<sup>14</sup> Nourse argues for a pragmatic view of intent inferred from action.<sup>15</sup> Again, Congress's rules of proceeding are critical because they provide the necessary context to interpret congressional action as a manifestation of pragmatic intent.<sup>16</sup> As Nourse has previously explained, the idea of congressional intent is a metaphor,<sup>17</sup> and the metaphor does not work without the referent of legislative context.<sup>18</sup>

Reading as a researcher who is accustomed to spending time identifying and gathering legislative histories, Nourse's view is powerful and affirming, and her recommendations instantly useful. In Chapter 3, she provides step-by-step instructions for "reverse engineering" a statute to identify the most relevant legislative evidence, guiding the reader to seek out last-in-time documentation of bipartisan agreement on statutory meaning.<sup>19</sup> As the book repeatedly points out, databases like ProQuest Congressional and websites like Congress.gov (not to mention search engines like Google) make the once-laborious process of finding these

11 See *id.* at 118–19. The focusing illusion was first identified by Prof. Daniel Kahneman, who addressed its impact on decisionmaking in his recent best-seller, *Thinking Fast and Slow*. See DANIEL KAHNEMAN, *THINKING FAST AND SLOW* 85–88 (2011).

12 NOURSE, *supra* note 1, 68.

13 See *id.* at 137–38.

14 *Id.* at 135–36.

15 *Id.* at 142–44.

16 *Id.* at 149.

17 See Victoria F. Nourse, *A Decision Theory of Statutory Interpretation*, 122 *YALE L.J.* 70, 82–83 (2012).

18 NOURSE, *supra* note 1, at 147.

19 See *id.* at 80.

texts simple. By encouraging the reader to seek out statements made at the most significant moments in the lawmaking sequence, such as cloture, the book also provides a method for streamlining legislative research. As Nourse points out, Justice Rehnquist's lengthy *Weber* dissent could have been stronger and shorter had he "reverse-engineered" the text.<sup>20</sup> Given how voluminous legislative materials can be, this is no small matter. The time saved on assembling minutely detailed, potentially irrelevant documents can be better spent reading the most relevant statements with a careful view to the procedural posture of the legislation and the identity of the speaker—is it from a "winner" or a "loser" of the ultimate political combat?

*Misreading Law, Misreading Democracy* was published several weeks before the 2016 elections that brought the Republican party into control of the presidency and both houses of Congress. The vitriol of our current political climate does not factor into Nourse's conclusion; congressional actions are entitled to respect by virtue of their representative privilege, not their wisdom. In other words, "even if one has contempt for Congress, a judge cannot have contempt for the real authors of legislation, the people."<sup>21</sup> To proceed otherwise would allow judges to break faith with democracy.

But what do we do with these principles if Congress "breaks faith" or alters its practices in ways that undermine the predictability or transparency of its actions? The 115th Congress has been criticized for drafting important bills "in secret" and in the face of significant public disapproval.<sup>22</sup> Does documentation of such decisionmaking, to the extent it is truly preserved, truly amount to evidence of popular will? How should we use unofficial, journalistic accounts of private dealmaking that may be instrumental to a bill's passage?<sup>23</sup> Nourse reassures the reader that most legislation is passed by large bipartisan coalitions, which is evidence of the stability created by institutional rules that favor supermajorities.<sup>24</sup> This

<sup>20</sup> See *id.* at 83. For example, Justice Rehnquist spends significant time analyzing draft language and House debates that predate the addition of the key textual provision at issue, and Senate debates prior to cloture—information that is "true but unhelpful." *Id.* at 82–83. "Justice Rehnquist's account of the legislative history is at its most persuasive when he cites statements occurring at the proper moment in the sequence: *post-cloture statements* against quotas, made by supporters and opponents of the bill." *Id.* at 83.

<sup>21</sup> *Id.* at 185–86.

<sup>22</sup> See, e.g., Thomas Kaplan & Robert Pear, *Senate Democrats Plan Showdown to Protest Secrecy over Health Law Repeal*, N.Y. TIMES, June 20, 2017, at A16.

<sup>23</sup> See, e.g., Mike DuBonis & Erica Werner, *How Republicans Overcame Outside Threats and Internal Strife*, WASH. POST, Dec. 21, 2017, at A1.

<sup>24</sup> NOURSE, *supra* note 1, at 73 ("Congress 101 tells us that 'normal lawmaking' depends upon the filibuster; bills don't pass by 51 votes; they pass by overwhelming supermajorities precisely because of the filibuster.").

leaves the reader unsure of how to interpret legislation passed in highly partisan circumstances under majoritarian exceptions.<sup>25</sup>

*Misreading Law, Misreading Democracy* is at its most compelling when it draws the reader away from his or her own “electoral connection” to the frustrations of politics, and refocuses attention on what Congress symbolizes as a co-equal branch of government. It effectively demonstrates that understanding congressional procedure is essential to statutory interpretation and should be elevated within the law-school curriculum. Even if the reader isn’t ready to give Congress high marks of approval, Nourse’s work makes the case for understanding how Congress works.

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<sup>25</sup> Consider Acts like the major tax bill passed in the final days of 2017 without any bipartisanship to speak of. H.R. 1, the “Tax Cuts and Jobs Act” of 2017, passed under majoritarian rules (51/49) without any Democratic votes in the Senate. See *Vote Summary on Passage of H.R. 1*, U.S. SENATE (Dec. 2, 2017), [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=115&session=1&vote=00303](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=1&vote=00303). The result was similar in the House. See *Final Vote Results for Roll Call 699*, OFFICE OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, <http://clerk.house.gov/evs/2017/roll699.xml>; see also DuBonis & Werner, *supra* note 23, at A1 (“The decision to spurn Democrats underscores the political risks undertaken by the GOP, which pushed forward on the tax bill despite polls showing that it is one of the most unpopular pieces of legislation in recent history . . .”).