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THE ROSTRUM PRINCIPLE: WHY THE BOUNDARIES OF THE PUBLIC FORUM MATTER TO STATUTORY INTERPRETATION

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INTRODUCTION

"For most men most of the time politics is a series of pictures in the mind, placed there by television news, newspapers, magazines, and discussions. The pictures create a moving panorama taking place in a world the mass public never quite touches, yet one its members come to fear or cheer, often with passion and sometimes with action."

—Murray Edelman[1]

There is a section of dicta in the recent Supreme Court decision on health care reform that might portend new ground, although not in Commerce Clause jurisprudence. Rather, in his dissent, Justice Antonin Scalia did a curious thing for those interested in statutory interpretation: He cited an op-ed in *The New York Times* that quoted Senate Majority Leader Harry Reid. Justice Scalia used this quotation as evidence of meaning on the issue of whether Congress intended to draft a severable mandate, or more specifically, why the Court should not interpret the fact that Congress was silent as anything more than compromise.[2] Of course, Justice Scalia often hammers the sentiment that Congress is a messy business, full of backroom deals and compromises,[3] but his choice of source here is illuminating. Though he repeatedly criticizes the use of traditional legislative history to interpret statutory meaning,[4] Justice Scalia rather casually referenced a newspaper quotation of a senator regarding provisions in the Patient Protection and Affordable Care Act.[5] This bit of dicta poses an interesting question: Should the Court look to the public statements of elected officials (outside of the Congressional Record) as

1. MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS 5 (Illini Books 1985) (1964).

2. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2675 (2012) (Scalia, J., dissenting) ("Such provisions validate the [United States] Senate Majority Leader's statement, 'I don't know if there is a senator that doesn't have something in this bill that was important to them . . . . [And] if they don't have something in it important to them, then it doesn't speak well of them. That's what this legislation is all about: It's the art of compromise.'" (second alteration in original) (quoting Robert Pear, *In Health Bill for Everyone, Provisions for a Few*, N.Y. TIMES, Jan. 4, 2010, at A10) (internal quotation marks omitted)).

3. *See, e.g.*, Zedner v. United States, 547 U.S. 489, 509–10 (2006) (Scalia, J., concurring).

4. *Id.* at 510–11 ("It may seem that there is no harm in using committee reports and other such sources when they are merely in accord with the plain meaning of the Act. But this sort of intellectual piling-on has addictive consequences. To begin with, it accustoms us to believing that what is said by a single person in a floor debate or by a committee report represents the view of Congress as a whole—so that we sometimes even will say (when referring to a floor statement and committee report) that 'Congress has expressed' thus-and-so. There is no basis either in law or in reality for this naive belief. Moreover, if legislative history is relevant when it confirms the plain meaning of the statutory text, it should also be relevant when it contradicts the plain meaning, thus rendering what is plain ambiguous . . . . [T]he use of legislative history is illegitimate and ill advised in the interpretation of any statute—and especially a statute that is clear on its face . . . ." (citation omitted)); *see also* Blanchard v. Bergeron, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring).

5. *See Sebelius*, 132 S. Ct. at 2675 (Scalia, J., dissenting).

evidence of meaning for purposes of interpreting ambiguous (or, in this case, silent) statutory text?[6] Is there a fundamental difference between contemporaneous statements by senators made to media outlets and those statements made on the legislature floor? How should these two types of statements made by elected representatives relate to each other and to the interpretation process?

This Article explores a normative proposal for statutory interpretation in light of this media-saturated age. The proposal, referred to in this Article as the Rostrum Principle, encourages the Court to interpret ambiguous terms in legislation with a presumption toward the way the legislation was "sold" to the public.[7] Almost thirty years ago Professor Jonathan Macey first identified the importance of holding legislators accountable for their statements regarding the intended public benefits of pending legislation. Holding legislators accountable for their statements discouraged what he termed "hidden-implicit legislation," where private parties lobby for legislation specifically to benefit their private purpose while legislators publicly hold the legislation out as benefitting the public interest.[8] Macey, however, limited his argument to statements in the legislative record.[9] Although Macey's argument remains as necessary and vibrant today as it was then, the Rostrum Principle pushes hidden-implicit legislation even further and focuses on the shifting public sphere, where such statements are heard, debated, and otherwise held to account—that is, through the media and popular debate.

As with Macey's hidden-implicit legislation, the Rostrum Principle is perhaps most relevant when there is a clear disconnect between the deal struck by the legislators in the text and the "public marketing" of the law to the electorate.[10] There is renewed scholarly and popular interest in curbing

6. Lawyers make these types of arguments to the Court in their briefs, but courts are, to date, wary of alluding to such sources of meaning in written opinions. *See, e.g.*, May v. Cooperman, 780 F.2d 240, 264 (3d Cir. 1985) (Becker, J., dissenting) ("I believe that this evidence is very weak. Community perception is simply too amorphous and unreliable to provide the ground for constitutional decisions. The opinions and perceptions of the community are shaped by many factors—editorials, personal biases, gossip, news broadcasts, and peer pressure, for example. Such perceptions are thus unreliable indicators of what the legislative purpose of the statute in fact was.").

7. The term "Rostrum Principle" alludes to the elevated platform for public speaking originating in Ancient Rome. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1083 (11th ed. 2011).

8. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 232, 236, 243–44 (1986).

9. *Id.* at 233.

10. *Cf.* Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892). The Rostrum Principle in some ways speaks to the *Holy Trinity* conundrum, but instead of addressing the disconnect between the "spirit of the law" and the text, it addresses the disconnect between the "spin of the law" and the text of the law. *See* Carol Chomsky, *Unlocking the Mysteries of* Holy Trinity*: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 949–51

the influence of private interests' hidden agendas over the legislative process,[11] and Rostrum provides a doctrinal mechanism for the Court to address legislative process abuse in the popular discourse when it is embedded within an issue of statutory interpretation.

This Article further explores the shifting public forum—away from the Congressional Record and formal legal frameworks to include cable news television, newspaper op-eds, and even Twitter. The explosion of popular and social media and politicians' increasingly sophisticated use of these forms of communication goes far toward setting the debate regarding pending legislation. At the same time, the saturation and accessibility of these forms of communication may dissuade engaged voters from researching legislative text or the Congressional Record and instead become swept into the debate through popular and social media. This can create more opportunity for private interests to shape a public message while cloaking a private benefit, and legislators may not always be aware of the spin.[12] By supporting the public marketing, or "spin," of the law when confronted with ambiguity, the Court can reinvigorate separation of powers by strengthening the voter's ability to hold the legislature accountable for its policy campaigns and, as Macey originally argued, remove the incentive for such hidden-implicit legislation because the private interest is made aware that a marketing bait and switch will not advance the private benefit in cases of ambiguity.[13]

This Article proceeds as follows: Part I situates the Rostrum Principle within an increasingly vibrant scholarly debate regarding how the Court

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(2000); *see also* John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1309–14 (2010) (arguing that "second-generation textualism" has destroyed any *Holy Trinity* leftovers); Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1138 (2011) (using *Holy Trinity* to show how meaning shifts depending on the audience).

11. *See, e.g.*, Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 531–32 (2009) [hereinafter Kysar, *Listening to Congress*] ("Unlike these ambiguous implications of political transparency, the earmark rules aim to cure deliberative distortions that occur from ignorance of the full content of legislation, a seemingly uncontroversial and clear goal. If special interest projects are transparent, congressional members and interest groups will have the opportunity to debate their merits."); *see also* Rebecca M. Kysar, *Penalty Default Interpretive Canons*, 76 BROOK. L. REV. 953, 955 (2011) [hereinafter Kysar, *Penalty Default*]; Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 595 (1995) ("[T]he court assigns meaning to a contested statutory term by using interpretive rules that are self-consciously designed to produce 'democratizing' effects—that is, institutional or social effects that correspond to a particular image of democracy. I call this conception 'metademocratic' because it recasts statutory interpretation as directed not only at assigning meaning in a particular case, but also at advancing a larger democratic project.").

12. *See, e.g.*, Ana Villar & Jon A. Krosnick, *Global Warming vs. Climate Change, Taxes vs. Prices: Does Word Choice Matter?*, SPRINGER SCIENCE+BUSINESS MEDIA, Aug. 19, 2010, at 1 ("[W]ord choice may sometimes affect public perceptions of the . . . policies . . . .").

13. *See* Macey, *supra* note 8, at 243.

should handle ambiguous legislative language. Part II discusses the changing nature of the public forum and the role of media (both traditional and social) in selling legislation. This Part also examines how the aggressive marketing of legislation in popular media by the elected officials themselves reflects upon the institutional balance between the legislative and judicial branches. Part III defines the Rostrum Principle by explaining what it is, when it would be most useful, and how it would work by applying it to a case study. Part IV addresses anticipated criticism and other limiting principles for the Rostrum Principle.

I. THE SCHOLARLY DEBATE

A. *The Dominant Interpretive Framework*

More than thirty years ago, Judge Guido Calabresi lectured at Harvard Law School and argued that American democracy was "choking on statutes" and that the legal system needed a comprehensive approach to interpreting the new legislative landscape.[14] Since that time, though there is a renewed interest in theories of statutory interpretation, there is little agreement on a dominant approach. A trio of guiding interpretive methodologies—textualism, intentionalism, and purposivism—is debated in law school classrooms, law reviews, and judicial opinions with no clear resolution. Most scholars and judges agree that interpretation must begin with the text of the statute.[15] But from there, questions abound. When is a text ambiguous?[16] When is there a plain meaning of the text, what is that meaning, and, perhaps most relevant for the Rostrum Principle, what should courts do when the seemingly plain meaning of the words are belied by the political or cultural history or climate?[17]

Depending on one's overall approach to interpretation, the use of the plain meaning doctrine can prove a refuge or a mirage. Some of the most

14. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1–3 (1982) (from a series of lectures given by Judge Calabresi as part of the Oliver Wendell Holmes Lectures delivered at Harvard Law School in March 1977).

15. *See, e.g.*, United States v. Gonzales, 520 U.S. 1, 4–11 (1997) (interpreting the federal Impact Aid Act). *But see* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 106 (2007) (Stevens, J., concurring) ("There is no reason why we must confine ourselves to, or begin our analysis with, the statutory text if other tools of statutory construction provide better evidence of congressional intent with respect to the precise point at issue.").

16. Is "ambiguity" a word capable of two meanings? What if a word is seemingly plain on its face but the history shows it is capable of another understanding—can history make a word ambiguous? These are mostly unresolved questions among judges and scholars of statutory interpretation.

17. The Supreme Court sometimes agrees that the meaning is plain, but then differs on what that meaning is. Plain meaning can encompass ordinary meaning or legalistic meaning—studies find that textualists often apply legalistic meanings. *See* Miranda McGowan, *Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia's Ordinary Meaning Method of Statutory Interpretation*, 78 MISS. L.J. 129, 143 (2008).

strident textualists turn their back on all legislative history when interpreting legislation, yet even they concede that language is contextual.[18] The context of choice for these textualists is found in dictionaries, precedent, and the traditional canons of construction.[19] Purposivists and intentionalists, on the other hand, consult a wider range of evidence when assessing context. They often rely heavily on the legislative record (consisting of committee reports, floor speeches, and the evolution of the text through drafts) as indications of what the legislature intended to address by passing the legislation.[20]

Some of the most polarized debates in assessing context are waged over the use of legislative history.[21] Those who promote such evidence as a way to contextualize ambiguous text do so as a proxy for deciphering the purpose of the legislation, or the legislators' intent in passing the pending legislation at the time their vote was rendered.[22] Critics of legislative history charge that using legislative history is piecemeal and often politicized and as such offers no indication of Congress's collective intent.[23] Accordingly, for textualists, the only constitutionally acceptable tools of interpretation for the Court are the words of the text itself, or "the deal that was struck."[24]

Textualists are generally wary when the Court consults extratextual tools, especially the legislative record, when interpreting ambiguous

18. *See* Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 829–30 (2002); *see also* George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 330–33 (1995).

19. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 69–75 (2012).

20. *See, e.g.*, Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 925 (2012) (reviewing reasons often cited by those in support of legislative history).

21. For an overview of the debate over the past eighty years, see SCALIA & GARNER, *supra* note 19, at 378–83.

22. *See* Frost, *supra* note 20, at 925 ("For all its imperfections, legislative history, in the form of committee reports, hearings, and floor remarks, is available to courts because Congress has made those documents available to us . . . . [L]egislative history is the authoritative product of the institutional work of the Congress. It records the manner in which Congress enacts its legislation, and it represents the way Congress communicates with the country at large." (alterations in original) (quoting Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 306 (1990)) (internal quotation marks omitted)).

23. *See* Manning, *supra* note 10, at 1293; *see also* Blanchard v. Bergeron, 489 U.S. 87, 98 (1989) (Scalia, J., concurring) (discussing the reality of how legislative history is made).

24. *See, e.g.*, Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544–51 (1983). *But see* Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 256 (1998) ("A judicial effort to discern and be instructed by the politics of the enacting body would have, in addition to its evident risks, the virtue of referring preferences and politics to that body the public elects, and can hope to control, for the exercise of that function.").

language.[25] Concerned that the Court can use legislative history to craft its own desired narrative, textualists argue that such tools violate separation of powers.[26] These arguments are traditionally rooted in more epistemological grounds—that is, Congress's intent is not deducible. Even if it were, Congress is a multimember body with many (and sometimes conflicting) purposes.[27] Justice Scalia therefore finds that the use of such tools is judicial overreach.[28]

The recent turn toward originalism theory in statutory interpretation infuses a focus on original public meaning to textualism and at first glance looks similar to Rostrum.[29] Justice Scalia described an understanding of originalism as focusing on the public meaning of words at the time of the Constitution's drafting as a means to contextualize language for interpretation.[30] Justice Scalia juxtaposed this approach with that of the intentionalists who focus on the subjective intent of the framers in drafting the Constitution.[31]

Rostrum, however, differs in two important ways from the original public meaning approach. First, Rostrum does not merely look to the colloquial use of language at the time the law was drafted. Instead, Rostrum is concerned with how the legislators chose to market the law to the people, thus keeping a distinct connection between the legislators' goals (not necessarily their subjective intent, but their publicly stated intent) and the public meaning.[32] Second, and related, is that Rostrum is in the end more deferential to the legislature than original public meaning theory. In Rostrum, the legislature has greater influence over how the Court will subsequently interpret the law, so long as legislators are consistent with how they present the law to the public and how they draft

25. *But see, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2607 (2012); Sullivan v. Finkelstein, 496 U.S. 617, 631 (1990) (Scalia, J., concurring).

26. *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 707 (1997).

27. *See, e.g.*, Frank H. Easterbrook, *Some Tasks in Understanding Law Through the Lens of Public Choice*, 12 INT'L REV. L. & ECON. 284, 284 (1992) ("[T]he concept of 'an' intent for a person is fictive and for an institution hilarious.").

28. SCALIA & GARNER, *supra* note 19, at 18.

29. *See* Dist. of Columbia v. Heller, 554 U.S. 570, 576–77 (2008) ("Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.").

30. *Id.* at 576 ("In interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" (quoting United States v. Sprague, 282 U.S. 716, 731 (1931))).

31. *Id.* at 605.

32. Rostrum attempts to incorporate what some call "cheap talk" or "audience costs" into the interpretation process in the hopes of rendering such talk less cheap and by doing so strengthening the electoral connection between legislators and their constituents. *See* Victoria F. Nourse, *Two Kinds of Plain Meaning*, 76 BROOK. L. REV. 997, 1003 (2011).

the law.[33]

However, as original public meaning purports to do, Rostrum also removes the epistemological uncertainty because the "actual" intent or purpose of Congress is not at issue with Rostrum, only the spin of the legislation.[34] The Court merely holds Congress accountable to the people for the meaning it sold.[35] The Court is not overreaching.[36] On the contrary, the Court merely echoes Congress's public statements and punts back to the electorate to ultimately weigh in on the legislative policy's underlying wisdom or goals.[37]

B. *Statutory Interpretation's Democracy-Forcing Role*

The animating spirit behind the Rostrum Principle is part of larger

33. *See, e.g.*, Strauss, *supra* note 24, at 266 ("Considering the courts, too, as political institutions whose misuse of authority must somehow be kept in check, in my judgment, requires judicial acknowledgment of a partnership with the Congress. That acknowledged partnership must be one that respects the general integrity of its processes (while mindful of the possibilities of manipulation). It must accept that the Constitution . . . requires of it the attempt to discern and build upon the public, political impulse of legislation. In such a context, the political history of legislation cannot be a suspect inquiry. Even in doubting the coherence of the inquiry, we would have to remember as well its importance as discipline for the inquirer; for the same insights that might make us doubt the existence in reality of a public-regarding legislative purpose must also make us extremely chary of judges who declare their independence of any inquiry into political history.").

34. In this respect, Rostrum stems from Professor Bernard Bell's exposition of a "public justification" theory of interpretation. Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L. J. 1, 6 (1999) ("[B]ecause members have a duty to consider the public justification of a statute when they vote, the lack of a joint subjective intent becomes unimportant because members can be viewed as constructively assenting to the text of the statute and the accompanying institutional explanatory materials. Thus, the approach is objective, like new textualism, focusing on the reasonable interpretation of text rather than subjective intentions of legislators."); *see also* Cheryl Boudreau, Mathew D. McCubbins & Daniel B. Rodriguez, *Statutory Interpretation and the Intentional(ist) Stance*, 38 LOY. L.A. L. REV. 2131, 2144 (2005).

35. *See* Paul E. McGreal, *A Constitutional Defense of Legislative History*, 13 WM. & MARY BILL RTS. J. 1267, 1284 (2005) ("It would be strange indeed to ignore these public justifications, offered to persuade the people and their representatives as to a law's propriety, when later applying that same law against the people."); *see also* Bell, *supra* note 34, at 9 ("A legislature's explanation of a statute itself merits recognition as an act of legal significance. Two normative principles compel such a conclusion. First, legislatures, like other governmental institutions, have a normative obligation to explain, as well as enunciate, their commands. Second, government must not mislead its citizens." (footnote omitted)).

36. Kysar, *Penalty Default*, *supra* note 11, at 964 ("My own view, as I have explored elsewhere, is that canons assuming the correct functioning of rules that the legislature sets for itself are less vulnerable to the attack that the judiciary has exceeded its interpretive function.").

37. *See* McGreal, *supra* note 35, at 1281 ("Specifically, bicameralism and presentment are a process intentionally constructed to generate public debate about legislation. Consequently, legislative history—which memorializes such debate—is a valued part of the process, not merely a disposable byproduct left over after text takes its final form."); *see also* Nourse, *supra* note 10, at 1120 (arguing that textualism should embrace legislative history as strengthening separation of powers).

scholarly and popular discussions about legislators' accountability to the electorate.[38] In the mid-1980s, a wave of articles uncovered the separation of powers benefits derived from judicial attention to the political history of legislation.[39] Almost three decades of strong textualism diverted the conversation from process-oriented public law scholars and toward a more formalist approach to the rule of law. However, in light of new uses of media, this Article reinvigorates some of those discussions and argues that courts should include legislators' use of media and other forms of marketing in "political history" and, moreover, that the inclusion of such a use is consistent with a pragmatic understanding of the interpretative process.[40] Professor Abner Greene writes that "[a] deeper understanding of social history can provide important insights into the legislative purpose behind the statute."[41]

As an institutional question, some scholars focus on Congress and propose changes from within the legislature to hold Congress accountable to the voter.[42] Others look to the Court to take a more active role and propose judicial review of the legislative process.[43] Still others question the utility of framing the underlying interpretive debate within the tripartite framework of textualism, intentionalism, and purposivism and suggest instead to move beyond these three theoretical approaches altogether.[44]

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38. Brannon P. Denning & Brooks R. Smith, *Uneasy Riders: The Case for a Truth-in-Legislation Amendment*, 1999 UTAH L. REV. 957 (1999) (advocating a truth in legislation amendment); Kysar, *Listening to Congress*, *supra* note 11, at 524 n.15 (collecting sources of "prior proposals" that "advance[] various statutory interpretation methods for special interest litigation").

39. *See, e.g.*, Macey, *supra* note 8; Strauss, *supra* note 24. Moreover, Professors Farber and Frickey argued that public choice theory is consistent with an inquiry into legislative intent. *See* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 461–65 (1988) (describing a pragmatic approach to legislative intent that is consistent with public choice theory); *see also* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989).

40. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 332 (1990).

41. Abner S. Greene, *The Missing Step of Textualism*, 74 FORDHAM L. REV. 1913, 1924 (2006).

42. Bernard Bell posits as part of his public justification method of interpretation that legislators have a "duty to explain" the reasons behind the legislation. Bell's theory aligns with Rostrum in that it uses legislative history to evidence the public justification rather than the subjective intent. It does not, however, appear to go beyond the more traditional legislative record. *See, e.g.*, Bell, *supra* note 34, at 76 ("The public justification approach seeks the reasonable meaning of words rather than subjective intentions of those who approved the words. It is an 'objective' rather than a 'subjective' approach, but expands the text that must be interpreted to include the institutional justifications for statutes as well as their text.").

43. *See generally* Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915, 1970–74 (2011); Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WM. & MARY L. REV. 805, 871 (2010) [hereinafter Bar-Siman-tov, *Lawmakers as Lawbreakers*].

44. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation:*

Hillel Levin recently proposed a theory of interpretation based on contemporary meanings and expectations.[45] Levin argues that "the behaviors and norms of the community, supported as they are by official action," should guide judicial interpretation.[46] The "contemporary meaning and expectations approach" advocates that how the community follows the law shapes the law's meaning.[47] The Rostrum Principle is in some ways a variation of this idea—elevating the role that the public's understanding plays in determining meaning—but the Rostrum Principle's traditional focus remains on the constitutional power to make the law and on the statements and presentation by the legislators.

The search for a new framework that includes the normative goals of increased accountability is supported in literature that addresses interpretation issues that arise from ballot initiatives or other direct democracy mechanisms.[48] Jane Schacter addresses these forms of direct democracy and explains, "The court assigns meaning to a contested statutory term by using interpretive rules that are self-consciously designed to produce 'democratizing' effects—that is, institutional or social effects that correspond to a particular image of democracy."[49] Schacter terms this use of statutory interpretation doctrine "metademocratic" and focuses on how the interpretive process is useful for normative democracy-forcing goals.[50]

Methodological Consensus and the New Modified Textualism, 119 YALE L.J. 1750, 1861–62 (2010); Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 164–67 (1995).

45. Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103, 1116 (2012).

46. *Id.* at 1116.

47. *Id.*

48. Schacter, *supra* note 44, at 166. Professor Schacter concluded:

> The traditional model of legitimacy in statutory interpretation reflects an approach that draws a sharp distinction between the functions of the legislative and judicial branches of government based upon the perceived demands of democratic theory. The traditional approach demands interpretive "restraint" as a way to enable the dynamic of electoral accountability to operate; voters can assess the choices made by legislators only if those choices are clear and unobscured by judicial choices covertly made in the name of interpretation.
>
> The popular conception of law, however, calls into question the extent to which the dynamic of accountability can operate. The problem is that voters receive information about, and come to understand, legislative law from a sprawling and diffuse set of sources—most prominently assorted media. As with initiative laws, the meanings that voters attach to legislative laws and other governmental policies flow as much—if not more—from ongoing, media-driven processes than from the bare legal language of law or other formal legal sources.

Id.

49. Schacter, *supra* note 11, at 595.

50. Schacter, *supra* note 44, at 111–12.

Similarly, Professor Victoria Nourse argues for reframing textualism to account for the representational separation of powers principle. Nourse points out the need for a theory of statutory interpretation that will embrace legislative history as representative of the plain meaning and will thus respond to the structural ambiguity a legislator creates by speaking to constituents in a decisively prototypical manner and then drafting with an eye toward the Court as audience.[51] Nourse reinvigorates a separation of powers perspective to the enterprise of statutory interpretation.[52]

C. *Situating Rostrum in the Literature*

The academic trend toward democracy-forcing proposals in statutory interpretation signals discomfort with the current process. Rostrum is based on similar discomfort. Current interpretation doctrines fail to address the disconnect between the Court's ex post interpretation of language "sold," perhaps unknowingly, to the public in a politically palatable light but then written in an ambiguous or even contrary manner. In other words, the text and context are increasingly divergent.[53]

Because public debate is increasingly partisan and increasingly loud, Congress repeatedly applies a marketing gloss on pending legislation and then the electorate votes according to the spin they have internalized. Meanwhile, the Court is operating under a very text-based interpretation scheme. This creates a disconnect between what the electorate thinks legislators do and what the Court might interpret the actual text of the law to do. This disconnect undermines the legislature's democratic accountability.[54]

This disconnect is concerning for several reasons: (1) the marketing can

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51. Nourse, *supra* note 10.

52. *Id.* at 1170 ("The question is how shifting power affects power-defined-as-representation. The representational approach 'asks whether and how the shifting of tasks among governmental players affects "who" will decide,' where the 'who' is the people, represented by state, district, and nation. Power is thus defined as the power of the people organized in 'constituencies creating the departments.'" (footnote omitted)).

53. Scholars argue that interpretation is generally a function of social context and audience, and as such relies on an understanding of the three main interpretive communities: policy, politics, and public. *See, e.g.*, William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 630 (2001) ("Statutes engage the following three distinct communities: the policy community of specialized professionals found in government bureaucracies, the political community of elected politicians, and the public community of the general electorate. Recognizing these communities dissipates much of the confusion surrounding statutory interpretation. Judges vary their readings of statutes depending on which community comprises the audience for the decision, and rightly so. In a representative democracy, judges usually should adopt the perspective of the community responsible for the issue." (footnote omitted)).

54. *See, e.g.*, Nourse, *supra* note 10, at 1129 (explaining such disconnect as a "structure-induced ambiguity" caused by the need for legislators to speak in ordinary language toward constituents and technical, legalistic language toward judges).

actively misinform constituents if they fail to notice that the text is presented differently; (2) the people are unable to hold their elected officials accountable for the text if legislators' public statements misinform the people; (3) the legislature currently lacks an incentive to monitor the disconnect between the portrayal of a pending law and the actual text on which legislators vote; and (4) the Court, when faced with ambiguous language, is left to consult dictionaries, canons of construction, and, possibly, the legislative record. None of these tools for deciphering meaning interact with the public debate that occurs before the law passes.

II. THE SHIFTING PUBLIC FORUM

The influence of special interests in legislation is certainly not a new problem; almost every generation wrestles with the tension between influence and democratic ideals. What recently changed is an increased use of various media outlets as public relations operations for special interest legislative agendas.[55] In light of this explosion of media-savvy politics, new dangers sprout: the legislator-as-talking-head, the coordination of talking points, and the mass production of legislation by special interests all combine to create a situation where the "public gloss" of legislation no longer represents the law as written. Or, even worse, the legislation is meant to obfuscate a very different private intent.[56] Although the glare from the media spotlight frequently blinds the public discourse to such an extent that the electorate holds the legislature accountable for policies that are not actually reflected in the text, the Court typically disregards those same policies.

A. *The Role of Marketing*

There is much academic and popular discussion about the role of marketing in electoral politics, especially post-*Citizens United*.[57] The focus

55. *See* Schacter, *supra* note 44, at 132 ("These findings are not surprising given that ballot campaigns are by no means the only political contests in which media and advertising play a dominant role in supplying information and influencing voter attitudes. The mass media are widely regarded as 'the primary source of information about public affairs received by most citizens.'" (quoting Michael Margolis & Gary A. Mauser, *Public Opinions as a Dependent Variable: An Empirical and Normative Assessment*, *in* MANIPULATING PUBLIC OPINION: ESSAYS ON PUBLIC OPINION AS A DEPENDENT VARIABLE 365, 366 (Michael Margolis & Gary A. Mauser eds., 1989))).

56. *Id.* at 166–67 ("[L]awmakers on all sides seem to have become ever more sophisticated about the power of rhetoric and characterization, as evidenced, for example, by the strategically chosen, sometimes 'Orwellian,' titles given to legislation. This pervasive 'spin' of law seriously undermines the possibility of meaningful electoral accountability." (footnote omitted)).

57. Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1268 (2009) ("Politicians and interest groups can therefore potentially construct or manufacture 'public opinion' that supports their preexisting policy preferences or use favorable polling data from independent sources to move public opinion further in their favored direction. To the extent that majoritarian preferences cannot truly be identified and followed by conscientious elected officials,

generally remains on campaign spending and marketing of particular candidates or attacking opponents through media.[58] Similarly, there is scholarly discussion about the role of media in ballot initiatives and referenda.[59] However, the legal scholarship contains very little analysis of the marketing of particular pending legislation and the attendant discussion of how a marketing campaign might relate to statutory interpretation issues.[60]

The word "marketing" itself has many meanings. For purposes of the Rostrum Principle, "marketing" is cabined to the statements that are clearly attributable to elected legislators that are made during the time before the passage of a statute and that explain the purpose of the legislation to the public.[61] Rostrum expands legislative history to include public statements by legislators in certain forms of more popular media—specifically op-eds, social media, television news, and cable network outlets.[62] Its own performance for evidentiary issues must limit judicial use of such popular media, but the Rostrum Principle seeks to expand the universe of evidence that the Court may rely upon to determine meaning with the goal of holding the legislature to its publicly stated purposes and intents.

At first blush, the use of popular media to establish meaning might appear radical. But if scholars and judges reframe popular media as the current public forum, then it becomes not only natural but expected that the way an elected official characterizes aspects of pending legislation on *Meet the Press* or Twitter should help explain the context in which the Court attempts to decipher meaning.[63] The participatory aspect of new media—the sharing of tweets and reposts on Facebook—amplifies the impact an elected official's marketing of legislation can have on voters.[64] Studies

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but rather are 'crafted' by public officials and other elites for their own purposes, the majority's will cannot serve as the autonomous constraint on—or focus for—decision making by elected officials that is contemplated by the political accountability paradigm." (footnote omitted)).

58. Bar-Siman-Tov, *Lawmakers as Lawbreakers*, *supra* note 43, at 830.

59. *See* Schacter, *supra* note 44, at 121.

60. For a comparative analysis of the role of interest groups and media in a case study of a particular legislative history, see Yael T. Ben-Zion, *The Political Dynamics of Corporate Legislation: Lessons from Israel*, 11 FORDHAM J. CORP. & FIN. L. 185, 195 (2006).

61. For more on marketing of legislation, see Bruce I. Buchanan, *Mediated Electoral Democracy: Campaigns, Incentives, and Reform*, *in* MEDIATED POLITICS 362, 362 (W. Lance Bennett & Robert M. Entman eds., 2001).

62. *See* McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, LAW & CONTEMP. PROBS., Winter 1994, at 3, 7 ("Signaling is, of course, a major preoccupation of politicians. They frequently make speeches, issue press releases, publish policy reports and studies, grant interviews, write constituents, and propose bills.").

63. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 353 (2010) ("The great debates between the Federalists and the Anti-Federalists over our founding document were published and expressed in the most important means of mass communication of that era—newspapers owned by individuals.").

64. CATHY J. COHEN & JOSEPH KAHNE, MACARTHUR RESEARCH NETWORK ON YOUTH &

have shown that participatory politics are engaging today's youth demographic, and a large concern for users of new media is gauging the trustworthiness of information.[65]

Rather than holding legislators accountable for their public comments as a tool toward deciphering intent, however, Rostrum merely holds legislators to their public statements as indicia of meaning on their face.[66] Rostrum provides no mechanism for using elected officials' remarks against them or for otherwise attempting to impeach an elected official's character. Instead, Rostrum focuses on the public forum and the public debate as they appear to the voters.[67] The public debate is a proxy for meaning; rather than relying on how a contemporaneous dictionary defines a word, Rostrum allows the Court to use the definition swirling throughout popular discourse—which the lawmakers themselves set into motion—during the time leading up to the passage of the legislation in question. In contrast to Justice Scalia's original public meaning textualism, however, the focus of Rostrum remains on the legislator's role in setting the public debate and thus on the chosen marketing spin that becomes the public meaning.

B. *Separation of Powers*

As noted above, coordinated lobbying efforts toward passing specific legislation are nothing new. However, the increased availability of media outlets to express a coordinated marketing campaign and the ability of certain coordinated groups to set the terms of the public debate through disciplined use of talking points and marketing strategies skew the electorate's ability to hold elected officials accountable.[68] The problem of hidden-implicit legislation, so aptly discussed by Professor Macey, remains. While Macey's proposal that courts should defer to the "public purpose" of laws when faced with ambiguity strikes to the heart of the matter, it does not address popular media's role as a forum for legislators to disseminate the public gloss while writing the private intent into the

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PARTICIPATORY POLITICS, PARTICIPATORY POLITICS: NEW MEDIA AND YOUTH POLITICAL ACTION 6 (2012).

65. *Id.*

66. Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2218–19 (2002) (describing an ex ante preference that does not encode a value judgment).

67. *See, e.g.*, Flatow v. Islamic Republic of Iran, 76 F. Supp. 2d 16, 19 n.4 (D.D.C. 1999) (noting the fact that legislation was sold a certain way but was enforced differently).

68. *See* Matthew A. Baum & Tim Groeling, *New Media and the Polarization of American Political Discourse*, 25 POL. COMM. 345, 347, 359–60 (2008) (describing the new media as more partisan and targeted to a specific audience); *see also* Michael X. Delli Carpini & Bruce A. Williams, *Let Us Infotain You: Politics in the New Media Environment*, *in* MEDIATED POLITICS 160, 166 (W. Lance Bennett & Robert M. Entman eds., 2001) ("[T]he distinction between fact and opinion or analysis is much less clearly identified by simple rules such as where it appears, who is saying it, or how it is labeled.").

text.[69]

Should the Court support the "plain meaning" of the deal that was struck even if it differs remarkably from the public marketing campaign surrounding the legislation? This question shines light on why popular media differs from the official record for interpretation purposes. While granted the ability to decipher the law, the Court walks a narrow separation of powers path between deciphering and creating meaning.[70] This attention to the Court's role threatens to downplay the other part of the separation of powers equation: the assumption that Congress is the most democratically accountable branch and is therefore the branch with the power to make policy (and that the electorate signals Congress through the vote).[71] But where is the accountability when members of Congress launch a full-force marketing campaign around pending legislation, only to draft text that is disconnected (either intentionally, through a series of compromises, or through the inherent limits of language) from what Congress promised? The electorate is removed from participating meaningfully in the process and Congress is no longer the most democratically accountable branch. In such a case, Rostrum posits that the Court buttresses separation of powers principles by interpreting ambiguity with a presumption toward what Congress sold to the electorate. By doing so, the Court strengthens the process that keeps Congress the most democratically accountable branch.[72]

C. *How The Media Differs from Legislative History*

Traditional legislative history can provide evidence of the legislative intent behind the resulting legislation and the internal processes leading up to the final draft. As such, these traditional sources offer insight into meaning and drafting history. But popular media differs in that it is meant primarily for consumption, on a mass scale, by laypeople. Because of its mass audience, popular and social media is simplified and proceeds in broad strokes and sound bites.[73] This feature lends itself well to marketing and talking points, which is where a threat to democracy may lie.[74]

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69. *See* Macey, *supra* note 8, at 227, 250–51; *see also* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 364 (2010) ("Speakers have become adept at presenting citizens with sound bites, talking points, and scripted messages that dominate the 24-hour news cycle.").

70. *See* Nourse, *supra* note 10, at 1164–65.

71. *See id.* at 1175.

72. *See id.* at 1126 (acknowledging that even "political scientists who find no correlation between people's views on particular issues and representatives' voting records, or who insist that voters have the 'haziest awareness' of specific policy issues" still place immense value on the role of the electorate to "check" representatives' behavior through the vote (footnote omitted)). *But see* Staszewski, *supra* note 57, at 1254 (stating that recent empirical work calls into question the connection between any particular policy and its subsequent vote).

73. The simplified nature of the language used to explain legislation to the public should not matter for its importance as an accountability scheme. For more on this, see *infra* Part IV.

74. *See* ARTHUR LUPIA & MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN

Because of its accessibility, popular media also increasingly sets the terms of the legislative debate.[75]

Rostrum also changes the use of legislative history, be it in the Congressional Record or in the popular media. For example, Judge Posner takes an expansive view of legislative history. He might include, for example, a direct quotation by a legislator in a newspaper on a pending legislative matter within the legislative history rubric.[76] A handful of federal court opinions do just that.[77] However, in those cases, the courts offer a newspaper quotation as a proxy for the legislator's intent or the purpose of the legislation.[78] Rostrum provides a different use of legislative history—where the courts use the public statement merely to evidence how the legislators present legislation to the public.[79] It is the communication

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CITIZENS LEARN WHAT THEY NEED TO KNOW? 227 (1998) ("The ability of voters . . . to make reasoned choices and delegate successfully depends on whether their opportunities to gain knowledge actually produce knowledge."); *see also* Schacter, *supra* note 44, at 158 ("This influence militates in favor of a narrow construction of the law, one that declines to permit ambiguous language to work major changes in the law when there are strong reasons to doubt that voters considered and approved specific changes.").

75. *See* Will Rhee, *Entitled to be Heard: Improving Evidence-Based Policy Making Through Audience and Public Reason*, 85 IND. L.J. 1315, 1324 (2010) ("[O]ne of the primary reasons for the apparent paucity of evidence-based policy making in pluralistic democracies may be that opposing sides in a divisive policy debate initially fail to clarify who is the target or incidental audience."); *see also* Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 442 (2006) (arguing that the media shapes the public debate around criminal justice and increases support for punitive policies).

76. Richard Posner, *Text of Judge Posner's Response to Justice Scalia*, THOMSON REUTERS NEWS & INSIGHT (Sept. 20, 2012), http://newsandinsight.thomsonreuters.com/Legal/News/2012/09_-_September/Text_of_Judge_Posner_s_respose_to_Justice_Scalia/ ("[Justice Scalia] may not consider such a historical inquiry to be an exercise of 'legislative history,' because he defines legislative history very narrowly . . . .").

77. *See, e.g.*, Sherman *ex rel.* Sherman v. Koch, 623 F.3d 501, 510 (7th Cir. 2010) (assuming for the sake of argument that the court should consider a press report as an example of legislative history); Brown v. Gilmore, 258 F.3d 265, 271 (4th Cir. 2001).

78. *See Sherman*, 623 F.3d at 510; *id.* at 521 (Williams, J., dissenting) ("There are troubling statements in the record indicating religious motivations on the part of some of the Act's supporters. The bill's chief sponsor, Senator Kimberly Lightford, said this to the press: 'Here in the General Assembly we open every day with a prayer and Pledge of Allegiance. I don't get a choice about that. I don't see why students should have a choice.'"); *Brown*, 258 F.3d at 271 ("When asked by a newspaper reporter about his intent in sponsoring the bill, Senator Barry responded that his intent was not to force prayer in schools, but he added, 'This country was based on belief in God, and maybe we need to look at that again.'"). *But see id.* at 271 n.2 ("The parties disagree whether statements to the press are admissible as exceptions to the hearsay rule. We do not decide this question but include this statement only for the sake of completeness. We do not, however, believe that its inclusion materially adds or detracts from the views of legislators contained in the legislative record.").

79. *See* Nourse, *supra* note 10, at 1124 ("This means that legislative history should be consulted not to find *the intent* of the legislature, but as a reference guide and a lexicon for prototypical legislative meaning."); *see also* United States v. Halifax Cnty. Bd. of Educ., 314 F. Supp. 65, 75 (E.D.N.C. 1970) ("This Court has chosen to admit the newspaper articles for the

itself as well as the audience's reception of that communication that determines how the Court should interpret meaning.[80]

Underlying the Rostrum Principle is a conception of separation of powers that requires consistent dialogue between the public and their elected officials. The Rostrum Principle focuses on expanding the Court's conception of the public forum from the halls of Congress (that is, traditional legislative history) to the "Twitterverse."

If the goal of statutory interpretation is to yield the most objective reading of the statute as understood by those who voted on and are to be governed by such laws, then examining how the debate was cast and vetted through popular dialogue is a fair way to decipher that meaning. Society's modes of communication are rapidly changing and legal doctrine does not always keep pace with such changes. Words acquire meaning through context and the context of legislation is rooted in the public debate surrounding the birth of that legislation. Given that the Library of Congress is now archiving every public "tweet" ever posted,[81] however, the justification for allowing a senator's statement on the floor of Congress but disallowing the same senator's statement to his constituents through *The New York Times* or Twitter is increasingly flimsy. This rationale underlies centuries of reference to the official legislative record. There is something both obvious and necessary about using legislators' own statements to hold them accountable to the public. Rostrum merely expands the pool of available evidence to include what is arguably more reflective of the public debate in today's times—television, print, and social media.

III. WHAT IS THE ROSTRUM PRINCIPLE?

A. *Definition and Goals*

The goals of the Rostrum Principle are three-fold: to encourage Congress to market legislation in a similar fashion to how Congress conceives the legislation; to put the voters on proper notice regarding legislation and policy; and to encourage a functioning dialogue in the spirit of democracy. A large part of any functioning dialogue entails trust, and the voters are more likely to trust the cues they receive from legislators if there is institutional assurance that the legislators mean what they say—the judiciary will hold legislators accountable for what they say.[82]

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purpose of showing that they did appear and not for the purpose of showing the truth of the information contained in them.").

80. *See, e.g.*, Levin, *supra* note 45, at 1115, 1117.

81. Doug Gross, *Library of Congress to Archive Your Tweets*, CNN (Apr. 14, 2010, 5:31 PM), http://www.cnn.com/2010/TECH/04/14/library.congress.twitter/index.html?iref=al lsearch.

82. *See* LUPIA & MCCUBBINS, *supra* note 74, at 64–65, 75–76, 205–06, 208–09; *see also* Todd D. Rakoff, *Statutory Interpretation as a Multifarious Enterprise*, 104 NW. U. L. REV. 1559, 1574 (2010) ("[T[he point of view of those subject to the legislation—its readers—ought to count for something. To put the matter in language more commonly applied to private documents, there

The institutional restructuring posited by the Rostrum Principle strengthens Congress's proper role as policymaker by using the judiciary as a guard against improper or incomplete dissemination of information to the public.[83] Rostrum gives the Court a means to monitor the legislature's dissemination of information to the electorate while respecting the legislature's ability to define policy. The Rostrum Principle provides institutional confirmation that there is important normative value in expanding the extrinsic evidence to include statements made by elected officials to the popular media so that a court may refer to these statements in order to decipher a text's meaning. Rostrum ensures that the interpretation is contextually appropriate and reflected in the public forum.[84]

Almost all legal and linguistic theorists agree that language is meaningless when divorced from context.[85] The Rostrum Principle is based on a normative claim that the relevant context for statutory language is part and parcel of the democratic dialogue out of which the statute was born. Context in this sense has two important audiences: the legislators themselves, who set the terms of the popular debate through their public statements,[86] and the voters, who are governed by the statute and ultimately must weigh in on the overall legislative policy choices carried out by their representative.[87] While the dictionaries and semantic canons used by textualists also provide a sense of cultural context,[88] as does the underlying premise of purposivism (that is, understanding the mischief the law was meant to address and thus its historical and cultural impetus),[89] the

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has long been a dispute between the 'subjective' and the 'objective' readings of statutory language." (footnote omitted)).

83. *See* Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422, 1454 (2011).

84. *See* NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 48:2 (7th ed. 2007) ("Consideration of fairness weighs on the side of reading the materials of legislative history from the vantage point of the public or those affected by the law. It is designed to determine the legislative intent and the fact that a conservative organization was the actual sponsor of the legislation does not mean there has to be a conservative interpretation. The maxim that people are held to know the law becomes unfair concerning portions of the law which are essentially undiscoverable. Basing decisions of statutory interpretation on historical events that are, practically speaking, obscured from the awareness of persons not directly involved in the legislative process has the character of enforcing secret laws." (footnote omitted)).

85. *See, e.g.*, John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 108–09 (2001) (describing "new textualism's" view of language in context).

86. And, in turn, the media and cultural understandings of language and contemporary debates also affect legislators. *See* Schacter, *supra* note 44, at 165 ("Media sources such as television, talk radio, and newspapers heavily influence legislators.").

87. *See* SINGER & SINGER, *supra* note 84, § 48:2 (suggesting that the Court should give weight to unofficial meaning attached by the public at large when considering issues of interpretation).

88. Especially when one makes a point of relying on a dictionary written contemporaneously with the legislation. *See* MCI Telecomms. Corp. v. AT&T, 512 U.S. 218, 227–28 (1994).

89. *See* Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV.

Rostrum Principle provides a context for language, and at the same time reinforces a "metademocratic" norm.[90]

Professor Jane Schacter conceives of metademocracy as a form of

> democratic legitimacy in statutory interpretation that has emerged as the dominant essentialist view has receded. In this conception democratic legitimacy is measured *not* by the elimination of judicial discretion in statutory interpretation, but instead by the interpretive principles and default rules that shape and channel that discretion. Specifically, the court assigns meaning to a contested statutory term by using interpretive rules that are self-consciously designed to produce "democratizing" effects—that is, institutional or social effects that correspond to a particular image of democracy.[91]

Using metademocracy as a framework, the Rostrum Principle is an interpretive rule "self-consciously designed to produce"[92] a mirror that reflects the interpretive gloss that elected officials give pending legislation.

B. *Rostrum and Current Statutory Interpretation Doctrine*

One might pragmatically consider the Rostrum Principle a policy canon like the rule of lenity, the rule of constitutional avoidance, and the federalism presumptions. The Rostrum Principle could operate as a normative prescription that strengthens institutional organization and supports larger substantive goals.[93] Scholars may introduce the Rostrum Principle as a policy canon when: (1) there is an interpretive question surrounding ambiguous text and (2) the parties have access to public statements by the legislators made contemporaneously with the time of enactment that evince public discussion of a particular interpretation. Rostrum will not frequently come into play because much current legislation was passed years before extensive media accessibility and expansion. In other words, Rostrum is a canon in its infancy by its very nature. However, in coming years, as the legislative process becomes more

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L. REV. 630, 670–71 (1958).

90. *See* Schacter, *supra* note 44, at 112 ("The metademocratic approach acknowledges the inevitability of interpretive discretion and the centrality of the rules used to resolve ambiguity, focuses upon choosing interpretive rules that are self-consciously designed to address identified problems in the democratic process, and links democratic legitimacy not to a mythic brand of interpretive 'restraint' but to the use of default principles designed to further a larger vision of democracy.").

91. Schacter, *supra* note 11, at 595.

92. *Id.*

93. For an example of how these canons are added to the judicial toolbox, see Anita S. Krishnakumar, *The Hidden Legacy of* Holy Trinity Church*: The Unique National Institution Canon*, 51 WM. & MARY L. REV. 1053, 1093–98 (2009).

entwined with popular consumption of media and marketing, it is likely that Rostrum will become more relevant.

Finally, the Court must play other roles to ensure proper democratic norms, for example, by shining a light on legislative attempts to cloak something unconstitutional as constitutional through carefully ambiguous drafting.[94] Rostrum does not foreclose such roles of the Court. Rather, Rostrum merely envisions the use of public statements as a snapshot or record of the public debate as evidence of the meaning of ambiguous language.

C. *Practical Applications of Rostrum*

As discussed above, the Rostrum Principle will not apply to all interpretive situations; it is seemingly best suited for recently enacted legislation where there is a record of public engagement on the policies and terms, or the legislation.[95] Although the small universe of statutes that might currently be eligible for this approach to interpretation might not seem to warrant an entirely new interpretive canon,[96] it can be expected that, going forward, more legislation will be marketed through intense public relations and social media campaigns. The Rostrum Principle can help define the institutional roles early and hopefully reignite a vibrant public dialogue about policy on the front end of the legislative process. In other words, the Rostrum Principle formally adopts the implicit understanding that public debate, and the norms and values expressed in the public forum, matter for determining the context of ambiguous statutory language.[97]

Recent opinions reflect that the courts are currently split on how to address contemporaneous media statements as evidence of public debate.[98]

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94. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2605–07 (2012). If the interpretive dilemma faced by the Court is one with clear constitutional implications (such that motivation or meaning might implicate constitutional concerns) then the Court is within its power to expose such legislative mischief, and sometimes might need to resort to public statements to evidence such mischief. But the use of public statements in this case differs from the use of such statements under Rostrum.

95. *See* Elizabeth A. McNellie, Note, *The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation*, 89 COLUM. L. REV. 157, 176–78 (1989).

96. *See* Rakoff, *supra* note 82, at 1560, 1575–78 (arguing for a functional, multifaceted approach to interpretation based on the type of statute).

97. Some have discussed this idea as a "duty to explain" to one's constituents. *See* Bell, *supra* note 34, at 9–20. This implicit understanding also is a driving force in current administrative law doctrine, especially those recent doctrinal developments that celebrate reason-based decision-making and transparency. *Cf.* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 48 (1983) (stating that an agency must explain why it exercised discretion in a certain manner); Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (holding that the Court could require administrative officials to explain their decision).

98. *See* Madden v. Cowen & Co., 576 F.3d 957, 970–71 (9th Cir. 2009) (citing the public debate surrounding an addition to a statute); Khodara Envtl., Inc. *ex rel.* Eagle Envtl. v. Beckman,

Examination of these federal court opinions increasingly grappling with the use of media for interpretation purposes is useful to understand how Rostrum could work.[99]

Focusing on the federal system helps crystallize the boundaries that must limit Rostrum.[100] The goal of Rostrum is not to uncover any true motivations of sponsors;[101] rather it is to reframe interpretation of meaning as one reflected most clearly, and perhaps most democratically, by the terms of the debate in the public forum at the time of passage. Since states vary in their legislative record-keeping and legislative processes, the role of media and other public forms of debate could vary state to state.[102] Expanding Rostrum to fit the variety of state interpretive precedents and situations is outside the scope of this Article.

As discussed above, the use of newspaper quotes or other extratextual media sources as evidence of some true meaning for purposes of constitutional analysis is also outside the scope of the Rostrum Principle. For example, a series of school prayer cases reflects a pattern of debate about the limits of newspaper quotations by senators as evidence that religious purposes motivate "moment of silence" laws. In the mid-2000s, federal circuits grappled with whether these "moment of silence" laws violated the First Amendment, and the circuits split as to the propriety of using senators' statements to the media to show the legislature's motivation for the legislation.[103] This is different from using such sources merely as proxies for the public debate.

Although a search of federal case law reveals that no courts currently adopt an equivalent of the Rostrum Principle, an increase in dicta and dissents seems to point to the use of extratextual materials to capture the

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237 F.3d 186, 190 n.4 (3d Cir. 2001) (referring to a press release and newspaper article as legislative history); Brooks v. Miller, 158 F.3d 1230, 1242 (11th Cir. 1998) (rejecting the use of news articles as a source for determining legislative intent); *see also* Larez v. City of Los Angeles, 946 F.2d 630, 641–44 (9th Cir. 1991) (ruling that newspaper quotations were inadmissible as hearsay in a civil rights case).

99. For definitional purposes, this Article confines the Rostrum Principle to the federal courts. While state legislatures and state courts might benefit tremendously from the adoption of a Rostrum Principle for interpretive purposes, the vast differences in organization and official record-keeping at the state level are perhaps too diverse for broad interpretive theories.

100. *Cf.* Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 437, 498–99 (2012) (looking at how lower courts interpret statutes).

101. *See* Sherman *ex rel.* Sherman v. Koch, 623 F.3d 501, 510 (7th Cir. 2010); Brown v. Gilmore, 258 F.3d 265, 276–77 (4th Cir. 2001).

102. *See, e.g.*, *In re* Jason W., 837 A.2d 168, 175 (Md. 2003) (Harrell, J., concurring) ("As apparent justification for recourse to such in the present case, Judge Wilner notes that, at the time of the enactment of the 1970 law, '[t]he Maryland legislature had not yet begun [regularly] to preserve committee files or to require written committee reports, so there is no official legislative history' of the 1970 version of the statute at issue here." (alterations in original)).

103. *See Sherman*, 623 F.3d at 510; *Brown*, 258 F.3d at 271, 276–77.

spirit of the public debate in order to shed light on ambiguous statutory text.[104] In at least a few of these cases, there is some discussion of whether legislators' statements to newspapers or press releases from legislators' offices are valid evidence of public debate.[105]

In 2011, the Third Circuit used press releases from senators' offices to provide clues to Congress's intent to interpret ambiguous wording in a New Jersey law.[106] In *Lomando v. United States*, one of the issues was whether a New Jersey law requiring a plaintiff to submit an expert affidavit alongside a claim for medical malpractice applied to a physician assistant.[107] The Third Circuit first found the statute ambiguous on this question and then looked to legislative history for guidance.[108] Relying in part on a press statement from senators' offices stating that "[t]he goals of the final legislation were to 'reform the State's ailing medical malpractice insurance system to provide insurance relief *for doctors* and ensure that patients in New Jersey' will be able to get the treatment they seek," the court read the statute narrowly not to include physician's assistants.[109] The narrow reading in this case allowed the claim against the physician assistant's employer to proceed even in the absence of an expert affidavit, and the case was remanded to the district court.[110]

In *B & G Construction Co., Inc. v. Director, Office of Worker's Compensation Programs*, the Third Circuit used a press release and a post-enactment sponsor statement on the floor as "clues to Congress' intent" in wording a Patient Protection and Affordable Care Act (PPACA) Amendment to ensure access to benefits for those suffering from Black Lung Disease.[111] Examination of a series of amendments to the 1969 Federal Coal Mine Health and Safety Act revealed a "congressional seesaw" of sorts of which the latest amendment, inserted in the PPACA, restored the rights of eligible survivors to continue to receive benefits after a miner's death without having to file a new claim for benefits.[112] The court found that the amendment was not ambiguous but used extratextual

104. *See, e.g.*, Madden v. Cowen & Co., 576 F.3d 957, 971 (9th Cir. 2009) (pointing, in dicta, to the fact that legislative history is belied by the "public debate" which seemingly points the other way).

105. *See, e.g.*, Lomando v. United States, 667 F.3d 363, 387 (3d Cir. 2011); B & G Constr. Co. v. Dir., Office of Workers' Comp. Programs, 662 F.3d 233, 251 n.19 (3d Cir. 2011); Gonzales v. City of Castle Rock, 366 F.3d 1093, 1107–08 (10th Cir. 2004) (en banc), *rev'd*, 545 U.S. 748 (2005).

106. *Lomando*, 667 F.3d at 387.

107. *Id.* at 385.

108. *Id.* at 385–87.

109. *Id.* at 387 (alteration in original).

110. *Id.*

111. B & G Constr. Co. v. Dir., Office of Workers' Comp. Programs, 662 F.3d 233, 244–45, 250–51, 251 n.19 (3d Cir. 2011).

112. *Id.* at 245, 253.

sources to support the reading of Congress's intent to allow the claim.[113] The court noted there is very little legislative history on the PPACA amendment and continued to search for clues that ranged from the title of the amendment, to a post-enactment floor statement, to a press release from Senator Byrd's office (the amendment's sponsor).[114] The press release squarely addressed the issue before the court, stating in part, "For widows of coal miners who [sic] spouses suffered from totally-disabling black lung disease and were collecting benefits, they would no longer have to reapply to retain their modest benefits."[115]

Both of these examples couch the press release in terms of expressing clues to the "intent" of Congress. However, as explained above, Rostrum focuses on the metaphorical intent of any legislation, or the spin as captured by its marketing. Perhaps the best example of judicial examination of the principle embodied by Rostrum is captured in a Tenth Circuit case the Supreme Court overturned.[116] In *Gonzales v. City of Castle Rock*, a wife brought a Section 1983 claim against the city and its police officers after the officers refused to enforce a domestic abuse restraining order.[117] The interpretation question before the court was whether the language of the state law (specifically, the use of the word "shall") governing such restraining orders required mandatory enforcement by police, and thus created a due process entitlement to such enforcement.[118] The majority used legislative history to support its reading that the statute embodied a legislative intent to require enforcement of restraining orders. The majority specifically referred to two newspaper articles, one of which contained a pre-enactment quotation by a sponsor of the bill.[119] As quoted in the *Rocky Mountain News*, Representative Diana DeGette (D-CO) explained, "We've basically completely revamped domestic-violence laws in Colorado. . . . The message to citizens is 'We're taking a zero tolerance in this type of activity.' People who beat up their spouses, girlfriends or boyfriends are going to be punished swiftly and severely."[120] The Tenth Circuit reversed the district court's grant of a motion to dismiss and remanded the case.[121]

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113. *Id.* at 249–51.

114. *Id.* at 250–51.

115. *Id.* at 251 n.19 (alterations in original) (noting the provisions that Senator Byrd inserted into the bill).

116. Gonzales v. City of Castle Rock, 366 F.3d 1093 (10th Cir. 2004) (en banc), *rev'd*, 545 U.S. 748 (2005).

117. *Id.* at 1096–98.

118. *Id.* at 1104–05.

119. *See id.* at 1107–08 (citing John Sanko, *Stopping Domestic Violence: Lawmakers Take Approach of Zero Tolerance as They Support Bill, Revamp Laws*, ROCKY MTN. NEWS, May 15, 1994, at 5A).

120. Sanko, *supra* note 119, at 5A.

121. *Gonzales*, 366 F.3d at 1118.

What makes the *Gonzales* case a particularly compelling example is that the Supreme Court reversed the Tenth Circuit.[122] Justice Scalia wrote for the majority and found that the use of the word "shall" did not create a mandatory enforcement duty.[123] Justice Scalia derided the floor statement used in support of the legislature's intent to create a mandatory enforcement for restraining orders, but he did not mention the press statements.[124]

Justice John Paul Stevens and Justice Ruth Bader Ginsburg dissented from this interpretation of Colorado law, seemingly mindful of both the need for deference to the federal court's jurisdiction over Colorado on issues of interpretation of Colorado law, as well as the undeniable policy debates that spurred the passage of this particular Colorado law.[125] While Stevens and Ginsburg also did not mention the press statements, they wove together law review articles, policy studies, and legislative and other political history of the pre-enactment period to show the loud policy discussion that mandated enforcement of restraining orders in the domestic abuse arena.[126] The dissent harshly criticized the majority for giving "short shrift" to this political and cultural history and discrediting how political and cultural history informs the reading of the language at issue.[127]

While Justices Scalia and Stevens seem to continue to debate their long-standing differing views on interpretation—that is, whether or not legislative history and other extrinsic evidence can ever capture a legislature's purpose or intent—Rostrum might break their impasse.

Here is how: By using the sponsor's statement to the press about the law providing zero tolerance, the Court can understand that the legislators presented the public with this legislation as a new turn for the state—one of mandatory enforcement in domestic violence restraining order cases. Because the sponsor "sold" the legislation as such, the sponsor is accountable for such policy to the constituents. The more examples of such a marketing spin (or other public statements to similar effect), the easier the Court can apply Rostrum. If the public feels strongly that law enforcement needs to retain discretion in these matters, the public is now

122. *See* Town of Castle Rock v. Gonzales, 545 U.S. 748, 769 (2005). Two other recent Supreme Court cases point to press releases and public official press statements as evidence of meaning as well. *See, e.g.*, AT&T v. Concepcion, 131 S. Ct. 1740 (2011) (Breyer, J., dissenting) (pointing to a press release as evidence of meaning, but from 1925); Kennedy v. Louisiana, 554 U.S. 407, 452–54 (2008) (Alito, J., dissenting) (examining newspaper quotations and press releases from state legislators regarding pending legislation in their states to capture "indicia of a national consensus" with respect to child rape death penalty laws).

123. *Gonzales*, 545 U.S. at 750, 760–61.

124. *Id.* at 759–60 (discussing the Court of Appeals' use of the legislative history as "sheer hyperbole").

125. *Id.* at 774–76 (Stevens, J., dissenting).

126. *Id.* at 780–84.

127. *Id.* at 779.

able to voice that sentiment through the electoral process. Because of that accountability mechanism, i.e., the vote, the Court should approach any question or ambiguity about whether the statute creates a mandatory enforcement scheme with deference toward the ongoing relationship and communication between the voters and the legislators. The Court need not decipher any underlying purpose or intent on behalf of the legislature; it merely needs to point to the public debate as presented in the contemporaneous media accounts (and *only* that public debate clearly attributable to the lawmakers relevant to the drafting and passage of the particular law at issue). By deferring to the public presentation of the law, the Court remains institutionally deferential to the legislature on policy matters, while at the same time incentivizing a more transparent transmission of the relevant policy discussion to the people.

IV. INTEGRATING THE ROSTRUM PRINCIPLE INTO THE CURRENT LEGAL SYSTEM

Rostrum gives the Court a tool to apply in order to examine the public debate and guide interpretation. Of course, Rostrum has boundaries. First, Rostrum is limited to public statements by lawmakers, and only those public statements on the record.[128] This includes appearances on television shows such as *Meet the Press* or other cable news network shows, the legislator's own press releases, Facebook accounts and Twitter postings, and any written op-eds or other direct quotes in print media.

By its very nature, Rostrum is a doctrine in its infancy. It is not applicable to all interpretive questions because there are interpretive issues surrounding laws and language that do not generate public debate in social and other forms of popular media. Also, the goal of Rostrum is to capture the public understanding of the law at the time of its passage, so its focus is on how the legislators presented the legislation in the affirmative to voters. Negative spin and partisan attacks are less relevant to interpreting ambiguous text. They play no role in Rostrum directly, though they too set the agenda of the public debate and might very well have radiating effects as to how the legislation is presented affirmatively.

At this point, Rostrum is primarily conceived on the federal legislation stage. I am currently assessing different state approaches to the legislative process and to legislative history, as well as the effect of multistate coordination of legislative agendas to explore how Rostrum might apply in the states.

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128. Courts are, and should remain, wary of using newspaper accounts to portray legislative intent; however, most of the discussion about limiting such use centers on accounts written by journalists, or opinion pieces, as opposed to actual quotations by legislators merely reproduced in the press. *See, e.g.*, *In re* Jason W., 837 A.2d 168, 177–78 (Md. 2003) (reviewing both state and federal courts that are cautious in their use of contemporaneous newspaper accounts to establish legislative intent).

A. *Incentives*

There are several incentives that Rostrum could provide as an accepted doctrine of interpretation. First, it encourages legislators to communicate to the electorate about policy against a background of judicial monitoring. Ideally, the Court's monitoring function is subtle; the Court merely intends to hold the legislature to its public statements. But the monitoring plays a vital role in restoring trust between the electorate and the legislative branch and ultimately strengthens separation of powers.[129] Any communication puts voters on proper notice about legislation and policy as well, which has normative benefits beyond separation of powers.[130] Finally, through describing and categorizing Rostrum as a principle, the Court is provided a framework for using public statements and public debate which plays a crucial contextualizing role in interpretation already.

The Rostrum Principle might create the following incentives for Congress: either (1) make Congress less likely to engage in misleading spin of pending legislation because of the awareness that the Court will hold the legislation accountable to the spin, or (2) ignite even more political pandering and spin in the hopes of laying groundwork for eventual interpretation issues. Taking each of these possible incentives in turn, the Rostrum Principle upholds its normative goal of fostering meaningful and accountable public debate.

First, application of Rostrum will sound a warning to legislators that their public comments to various media outlets matter and could influence later interpretive questions. This merely curbs the lobbyists' ability to spin legislation through elected officials.[131] If the application of Rostrum chills public officials' speech in popular and social media, citizens might have to work harder to ascertain how their public officials represent them.[132]

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129. *See* D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 719–21 (2013); *see also* Ethan J. Leib, David L. Ponet & Michael Serota, *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91, 92 (2013) ("Part of the appeal of conceiving the political relationship between representative and represented in fiduciary terms is that it regards politics in more realistic and textured ways—as a constellation of power relationships in a web of trust and vulnerability—rather than as a mere social contract no one ever signed.").

130. *See supra* note 97 and accompanying text.

131. *See* JOHN A. QUELCH & KATHERINE E. JOCZ, GREATER GOOD: HOW GOOD MARKETING MAKES FOR BETTER DEMOCRACY 175, 273–74 (2007). Clearly, Rostrum does nothing to curb unelected persons spouting talking points and spin, but the voters are on more notice that such punditry is based on special interests, whereas elected officials carry with them a veneer of public interest goals, which renders their spin much more dangerous.

132. *See* Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 CALIF. L. REV. 919, 936 (1989) ("If, as the economic model of legislation suggests, statutes are nothing more than memorializations of bargains struck by (unelected) interest groups, then enforcing the legislature's will means nothing more than enforcing the will of the relevant interest groups. If so, the force of the positivistic premise is considerably weakened; after all, why should we prefer the will of a group of self-interested pressure groups to the will of judges?"); *see also* John O. McGinnis & Charles W. Mulaney, *Judging Facts Like Law*, 25 CONST. COMMENT. 69, 130 (2008) (stating that courts should

However unlikely it is that the average voter will engage in research of the Congressional Record and the corresponding absence of debate that might occur if media is somehow weakened, applying Rostrum is arguably better than allowing unaccountable statements to set the terms of any public debate.

Alternatively, scholars could argue that the use of Rostrum will only make the current echo chamber louder as special interest groups fight to have their spin encoded in the public debate for future litigation purposes.[133] While a valid fear, and one that could potentially skew the public debate based on access to media (assuming that those interests with the most money continue to enjoy the most access to media and thus have the loudest voice), there is the corresponding consequence that the Court will echo the spin.[134] At the very least, Rostrum encourages public debate to center on the actual policy discussion rather than on a false public benefit that cloaks a private interest. In the midst of ambiguity between the stated public interest and the unstated private benefit, the Court will give preference to the stated public interest.[135] In other words, an elected official must take care to market pending legislation exactly as the elected official intends the judiciary to interpret the legislation.[136]

B. *Possible Stumbling Blocks*

There are some problems that might arise with the application of the Rostrum Principle. The first problem is a practical one: It might make interpretation messy at first, as litigants struggle to organize and cite to public statements. There is little reason to scrap the whole enterprise however, as courts have shown themselves capable of sorting through such evidence even though scholars have long made the same arguments against legislative history.[137]

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be able to make factual findings regardless of whether Congress has expressly made findings).

133. *See* Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 412 (2004) ("Without transparency, agents gain less from adopting positions that resonate with immediate popular passions, so transparency may exacerbate the effects of decisionmaking pathologies that sometimes grip mobilized publics."); *see also* Schacter, *supra* note 44, at 145 ("[A]ssigning a central place to media sources invites strategic behavior on the part of partisans in the initiative battle, such as attempts to fill the airwaves and the larger public record with characterizations and claims intended to influence subsequent judicial interpretation.").

134. *See* Staszewski, *supra* note 57, at 1290–92.

135. For more on this outcome and why it differs sharply from textualism, see Bell, *supra* note 34, at 20–23.

136. *See* Staszewski, *supra* note 57, at 1289 ("[D]eliberative accountability is premised on a conviction that it is more productive to debate the merits of particular policy choices, rather than trying to ascertain or impugn the motives of those who have taken a position.").

137. *See* Anita S. Krishnakumar, *The Anti-Messiness Principle in Statutory Interpretation*, 87 NOTRE DAME L. REV. 1465, 1512–13, 1516–17 (2012); *see also* Manning, *supra* note 26, at 732 ("[I]f a court relies on the legislative history for contextual information (not of the committee's or sponsor's own design), it must take care to verify the accuracy of the reporting; otherwise, judicial

Slightly more problematic for a Rostrum application is that the Principle rests on a possibly unrealistic premise, which assumes a direct relationship between the passage of any particular law and a subsequent vote on a lawmaker's retention.[138] This premise may very well be somewhat weak. However, we must assume that votes matter when designing institutional accountability. This is especially true when designing doctrine intended as democracy-forcing; it is imperative that such doctrines rest on the premise that most empowers the electorate to vote based on actual information.

The largest stumbling block to the Rostrum Principle is accounting for the necessary simplicity of a five minute appearance on the *Daily Show* or even the mere 140 characters allowed per tweet. In some ways, this stumbling block highlights the problem in itself: the fact that legislators speak in a different language to constituents in the public forum than they do when wearing their drafting hats.[139] In some cases this reality might make statements inapplicable to the interpretation process because they will not provide the electorate enough information to hold the legislator accountable for a certain interpretation. Unless the public statement evidences clear intent to change the law, one way to solve this problem is to narrowly use Rostrum.[140] In this way, Rostrum is similar to a clear statement rule, but instead pays attention to Congress's clear statements to the public. There are and will continue to be times where the clear public message is belied by the text, and that message, even if simplified by the constraints of the medium, can and should shed light on ambiguous textual language.

Finally, there is the problem of the temporal element of compromise, or the realities of the legislative process.[141] In other words, what if a legislator spins a law a certain way for a month but, in a last minute compromise, edits the text slightly?[142] Does Rostrum then undercut the legislative

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reliance on such legislative history would simply give committees or sponsors an indirect way to 'say what the law is' through a selectively tailored account of the historical background. This possibility, however, does not require the blanket exclusion of legislative history from judicial consideration. When a party prepares a brief in litigation or a professor writes a law review article, a court is capable of evaluating the persuasiveness of the author's contentions on the merits, even though that author may have an agenda.").

138. *See, e.g.*, ROBERT A. BERNSTEIN, ELECTIONS, REPRESENTATION, AND CONGRESSIONAL VOTING BEHAVIOR: THE MYTH OF CONSTITUENCY CONTROL 104–05 (1989).

139. Nourse, *supra* note 10, at 1128–29, 1131–33.

140. This is similar to the hypothetical application to the *Gonzales* case. *See supra* Part III; *see also* Schacter, *supra* note 44, at 128–30 (noting the risk of abuse when public statements are unclear).

141. *See, e.g.*, Vermeule, *supra* note 133, at 412–13 (discussing the need for bargaining in the legislative process and the concern that too much public accountability might chill flexibility in bargaining).

142. *See* McNollgast, *supra* note 62, at 7–8 (examining how signaling from legislators can aid the judiciary in following the twists and turns of coalition building in the legislative process).

process? Arguably, no. What Rostrum does is incentivize the legislator to keep constituents abreast of last minute changes. If the legislator does not want to enforce the last minute change then arguably the party that does will carry the burden to convey the change to the public.[143] If no legislators want the last minute change available to the public, then the Court merely curbs abusive process by not allowing such private drafting to stand. Moreover, Congress should record any last minute compromises in the Congressional Record. Rostrum is not necessarily proffered to trump the Congressional Record. Rather, the inclusion of the public sphere and the pre-enforcement marketing of legislation add more context to both the traditional legislative history as well as the ambiguous text.

CONCLUSION

The debate about whether courts should engage legislative history when interpreting statutes has come full circle. The Rostrum Principle, however, is not a mere expansion of legislative history in the traditional sense. Instead, the Rostrum Principle attempts to make the law on extratextual sources more coherent while also recasting such use as reflective of the presentation of the legislation in the public sphere. Operating under the premise that legislators are representatives of the people and are required to account to the people for their legislative acts, Rostrum merely enlarges the public sphere through which such accounting takes place. It is a legal fiction to enshrine the halls of Congress as the bastion of public debate while turning a blind eye to the parallel public debate on popular and social media. Because elected officials carry a veneer of trust, it is particularly misleading when an elected official uses the media to disseminate a public-regarding spin of legislation and then drafts or votes for something containing a hidden private benefit.

The Rostrum Principle creates a new institutional framework where the judicial practice of deferring to the cultural debate as expressed through the public sphere for purposes of interpreting ambiguity in turn has the normative effect of reinvigorating trust and restoring democratic engagement and accountability of the legislative process. Since the marketing of legislation in popular and social media changed dramatically in recent years, Rostrum is a tool that is just now coming into its own.

143. *See* Bell, *supra* note 34, at 83 ("Just as each legislator has a duty to make herself aware of the statutory text and its meaning in ordinary English usage, under the public justification approach each individual legislator also has a duty to make herself aware of the public justification offered for the statute, and to vote on the basis of that public justification. Accordingly, if the legislator votes for the statute without dissenting from the public justification, she should be viewed as constructively assenting to that public justification. The legislator who fails to familiarize herself with the public justification for a statute, or fails to challenge a public justification that she privately considers inaccurate, has not acquitted her duty as a legislator. Her actual views of the statute's rationale are irrelevant because she failed to meet her obligation to address the statute's public justification.").

More empirical work is needed to capture the relationship between particular legislative histories through popular media and resulting interpretive issues, as well as a greater understanding of the long-term institutional dynamics that might affect the application of the Rostrum Principle.