I VOTED FOR WHAT?

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I. INTRODUCTION

The call for papers sent out by this symposium's organizers highlighted two themes: "fake news" and "weaponized defamation." At the symposium itself, presentations and discussions centered on a question that touched on both: Does, can, or should, the law protect politicians and office seekers (or even the ever-elusive and amorphous "the public") from the false speech of their opponents? This paper does not address that question, however, for the simple reason that I believe the issue has been sufficiently answered by cases like *United States v. Alvarez* and *R v. Zundel*, and discussed in articles like Professor Hasen's *A Constitutional Right to Lie in Campaigns and Elections?*[1] Instead, this article investigates the influence that fake news

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1. United States v. Alvarez, 567 U.S. 709 (2012) (striking down the Stolen Valor Act as an unconstitutional content-based regulation because the prohibition on false claims in general violated the First Amendment); R. v. Zundel, [1992] 2 S.C.R. 731 (Can.) (striking down a Canadian law that

might have on the passage of specific statutes, and how, if at all, courts should account for that influence when called upon to interpret those statutes. This article addresses two questions in turn: First, is there any reason to believe that fake news, liberally defined, influences the legislative process? Second, how (if at all) should a court account for the influence of fake news on the legislative process when interpreting a statute's text?

II. HOW FAKE NEWS CAN INFLUENCE THE LEGISLATIVE PROCESS: WHO WRITES STATUTES?

While a statute is said to be the "Act" of a legislative body, the legislature itself is a corporate entity that acts—and writes—through individual agents. Maybe one member of the body writes the actual text of the bill. Maybe several members work together to write it as part of a committee. Maybe that committee hires research staff and legislative counsel to do the actual drafting, or maybe several committees work together on a single bill, along with all their staff. Maybe that committee receives additional "assistance" from lobbyists or members of the executive branch.

Whichever individuals actually type up the text of a bill, for the bill to become law it must be voted on – that is, voted for – by the legislators, the majority of whom inevitably did not author the bill. In an ideal world, their knowledge of the bill's contents would be based on having carefully read the text themselves and by analyzing how the bill's provisions interact with each other as well as with the pre-existing body of law. But this is not an ideal world. Whatever the theory, in practice we can say with some certainty that most legislators are not reading most of the bills that come before them. Bills are too long, too complicated, and too numerous. Instead of reading hundred- or even thousand-page bills themselves, legislators must necessarily base their opinions (and votes) on summaries and assessments prepared by supporting staff, party leadership, government agencies, advocacy groups, and, increasingly, media outlets.[2] Even when a media outlet doesn't produce its own summary of a bill, it will disseminate the summaries prepared by other parties.

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criminalized "willful publication of what are known to be deliberate lies" on the grounds that the prohibition violated freedom of speech); Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53 (2013) (analyzing U.S. courts' treatment of false campaign speech in the United States).

2. *See* Brian Christopher Jones, *Don't Be Silly: Lawmakers "Rarely" Read Legislation and Oftentimes Don't Understand It . . . But That's Okay*, 118 PENN ST. L. REV. 7 (2013).

Even if you take the optimistic view that legislators *generally* actually read the bills they vote on, there are many situations where this is exceedingly improbable, if not outright impossible.

For example, the United States PATRIOT Act,[3] which was 300 pages long and amended a dozen federal statutes, was introduced in the House on October 23rd, voted on and passed by the House on the 24th, voted on and passed by the Senate on the 25th, and signed into law by the President on October 26th.[4] Now, it isn't *technically impossible* that 357 Representatives, 98 Senators, and one President each carefully read the entire text of the Act, as well as the existing statutes that the Act amended, before voting it into law, but I doubt it. There are other scenarios where legislation has been introduced and passed so quickly that not even a talented speed reader could read the full text in the time allotted, let alone understand its implications. In the Province of Ontario, for example, which has a unicameral legislature but requires that bills pass three votes, legislation is occasionally introduced and passed in a matter of minutes.[5]

This is how fake news can work its mischief on the legislative process. If legislators base their votes not on the text of a bill, but what they are *told* is the text of a bill (or more accurately, what they are told the text of a bill accomplishes), then inaccurate summaries or assessments of a bill – "fake news" about a bill – could lead to a legislator voting for a bill that has provisions different than what that the legislator thought he was voting for.[6]

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3. USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections at 18 U.S.C. §§ 2510-2523 (2012)).

4. Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001); H.R. 3126, 107th Cong., 147 CONG. REC. pt 14, at 40400, pt. 15, at 20669 (2001) (passed by the House on October 23rd, 2001) (passed by the Senate on October 25th, 2001). Despite how little time Congress had to read the bill and to consider its impact on other federal laws, the PATRIOT Act passed with overwhelming support in both houses. In the Senate, the Act passed 98 to 1. *See* Actions Overview, *H.R.3162: Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001*, CONGRESS.GOV, https://www.congress.gov/bill/107th-congress/house-bill/3162/actions (last visited Nov. 5, 2018).

5. *See, e.g.*, Ontario, Legislative Assembly, *Official Reports of Debates* (Hansard), 39th Parl., 1st Sess., No. 34 (27 Apr. 2008), at 1401 (Can.), https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2008/2008-04/house-document-hansard-transcript-1-EN-27-APR-2008_L034.pdf. On Sunday, April 27th, 2008, the Ontario Legislature convened to pass "back to work" legislation ending a transit strike. The process began at 1:30, and the legislature adjourned at 2:01. *Id.* In 2009, this was done again to end a university strike. That took 27 minutes. Ontario, Legislative Assembly, *Official Reports of Debates* (Hansard), 39th Parl., 1st Sess., No. 104 (25 Jan. 2009), at 4685, 4688 (Can.), https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2009/2009-01/house-document-hansard-transcript-1-EN-25-JAN-2009_L104.pdf.

6. Admittedly, this analysis does exclude "whipped votes," where legislators vote for a bill for no other reason than that their party leaderships tells them to.

A simple hypothetical highlights the potential influence this kind of fake news can have. Suppose a state wanted to reform its traffic laws. In particular, the government wanted to change the speed limits that were set decades before. The resulting New Traffic Bill is over 1,000 pages long and contains a complicated formula for determining the speed limit of each specific stretch of road. Figuring out the effect of the New Traffic Bill on speed limits requires a thorough reading of the Bill to see how several different cross-referenced provisions interact with each other.

The government trots out Pundit A, who says the New Traffic Bill would raise all speed limits by five miles an hour. Pundit B says that Pundit A is wrong, and the New Traffic Bill would actually lower all speed limits by five miles. Neither Pundit's statement was an opinion, and only one of them can be correct (though they both could be wrong). Each Pundit's claim could be verified (or falsified) by reading the New Traffic Bill with sufficient care and skill – but the legislators don't do that. Pundit A was a very wise looking, very venerable, very respected, law professor with years of experience studying traffic legislation in a multitude of jurisdictions. Pundit B, on the other hand, looked like Uncle Fester, talked like Doc Brown, had no legal background, and worked for a "think tank" he ran out of his garage. Most people, including legislators, believed Pundit A. Support for raising speed limits was high in-and-out of the legislature, and the New Traffic Bill passed almost unanimously. The legislators who spoke in favor of the bill during committee meetings and floor debates always highlighted the fact that the bill would raise speed limits, and how good they thought this would be. The only legislator to vote "no" gave an impassioned speech where he said he believed Pundit B, and he could not in good conscience vote for a law that would lower speed limits. His colleagues ignored him, and the bill became law. Once it went into effect and workers started changing all the speed limit signs, it turned out that Pundit B was correct. Dismayed citizens called their local representatives and complained "why'd you vote to make my commute slower?" To which the representatives responded: "I didn't! I voted to *raise* speed limits."

What happened here? Aren't both the complaint and rebuttal true? The representatives, by voting for the New Traffic Bill, did factually vote to lower speed limits. But their belief – their *intention* – in voting was to raise speed limits. This actually happens, though there isn't always a "Pundit B" advertising what the actual effect of the law will be, and so these cases are typically analyzed as errors in the drafting process.

For example, Professor Jonathan Siegel has identified what was almost certainly a substantial drafting error in the statutes controlling the venue

where a plaintiff can bring a civil suit against defendants in a federal court under diversity jurisdiction.[7] As Professor Siegel explains, at the time the article was written, the statute's primary rule was that a plaintiff could bring a case "in a judicial district where any defendant resides, if all defendants reside in the same state."[8] So, if defendants A and B reside in Districts 1 and 3 of the same state, a plaintiff could bring suit in either of Districts 1 or 3, but not in District 2. However, a secondary rule in the venue statute says that a corporate defendant is deemed to reside in any district where it would be subject to personal jurisdiction.[9] Because of their nature, a corporate defendant might be subject to the personal jurisdiction of multiple judicial districts, in multiple states. Since the primary rule allows the plaintiff to file "in any judicial district where any defendant resides," Siegel shows that, as the law was written, a plaintiff in California suing an individual defendant resident in Louisiana and a corporate defendant headquartered in Louisiana but with offices around the country, including in Alaska, could bring suit against both defendants in Alaska.[10]

Why? Because, by virtue of its headquarters, the corporation is resident in the same state as the individual defendant, and, therefore, the primary rule allows the plaintiff to sue in *any* district where *either* defendant resides. And by virtue of the secondary rule, the corporate defendant will also be deemed to reside in the District of Alaska.[11] Siegel convincingly argues that this is a result that could not have been intended, and the primary rule should probably have read "a judicial district where any defendant resides, *in a state*

7. Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309, 311-15 (2001).

8. The general venue rule was originally given under 28 U.S.C. § 1391(a)(1). The statute was amended in 2011, and the successor provision, now articulated in 28 U.S.C. § 1391(1)(b), states that a civil action may be brought in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located." 28 U.S.C. § 1391(a)(1) (2002), *amended by* 28 U.S.C. § 1391(b)(1) (2012) (quoted in Siegel, *supra* note 7, at 313).

9. Former 28 U.S.C. § 1391(c), now § 1391(c)(2), establishes that "an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business." 28 U.S.C. § 1391(c)(2). Importantly, here, the 2011 amendment struck out former subsections (a) and (d) relating to venue when the defendant is a corporation. *See* Act of Jun. 25, 1948, Pub. L. No. 112–63, § 202(1), 125 Stat. 763 (2011).

10. Siegel, *supra* note 7, at 313-15.

11. *Id.* at 314-15. Siegel uses the states of New York, California, Delaware, and Michigan. I changed the states to make the problem more extreme.

in which all defendants reside, if all defendants reside in the same State."[12] That is, the plaintiff in this hypothetical should have been limited to suing in Louisiana.

While that might have been a drafting error, it wouldn't be considered a "Scrivener's Error" – a typo so obvious and unmistakable that it's considered proper for a court to just ignore it and interpret the statute the way it "ought" to have been written. Another example along the same lines is New Hampshire's Senate Bill 66, which as originally introduced would have made it legally impossible to charge a woman with murder if the killing occurred while she was pregnant.[13] But both of these examples seem to have more to do with poor draftsmanship than "fake news," except in the technical sense that legislators in New Hampshire were probably not told SB 66 would in effect legalize murder for one segment of population, and the Congressmen who voted for the venue statute were probably told that the law would restrict cases to states and districts where all defendants were resident. However, as Professor Siegel pointed out, the problem in this sort of case is the "divergence between intention and utterance."[14]

There certainly are cases where this divergence is the result of legislators being misled. Judge Abner Mikva told a story about a congressman who had spent decades trying to pass a controversial bill regulating strip mining. Finally, near the end of his career, the political stars aligned, opening a small window for the congressman to push through the bill. He was relentless. Whenever one of his colleagues asked him a question, the congressman made sure to respond with the answer his questioner wanted to hear, even if this meant contradicting himself. [15] Though the congressman's answers changed

12. *Id.* at 315 (emphasis in original).

13. New Hampshire Senate Bill 66 created criminal liability for purposely or knowingly causing the death of "a fetus." The concern, however, was that the original text providing that "[n]othing in this section shall apply to . . . [a]ny act committed by the pregnant woman," exempted pregnant women from criminal murder charges. As adopted, the text instead provides that "[n]othing in paragraph IV shall apply" to acts of pregnant women. N.H. REV. STAT. ANN. § 630:1-630:6 (LexisNexis 2018); *see* Allie Morris, *N.H. Fetal Homicide Bill Unintentionally Gives Pregnant Women Impunity to Murder*, CONCORD MONITOR (June 23, 2017), https://www.concordmonitor.com/fetal-homicide-bill-has-pregnant-woman-loophole-10658835.

14. Siegel, *supra* note 7, at 315.

15. Abner J. Mikva, *A Reply to Judge Starr's Observations*, 36 DUKE L. REV. 380, 380-81 (1987). In the same day, the congressman told a West Virginian colleague that the bill would not impinge on state sovereignty in any form, and an Arizona congressman that the bill set firm federal standards. *Id.* When an observer informed the congressman that these could not both be accurate, he agreed that the observer was absolutely correct. *Id.*

frequently, he never altered the text. He simply told whomever was asking that the bill said what that individual wanted it to say. And since legislators do not read bills, or at least do not read them thoroughly before voting on them, the bill passed, with some serious ambiguities.[16]

So, whether this divergence is the result of legislators "meaning" one thing and the text accidentally saying something else, or the result of legislators being misled (innocently or intentionally) by inaccurate descriptions of the text ("fake news"), the question remains the same: What should a court do when there is evidence of a mismatch between the provisions legislators believed they were voting for, and the provisions actually provided for by the statute's text?

III. THE PROBLEM FOR COURTS

Legislators' reliance on third-party summaries of bills in place of reading the bills themselves can lead to three different problematic situations. The first is a problem of *inclusion*, where the text of the bill includes one or more provisions that the legislators did not believe would be part of the law. The second problem is one of *omission*, where the text of the bill does not include one or more provisions that the legislators believed would be part of the law. Finally, there is the problem of *contradiction*, a combination of omission and inclusion, where the text of a bill contains a provision that is the opposite of, or at least substantially different from, what the legislators believed. In each case, the dilemma for a court asked to interpret and construe the law is the same: should it follow legislative belief or legislated text?

In this paper, I argue that the answer is "neither and both." While fidelity to statutory text is generally preferable to a free-flowing judicial inquiry into what the legislature intended to accomplish, the fact that legislators are basing their votes on summaries and descriptions of bills makes strict textualism untenable. A rule, or at least a principle, is necessary to determine when extra-textual evidence of legislative intention can supplement or even overrule a statutory text. I argue that a rule allowing courts to consider evidence of legislative intent only to *nullify* certain textual provisions, as opposed to reading in intended-but-omitted provisions, fits best with the

16. *Id.* In particular, the Act was unclear about when a state and when the federal government should act. *See* Surface Mining Control and Reclamation Act of 1977, Pub. L. No. 95-87, §§ 501-506, 91 Stat. 445, 467-476 (codified at scattered sections of 18 U.S.C. and 30 U.S.C. (1982)).

philosophical and political assumptions underlying textualism. However, it is a somewhat circuitous argument.

A. *The Argument for Textual Supremacy*

"We're all textualists now," said Justice Kagan, and she may be right.[17] Textualism of some form or another does seem to be the dominant interpretive theory of the day, and few in the mainstream argue that the clear text of a statute should be ignored in favor of a gloss based on what the court thinks the legislature intended to accomplish. Still, it would be useful at this point to review and summarize one of the foundational arguments for textualism: sticking to the text respects and protects the legislative process.

Textualism is inherently tied to positive theories of the law, and to formalism in particular. Textualism says that what is law is what legislators actually said – actually wrote – when they enacted a new bill, not what they wished they said, would have said if they'd thought about the issue more carefully, or should have said if they had a proper regard for fairness, justice, welfare, or some other abstract virtue.[18] As Judge Easterbrook explains:

> For the textualist a theory of political legitimacy comes first, followed by a theory of interpretation that is appropriate to the theory of obligation. [A] Constitution . . . establishes rules for the making and enforcement of law. In [Anglo-American] systems what counts as law is texts enacted by . . . the legislature and signed by the [Executive] . . . and these laws are effective from the date of their enactment until their repeal. To carry forward the program of such a constitution, which limits what counts as law and makes laws hard to enact and change, the judicial branch serves best by enforcing enacted words rather than unenacted (more likely, imagined) intents, purposes, and wills. An interpreter who bypasses or downplays the text becomes a lawmaker without obeying the constitutional rules for

17. Harvard Law School, *The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE.COM (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg.

18. *See* Lamie v. United States Tr., 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent."); United States v. Granderson, 511 U.S. 39, 68 (1994) ("It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferred result.").

> making law. *That* is what textualists say, and it is antithetical to the proposition that "will" matters.[19]

Textualism is only called that – it is only concerned with 'text' – because the Constitution[20] and its accompanying brand of legal formalism defines the legislative process in reference to a piece of text. A legislative proposal is reduced to text. That text is voted on. If it gets the right number of votes, that text is offered to the executive for assent or veto. Only then is that text considered "law." Text is a useful way of tracking and identifying the legislative proposals that have satisfied the formalities of the legislative process. But text is not the *only* way of doing that. Some medieval Scandinavian states relied instead on a *lagman,* or lawspeaker, whose job it was to attend the meetings of the legislative body, identify which proposed rules received sufficient support to become law, and then commit them to memory. In other words, if you wanted to know what the law was, you asked the lawspeaker.[21]

In such a society, the equivalent of textualism would be the argument that the rules which should be given legal effect are those the lawspeaker identifies as law, and not what the members of the legislative body wished to enact, believed they enacted, or intended to enact. So, if the lawspeaker said "last session the legislature passed a law that dog owners are to pay a special tax," and members of the legislature showed up and said "actually, we passed a law that *cat* owners are to pay a special tax," the "textualist"[22] would argue that under the constitution, the law is what the lawspeaker says it is, and the tax is on dog owners. If members of the legislature think the tax should actually be on cat owners, then they should change the law at their next session. (Similarly, if legislators in a text-based culture believe the text of a statute does not accurately reflect the law they wanted to promulgate, that's something they can fix through legislation, and they shouldn't rely on courts to clean up after them.)[23]

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19. Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1119-20 (1998) (emphasis in original).

20. Be that the constitution of Canada, the United States, any of their constituent states or provinces, or some other English-speaking democracy.

21. THE LAWS OF EARLY ICELAND: GRÁGÁS I, at 12, 187 (Andrew Dennis et al. trans., 1980) (It was "the Lawspeaker's duty 'to tell everyone who asks him what the article of the law [was]' . . . . It is possible that a Lawspeaker's declaration of what he thought was law was tantamount to initiation of law, though always subject to the final approval of the Law Council.").

22. Lawspeakerist?

23. *See, e.g.*, Chung Fook v. White, 264 U.S. 443, 445-46 (1924) ("The words of the statute being clear . . . the remedy lies with Congress and not with the courts. Their duty is simply to enforce the law as it is written, unless clearly unconstitutional.").

Leaving aside the possibility of a malicious and self-serving lawspeaker, trusting the memory of one person (the lawspeaker), over the memory of several (the members of the legislature claiming the tax targeted cat owners) seems a silly way to run a country. However, this isn't a strong argument against textualism. As a substantive matter, a rigid text is even better evidence than group memory, and as a theoretical matter the "Scandinavian textualist" is still right for wanting to follow the lawspeaker: If a constitution spells out specific rules for distinguishing between actual statutes, and mere legislative proposals, then those are the rules a court needs to follow, even if the substantive results may sometimes be less than ideal.

Non-textualist theories of statutory interpretation are problematic for those concerned with niceties like the rule of law and legal positivism, because they allow for judicial recognition and enforcement of something other than a duly promulgated statute as positive law. Legislative intention is not voted on. Legislative wishes are not presented to the executive for signature or veto. What the legislature intended to do is not published in a gazette, enrolled in the national archives, or otherwise announced to the public. Fidelity to the text ensures everyone is literally on the same page when determining what the law is and is not.

The point is that Textualism does not advocate for the supremacy of the text in statutory interpretation because of anything special or magical about "text" in itself, but because under our constitutional systems, text is not just the *best* evidence of which proposals have made it through the mandated legislative process, but *necessary* evidence.

B. *Sometimes Text Is Not Supreme*

There are cases where mainstream textualism says that courts should alter a statute's text by adding, removing, or changing words. One minor but important example is the aforementioned rule of "Scrivener's Error," which says that courts can and should ignore or correct obvious typos. This rule has two parts. First, the error must be blatant. If it's possible that the text as written is what the legislature actually intended, then it is not a proper Scrivener's Error. Second, if the court is to correct the error, it must be equally clear how the text was "supposed" to read. Under the doctrine of Scrivener's Error, a court could properly delete an unintentionally repeated

word (so that the phrase "third party partly" is read as "third party"),[24] or insert a missing article. However, it could not rewrite the New Traffic Bill to raise speed limits, as this 'fix' would require more than correcting a typographical error and the rule "does not include substantive errors arising from a drafter's failure to appreciate the effect of certain provisions."[25]

The doctrine of Scrivener's Error is just one of many "canons of interpretation" that judges – including textualists judges – resort to when reading statutes. For example, masculine pronouns are deemed to include the feminine (and singulars plurals), *expressio unius est exclusio alterius*.[26] So, while a statute's enacted, printed text might read simply: *No man shall walk a Rottweiler in this park.* A textualist would read it slightly differently: *No man (or woman, or group) shall walk a Rottweiler (or Rottweilers) in this park (but any other breed of dog is allowed).* Because of these additions to the written text, a woman accused of walking her Rottweiler, or a man walking *three* Rottweilers, would not be able to claim that according the plain meaning of the law, they did nothing wrong.

Like Scrivener's Error, the principled basis for these canons concerns the relationship between the text and the legislators responsible for it. These canons and their like are based on assumptions about how language is ordinarily used, and the further assumption that the legislators chose to use language ordinarily. (And, prior to this, a textualist would have to assume that the "author" of the no-Rottweilers law intended to legislate in English, as opposed to some obscure language or an idiolect in which "No man shall walk a Rottweiler in this park," means "It is legal to rob banks, as long as it is a Thursday.") These assumptions are a logically necessary part of basing textualism in legal formalism. If courts did not assume that legislators were using English in its common form, then the text would not usefully indicate what legislative proposals had successfully passed through the legislative process. Another way of putting it is that these canons assume that legislative text is produced by a fallible, human, process. A jurist in a theocracy who is presented with a textual commandment believed to be written by God would have a much harder time justifying even minor emendations to the wording.

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24. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 234-35 (2012); *see also* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 289 (1989) ("If the directive contains a typographical error, correcting the error can hardly be considered disobedience.").

25. SCALIA & GARNER, *supra* note 24, at 238.

26. The specific mention of one member of a class excludes application to the others.

The question now is whether that same awareness of the fallibility of those involved in the legislative process would justify judicial disregard for statutory text because of the influence of "fake news"?

C. *How Should Courts Respond to Divergence Caused by Textual Manipulation?*

The argument is simplified if we can use a model legislative process, free of historical baggage. Imagine under the Constitution of Freedonia that for a bill to become law, it must first be passed by its unicameral legislature, and then be signed by the Premier. Like the United States,[27] Freedonia has an Enrolled Bill rule, which says that the hardcopy of a bill passed by the legislature, then signed by the Premier, and then stored in the National Archives, is the official version of the law. If a discrepancy is found between the Enrolled Bill, the Freedonian Statutes at Large, or the collected Freedonian Code, the version of the text found in the Enrolled Bill is controlling.

Imagine further that there is a forger, Frank, who is so skilled that his work is indistinguishable from the original article, and that Frank has gained access to the National Archives, where he's replaced the official copy of the Omnibus Act (which is 1000 pages and amends numerous statutes) with his own version. Frank's version of the Omnibus Act is identical to the original in all respects, except for Section 666, in which Frank amended the Criminal Code to grant himself total immunity from prosecution.

Sometime later, Frank is arrested and charged with unrelated offences. In court, Frank's defense rests entirely on the presence of Section 666 in the enrolled version of the Omnibus Act. While there is no evidence of what Frank has done, the prosecution introduces testimony from every legislator that voted for the Omnibus Act, and the Premier that signed it, to the effect that Section 666 was not part of the Omnibus Act when the legislators voted or when the Premier signed it, and they would not have supported any bill which included such a provision. What should the judge do?

Maybe this seems like a case best handled by the Absurdity Doctrine – closely related to the rule concerning Scrivener's Error – which says that a statutory provision may be "disregarded . . . as an error . . . if failing to do so would result in a disposition that no reasonable person could approve."[28] While granting total legal immunity to one individual may be terrible policy, it is not necessarily absurd, and it certainly doesn't look like a simple

27. Marshall Field & Co. v. Clark, 143 U.S. 649, 670 (1892).

28. SCALIA & GARNER, *supra* note 24, at 234.

typographical error. Resorting to the absurd or unreasonable content of Frank's Section 666 in order to invalidate it feels like a cheap way out. Perhaps Frank was an ardent environmentalist, and his Section 666 introduced stronger penalties for illegal logging and poaching in Freedonia's national parks. Is such a law so absurd that courts would be justified in ignoring it?

Perhaps the evidentiary record before the court is more muddled as well. On cross examination, the Premier and some percentage of legislators, admitted that they actually hadn't read every page of the Omnibus Act, and therefore for all they knew, the drafts they saw *did* contain Section 666. Maybe Frank was able to bribe or persuade a handful of legislators to testify that they *did* remember seeing section 666 when the Omnibus Act was before them as a bill, and its inclusion was part of the reason they voted the way they did. In this case, I think the judge would be obligated to enforce Section 666 as it appears in the (supposedly) enrolled version in the National Archives.

If that strikes you as a repulsive result, remember that the judge doesn't know what you know. What the judge knows is that the Constitution says the "law"[29] consists of those rules approved by the majority of the legislature and the Premier, and the authoritative version of a law is found in the National Archives. The judge also knows that the Omnibus Act in the National Archives includes Section 666, and that after the Omnibus Act was passed some of the politicians who helped create the Omnibus Act have turned up in court to argue that Section 666 should not be given legal effect because they don't remember it.

Yet some number of politicians say they *do* remember Section 666 and many who testified that they did not read the entire bill. There are strong policy reasons for not allowing politicians to overrule the clear text of statutes they promulgated (or seem to have promulgated) by claiming "this isn't what we meant to do."[30] The line between a legislator claiming, "I don't remember that being part of the text" and "I didn't think the text meant what you're

29. Or at least the statutory component of the law.

30. *See, e.g.*, Chung Fook v. White, 264 U.S. 443, 446 (1924) ("the words of the statute being clear . . . the remedy lies with Congress."); Marshall Field & Co. v. Clark, 143 U.S. 649, 669-70 (1892) ("[U]pon well settled rules of law, a copy of a bill bearing the signatures of the presiding officers of the two houses of the legislatures and the approval of the governor . . . was conclusive proof of the enactment and contents of a statute, and could not be contradicted by the legislative journals or in any other mode."); SCALIA & GARNER, *supra* note 24, at 237 ("Yet error-correction for absurdity can be a slippery slope. It can lead to judicial revision of public and private text to make them (in the judges' view) more reasonable.") (citing John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2476-79 (2003)).

saying it means when I voted for it" seems awfully hazy, and there are probably many provisions of any statute that the legislators who voted for it would not remember.

The evidence could tell a different story. Maybe security tapes in the National Archives show Frank breaking in, destroying the real copy of the Omnibus Act, and replacing it with his forgery. Maybe he told a confederate what he was planning and that confederate testified against him. Maybe that combined with the fact that Frank's version of Section 666 does not appear in any of the "working copies" of the bill that were sent out to legislators and their staffers convince the judge that the version of the statute in the Archives is a forgery, and the real enrolled Omnibus Act, prior to its destruction, did not include Frank's Section 666. In this case, the judge should obviously *not* follow the text of Section 666.

However, this is qualitatively different than a court ignoring or re-writing a statutory provision under the Absurdity Doctrine. The judge in Frank's case is not engaging in an interpretative task, rather he is fact-finding. The judge is weighing the evidence to answer the *factual* question: what is the text that was voted through the legislature and signed by the Premier? While the enrolled copy of a statute found in the National Archives is deemed to be the best evidence of what that text was, in this case, the Judge has determined that it was not unimpeachable evidence.

There are (at least) two ways of analyzing this. The first, more limited, interpretation is that the judge has resolved an apparent divergence between the statutory text and legislative intention when he determined the text giving rise to the apparent conflict (the version of Section 666 found in the Archives) is not actually statutory text at all, since it had been proven to the court's satisfaction that the text in question did not make it through each stage of the constitutionally mandated legislative process. The second, more expansive, interpretation is that the court resolved the divergence between text and intention when it invalidated the text on the basis that the evidence showed that legislature did not intend for it to become law.

I think that most people would agree with a rule based on the first interpretation of Frank's case. If it is proven that the text of a statute has been manipulated post-enactment, then it should not have legal effect. The validity of a rule based on the second interpretation becomes important if we change the timing of the alterations to the text, or the bad actor's identity.

Suppose Claire, the chief clerk of the Freedonian Legislature, is responsible for preparing the final version of a bill before the vote. Before her retirement, Claire slips Section 999 into the Budget Act. Section 999 could be anything: a massive increase to Claire's pension; a criminal

immunity clause; stiffer penalties for environmental offenses; or changing the lyrics to Freedonia's anthem to make it more egalitarian. It is important to note, no legislator *asked* Claire to do this and she did not tell anyone about her addition. The Budget Act is properly enacted, somehow the government finds out about Section 999, and its validity is challenged in court. As in Frank's case, the government argues Section 999 is not law, relying on legislators testifying that Section 999 was not in the text they negotiated, and they didn't know that it was part of the Budget Act when they voted for it.

To simplify the evidentiary issues, assume that when questioned, Claire admitted that she added Section 999 on her own initiative, told no one about it, and was careful to add it to a section of the Budget Act she thought no one was going to bother reading. What should the judge do?

The first interpretation of Frank's case offers no help. Here, it is clear that the text of Section 999 actually *did* make it through the legislative process set out in Freedonia's Constitution. Does the second interpretation work? Does the judge's finding that, as a matter of fact, Freedonia's legislators and Premier were not aware Section 999 was included in the Budget Act and never intended (and couldn't have intended) to enact it into law, justify the judge denying it legal effect?

"No" seems like a perfectly acceptable answer. Even if they weren't aware of what they were doing, a majority of legislators voted for Section 999 to become law and the Premier agreed. In any bill of moderate length, there are probably sections that some percentage of legislators (and perhaps even a majority) are unaware of. Given that a single piece of legislation, particularly budgets and omnibus bills, usually address many different topics and issues, some which may not be of interest to most legislators (like pork barrel amendments benefiting only one legislator's constituents). It is probably fair to say that the legislators who pass these bills each vote for the sections they are interested in and are not consciously aware of (or in agreement with) every provision the bill contains. Requiring litigants who want to rely on an otherwise duly-enacted statutory provision to prove that at least a majority of legislators knew about that provision would open up a terrible can of worms.

At the same time, "no" seems deeply unsatisfactory. The difference between what Claire and Frank did seems minimal and can be made smaller if we say that instead of forging and replacing the Omnibus Act when it was in the National Archives, Frank made the swap while it was sitting in Claire's office. The difference then is one of timing only. Sometimes bright-line rules are necessary or proper, and a rule that textual changes made after the legislative moment are invalid (since they fall outside of the mandated

legislative process), while changes made prior to the legislative moment should be given effect (since legislators should be presumed to have read and agreed to any bills they vote for) is at least a nominally defensible position. However, it is a position that unduly privileges the formalities of the legislative process over its substance.

If textualism doesn't hold that statutory text is "magically" co-extensive with the enacted law, and instead treats the text as just the best evidence of which legislative proposals have made it through the legislative process, and we make the not-unreasonable assumption that the legislative process was designed to ensure that only proposals with sufficient support among the "legislative class" become law, then there must be some threshold where enough "non-best" evidence of contrary legislative intent (i.e. a lack of support amongst the legislative class) is sufficient to overrule the "best evidence" offered by the text. Textualism and legal positivism both assume that legislation is a conscious, intentional act (if this were not so, then the canons of interpretation, which depend on the assumption that legislators are using language in a commonly accepted fashion, would be hard to justify). If Frank was not a forger, but some sort of comic-book mesmerist able to hypnotize members of the legislature into voting for a bill he crafted while they were in trance state – no more conscious than while sleeping – should that statute be given legal effect just because it passed through all the formalities? Allowing either Frank's "hypno-bill" or Claire's Section 999 to be treated as law would be to say that legislation can be accomplished without any conscious will behind it. To be consistent with positivism and textualism, a judge ought to invalidate these statutory provisions, where there is evidence to show a total or near-total lack of legislative intention to enact a specific statute or provision.

But how is this any different from the case of a New Traffic Bill, or the real-world examples of New Hampshire's State Bill 66 and the federal venue statute examined in Professor Siegel's paper? In all cases, there is some – let us stipulate for the sake of argument *compelling* – evidence that the legislature did not intend to enact a specific provision. If we accept that that legislation is something that can only be accomplished consciously, then *none* of these accidental enactments should be given legal effect. However, I would suggest that there is a meaningful difference between evidence that legislators did not intend a provision to be interpreted a specific way, or for multiple provisions to interact to achieve a certain effect on the one hand, and evidence that legislators did not intend to enact a specific text *at all* on the other. While still requiring some degree of mind-reading (or at least an inquiry into the mental state of the legislature's members), the latter is much

less problematic. Unlike asking what legislators thought a law meant, asking whether legislators knew that a specific section of text was part of a bill they were voting for does not kick-off an open-ended inquiry, and only requires a "yes" or "no" answer. Either there's evidence legislators were aware of the provision, or there isn't.

In other words, there is a difference between poorly thought out legislation and *unconscious* legislation. Textualism does not accept poorly thought out legislation as a justification for courts departing from the otherwise unambiguous meaning of the enacted text. However, nothing in textualism requires (or necessarily supports) courts giving effect to unintentional legislation, and the same arguments that sustain textualism point against enforcing a legislature's unconscious acts.

D. *Divergence Arising from Alterations of Belief*

So far, these examples have dealt with covert alterations to statutory text and seem to have little to do with fake news. However, if the core problem is the divergence of legislative intent and enacted text, then the same principles ought to apply regardless of whether that divergence was the result of covert manipulation of the text or manipulation of legislator's minds.

Imagine that Claire's job as Chief Clerk also required her to prepare a summary of each bill. This is not required by Freedonia's Constitution, but it is provided for in the Rules of the legislature and the practice goes back to the earliest days of Freedonia. These summaries have two parts. The first is an executive summary that briefly explains the bill's context and highlights the key changes proposed. The second part is a plain English, bullet point, list of every legal change (the introduction, deletion, or alteration of any legal rule) the bill proposes. As it is a non-partisan position, generations of Freedonian legislators have put their faith in the Chief Clerk and based their votes on the Chief Clerk's summaries. Obviously, when it comes time to prepare the summary for the Budget Act, Claire completely omits Section 999. In my view, that only strengthens the argument for disregarding Section 999, since its enactment was the result of intentional deceit. But can we extend this principle any further?

Imagine one day a bill comes across Claire's desk that she *desperately* wants to see become law. The only problem is that it contains a single provision that she knows will be hugely unpopular – so unpopular it will doom the bill from the beginning. So, she leaves it out of the summary. Obviously, the bill's author is aware of that provision (as may be some number of allies), but thanks to the "fake news" about the bill spread by Claire, the vast majority of legislators remain ignorant. As in the Budget Act

example, they could discover the "hidden" provision if they bothered to actually read the text of the bill. Since they are busy legislators and rely on summaries provided by a third party, they do not discover the provision. But once Claire's deception becomes known, should that specific provision be given legal effect by courts?

I personally do not see how this is significantly different from the prior hypothetical. In fact, the Budget Act case can easily be rephrased as an instance where "fake news" was the culprit, without materially changing the facts: if legislators read the bill, they would have discovered Section 999. However, they didn't read the bill – or didn't re-read the bill after it came out of Claire's office – and instead must have relied on others to tell them what the bill contained. Those summaries were evidently inaccurate (or at least incomplete). Does it matter whether the inaccuracy was the result of malice (like the intentional omission in Claire's summaries), or an accident (like an omission in the summary prepared by an overworked staffer who only skimmed the bill) if the end result is the same, and the majority of legislators are left with the false belief that the bill's text does not contain a specific provision?

I think not. If you accept that sufficient evidence that legislators were unaware that they were voting for a specific section of a text justifies invalidating that section, then there is no principled reason for distinguishing between cases where a provision was illicitly inserted into a bill, and cases where legislators were convinced—through any other means—that a provision was not part of the bill, even though it actually was.

E. *Omissions*

So far, these examples have dealt with what I called "Inclusions," cases where the divergence between text and intention is the result of legislators being unaware of some textual provision. What about the opposite problem of "omissions," where legislators believe that they were voting for a provision which was actually *not* included in the enacted text?

Suppose that the Health Bill was dropped on Claire's desk, and it included a provision that Claire found detestable. It could be a provision outlawing abortion, permitting (or forbidding) physician-assisted suicide, imposing mandatory vaccinations, or forbidding parents from vaccinating their children. Claire deleted it on her own volition and without telling anyone. Is that deleted provision still law? Or, there could be the Library Bill, which Claire supports, but knows is not popular enough to pass the legislature. To fix this, she adds an incredibly popular provision to the summary she prepares, but she does not actually add it to the text of the

Library Bill. Should that "ghost" provision be considered law? Stipulating that in both cases there is clear evidence that the legislators *wanted* these omitted provisions to become law and believed they voted on bills which included such provisions. Should the analysis be any different than in cases of Inclusion? Should a court be able to enforce a "ghost" provision for the same reason they could refuse to enforce Section 999?

I think the answer is a definite "no." Invalidating a provision despite there being textual evidence that it made it through the legislative process is meaningfully different from enforcing a provision when there is no evidence that the text actually made it through the legislative process. This would still hold true even if the rationale in both cases would be overwhelming evidence that the legislators *meant* to either omit or include the provision in question. What I've argued so far is that inclusion in the enacted text should not guarantee a provision's legal status, if there is clear evidence that the legislature's members did not know the provision had been included in the text they voted for. In other words, I have argued that the text should not be considered coextensive with the enacted law.

I have *not* argued that legislative intent is coextensive with enacted law. That is not the justification offered for the judge's decision to invalidate Section 999. Nullifying Insertions is justified not because of the overpowering importance of legislative intention, but because of evidence that the provision's inclusion in the text was not an intentional legislative act, on the most basic level. What is relevant to the judge's determination in those cases is the evidence of a lack of legislative intent. Nothing in this suggests that evidence of legislative intent should allow provisions to be inserted into a properly enacted statute.

There needs to be some boundary on what can be considered a "statute" and a dividing line between "legislative proposal" and "law." In our system (and certainly in Freedonia) that line is drawn in reference to text. In ancient Scandinavia, the defining threshold between law and proposal was the Lawspeaker's memory. There is a difference between saying that there are circumstances where a court should be able to say, "Even though this provision bears all the hallmarks of having become law, there is sufficient evidence that it was not actually enacted through a conscious legislative process, therefore it is invalid," and arguing that a court should be allowed to give legal effect to a provision which *clearly* does not bear the hallmarks of a properly enacted statute, even if there is evidence that legislators intended to enact it.

The principle I have suggested is that evidence of legislative intent and evidence that a provision has passed through the formalities of the legislative

process (i.e. that the provision is included in the enacted text) are each necessary-but-insufficient basis for that provision to be considered law. Before a court should treat any provision as law, there must be sufficient evidence of both.31 In other words, any divergence between legislative intent and legislative text should be resolved by treating the provision as a nullity and preserving the status-quo ante. Allowing judges to insert "ghost" provisions into enacted statutes creates a second problem. When dealing with errant Inclusions, the judge only has to answer one, yes-or-no question: is there sufficient evidence that the legislature intended to enact the textual provision before me? Omission cases first require the court to decide if there is evidence the legislature intended to enact a provision that did not make it into the text, and, if the answer is "yes," the court must additionally determine the exact content and wording of that provision.

In some cases, like the Health Bill example where Claire deleted a provision she disliked, that may not be very difficult. If there is a clear record of the language that was deleted and no persuasive arguments to the effect that the text would or could have been changed in some manner later in the legislative process, then its restoration by the court might be unproblematic. In such a case, with clear evidence, it might even make sense to think of the deletion as an extreme example of Scrivener's Error. If something had just "gone wrong" in the machine that printed out the bill, and one or two lines didn't get printed before they were voted on, and this could be proven satisfactorily, then all the judge would be doing by giving those sections legal effect is correcting a literal printing error. Still, to prevent the appearance of legislating from the bench, it might be safer to insist that the legislature pass a corrected version of the law.

What about the *harder* cases? What about cases where Claire does not delete anything from the text, but adds provisions to her summary (like with the Library Bill)? The description of the provisions in the summary might be quite specific (e.g. "this section makes it a crime to beat your dog"), but it does not give us the actual language of the section, which leaves many questions unanswered: does the law apply to dogs you don't own? Is the offense a felony or a misdemeanor? What is the penalty? What are the elements of the crime? What counts as "beating?" Does it cover other forms of canine-focused violence, like intentionally hitting a dog with a car?

With no text to guide and restrain its analysis, the court could only answer these questions by trying to decide "what the legislature would have

31. As a practical matter, the inclusion of a provision in the text would seem to create a very strong, yet still rebuttable, presumption that the legislators intended it to become law.

said, if they had said it." In reality, that means the court could answer those questions based on pretty much anything, or nothing. If we say it is okay for the judge to answer all those question and fill in all the blanks just because there is clear evidence that the legislature wanted to "make it a crime to beat your dog," then we are endorsing an exceptionally liberal form of purposive interpretation that ultimately holds that a judge's job in interpreting and applying the law is to do whatever he thinks best fits the legislature's abstract wishes. The problems with such an approach are dealt with at length elsewhere.[32] I am not aware of any mainstream philosophy of statutory interpretation that says judges should be free to enforce the free-floating wishes and desire of the legislature, absent a textual anchor.[33]

F. *Contradictions*

If the rule I propose is that both Inclusions and Omissions should result in the putative provision having no legal effect, what should be done with Contradictions? What if instead of deleting or adding a provision, Claire altered one? What if Claire increased a $1,000 fine to $10,000, or halved a tax hike from ten percent to five?

With the right evidentiary record, these alterations could be undone as Scrivener's Errors. But what answer is offered by the principles set out above? One approach would be to treat a Contradiction as a simultaneous Omission and Inclusion. Claire deletes one provision, and substitutes another, and the fact they are very similar does not change the analysis at all. The provision Claire deleted lacks a presence in the enacted text (and therefore is not law) and the provision she included in its place was not intended to be included by the legislature (and therefore is also not valid law). A second approach would say there is some overlap in these cases, thus, the judge should honor the text and intention. There is evidence the legislature intended to impose a $1,000 fine, and the enacted text authorizes fines up to $10,000, so there is no real divergence between text and intention when it comes to fines of up to $1,000. Similarly, both statutory text and legislative intention agree on a five percent tax cut. In fact, describing "the law" as the overlap between text and intention is a good description of the principle

32. *See generally* SCALIA & GARNER, *supra* note 24, at 1-28.

33. Such an analysis would completely disregard the public. It is one thing to say that individuals are presumed to know criminal law. Such a position seems especially absurd, however, if a criminal defendant is expected to also know what criminal laws the legislature "meant" to create if there is no written record of those laws.

argued for in this paper. It is also somewhat similar to the phenomenon of legal bilingualism in Canada, under which every law is passed in both French and English. The version in each language is considered equally authoritative and only provisions found in *both* versions have legal effect.[34]

Looking for overlap works when you are dealing with differences between numbers or other points on a spectrum. But what about alterations that create a genuine Contradiction? Imagine a statute originally said that the power to declare when the statute comes into force is vested in the Premier, however, Claire changed it so that the power is given to the Chief Justice. What should a court do? Following the first approach and holding that both the original version (giving the power to the Premier) and Claire's version (giving the power to the Chief Justice) are void would frustrate the entire statute. Clearly, some official needs to give the go-ahead for the new statute to take effect, but the second approach does not offer any better result, since there is no overlap between "Premier" and "Chief Justice" akin to the overlap between "$1,000" and "$10,000."

I favor a third approach which would say that in Contradiction cases, where there is no overlap between versions, the court should treat the text as ambiguous – as if the words giving rise to the Contradiction are unreadable or have no ordinary meaning. In this case, the court would read the section "This Act shall come into force on the date declared by the Chief Justice" as "This Act shall come into force on the date declared by the _____."

The court should then apply all the tools normally used to resolve textual ambiguity. For example, a court will generally avoid an interpretation that clearly frustrates the legislation entirely, so *someone* must have to the power to order the Act into force. Based on context (and common legislative practice) that person is supposed to be a public official. Unfortunately, context and custom only take the court so far, because in Freedonian history, the power to decide when a statute comes into effect is variously given to the

34. At least in principle. *See* Pierre-Andre Cote, *Bilingual Interpretation of Enactments in Canada: Principles v. Practice*, 29 BROOK. J. INT'L L. 1067, 1069-70 (2004) ("Since both linguistic versions of bilingual legislation constitute authentic expressions of the law (in effect, it might be better to say that they form together but one bilingual and authoritative text of the law), someone cannot claim to correctly interpret a bilingual text if they ignore one half of the text being interpreted. Thus, bilingual legislation requires bilingual interpretation, that is, an interpretation that takes into account the complete text of the law, which includes both an English and a French version.") (first citing Roderick A. MacDonald, *Legal Bilingualism*, 42 MCGILL L.J. 119, 160-61 (1997); and then citing RUTH SULLIVAN, SULLIVAN AND DRIEDGER ON THE CONSTRUCTION OF STATUTES (4th ed., 2002)), *available at* https://brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1319&context=bjil.

Premier, the Chief Justice, the Speaker of the legislature, and on occasion the legislature's chief clerk.

Giving the power to any one of those public officials is a reasonable interpretation of the ambiguous text. Choosing between reasonable alternative interpretations of an ambiguous statutory provision is a core judicial function. It is not controversial that judges exercising this function can and should look for evidence of which reasonable alternative (if any) was intended by the legislature. Disagreements may arise as to how much weight should be given to legislative intent, but it is not controversial to say that it should be given *some* weight. Sometimes, evidence of legislative intent is found within the statute's "four corners" (e.g. a preamble explaining what the legislature was trying to do). But courts also accept evidence of intent from other sources: comments made during legislative debates; speeches; reports produced by legislative committees and their staffers; and comments made by and in the media.[35]

In this case, would it be proper for the court to consider and rely upon Claire's false summary of the statute as evidence of legislative intent? On the one hand, reliance on the chief clerk's summaries is a well-established Freedonian convention and would seem like rich source information about what legislators thought they were voting for. On the other hand, to endorse the court's reliance on the summary would be to endorse a court's reliance on a description of a statute that is known to be inaccurate – "fake news" – in order to interpret an ambiguous statute. And that brings us back full circle to the question asked at the top of this paper: How, if at all, should courts account for "fake news" when interpreting statutes?

IV. A POTENTIAL ANSWER MASQUERADING AS A CONCLUSION

The problem of Contradictions gets the closest to what might be the real-world applications of these arguments. I am not ready to confine the rest of the paper to the realm of the purely theoretical, since it remains possible that some hacker or Deep State Agent might find a way to alter a bill's text right before it is voted on by Parliament or Congress, or that every legislative staffer will conspire to mislead their bosses about a bill's contents. However,

35. For example, the district court that initially issued the temporary restraining order against President Trump's Executive Order barring immigrants from a list of Muslim-majority countries, relied in part on the President's repeated promises during his campaign to enact a "Muslim Ban." *See* Washington v. Trump, 847 F.3d 1151, 1157-58 (9th Cir. 2017) (upholding the district courts temporary restraining order on President Trump's Executive Order barring immigrants from a list of Muslim-majority countries, but reserving consideration on the State's establishment and equal protection clause claims until the merits had been fully briefed).

these scenarios seem unlikely. It is far more probable that there will be – and already may be – cases where a court, needing to resolve statutory ambiguity, chooses to use legislative intent as a factor in its analysis and confronts the fact that the legislators were exposed to fake news about the bill.

I believe the forgoing hypotheticals and arguments make a convincing case that judges can and should look to even *undeniably* fake news for evidence of legislative intent, when there is evidence that the fake news influenced a legislator's belief about what a bill contained or would accomplish, so as to create a divergence between legislative intent, and the enacted text.

How much weight any instance of fake news should be given would be a question for the court to answer (the case for all evidence), but some guiding principles are suggested. For instance, it seems sound to say that the closer the fake news is to the legislative "action," the more weight it should be given. A summary like Claire's would be the kind of "fake news" that could be given a lot of weight, while the rants of a clearly demented protestor outside the legislative building should be given very little or no weight, even if heard by every legislator. As with determining how much weight to give any other piece of extra-statutory evidence of legislative intent, the guiding principle should be whether it is credible evidence of what legislators believed about the bill at the time they voted. All else being equal, a committee report that contains "fake news" about a bill should be given the same weight as a factually correct committee report.

That means the falsity of a bill's description or summary is not an important factor in considering whether it is good evidence of legislative intent. An inquiry into what legislators believed is a factual inquiry. Thus, the threshold for evidence to be included in that inquiry should be whether it is material and probative: is it logically connected to the question asked and does it make one or more answers more probable? The objective truth or accuracy of propaganda about a bill is not relevant. Even undeniable falsity is no reason for a judge to exclude it from the analysis. What matters is whether the propaganda was *effective*.

The truth, however uncomfortable, is that propaganda and fake news can influence legislators, like the individual voters who elect them, and this influence may be determinative where legislators do not bother to actually read bills. But asking judges to try and retroactively undo the impact of fake news on the legislative process by choosing to ignore the influence that fake news had on how legislators thought about the bills they voted on, simply because we are morally dismayed by fake news and don't want it corrupting the legislative process, would itself do damage to the integrity of that process.

So how should courts allow for the influence of "fake news" on the legislative process? In the exact same way that they allow for the influence of "real news." Influence is influence. If a court thinks that an op-ed or speech by a bill's sponsor that contains a description of the bill is good evidence of legislative intent, then what should matter is evidence of that op-ed or speech's influence, not the accuracy of its description of the bill's text.

And that leads to a final, curious, thought: At the end of the day, once the court is finished interpreting the Act, a description of it once dismissed as "fake news," may end up being *true*.[36]

36. And so a fine might be revealed to have been a tax all along.