Incomprehensible!

A STUDY OF HOW OUR LEGAL SYSTEM ENCOURAGES INCOMPREHENSIBILITY, WHY IT MATTERS, AND WHAT WE CAN DO ABOUT IT

WENDY WAGNER
University of Texas School of Law

WITH
WILL WALKER
Harvard Divinity School

CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781107008472
DOI: 10.1017/9781139051774

First published 2019

Printed and bound in Great Britain by Clays Ltd, Elcograf S.p.A.

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data
NAMES: Wagner, Wendy (Wendy Elizabeth), author. | Walker, Will, 1995- author.
TITLE: Incomprehensible! : a study of how our legal system encourages incomprehensibility, why it matters, and what we can do about it / Wendy Wagner, University of Texas School of Law with Will Walker, Harvard Divinity School.
DESCRIPTION: Cambridge, United Kingdom ; New York, NY, USA : Cambridge University Press, 2019. | Includes bibliographical references and index.
IDENTIFIERS: LCCN 2018061719 | ISBN 9781107008472 (hardback : alk. paper) | ISBN 9781107400887 (pbk. : alk. paper)
SUBJECTS: LCSH: Law–United States–Interpretation and construction. | Law–United States–Language. | Comprehension. | Law reform–United States.
CLASSIFICATION: LCC KF425 .W34 2019 | DDC 349.73–dc23
LC record available at https://lccn.loc.gov/2018061719

ISBN 978-1-107-00847-2 Hardback
ISBN 978-1-107-40088-7 Paperback

7

Comprehension Asymmetries in Legislative Process

Congress surprised its critics in 2016 when it passed the long-awaited Lautenberg Chemical Reauthorization Act by a landslide.[1] The 300-page bill updated and modified an existing statutory program that had been in place for nearly 40 years – a program that by all accounts was dysfunctional.[2] Given longstanding partisan gridlock, Congress's success in passing this major legislation was hailed a major victory. Only 12 Representatives and 2 Senators voted against the bill in the Republican-dominated Congress.[3] Senator Vitter, the Republican co-sponsor of the bill, boasted after its passage: "This is an historic day on which we've come together to pass significant chemical safety legislation." Despite compromises, Vitter observed, the resulting measure is "a comprehensive, effective, thoughtful, bipartisan bill."[4] Nearly every stakeholder participating in the process similarly credited the final passage as a step in the right direction. By all accounts, this was a major (and rare) congressional step forward.

But behind the congratulations and backslapping lay a hidden secret: No one, including perhaps the sponsors and party leaders themselves, quite knew what this bipartisan bill actually contained. In fact, rather than the clear, clean progress Senator Vitter prophesied, the actual bill was a voluminous, complicated piece of legislation that is vastly more convoluted than the social problem it purports to address.[5]

In particular, the final Chemical Reauthorization Act adds hundreds of new pages to the US Code and will likely add at least that much girth to the appellate opinions as well. Definitions of certain key requirements are not only ambiguous but sometimes even contradictory – forcing the EPA to essentially build its own bill behind the bill.[6] The steps and requirements mandated by the Act are labyrinthine and will likely tie the authorizing agency, the EPA, up for years.[7] What's more, even if the EPA can make sense of some of the provisions, those interpretations will be challenged through the dozens of attachment points loaded into the law that allow aggrieved stakeholders to block progress.[8] In other words, this legislative "triumph" was, in large part, a pyrrhic victory.

But how could this be? How could a bill pass through both houses of Congress and the Oval Office without anyone calling out its clear incoherence? In this chapter, we explore the phenomenon of incomprehensible legislation. Consistent with our model, we consider only a small slice of legislative activity – major legislation in which the party leaders enjoy considerable comprehension advantages relative to their audience (identified here as other voting members of Congress) and are more eager to get something through than to dedicate effort (or take risks) associated with ensuring that the bill is comprehensible to their colleagues. These leaders best understand a bill's policy vision and its drafting history, even while they might encounter challenges in understanding the bill text themselves. Indeed, in this slice of congressional activity, the primary motivation of our bill-drafters is to get a major law passed that is acceptable to their own political party and as many constituents as possible. The fact that the final bill may be convoluted or might even be incomprehensible is not a fatal flaw. In fact, as strange as it may sound, in a subset of legislative processes it is sometimes easier to pass laws when nobody understands what's in them.

For a subset of important and potentially deadlocked legislation, then, incomprehensibility may provide a magic bullet. Powerful congressional leaders – "speakers" – may find few impediments and perhaps even some benefits to putting together bills that are, or quickly become (in satisficing constituencies and other members), so opaque or convoluted that they are almost impenetrable. Voting members might be encouraged to toe the party line, a bargain they're willing to make if they can't figure out the general contents of the bill in the first place. Some constituents may also be pacified by certain provisions that appeal to their interests; when the bill is otherwise incoherent, these groups may rationally forgo investing added effort to understand the entirety of the bill since they have their "goodie" buried on page 320.

In the first part of this chapter, we examine evidence for the existence of at least some body of blind-lawmaking or "incomprehensible" legislation governing particularly important issues. We also consider whether there are comprehension asymmetries between speakers and their audiences in this subset of cases. This analysis then sets up our investigation of legislative process. There are multiple causes of incomprehensible legislation, but – consistent with this book – we explore how our design of institutional processes may be a potentially important contributor. In a third section, we examine some of the consequences of a legislative system that sometimes tolerates and sometimes rewards incomprehensibility. And, finally, as the chapter closes, we put forth some preliminary suggestions for counteracting those processes and rules that may be egging this phenomenon along.

Since congressional processes are highly complex and poorly understood, we necessarily make a number of simplifying assumptions in the analysis that follows. Yet there are enough independent sightings of comprehension asymmetries in the literature on legislative process to indicate that this area is worthy of further exploration. While our

simplifying models and assumptions may ultimately not be the best way to approach this topic, the primary aim is to start a conversation about the issue.

I THE PROBLEM OF INCOMPREHENSIBLE LAWS

The precise categorization of a law as "incomprehensible" is necessarily fuzzy, but the fact that some major laws fall into this incomprehensible category is beyond question. Remember that what makes something "incomprehensible" in our model is determined by what the target audience can reasonably understand with the available support, time, and resources. So, applied to this setting, an incomprehensible law is one in which the majority of rank and file members of Congress cannot gain a reasonable understanding of the major features of a bill that they are asked to vote on. Incomprehensibility is always contextual and depends on the processing capabilities of the intended audience at the time of the conversation.

Concerns about a subset of "incomprehensible" laws emerging from Congress have been fodder for comedians for decades. A cartoon, sketched back in 1947 by George Lichty, sets the stage. See Figure 7.1.

But, humor aside, what is the hard evidence that legislation is being passed by members of Congress who could not make sense of the most important basic features of the bill at the time of voting?

A *Specific Accounts of Incomprehensible Laws*

The most systematic research, which draws from original interviews, case studies, and quantitative analyses of passed legislation, comes from James Curry's award-winning book, *Legislating in the Dark*. Curry uses these sources to identify dozens of laws that – for our purposes – are "incomprehensible." (The most determined rank-and-file member has little chance of making sense of the content of these laws, even at the most general level.) As Speaker of the House, Boehner conceded in the course of deliberations over an appropriations bill, "Here we are with 1,100 pages – 1,100 pages not one member of this body has read. Not one. There may be some staffer over in the Appropriations Committee that read all of this last night – I don't know how you could read 1,100 pages between midnight and now. Not one member has read this."[9]

Legal scholars reinforce Curry's findings with additional examples of statutes that are so flawed that it appears few members reviewed or understood the laws at the time of passage. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, for example, was widely hailed as a legislative mess despite the fact that it was ultimately passed by large margins in both the House and Senate.[10] As Jean Braucher observed, "[t]he sheer complexity of the [resulting legislative] changes made the law hard to understand and its effects difficult to predict."[11] For instance, the final bill included redundant notices to debtors that strongly suggested the

FIGURE 7.1 Poking Fun at Congress's Incomprehensible Lawmaking
George Lichty, "Grin and Bear It," *Los Angeles Times*, Mar. 12, 1947 Used with permission from Grin and Bear it©1947 King Features Syndicate, Inc.

drafters of the legislation were not following out or fine-tuning their new legislative requirements.[12] The statute was also visibly in disarray. "[T]ypos, sloppy choices of words, hanging paragraphs, and inconsistences [fill the pages]. Worse, there are largely pointless but burdensome new requirements, overlapping layers of screening, mounds of new paperwork, and structural incoherence."[13] Bankruptcy scholars seem to be unanimous in concluding that "the bill's poor drafting will require judges to exercise their judgment simply in trying to determine what it means."[14] All accounts place responsibility for the incoherence with the industry that drafted the bill, yet sponsors and voting members passed these defects into national legislation.

Still worse in terms of legislative incomprehensibility are the so-called omnibus bills, which amalgamate dozens, or even hundreds, of *different* laws into one single bill. In "Uneasy Riders," Brannon Denning and Brooks Smith provide a particularly vivid account of the size of one omnibus bill and the members' reactions to it. In this particular case, the final legislation combined 8 spending bills together, selecting out from 13 that Congress had been unable to pass. The bill was a "3,825 page, sixteen inch tall, forty pound" law, which was changed and modified right up to the final vote.[15] In fact, "a final draft of the behemoth was not available until the middle of the day the House was to vote, and that final version 'include[d] handwritten notes in the margin, e-mail printouts inserted into the bill, and misnumbered or unnumbered pages.'"[16] As Senator Byrd exclaimed, "Only God knows what's in the monstrosity."[17]

Denning and Smith, however, conclude that "[o]n the whole … individual members of Congress tended to care not so much what others managed to insert, as long as their own pet causes made it in … Thus most members held their noses and voted for it, even as they complained that Congress did too much, too quickly, and without fair warning."[18] In other words, rather than crafting a coherent bill, oriented toward changing a concrete feature of the American legislative landscape, lawmakers threw together "whatever worked," focusing on achieving individual political aims over the construction of a sensible and comprehensible law.

More general accounts of the processes surrounding key legislation underscore the limited effort dedicated to ensuring the legislation is reasonably comprehensible to fellow members. Rank and file members of the ruling Republican party in the 115th Congress – a party that enjoys trifecta control of all political branches – complain about the party leaders "jam[ming]" legislation through[19] and "coming up with a proposal behind closed doors" only to "spring it on skeptical members."[20] The rushed passage of the 400-plus page tax bill on November 16, 2017, provides a case in point. [21] As John Cassidy writes, "In the days of yore, whenever a major legislative proposal was put forward, each chamber would spend a good deal of time discussing and dissecting it. Hearings would be scheduled; experts would be summoned." "But … [in the case of the 2017 tax bill, powerful sponsors] … introduced their tax bill, which is more than four hundred pages long, [only two weeks before the final vote]. The chairman of the Senate Finance Committee … released his version, which is equally long and complicated, [two days before the vote] … This pace is more akin to downhill skiing than to traditional legislating."[22]

Perhaps the strongest evidence of incomprehensible laws, however, comes from those who are closest to the text – the federal judiciary. D.C. Circuit Judge Harry Edwards lamented that the judicial system is "choking, not on statutes in general, but on ambiguous and internally inconsistent statutes."[23] This legislative incoherence in turn prompts "'disagreement among different judges and panels" with resulting "inconsistency and unpredictability."[24] Writing more than 50 years ago, Judge Friendly observed this same "incoherent legislative" problem with laws

that were "defective" in offering useful guidance.[25] Some of these were laws "in which the legislature has succeeded in literally saying something it probably did not mean."[26]

Even judges who are explicitly committed to extracting meaning only from the "plain text" of a statute occasionally acknowledge the problem of incoherence. For example, while Justice Scalia was on the D.C. Circuit, he remarked that the "Little Tucker Act claims were 'so imprecisely drawn' that '[i]ts language could reasonably be read . . . [in] six quite different ways."[27]

Justice Ginsberg dedicated several articles to documenting the "foggy statute problem" in which "Congress has given us guidance that is defective in one way or another."[28] She provides "a brief, illustrative catalogue" of laws that are defective in ways that were fully preventable. One set of laws, for example, used wording that "made Congress's will unknowable" because the text admitted two contrasting interpretations.[29] As Justice Ginsburg notes, "Detecting the will of the legislature . . . time and time again perplexes even the most restrained judicial mind. Imprecision and ambiguity mar too many federal statutes."[30]

B *Explanations for Incomprehensible Lawmaking*

So, if everyone is aware that a subset of legislation passed by Congress is incomprehensible, how is it that these laws continue to be passed? A search through the academic literature and judicial opinions provides several overlapping hypotheses that begin to answer this question.

Curry's targeted study, *Legislating in the Dark*, offers the most complete account both of the incomprehensibility problem and its likely causes. Indeed, our work here draws heavily from Curry's study. His central finding is that "meaningful and pervasive inequalities exist among members of Congress regarding the information they possess during the legislative process," and "these inequalities affect the balance of power and influence in the House."[31] "[T]hose holding formal leadership positions – party leaders and committee chairs – have extensive information about the legislation being considered and political dynamics surrounding the legislation." Rank-and-file members of Congress, by contrast, "have limited resources and find it very difficult to become informed about most of the legislation being considered at any time."[32] He identified "both party leaders and committee chairs" as using "tactics that aggravate the informational inequalities, making their rank and file even more dependent on them for information."[33]

In their pathbreaking two-part study, Abbe Gluck and Lisa Bressman place some of these behaviors into larger legal context and underscore the "glaring omission in the theoretical debates about statutory interpretation . . . [namely,] there has been little discussion of Congress's obligations [to pass laws capable of reasonable interpretation]."[34] Their own investigation into congressional practices exposes the ways that Congress's "deep internal structural fragmentation" presents

impediments to Congress's ability to pass laws that are consistently coherent and comprehensible.[35]

Judges similarly chalk up Congress's deficiencies to both resource limits and fragmentation in legislative processes. Justice Ginsburg, for example, concludes that "Congress . . . bears considerable responsibility for both federal court creativity, and federal case generation. The will of the national legislature is too often expressed in commands that are unclear, imprecise, or gap-ridden."[36] Among the underlying problems, according to the judges, is the lack of adequate deliberation on some laws. Judge Friendly, for example, noted that members have a finite time [to legislate], which makes it difficult if not impossible for them to seriously engage in legislative details for more complicated legislation.[37]

The analysis that follows is thus not blazing new trails. Instead, we simply weave this existing work together through a slightly different conceptual model – that of comprehension asymmetries.

C *Limitation of the Analysis*

Before proceeding, it is important to spotlight one difficult issue we explicitly bracket in the analysis that follows – the question of *when* an individual law is in fact incomprehensible to rank-and-file members on one or more given issues. Reasonable observers might disagree, for example, about whether the Affordable Care Act (commonly referred to as "Obamacare")[38] and the Dodd Frank Act[39] are examples of incomprehensible laws. Some might argue that these particular bills should *not* be classified as incomprehensible. Despite the fact that each of the 2010 statutes dealt with complicated issues, they were subject to considerable deliberations. On the other hand, it is also true that both bills contain some exceedingly complex, but important, provisions that may not have been adequately explained to rank-and-file members.[40]

Fortunately, we do not need to wade into this taxonomic swamp. Our singular focus here is on the incentives major actors have to communicate cooperatively in legislative decision-making. Whether or the extent to which a particular law is incomprehensible goes beyond the scope of this project. We thus consider only the *why* question, without attempting to develop a detailed inventory of which laws are incomprehensible and which laws are not.

II COMPREHENSION ASYMMETRIES BETWEEN SPEAKER AND AUDIENCE

Our attention now turns to the question of whether there are institutional design issues that allow, or in fact encourage, incomprehensible laws to be passed. Our first pass at this question would seem to suggest that institutional design is not to blame. A basic civics course reminds us that the intense pressures on members of Congress

for demonstrating high levels of productivity in policymaking serve to discipline lapses in legislative professionalism. Congressmen who sponsor and/or vote in favor of convoluted legislation are supposed to be stigmatized for endorsing bills that nobody can understand. Moreover, and particularly in the current partisan climate, bills that are incoherent seem ripe for attack. Indeed, as the vignettes in the previous section reveal, members do publicize the convoluted nature of bills when mounting their opposition to them. It seems likely that the powerful constituents who lobby for legislation would not be happy with incoherent laws either. These imprecise bills are risky and raise the possibility that some promises may not be kept during the inevitable implementation battles that follow.

Yet, as we have also seen, the cumulative penalties for incomprehensible laws do not always outweigh the benefits. Throughout the rest of this chapter, we focus on several structural incentives built into our institutional design that help explain the occasional entrance of an incomprehensible law onto the legislative scene. While these institutional processes, standing alone, are certainly not the sole cause of this problem, without question they contribute to it.

We begin this section by exploring at a high altitude the background incentives of our legislative speakers and audiences with respect to cooperative communication. The designated speaker within our model is the powerful chair or party leader (*not* the Speaker of the House) who serves as the promoter of a bill. On the audience side, while there are a number of potential target audiences, we consider in our analysis only the rank-and-file members of Congress. There are of course many audiences for legislation – agencies, regulated parties, lobbyists, courts, and sometimes the general public. However, while each audience is important (and susceptible to comprehension asymmetries), we focus on voting members as the most important, given their obviously pivotal role in voting on the legislation.

In our orientation below, we consider whether the speaker does enjoy an advantage in processing the meaning of complicated legislative and related information as compared to the rank-and-file member. We also consider whether the speaker is motivated to ensure that the rank-and-file member understands the nature and nuances of his proposed law. If there are comprehension asymmetries between speaker and audience and the speaker is not inclined to communicate cooperatively, then Congress's legislative processes will need to be designed to correct this problem.

A *Rank-and-File Members as Audience*

In an essay entitled "Due Process of Lawmaking," published nearly 50 years ago, Hans Linde laid out the ideal world of legislative deliberations from the standpoint of the rank-and-file audience of congressmen. In this ideal world "there is no place for a vote on final passage by members who have never read even a summary of the bill, let alone a committee report or a resume of the factual document."[41]

"A member who never attends the committee meetings [would] at least examine the record of evidence before casting a vote, or be told about it, and [would] certainly never vote by proxy."[42] He imagined that "[t]hese kinds of demands are implicit in due process, if lawmakers are really bound to a rule that laws must be made as rational means toward some agreed purpose."[43]

However, Linde was quick to note how congressional reality fell far short of this due process ideal. In contrast to this romanticized account, in 1976 "[a] bill need not be explained by its sponsor on the introduction – it may, indeed be introduced . . . with the sponsor's candid admission that he does not understand it."[44] Additionally, "[a] bill need not declare any purpose nor recite any legislative findings. It may be enacted by members whose minds are wholly closed to reasoned argument because of prior commitment to one point of view, ignorance and misinformation, lack of interest and lack of time, or simply because of absence of any opportunity for inquiry and debate."[45]

How could the legislative process tolerate uninformed voting? A close analysis of the rank-and-file voting member's available resources (our audience) supplies at least a partial answer. As our more specific itemization of the evidence reveals in the pages that follow, for rank-and-file members, the costs of understanding complex bills are exceedingly high. At the same time, most members are badly strapped for the resources required for effective deliberation. In other words: Congressmen are limited in their capacities to process all the information being thrown at them and aren't provided any real incentive structure for making sure they digest all he relevant information in a bill.

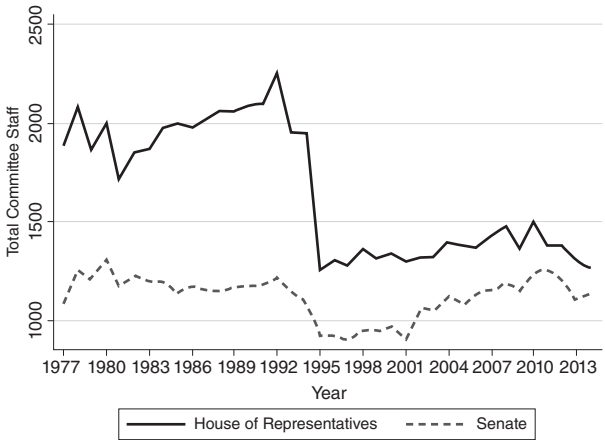


FIGURE 7.2 House vs. Senate Committee Staff, 1977–2014

Russell W. Mills and Jennifer L. Selin, "Don't Sweat the Details! Enhancing Congressional Committee Expertise Through the Use of Detailees," 42 *Legislative Studies Quarterly* 611, 615 (2017) © Used with permission from John Wiley & Sons

Costs of Processing. Consider first the resource limitations of rank-and-file members with respect to conducting this important legislative work. Although the number of staff provided to individual members has increased slightly over the last 20 years, most of this added staff is channeled to district offices to serve the home community and is not assigned to making sense of the bills coming down the pike. At the same time, congressional staff allocated to assist with committee work is dropping. See Figure 7.2.[46]

To make matters worse, a 2017 study reports that "[p]ay for committee positions such as staff directors and counsels have fallen by as much as 20%, leading to high turnover."[47] Combined "[f]actors such as long hours, relatively low pay, and decreasing benefits have resulted in an exodus of committee staff from Capitol Hill," leading to "an overall loss of legislative capacity and expertise, as senior committee staffers who possess greater policy expertise and institutional memory are more likely to leave."[48]

The support system for rank-and-file member deliberation, in other words, has decreased over time. At the same time, the size and complexity of the bills that members must review are increasing.[49] Although the bills ultimately enacted are dropping in number, the size of the bills is sometimes nearly threefold higher today as compared to the 1960s.[50] See Figure 7.3.[51]

It follows, then, that as the resources available to members for legislative work decline and the size of the legislative workload increases, the time and attention available to members for scrutinizing a bill drops. Indeed, in view of these developments, some congressional scholars opine that Congress is "elect[ing] to 'lobotomize' its internal committee and support agency (e.g., GAO, CBO, etc.) capacity in favor of allocating more staff to leadership and district offices to support reelection goals."[52]

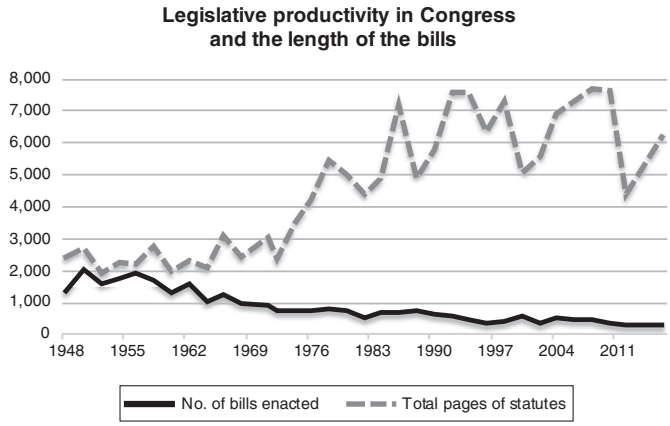


FIGURE 7.3 Legislative Productivity in Congress and the Length of the Bills over Time
Created based on the dataset published on Brookings Institution's website, Vital Statistics on Congress, ch. 6 (May 2018), available at www.brookings.edu/multi-chapter-report/vital-statistics-on-congress/#cancel

These resource limitations also provide a partial explanation for why members and their staff rarely read or discuss the text of bills themselves. Consistent with Linde's observations nearly half a century ago, congressional staff concede that "Members don't read text. Most committee staff don't read text. Everyone else is working off [the section-by-section] summaries [in the legislative history] . . . The very best members don't even read the text, they all just read summaries."[53] In effect, given the practical restrictions of being in Congress today, congressmen and their staffs just don't have enough time to read all the material in the legislation they're passing.

Incentives to Invest in Understanding Bills. But what of the benefits to individual members for doing this difficult processing work? Won't members who take on incomprehensible laws be regarded as heroes by their constituents? Won't there be strong incentives for a few members to read and process information in order to maintain power?

In today's highly partisan Congress, however, this good Samaritan activity seems unlikely. Remember our speaker – the advocate for a bill – is a powerful member of Congress. In cases in which the bill is sponsored by a rank-and-file member's own party, the benefits to pointing out the flaws, particularly in a fragile, complicated bill, are likely low. Party loyalty is considered essential to congressional survival.[54] Moreover, when the member is not involved in the drafting process, well-intended scrutiny of the bill may be regarded as hostile rather than collegial. Party leaders may not appreciate efforts to document legislative incoherence, which in turn requires readjustments that may not survive constituent pressures. There would thus seem – in general – to be few benefits associated with sticking one's neck out within one's party to offer improvements, particularly those of the legal and technical nature.

But what if a congressman (and her party) opposes the bill? Wouldn't that be a perfect opportunity to point out incoherence? Indeed, as we've seen, the opposition is quick to point out when legislation is incomprehensible. But at the same time, we've also observed how this opposition is not always (or perhaps often) successful.[55] Even when buoyed with considerable media attention, some of these major incomprehensible laws manage to pass both houses nevertheless. It remains to be seen why this happens. Perhaps pointing out the incomprehensibility of a bill, standing alone, isn't enough to doom it in the political process. The losing party may even be poised to capitalize on the inevitable (and predicted) problems that arise post-enactment once an incomprehensible law is passed. By deploying these "I told you so" strategies, members may ultimately gain the political high ground, even when they lose the vote.[56]

Opportunity Costs. Up until now we have assumed a best case – namely that rank-and-file members will invest a reasonable amount of effort into understanding bills and contribute meaningfully to legislative deliberations. Yet in truth, at least some

rank-and-file members may favor constituency services and reelection campaigns over their legislative responsibilities.[57] If the rank-and-file behave this way, the problem may not be just deficient speaker incentives, but also deficient audience incentives. We return to these audience incentives in our reform. But for the analysis that follows, we assume rank-and-file members *will* make a reasonable effort to understand the bills, engage in the legislative process vigorously, and vote responsibly. Since this best-case assumption presents the greatest challenge to our argument, it provides a way to further simplify our analysis.

Summary. In brief, the analysis so far has underscored the limited benefits and high costs to an individual member (and, to some extent, the institution of Congress itself) to scrutinize legislation for comprehensibility and coherence. As a result, our audience will generally have a limited capacity to process and understand complicated bills as well as face few incentives to do this resource-intensive work.

However, not all congressional audiences are created equally. In particular, when a bill goes through committee, the benefits to the rank-and-file member on that committee for scrutinizing the bill increase, sometimes significantly. Members of the legislative committee may be more motivated to invest resources into making sense of a bill because they bear some responsibility for ensuring the quality of the final product. (We discuss later how changing practices in Congress appear to be making this role less important, however.)

Together the aggregate evidence nevertheless supports the unfortunate fact that rank-and-file congressional members are "receiving one-sided information to a greater degree and are spending less time learning about potential solutions" relative to the past.[58] This disparity of resources and information processing does not bode well in general, but suggests particular worries for complicated bills, especially those that do not originate in a single committee.

B *Powerful Party Leaders and Sponsors as Speaker*

The speaker (again, *not* the Speaker of the House) in our analysis is a powerful party leader or chair supporting the bill and/or drafting it. These speakers enjoy considerable advantages in processing the substance of complex bills relative to other members, or at least in understanding some of the policy choices that lie behind the bill. As "managers" of the bill, speakers also have a fuller appreciation of the steps (and possibilities for slippage) involved in drafting the bill text that may not be evident to rank-and-file.[59] On the benefits side, such speakers stand to reap – in a subset of legislative settings – benefits to bill passage, even in cases where the law is incomprehensible at the time of passage and remains unintelligible.

Superior Processing Capacity. With respect to processing capabilities, our speakers have access to vastly more resources for processing information in a bill as compared to the normal rank-and-file members of Congress. Some of this superior capability is due to the speaker's role as bill-drafter or promoter, which places him in a superior position with respect to crafting the policy vision behind the legislation.[60]

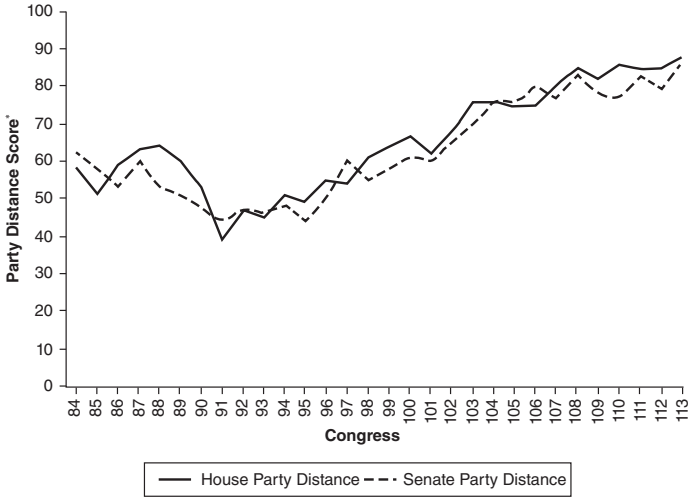
Equally important is the much greater endowment of congressional staff and resources that these powerful members enjoy relative to rank-and-file members. While leaders have always enjoyed greater staff and resources compared to rank-and-file congressional members, the centralization of resources to a few, limited members has grown severalfold over the last few decades. In a 2010 study, the Congressional Research Service (CRS) found that staff working for leadership rose by more than 250 to 340 percent between 1979 and 2009 as compared to much more modest increases for rank-and-file members, who place most of the increased staff in district offices.[61]

Limited Benefits to Cooperative Communication in Some Legislative Settings. However, speakers do not merely enjoy greater resources to assess the comprehensibility of the bills relative to members; they also enjoy periodic benefits from shepherding incomprehensible legislation through the legislative process.

First and foremost, in today's legislative climate getting *any* legislation through the process is a triumph over "congressional gridlock." Leaders can tout the virtues of a passed bill, particularly for important topics such as health care, chemical regulation, or tax reform. Moreover, whether a particular passed law is "incomprehensible" is difficult to measure. As just discussed, critics must invest considerable energies in identifying incoherent features and might find it difficult to make this particular problem newsworthy. The public, for example, may not be concerned (and could even be relieved) to learn that an unwieldy bill does little more than kick the controversy down the road to agencies and courts. Incoherent laws may also offer some resourceful stakeholders the ability to wage war against implementing agencies, where they may enjoy greater power.[62]

Second, incomprehensible laws sometimes make it easier for leaders to keep the party together.[63] This unity is particularly necessary as a result of the well-documented trend of increasing polarization and partisanship within Congress. As Thomas Mann and Norman Ornstein explain, "The parties have become [increasingly] ideologically polarized, tribalized, and strategically partisan"[64] and can become "virulently adversarial" in many of their dealings.[65] See Figure 7.4. Incomprehensible laws, then, provide a way to keep members in line with the political party.

In *Legislating in the Dark*, Curry traces in detail the ways that information costs (which in large part consist of processing costs) allow congressional leaders to retain control over rank-and-file members. These leaders can craft the bills on behalf of their party, but establish processes – limited in time and extremely high in



*Party Distance Score = mean Democratic Party voting score – (100 – mean Republican Party voting score)

FIGURE 7.4 Distance between the Parties on Partisan Votes, 1955–2014
Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the US Congress* Figure 6.1, at 144 (C.Q. Press, 5th ed, 2016) © Used with permission from Sage Publications

processing requirements – that virtually ensure that most of the members of their party will not be able to make sense of the law itself, much less trace its implications in the existing legislative landscape.[66] By "keeping [rank-and-file members] in the dark, leaders undermine the quality of legislative deliberations and dyadic representation in the House of Representatives."[67] Speakers, in other words, can use incomprehensibility as a proverbial stick – smacking rank-and-file members to keep them in line and ensure they don't get hold of too much congressional power.

Third and finally, given the collective aspect of congressional action, speakers and party leaders can often evade blame when incomprehensible laws are ultimately passed. Bills change as a result of negotiations and compromise; is the end product the sponsor's or drafter's fault? Safety in numbers may not only spare members from responsibility for legislative incoherence but also spare our speaker from the stigma associated with sponsoring incomprehensible laws.

Putting these pieces together, it makes sense why some legislation might not just pass in spite of but *because* of its incomprehensibility. In an era of high partisan debate and deadlock, incomprehensible laws are sometimes the only kind of law that most people can agree on.

The main question, however, remains: Why don't existing legislative processes and related checks institute strong incentives for speakers to ensure laws are comprehensible to rank-and-file members? In other words: Why does the law *allow* this incomprehensibility to go unchecked?

III COMPREHENSION ASYMMETRIES IN LEGISLATIVE PROCESS

We now turn to explore these existing practices and procedures in Congress with an eye to how well they help to encourage cooperative communication in legislative deliberations.

Before delving into more detailed procedures, however, our investigation begins on a sour note: There are no explicit requirements within Congress that require sponsors to craft bills that are coherent or accessible. At no point in a bill's life – from initial drafting all the way to the final vote – is there a procedural step that checks to ensure that the bill is reasonably understandable to other members of Congress, or even to the bill's sponsors and promoters. Thus, if all congressmen voting "yea" on a complex bill concede they have no earthly idea what they were voting on, no congressional rule or procedure is violated, and the resulting law is perfectly legal.

A number of authors have expressed concern about the lack of systematic checks on legislative coherence.[68] In his writing in 1963, Judge Friendly attributed the occasional passage of incoherent laws to the absence of these kinds of internal review mechanisms within Congress.[69] In his study of Congress's passage of the Truth in Lending Act, for example, Ed Rubin discusses at length the absence of methods and processes to ensure competent policy analysis with Congress.[70]

This absence of a formal check on incomprehensible legislation is not a particularly good omen for the analysis to come. But in an institution as complex as Congress, there are undoubtedly other practices and procedures at work that could encourage cooperative communications between speakers and their audience. It is to these more intricate procedures and practices we now turn.

The investigation begins with an analysis of the incentives of the conscientious Rule-Follower sponsoring a bill. We then explore the net incentives of the scheming Rule-Bender who seeks to enlarge his sphere of power by exploiting gaps in process.

A *Rule-Followers*

At first blush, one would imagine Rule-Following bill-drafters to be eager for rigorous, informed deliberation by congressional colleagues. However, we will see in the analysis that follows that ingrained procedures and requirements in Congress may actually impede Rule-Followers in their efforts to produce a bill that is reasonably accessible to fellow congressmen.

Some of these procedural impediments not only undermine the audience's understanding of the bill but can impede speakers themselves from fully comprehending a bill's meaning and implications. There are in fact two distinct challenges for dedicated Rule-Followers in cooperatively communicating. First and perhaps most challenging, the Rule-Followers themselves are beholden to law-text drafters and other congressional staff to adequately capture the policy vision and put it into legal language.[71] The Rule-Followers thus experience comprehension asymmetries

of their own with respect to the drafters of legal text who have a superior grasp of the bill. Second, the Rule-Followers then must cooperatively communicate their knowledge (including their lack of understanding of the intricacies of the legal text) to rank-and-file in the course of persuading them to vote in favor of the bill.

Under both circumstances, the rank-and-file may not be fully apprised of the contents of the bill.

1 Bill-Drafting

Our tour of legislative processes begins at the earliest life stage of a bill – the drafting process – and identifies several challenges that can impede the ability of Rule-Followers to ensure the bill is reasonably comprehensible. Current congressional practice (within which the Rule-Follower operates) tends to both disperse and fragment the drafting process, which allows a number of different entities to become involved in crafting the basic terms of a bill. As a result, the bill may become more complicated and unwieldy.

A DELEGATED AND FRAGMENTED AUTHORSHIP

Since the Rule-Following speakers in our analysis are typically the powerful advocates of a bill, we would assume the basic conventions of authorship and attribution would serve as a powerful disciplining force to ensure resulting bills are of high quality. A speaker would not want to propose, much less support, a bill that is incoherent in important respects.

Yet, it turns out that even the most conscientious, Rule-Following speakers typically do not draft their own bills, and some may not read them carefully once drafted. The true bill-drafters in Congress generally consist instead of an assortment of interest groups, administrative agencies, committee staff, and the staff in Congress's Office of Legislative Counsel. Sometimes each of these groups has a hand in drafting a bill, and in other instances only one of these characters is the actual author. But in many cases, bills will be drafted by someone other than the sponsors and their personal staff.

The resulting delegation of authorship, as a matter of institutional practice, leads to attenuated control as well as potentially significant fragmentation in the drafting process that may cause even the Rule-Followers themselves to sometimes be unfamiliar with the precise terms of the bill they are introducing. Yet despite these challenges, "there is currently no mechanism for coordinating drafting behavior" in Congress among these various drafting sources.[72] Atiyah and Summers conclude, "This lack of centralization in the drafting of federal legislation in America is itself the cause of many problems arising from the use of legislation as a source of law."[73]

Risks of incoherent bills, along with other quality control problems, appear to be at their worst when private parties and agencies serve as the primary drafters.[74] Commentators note that these lay drafters (especially private parties) can be particularly inexpert in legislative drafting, and yet some evidence suggests these private

parties may well draft the majority of bills introduced into Congress.[75] Private parties also have their own axes to grind that may impact the text in subtle ways that even the sponsor may not fully appreciate or even notice. Despite these risks, externally prepared bills are not always (or perhaps often) reviewed or edited by Congress's centralized Office of Legislative Counsel.[76]

Almost all of the remaining bills are drafted in-house by the staff in congressional committees and by Congress's Legislative Counsel Office. Congressional committees generally have counsel on staff who are able to do the fine-grained work of legislative drafting; this specialist might take the first crack at drafting major bills. For its part, the Legislative Counsel Office consists of a nonpartisan group of expert lawyers whose primary job is to translate a sponsor's policies into legislative text. Because of their expertise, there is widespread agreement that the existence of this Legislative Counsel Office improves the coherence and legal rigor of the resulting bill. Indeed, even expert counsel in committees may engage this Office to check and fine-tune their own drafting efforts. But, given the attenuation between sponsor and drafting, there are also reasons to expect that in some cases the resulting "disconnect between text and policy"[77] will create room for errors and sometimes increase the processing costs needed to understand a bill.

This disjointed legislative drafting process can lead to a number of possible misunderstandings and sources of inflated processing costs in the resulting legislation. First, there are multiple steps in the assembly line in drafting a bill. According to Gluck and Bressman, staffers who work for members or sometimes even committees typically prepare policy bullet points or outlines that the lawyers in the Legislative Counsel's office turn into statutory text.[78] The members, then, convey the policies to staff who convey the policies to the Legislative Counsel who then turn the policies into draft legislation. But the necessary feedback loop that closes the circle – namely sponsor scrutiny of the final product – is sometimes and perhaps almost always absent. In the Gluck and Bressman survey, for example, the "non-Legislative Counsel staffers told us that they often are not capable of confirming that the text that Legislative Counsel drafts reflects their intention."[79] Gluck and Bressman found multi-layered problems: "Our ordinary counsels reported that the difficulties of understanding technical statutory language and of tracking the numerous statutory cross-references and amendments to preexisting legislation make penetrating the language that Legislative Counsel generates challenging even for staffers who are lawyers."[80]

There also does not appear to be close oversight of the legislative drafting by the Rule-Followers or their staff, at least in some cases. Gluck and Bressman conclude, "Our findings cast doubt on whether members or high-level staff read, much less are able to decipher, all of the textual details."[81] As one staffer conceded: "Leg. Counsel rewrites it and sometimes changes it. It's kind of like translating the Bible." Another remarked that "Legislative Counsel drafts, and the staffer doesn't have the law degree or expertise to evaluate what Legislative Counsel did."[82]

Second, and further complicating the role of these nonpartisan drafters in the crafting of a bill, is the fragmentation and variation within the Legislative Counsel's office itself. Apparently, the disjointed committee jurisdictions within Congress are mirrored in similar silos in the staff working for Legislative Counsel. Those working in the Counsel office concede that the fragmentation leads to very different drafting practices, word choices, and even the role that the Counsel plays in a given topic area. For example, in some areas, Legislative Counsel play a major role in text drafting, but not in others.[83] The role of Legislative Counsel also varies depending on the source of the originating text or policy. As noted, in cases where private parties draft the statute, as one example, Legislative Counsel play a less central role than in cases where they prepare the first draft from scratch.[84]

Third, it is common practice for Rule-Follower sponsors to typically draft a single statute with multiple audiences in mind, and this fact can further complicate the internal coherence of a bill. One Legislative Counsel staffer reports that the professional office is used to draft the technical parts of the statute, but most statutes contain other more expressive messages directed at constituencies (or sometimes drafted by them). For these portions of a bill, Legislative Counsel is not involved in the drafting process.[85] Thus a statute can be sliced into pieces with each piece drafted by a different author and directed to a different audience (e.g., court versus industry benefactor) and written with different communicative goals in mind (the latter being clear communication and the former being accurate rendition of the details, such as they are).[86]

B FRAGMENTED COMMITTEE JURISDICTION

The fragmentation introduced into bill-drafting by turf-conscious committees has been a long-standing problem in Congress that may also adversely impact the coherence and comprehensibility of some of the Rule-Follower's bills.[87] Gluck and Bressman observe, based on their surveys, that "the division of Congress into committees creates drafting 'silos' that exacerbate drafting fragmentation and also 'turf' consciousness that incentivizes drafting to protect jurisdiction."[88]

In particular, survey participants report that "committees draft statutes to keep matters within their own jurisdiction, even if doing so requires contorted language and not the 'ordinary' language that courts presume drafters use."[89] Fifteen percent of the participants volunteered that "committees go out of their way to draft statutes so that agencies within their jurisdiction will implement them."[90] This is the case even when the "fit is unclear."[91] One survey respondent elaborated that "'Committee jurisdiction is really important to how stuff gets drafted . . . It affects general policy approaches, leads to contorted ways of talking about things in legislation . . . you try to phrase the policy to keep it in your committee.'"[92]

Different committees also have different practices, use terms differently, and diverge in the types of staff they hire and their role in drafting.[93] None of these divergences necessarily will lead to more incoherent and incomprehensible laws.

But the fact that there are so many varying practices with staffs playing different roles creates still more opportunities for confusion that might be expressed in the resulting statutory texts. As one staff survey participant observed, "some members don't use lawyers in drafting and it's more sloppy."[94]

2 Adjusting Bills to Achieve Better CBO Scores

The Rule-Follower's bill must also provide a "Congressional Budget Office" score as a bill leaves committee, but this requirement can create pressure on the Rule-Follower to adjust the bill in ways that can make the bill less coherent and accessible. More specifically, Section 402 of the Congressional Budget and Impoundment Control Act of 1974 requires the Congressional Budget Office to develop a cost estimate for every bill passing through committee, except bills originating within appropriations committees.[95] The score provides ready information to all congressional members on the approximate costs involved in implementing the bill. In theory, then, the score places a highly accessible "price tag" on all bills, including those that are unwieldy or otherwise incomprehensible.

There is some preliminary evidence that this well-intended effort to identify the financial implications of a bill can take a toll on drafting practices. In order to keep a bill on or below the target amount, Rule-Followers may inadvertently produce a bill that becomes more convoluted. Coherence takes a back seat to obtaining an impressive CBO number. In Gluck and Bressman's study, for example, survey participants reported that they "routinely change the bill text to bring legislation within a budgetary goal."[96] One respondent even volunteered that the budget score can affect how much detail to put into legislation versus leaving the issues ambiguous.[97] Other commenters report other forms of gaming of the CBO process in order to manipulate the budget score.[98]

3 Post-Committee Amendments

As the legislation-crafting process proceeds, Rule-Followers lose more and more control over the coherence of their bill as members take advantage of the opportunity to amend bills on the floor. In some cases, unlimited amendments are allowed.[99] In fact, "amending marathons" are not uncommon. "[S]ince amendments may make a bill more broadly attractive or at least give the sponsors of successful amendments a greater stake in the legislation's enactment" . . . "[t]he adoption of floor amendments may enhance a bill's chances of ultimate legislative success."[100] Barbara Sinclair even found "[a]mending marathons are [in fact] associated with legislative success. Bills subject to ten or more Senate amendments decided by roll call votes are more likely to pass the Senate and more likely to become law than are other measures."[101]

Yet while this amending activity does help gain buy-in and can sometimes add useful adjustments, at the same time, unrestricted amendments also seem capable of compromising the coherence and textual integrity of a bill. Committee and party leaders do sometimes attempt to anticipate and placate disgruntled senators in advance before the bill reaches the floor (taking the form of post-committee adjustments), but this anticipatory work is not always successful.[102] Either way, the resulting amending activity may place significant pressure on the internal coherence of a bill by introducing various ad hoc compromises inserted after the fact to make the bill more politically palatable.

4 Negotiations and Compromise

Most challenging for the Rule-Followers, however, is the effect of inevitable, informal legislative deliberations and negotiations on the coherence of the emerging bill. The multiple steps (or "obstacle course")[103] that a bill must pass through means that "even those working on the statutes themselves cannot always predict whether they will be able to touch, or fix, them later in the process."[104] In some (but not all cases), rather than a deliberative process that over time produces an increasingly coherent piece of legislation, the realities of legislative bartering and negotiation can lead to the opposite – a type of Mr. Potato-head statute with each interest adding their own appendage to the legislation.

The adverse effects of this necessary compromise on comprehensibility have been of continuing concern to congressional scholars. In 1987, Atiyah and Summers noted how the imperative of compromise in Congress leads to legislation that can often be both confusing and inconsistent.[105] Melnick similarly observed that the fragmented process in Congress, coupled with the challenges of reaching agreement on controversial issues, cause "many" statutes to "lack coherence, fail to resolve controversies, or even incorporate inconsistent requirements."[106] Kagan observes that although American statutes have always been "less carefully drafted and hence less coherent than those of the British Parliament . . . in an era of divided government and weak political party unity, American legislation has gotten worse." The statutes are "painfully stitched together by shifting issue-specific coalitions."[107] Graetz observes in the tax context how unconstrained congressional negotiations "create[] the lack of a coherent vision of tax equity. This, coupled with [the tax law's] complexity, has made the tax code unstable."[108] And, in his empirical work on complexity in legislation, Curry finds a positive correlation between bills that attract substantial interest from lobbyists and bill complexity, with a coefficient that is statistically significant.[109]

There are at least two more specific sets of challenges that arise for Rule-Followers as their bills are subject to these negotiations. Each challenge threatens to complicate a bill and thus increase the processing costs required for other rank-and-file members to make sense of the draft legislation.

A FAVORED WORDS AND "SAUSAGE-Y" BILLS

In Gluck and Bressman's study, the art of compromise can sometimes lead to the insertion of key words that a particular member of Congress or engaged constituency demands. These words often do not serve to illuminate but instead complicate the meaning and implications of the law. One interviewee noted, for example, that "sometimes the lists [of words] are in there to satisfy groups, certain phrases are needed to satisfy political interests and they might overlap."[110] Rule-Followers may nevertheless opt for these compromises because the insertion of favored items or "gimmies" to pacify some opponents helps grease the wheels for bill passage.

Yet, the coherence and precision of bills can be compromised when words are selected to make various constituencies happy rather than arrive at a coherent legislative statement. These compromises over word choice create possible sources of inconsistency not only within but also between statutes. For example, only 9 percent of the respondents in Gluck's and Bressman's sample reported that "drafters often or always intend for terms to apply consistently across statutes that are unrelated by subject matter."[111] One legislative staffer nicely sums up this incremental compromise approach and its impact on the comprehensibility of the resulting legislation:

> We've been working on this bill very hard recently and I was talking to somebody . . . and he was saying, "okay, alright, so we're done with the policy part of it, now let's do the politics part of it." And . . . I knew exactly what he was saying . . . Okay, now here we are talking about "can you put this in? Will X buy it? Will Y buy it? Will Z buy it? No, Z won't buy it. Okay forget it. Can we word it like this? No. Why? Okay, Y won't buy that, but Z will." And so you go through that period and what I think is that if you actually have enough time to do that, you can kind of – it's still sausage, but you can kind of get it to work. When you have to do it at the last minute, especially on these bills that are really complicated . . . when you start doing that in the last minute, it's just, it's bad.[112]

B EXCESSIVE AMBIGUITY

Another coping mechanism used by Rule-Followers to avoid deadlock in negotiations is to replace precise terms with select ambiguous terms. The use of this tactic, however, tends to make it more difficult for rank-and-file members to understand a bill and its implications. In *The Devil Is in the Details*, Rachel VanSickle-Ward finds that "on a high-profile issue, legislators and executive actors often choose ambiguity as a political strategy to achieve compromise."[113] Ambiguity also helps avoid opposition from high-stakes groups who might object to specific language. Rather, "leaving 'loopholes,' 'flexibility,' or 'wiggle room'" is a safer legislative course.[114] VanSickle-Ward even shows that the number of times ambiguous terms are used increases when the vote on an issue is likely to be close and/or the issue being discussed is highly salient.[115] (Lower salient issues can typically be hammered out with more clarity because the stakes are lower; contention on these issues actually

facilitates specificity.)[116] Of course, ambiguity does not always succeed; sometimes the issues are deadlocked and the bill fails.[117] But when controversial legislation passes in a sharply divided Congress, significant ambiguities in the legislation are likely.

Ambiguity does not translate directly to incomprehensibility.[118] But in some cases, ambiguity could be considered a first cousin since the use of ambiguous terms increases processing costs, particularly when it involves some uncertainty and complexity with regard to what a law means. One state legislator in VanSickle-Ward's study summed it up this way: "[Ambiguous language means] you're not hurting anybody's feelings and you're not causing anyone to say '[explicative] I'm not going to vote for that,' whereas they can say 'well . . . it means this,' and they can walk off feeling good and the other person walks away thinking it means the exact opposite."[119]

B *Rule-Benders*

Rule-Benders – again, the party leaders and committee chairs that sponsor or are the driving force behind bills – will use incomprehensibility to expand their power base and gain control over the rank-and-file. As long as legislative processes do not sanction or even call attention to incomprehensible bills, Rule-Benders will find a way to use this neglect to their advantage.

1 The Curry Study

In *Legislating in the Dark*, James Curry traces a variety of ways that powerful congressional leaders exploit comprehension asymmetries in the House to gain greater control over rank-and-file members. These tactics include negotiating behind closed doors while keeping the legislative language secret up until the very last minute, changing the legislation immediately before its consideration, and manipulating the complexity of the legislative language itself.[120]

The resulting tactics help Rule-Benders leverage greater party loyalty on legislation. Specifically, because members cannot gain independent information to understand the bills, they line up behind party leaders and find it more difficult to defect.[121] Even the basic policy vision behind the law can be communicated to rank-and-file members in ways that are not accessible or accurate. And leaders can do this precisely because rank-and-file members lack the time and expertise to check those representations against the bill's text.

Incomprehensibility also impedes those who seek to oppose the bill from gaining purchase on the bill's content. This is particularly true when complex bills are rushed through the system. One frustrated minority leader staffer observed:

> Where we can be given notice of a bill, and sometimes a pretty substantial bill, that is coming to the floor the next day, we get that notice the night prior, sometimes at midnight or something like that. In that case we're really scrambling. So the information that we are coming up with, one, we don't have access to it, two, we don't have time.[122]

Curry's quantitative analysis in fact reveals strong correlations between complex bills and sponsorship by powerful leaders in the House. While this does not imply that powerful leaders actively sit down and attempt to make laws more incomprehensible, it could suggest that leaders are attracted to or do not hesitate to make bills more complex since these bills carry some advantages in bringing discipline to the rank-and-file. Curry concludes from his analysis that "majority leadership priority bills [were] . . . significantly more complex than other bills . . . by almost one-third of a standard deviation."[123] Curry's analysis also reveals that bill complexity is increasing over time,[124] although this observation does not cut across all legislative areas.

Curry also finds that this incomprehensibility matters; the resulting bill complexity can and does adversely affect the audience's ability to understand a bill. In some legislative settings, "the information encompassing their [rank-and-file members'] worlds is crushing and cacophonous. The challenge for them is not simply to accrue information but to identify the useful information within their time and resource constraints."[125] One member observed that understanding a bill that is being rushed is "like going to a neurosurgeon and asking for brain surgery and him saying it will take ten hours and you asking him if he can do it in thirty minutes."[126] Another member noted that even when "[t]here was usually enough time [to read the bills] . . . it was like reading a computer program. The language is dense and hard to understand."[127]

Finally, and most relevant to the Rule-Bender categorization, is some evidence that these maneuvers are deployed deliberately.[128] Among the techniques Curry identifies for keeping members' processing costs high are:

- "[P]ackag[ing] legislation in an omnibus bill that is hundreds of pages long, deals with a multitude of issues, and is time consuming for rank-and-file lawmakers to process"[129]
- "[D]raft[ing] legislation to be more difficult to read, using more technical jargon than is necessary, writing provisions in a way that is less than straightforward, or burying the lead by including significant provisions toward the end."[130]
- Making last-minute changes to bills that are not recorded in track change and are inserted into non-searchable PDFs.[131]
- Restricting release of the bill to the public so that members cannot consult expert stakeholders for input.[132]
- Controlling the release of bills so there is no time for amendments or negotiations on terms before it reaches the House floor.[133]

Some Rule-Benders even fess up to the occasional use of these exploitive tactics, particularly with regard to withholding an accessible summary of how a bill is likely to work in practice. One staff from a party leader conceded using these tricks but argued they were ultimately harmless; "unless you are a committee staffer that wrote the damn thing" members won't understand the implications of the bill even if they read it. "So this whole 'read the bill' stuff is almost a little bit disingenuous, because reading five lines referencing some part of the code isn't going to help you at all."[134] As a result, members on both sides of the aisle find themselves dependent on sponsors and party leaders to explain the "big stuff" about what the bill will actually do in practice.[135]

The target audience appears well aware of at least some of these exploitive tactics. One rank-and-file staffer aptly summarized how his own party uses incomprehensibility to gain control over the vote:

> There will be some information given out about the bill that is more detailed and less accessible. On things they might not want you to understand because you might vote against it, they will be less clear. And on things that they are full-throatily behind they will be more clear.[136]

Even attentive members – those who are especially interested in a given area of legislative activity – sometimes find themselves unable to muster the resources to participate. As Curry notes, "Even if a few skeptical lawmakers do allocate the time necessary to scrutinize the information legislative leaders give them" and find that legislation problematic, "these efforts will have consequences only if these skeptical lawmakers have the resources, contacts, and clout to convince a significant number of their colleagues that their leaders are misleading them."[137]

As a result, because they are adrift in a sea of unprocessed information, most members find they must resort to looking for "proxies" to determine how to vote and when to support legislation. Those proxies – not coincidentally – are in large part the same chairs and leaders who attempt to exploit information-processing costs in order to gain the trust of the rank-and-file members.[138] As one rank-and-file member interviewed for Curry's study ultimately conceded:

> People would say, "You mean you don't understand every vote you take?" Well certainly I don't! No way! There's not enough time! Even my staff, as good as they were. So you find credible members on the other committees. And staff would find other staff that they trusted.[139]

Yet relying on these proxies for legislative guidance does not always work in advancing the goals of individual rank-and-file members.[140] Curry's case studies reveal instances in which members who vote the party line in favor of a convoluted law later discover that the bill conflicts with their own district's unique interests. In one case, for example, party leaders advanced a purportedly benign bill calling for an EPA/NAS study of the effects of using ethanol in vehicles.[141] But the detailed

provisions in the bill (not summarized in the sponsor's memo) effectively ensured the study would kill EPA's plans to use ethanol. This in turn undermined a large economic base in some congressional districts. However, based on the skewed information, Midwestern rank-and-file members who would normally oppose the bill unwittingly supported it.[142]

"In short, leaders can use their information advantages to persuade lawmakers, in part because lawmakers are persuadable."[143] The result is a concentration of power in a few leaders, with greater polarization between the parties. In fact, based on his quantitative analyses, Curry concludes, "Bill complexity has the most robust effect on partisanship, with every test indicating that more complexity results in more partisanship."[144]

2 Unorthodox Practices

Rule-Benders may also take advantage of the opportunity to bypass established congressional procedures intended to enhance deliberation and cooperative communication by utilizing a variety of "unorthodox practices." Taking advantage of these unorthodox practices puts the rank-and-file at an even greater disadvantage in understanding the terms of bills and hence may grease the wheels for bill passage by controlling deliberations. And Barbara Sinclair found that these efforts pay off; for bills "subject to two or more special procedures and practices in both chambers, 78 percent were successful; at the other extreme, if subject to none in either chamber [hence following the conventional path], only 48 percent were successful."[145]

While Sinclair identifies a number of unorthodox practices in use today by Congress,[146] there are two in particular that tend to exacerbate existing comprehension asymmetries.

A ECLIPSING AND BYPASSING COMMITTEES

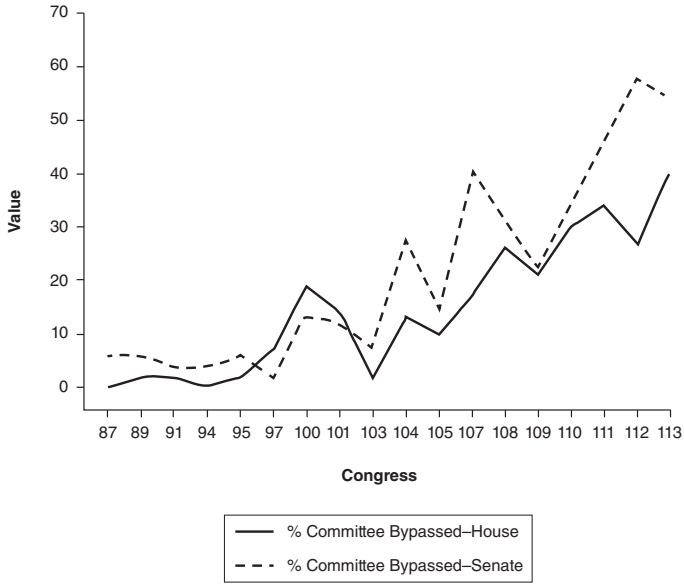
Historically, congressional committees were used to provide opportunities for a subset of the rank-and-file to engage more deeply in the focused review and fine-tuning of draft legislation.[147] One prominent congressman from the middle of the last century was quoted as asserting that "'95 percent of all the legislation that becomes law passed the Congress in the shape that it came from our committees." He continued, "if our committee work is sloppy . . . our legislation in 95 percent of the cases will be bad and inadequate as well."[148]

Particularly over the last few decades, however, the power of committees has been eclipsed by increasingly powerful party leaders. Two changes deserve particular note in this regard. First, and in contrast to past practices, the majority party in committee sometimes operates as a unified block. Sinclair reports, for example, that while "[t]he rules allow the minority to offer amendments . . . consideration is perfunctory and all are voted down, with the majority voting in lockstep."[149] This eclipsing of minority views does not occur for all legislation. But legislation that sparks "high

partisan polarization" can trigger these divides that leave the minority effectively cut out of the deliberative picture.[150] The result is less opportunity (and hence incentive) for the rank-and-file to invest scarce resources in understanding a bill. This is particularly true for minority members, but could impact all members to some extent. Thus, while committees still do not operate as a rubber stamp for leaders, commenters note how this party dominance has caused the committees' influence to wane as compared with the heydays of "committee government."[151]

Second, Rule-Benders sometimes manage to bypass the committee altogether, foreclosing this important opportunity for select rank-and-file members to engage more meaningfully with a bill. Statistics from the 112th Congress reveal that 41 percent of the bills did not go through committees of either the Senate or the House. Sinclair reports that "in the Congresses of the 1960s through the 1980s for which data are available, the committee was bypassed in the Senate on 7 percent of major measures; for the 103rd through 110th Congresses, the average increased to 26 percent; and from 2009 to 2014, it was 52 percent."[152] See Figure 7.5. Perhaps not surprisingly, as their services are bypassed, the deliberative work of the committees declines accordingly. Ornstein reports that the number of committee and subcommittee meetings dropped in half from the 1960s to the early 2000s.[153]

The conference committee – deployed to iron out the House and Senate differences – is also regularly bypassed in this new world of "unorthodox



*Selected Congresses

FIGURE 7.5 Percentage of Major Legislation on which the Committee of Jurisdiction Was Bypassed

Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the US Congress* Figure 6.3 at 151 (C.Q. Press, 5th ed., 2016) © Used with permission from Sage Publications

lawmaking." In the first year of the 112th Congress (2011–12), out of 91 total measures that went through both houses, only three ended up in a conference committee. "[T]he rest were worked out by leadership deals, special legislative processes such as reconciliation, or 'preconference' – a process in which differences are negotiated behind the scenes by staff, and then each chamber passes the amendments necessary to make the bills identical without going through conference."[154]

When the committee process is bypassed, it reduces the scrutiny that rank-and-file members can provide to bills. The minority is particularly handicapped, not only because of processing costs, but also the lack of opportunities for deliberation. Sinclair observes that "[s]ince the mid-1990s the minority party has to a large extent been excluded from decision making at the prefloor – and often also at the post-passage – stage on the most highly visible major legislation in the House."[155] And, while some deliberation can occur on the floor, the combination of highly complex legislation and restrictive rules at least in the House make the possibility of meaningful deliberation effectively illusory.[156]

B THE RISE OF OMNIBUS BILLS

Another increasingly unorthodox practice used by Rule-Benders that was "rare" before the 1980s is the bundling of single-subject bills together in a large omnibus bill.[157] These bills are "usually highly complex and long" precisely because each omnibus bill addresses "numerous and not necessarily related subjects, issues, and programs."[158] Omnibus bills can be huge, easily stretching to more than 1,000 pages.[159] An example is illustrated in Figure 7.6.

Omnibus bills are typically created by the party leaders to overcome gridlock that might otherwise block individual legislative proposals.[160] By combining different legislative proposals, an omnibus bill helps increase buy-in since more members will see something in it they like. Omnibus bills can also increase buy-in because members are not sure what is in the legislation. In these bills, "party and committee leaders can package or bury controversial provisions in one massive bill to be voted up or down."[161]

As a general matter, omnibus bills are considered to be much less transparent, lack legislative history, and are difficult to understand.[162] Given the rank-and-file members' higher processing costs associated with understanding and evaluating the merits of an omnibus bill, it is perhaps not surprising that these bills tend "to be adopted with little debate or scrutiny."[163] Indeed, typically "[o]mnibus legislating moves lawmaking behind closed doors. Rank-and-file members are given few if any opportunities to change the final package. More errors, mistakes and waste may creep into the final legislation as a result."[164]

Omnibus bills dramatically raise members' processing costs, but precisely because they are so blatant with respect to limiting congressional deliberations, omnibus bills are also relatively unusual. They are most common in extreme settings, for example, when leaders can utilize end-of-session pressures and the fear of a government shutdown to force the adoption of the package with minimal debate. In the leaders' view, "it's the only way to push a budget through the gridlocked Senate floor."[165]

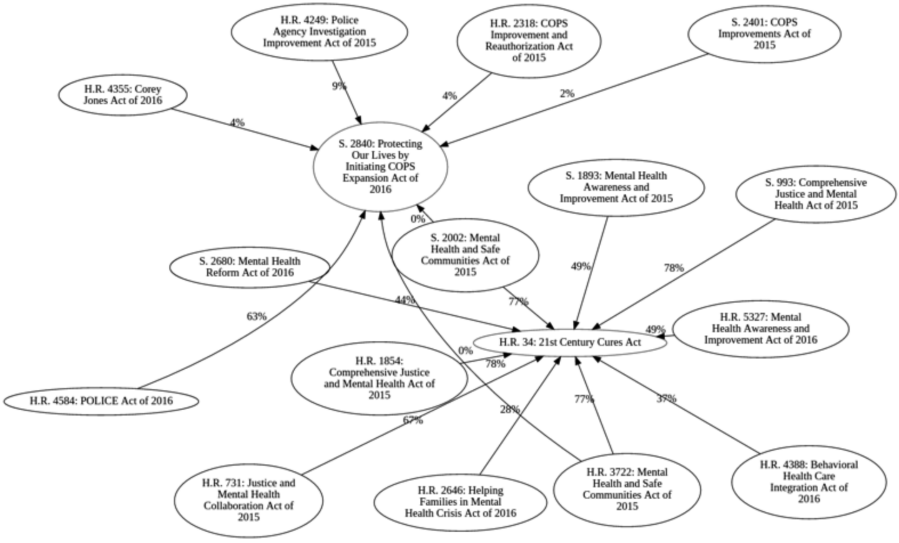


FIGURE 7.6 Mapping Omnibus Legislation: Provisions from 15 Separate Bills Were Merged into Two Bills that Congress Ultimately Enacted
Joshua Tauberer, "How a Complex Network of Bills Becomes a Law: Introducing a New Data Analysis of Text Incorporation!" *Government Track*, Jan. 7, 2017, available at https://medium.com/@govtrack/how-a-complex-network-of-bills-becomes-a-law-9972b9624d36

3 Public Choice Theory

The possibility that Rule-Benders might promote statutes, even when they do not fully understand them themselves, is at least partly explained by long-standing public choice theories of congressional behavior. In his classic 1987 article, McNollgast hypothesized that one means Congress uses to control policy is through "stacking the deck" procedurally to benefit favored constituencies in subsequent agency rule-makings.[166] McNollgast noted that the use of these procedural delegations increases in heated controversies. "[A] high level of conflict among congressmen creates an incentive to delegate increasingly large regulatory scope to an administrative agency" with procedures that at the very least are likely to slow agency progress.[167]

In the case of incomprehensible laws, the use of this "deck-stacking" technique can be both more subtle and devious. Rather than inserting terms into a law that will advance the interests of favored constituencies during implementation, the goal of this technique is to promote incomprehensible laws that are likely – by their very nature – to encounter substantial delays and implementation challenges. Incomprehensible legislation may, in fact, be more effective than procedural "deck-stacking" in settings where regulatory inaction is beneficial to influential stakeholders.

Indeed, a very clever Rule-Bender can take this public choice strategy further by tossing in a handful of favorable substantive provisions to appease the thinly financed opposition. As long as the law is replete with contradictions and unresolved

complexities, it will likely face a long and tortured path during implementation, and the bones thrown to the opposition will not materialize in practice. Yet the speakers have significantly more insight into the extent of this internal incomprehensibility and can fool the rank-and-file into placing more confidence in the bill than is actually warranted.[168] Moreover, and consistent with Fiorina's 1982 "shift the blame" theory, incomprehensible laws can allow Congress to gain credit in the short-term by overcoming gridlock and shifting blame in the long-term if constituents lose battles during the agency's implementation.[169]

Box 7.1 Comprehension Asymmetries in Legislative Process

The Rule-Follower Party Leader

Why **are some processing costs passed through to rank-and-file members rather than internalized by the bill drafters?**

- **Bill drafting is institutionally fragmented in ways that leave even the speakers unable to process some bill text.**
- **Bills may need to be adjusted to obtain better CBO scores, even though the terms of the bill can become more complex as a result.**
- **Post-committee amendments are outside the control of the sponsors.**
- **Negotiations and compromise can complicate the bill.**

AND

- **There is no requirement that bills be comprehensible, so why invest the effort unless it becomes essential to passage?**

The Rule-Bender Sponsor or Party Leader

How **can the processing limitations of rank-and-file members be overloaded in a way that shifts control to sponsors and leaders?**

- **Utilize unorthodox practices, like bypassing committee and omnibus bills.**
- **Take advantage of rank-and-file members' limited processing ability by expanding the size and complexity of a bill.**
- **Make last-minute changes to bills that are not recorded accessibly.**
- **Limit the time available to review a bill.**

4 Summary

In sum, the ability of Rule-Bending congressional leaders to profit from comprehension asymmetries resonates with both theory and evidence. As Curry summarizes, "[L]egislative leaders can exercise impressive influence over congressional policymaking by using their procedural prerogatives to exploit the asymmetrical possession of information within the chamber."[170]

Moreover, as more attentive groups are kept in the dark, the diversity of views and engagement drops and a few high stakes leaders dominate the deliberations. "By restricting information and accelerating the legislative process, leaders are minimizing the voices and influence on policymaking of representatives, interests, and ultimately constituents. The process becomes decisively top-down, driven by the goals and interests of those in leadership posts."[171]

Fortunately, Curry's research suggests this incomprehensibility occurs primarily in high priority, partisan bills, particularly when a party leader's power is threatened by other leaders or constituencies.[172] This is in part because the strategy is neither costless nor certain; in some cases, rank and file members do fight these strategies. Curry's study also reveals that many members are generally suspicious of the information that leaders provide.[173] With that said, because members have finite time and resources, they must pick the bills over which to spend time and effort to appease their suspicions. In the remaining cases they are generally at the mercy of the leaders' skewed information.

IV DOES INCOMPREHENSIBLE LAWMAKING MATTER?

Before discussing reform possibilities, we consider several important reasons why the problem of incomprehensible lawmaking may be best left alone. Most obvious, the legislative process is exceedingly complicated. Adjusting this one incentive for cooperative communication may upend even more important incentives within lawmaking, setting into motion a series of unintended consequences. While we ultimately introduce several preliminary reform ideas for purposes of discussion, the objections cataloged subsequently underscore the importance of proceeding both cautiously and conservatively.

A *Maybe Incomprehensible Laws Are Rare*

Several strands of evidence suggest that incomprehensible laws might be only a minor annoyance, and if so, any reforms to address incomprehensible laws would equate to using a "missile to kill a mouse."[174] First and foremost, since there are clear reputational costs for sponsors in particular and Congress in general to pass incomprehensible laws, these costs should generally suffice to discipline the

prevalence of incomprehensible laws. Past media reports and internal sanctions suggest very high costs to sponsors and party leaders who resort to these practices. Political scientists reiterate the significant, informal sanctions in place to penalize the advocates of complicated bills, at least for omnibus legislation.[175] Sinclair also notes that leaders are aware that ramming omnibus bills through the process can generate a great deal of hostility from within the party. As a result, incomprehensible laws may be passed only in "extraordinary" circumstances.[176]

Second and as noted, there are multiple well-established opportunities in place to check legislative incoherence. These traditional legislative processes include multiple review steps that can serve to sharpen both the policy and the text of the bills. By requiring sponsors to "opt out" of conventional processes, the existing legislative system adequately constructs a default that favors coherent legislation.

Third, powerful interest groups and engaged agencies will also dedicate energy to improve the comprehensibility of a bill when it inures to their interest. Private parties who succeed in extracting benefits from a bill will be particularly eager to shore up the rigor of that language to protect their bequest. Agencies will similarly find reason to engage in the legislative process to ensure the delegations are at least coherent. In his recent study of the agencies' role in legislation, for example, Christopher Walker discusses how Congress regularly solicits the regulatory agencies for technical drafting assistance. Agencies report that even when they do not support the legislation, they devote considerable resources toward weighing in at a micro-level to minimize downstream damage.[177]

Nevertheless, and despite these and other important checks in the system, there is a worrisome undercurrent running through the literature that suggests that the problem of incomprehensible legislation is significant enough to deserve closer scrutiny. Gluck and Bressman report a systemic "'passing the buck' feel to virtually all of our respondents' comments about Congress's obligations [to the courts] . . . but [they] did not seem incentivized to act on it."[178] Hellman notes that "[c]orrection of ambiguities and omissions in statutes already on the books has never ranked high among congressional priorities."[179] Until greater evidence is available to suggest that incomprehensible laws are anomalies that do not require attention, then, erring on the side of caution and continuing to explore the phenomenon seems in order.

B *Perhaps Coherent and Precise Laws Are Worse than Incomprehensible Laws*

In some cases, incomprehensible laws may actually be preferable to precise laws. Some scholars have noted the dangers of overly prescriptive laws that can become inflexible and quickly outdated. Pamela Gruber notes that an ambiguous bill allows for much-needed agency flexibility and may improve the quality of implementation downstream.[180] Barbara Sinclair similarly argues that there are tradeoffs in

representativeness versus responsiveness. Shortfalls in the transparency of bills and deliberative processes may ultimately allow for stronger responsiveness.[181]

Yet arguments touting the advantages of legislative ambiguity and open-endedness do not go so far as to excuse the problematic features of laws that are incomprehensible to members themselves. When legislation is not just open-ended but top expert observers and members who invest the effort cannot understand the law at even the simplest level, the problems run much deeper than ensuring flexibility in the statutory text.

In any event, meaningful reforms do not need to solve the different puzzle of when or how to strike the appropriate balance between precision and ambiguity in law.[182] Rather, reforms can simply endeavor to tune up the speakers' incentive system so as to create more costs for legislative incoherence. Ultimately, the choice is still up to sponsors of whether the slightly greater costs to incomprehensibility (in light of the reforms) outweigh whatever benefits they gain from the strategy.

C *Is Some Law Better than No Law*

A number of authors suggest that when it comes to ambiguous statutes or even convoluted omnibus bills, the fact that *any* law passed at all is better than congressional inaction. In *Hitching a Ride*, Glen Krutz makes this exact argument. He places the use of omnibus legislation within a larger context and highlights both the efficiency and effectiveness of bundling legislation relative to the challenges of passing the laws piecemeal. Such an approach not only facilitates greater congressional action and power, but also provides Congress with useful leverage over the president.[183]

As a substantive matter, however, if a law is excessively convoluted and incoherent, it is not altogether clear that the resulting law *is* better than nothing. A convoluted law that does not identify the major problems or addresses them in an incoherent way creates significant opportunity costs (the incomprehensible law impedes the passage of a better law), as well as the likelihood of misdirecting implementation and downstream agency, judicial, and private resources in dead ends and wrong-headed directions. Convoluted laws also tend to increase the risk of losing the forest for the trees on overarching policy goals; individual legislative requirements can take precedence over the bigger picture that the legal program seeks to advance.[184] Moreover, in implementing these complex laws, resources are not only necessary to make sense of the requirements, but also cause inevitable confusion downstream that can lead to an even more protracted and expensive litigation and political controversy that can be addressed only by returning full circle to Congress.[185]

There are also important process costs associated with incoherent laws. When significant laws are passed by a Congress whose members do not actually understand the terms or implications of the bills they pass, then we will be relying on a

deliberative process that rests power and policymaking expertise in a very small group of largely unaccountable individuals. Centralization of power in Congress may ultimately turn out to be a positive adaptation for avoiding deadlock in the early twenty-first century,[186] but centralization is not the same thing as requiring all other members to be in the dark about the law.

Incomprehensible laws also create inequities in democratic engagement. As laws become more incomprehensible, thinly financed lobbyists and watchdogs who cannot afford the processing costs will drop out. In his discussion of the deliberate inflation of processing costs by congressional leaders, Curry concludes, "While using informational tactics helps legislative leaders get their parties to overcome collective action problems ... it reduces, degrades, and sometimes eliminates individual lawmakers' ability to participate and to represent their constituents on questions before the chamber."[187]

V LEGISLATIVE REFORM

In the discussion that follows, we offer three proposals that endeavor to encourage cooperative communication in legislative deliberations. The first set of reforms creates speedbumps for incomprehensible laws while simultaneously providing benefits for speakers who draft more comprehensible legislation. The second set of reforms infuses subsidies and rewards into the process to defray the costs of processing for both busy Rule-Following speakers and disadvantaged audiences. Lastly, we propose a targeted adjustment to the amendment process that imposes greater accountability (and costs) for members who amend bills.

In addition to the important qualification that these reforms may ultimately prove premature or even unnecessary, we add two more notes of caution before proceeding. First, the proposals we advance are the result of an abstract, arm-chair analysis and are intended to jumpstart discussion. Our thinking is not constrained by the actual viability of the reforms; nor do we make a case that any given reform is necessary. Second, because of the delicate nature of legislative deliberations, our proposals take the form of carrots (voluntary rewards) rather than sticks (prescriptive rules or heavy sanctions).

A *Speedbumps to Discourage Incomprehensible Lawmaking*

Although the public costs from incomprehensible laws might be substantial, there is little motivation beyond the raw political process as described to discipline this activity. Ideally, then, some type of "day-of-reckoning" could be instituted as a checkpoint to assess the comprehensibility of each major bill. Members would face higher costs associated with sponsoring, amending, and voting on these laws once the incomprehensibility is documented and publicized.

1 A Day of Reckoning Review

The most extreme option is the creation of a day-of-reckoning (DOR) review of each bill destined for final passage into law. This DOR review would *not* "rate" a bill or give it a comprehensibility score, nor would it serve as a type of gatekeeping device to weed out convoluted bills. Instead, the review will simply make public – for members, sponsors, affected groups and the public at large – what the bill is, how it works, and major questions that remain with respect to its implementation. This public review thus creates an analysis that could either buoy up a legislative project (when it is done well) or create some stigma around a legislative project when there are a number of open questions and problematic provisions. Coupled with a 30-day "cool off" period that follows each DOR review, legislators could then react to serious problems, particularly those major problems that were not anticipated or noticed during deliberations.

This DOR review could be mandatory, for example applied to all bills that pass both houses, or it could be purely voluntary. If mandatory, the DOR review might apply to a subset of laws most at risk, for example those bills that are not rigorously vetted by committee or that otherwise lack conference or committee reports that explain the bills. Omnibus bills might, however, be exempted from DOR review since these bills, by definition, lack coherence and hence may be difficult to analyze in the manner proposed here.

If voluntary, a sponsor could elect to submit his or her bill to the day-of-reckoning (DOR) committee at key points in the process – e.g., before the bill moves to the floor – both in order to educate other members as to its attributes and perhaps also to provide some buffer against excessive amendments that affect the legislative proposal in significant ways. Indeed, perhaps a sponsor could submit the bill to the DOR twice – once before it enters the floor for debate, and again after it has been amended. This double look would help spotlight whether or how various amendments might have made the bill more incomprehensible in problematic ways.

To be successful, the DOR review must include several other key features, such as:

- *Bipartisan Expert Assessment.* The DOR review must be conducted by the most bipartisan, neutral committee possible. Designing such a committee is not easy. Studies of the now-defunct Office of Technology Assessment (OTA) and of the National Academies suggest that is nevertheless possible, at least when the survival of the office depends on being perceived as bipartisan.[188] As a preliminary matter, moreover, we believe for this same reason that the DOR review should be conducted in-house by staff who are the most motivated to be bipartisan. To ensure the designated staff are adequately critical, however, they might also be expected to solicit "peer review" from many top academic and related

experts in the field. In-house staff would, however, be ultimately responsible for analyzing and summarizing this input.

- *Timing.* This DOR committee would need to be fully primed with wheels greased so that the assessments can proceed expeditiously. Limits would need to be placed on the committee's review time, for example, a 60-day cap. Congress may also need a set time (e.g., 30 days) to respond before the official legislative deliberations conclude.
- *Documents Reviewed.* There will be decisions about what documents this DOR committee will review. Surely, the bill will be first on the list. Other supporting documents might be useful as well, including a summary statement of the bill, explanations and supporting materials of the bill provided to other members, and other reasonably accessible documents that were widely available to members. If these supplemental materials contradict the bill in significant ways, that will be noted in the DOR review. On the other hand, if the bill is quite complicated yet members are not brought up to speed, that fact would be noted as well.

However it is structured, the end game of the DOR review is to create positive incentives for more comprehensible legislation and member engagement. It is hoped that as a result of this review, bill sponsors, originating committees, and those actively amending the bill would encounter some rewards or, conversely, demerits from the added oversight.

2 Document the Rigor of Deliberations

A different, although potentially complementary reform, is to establish a standardized way to track and document a bill's deliberative record. In a way that is roughly analogous to the agencies, the principle is that stronger deliberations denote more comprehensible or at least more robust engagement by the audience. Documenting these features helps to reward this rich engagement, while spotlighting its absence in other bills.

As with the DOR review, the deliberative record could be instituted as mandatory or voluntary. Bills passed into law could each be accompanied by this record that would document its key deliberative features. Alternatively, a sponsor could elect to have a deliberative record prepared at any point in the process after the bill reaches the floor. A sponsor might do this to advertise the attributes of a bill, for example.

A deliberative record would itemize – for each bill – the deliberative highlights, such as the involvement of an originating committee in vetting the bill; the availability of rigorous summaries and explanations to other members; the size and amount of time the bill was shared with other members; the opportunities for questions and exchanges with sponsors; the extent of committee or related peer scrutiny, both formal and informal; the amendment history (discussed later); and even the identity of the original bill-drafters and their role (e.g., private parties;

agencies), including Legislative Counsel. A neutral congressional office could produce the record, perhaps at a sponsors' request.

This report provides some useful information regarding the deliberative process underlying legislation. Lengthy bills that lack summary statements or cogent explanations, were drafted by interest groups, and were publicly available to other members for only a few days or even a few weeks, etc., would be supported by deliberative records that make them somewhat suspect. These bills could be compared and contrasted with similarly sized bills that have more impressive deliberative records because the bills were summarized with crisp, certifiably accurate summaries and explanations; were prepared by the Legislative Counsel's Office; were subject to multiple rounds of committee mark-up, hearings, and discussion; and moved through Congress over a longer period of time (e.g., months rather than weeks).

A deliberative record could be voluntarily produced or even produced by the opposition. Either way, a deliberative record creates a useful incentive for bill sponsors to engage their audiences in cooperative communication, providing a kind of crude signal of the "due process of lawmaking."[189] Sponsors of bills that are subjected to less deliberation and scrutiny may be held accountable for the impoverished deliberations. The deliberative record also could give useful, quick information to agencies and courts during downstream implementation.

Finally, the heated partisan climate in Congress might seize on this deliberative record as a signal of legislative integrity; members would compete to produce bills with the most impressive deliberative records. Rather than a race to the bottom in preparing bills that bypass congressional deliberations, such a measure of legislative virtue could create a race to the top. At the very least, the extent to which bills are subjected to rigorous internal review within Congress will become more salient to outsiders.

B *Subsidies and Rewards*

Subsidies that support efforts to make bills more comprehensible may be useful as well, particularly in cases where most of the problems are primarily the result of a lack of resources and time by the speaker.

1 Resources for Speakers

Even though speakers enjoy greater resources and capabilities to understand and communicate their bills to rank-and-file members, some of the legislative incomprehensibility likely occurs because the speakers themselves lack sufficient resources to do this expensive work. One reform simply provides sponsors with more resources to help them translate bills for rank-and-file members, including both the preparation of summaries and explanations as well as scrutinizing the bill text. These resources could also be available to speakers to track amendments and changes, so the sponsor (and others) can stay abreast of the coherence of the legislation as it moves through the obstacle course of legislative negotiations.

While providing earmarked grants is the most straightforward approach, even more useful might be the creation of a nonpartisan team of experts – perhaps within the Legislative Counsel Office – whose job it is to help a sponsor make his bill coherent and more accessible to other members. Ed Rubin has offered one sketch of what this type of congressional assistance might consist of with respect to the key components of legislation – goal definition, implementation, substantive terms for effectuating the law, and the collection of data to run and adjust the law.[190] His work thus provides a good start in this regard.

2 Resources for the Audience

Earmarked grants could also be available to members who struggle to make sense of important legislative proposals. Yet while even limited support will improve the situation, this reform standing alone seems inadequate to ensure the audience will always be able to keep up with the proposed legislation.

An expert office – perhaps the same office just proposed for the speaker – could provide an important resource for rank-and-file members seeking to understand a bill. Curry emphasizes the need to provide members with some assistance to balance the inequities in informational resources within Congress. Curry suggests:

> Lawmakers need access to expert information that does not come from political actors or offices with explicit agendas. Restoring and bolstering congressional support offices that can supply this would be a good first step, including revoking the ban on the Office of Technology Assessment and other legislative service organizations . . . These organizations, banned by Speaker Gingrich in 1995, employed policy experts, produced reports on policy proposals, and answered lawmakers' inquiries. Dissolving them gave legislative leaders and interest groups even more power as sources of knowledge and policy information.[191]

Expert ombuds along the same lines as proposed for the agencies in Chapter 6 might provide a useful reinforcement as well. With adequate financing, this type of ombud could hold sponsors accountable for bills that are afflicted with excessive processing costs, while simultaneously helping disadvantaged audiences keep up with important legislation.

Thumbnail Sketch of Legislative Reform

1. Create added costs for incomprehensible laws by, for example, instituting a day of reckoning review and documenting impoverished deliberations.
2. Provide resources and rewards to both sponsors and the rank-and-file for processing complicated bills.
3. Track amendments to enhance accountability as bills move through the legislative process.

3 Rewards for Particularly Hardworking Audiences

At least some of the comprehension asymmetries in legislation may be the result of insufficient audience incentives, as well as perverse speaker incentives. We know that not all rank-and-file members will engage in legislative deliberations. Some rank-and-file will place most of their energies instead in attempting to get reelected, thus operating as free-riders on their more dedicated colleagues.

It is difficult to encourage all rank-and-file members to engage more rigorously in legislation, but it may be possible to reward a small subset of the rank-and-file who are already contributing to improve the quality of key legislation. With clear rewards, still more rank-and-file members might invest resources into understanding and engaging in these important legislative deliberations.

Partisanship already creates some rewards for investing in scrutinizing bills – the opposing party will gain some political benefits to halting, slowing, or weakening its opponent's bill. Within a party, however, there appear to be fewer incentives for rank-and-file to engage vigorously in deliberating over a bill that party leaders favor. And yet at some level, the greatest potential for improving legislation may ultimately lie within the party's own rank-and-file.

One means of shoring up audience incentives is the establishment of an official "deliberative credit," or similar reward, for individual members who play a meaningful role in the deliberations underlying a bill. Members making particularly valuable contributions would receive a "call-out" in the bill itself (listed under the names of the sponsors). This call-out distinguishes these more dedicated legislators from other rank-and-file who remain relatively unengaged. Legislators who are remiss in participating in legislative processes would thus have resumes with few credits; active, hardworking legislators would enjoy multiple credits that showcase their legislative commitment. Moreover, because a member's name will appear on the bill as a vigorous participant (although not as a co-sponsor), he or she will presumably take more responsibility for ensuring the quality of the legislation.

Providing this attribution for individual, hardworking members could be left to the discretion of the speaker, although to prevent cronyism, the speaker should be required to provide evidence of significant contributions. It may even be helpful to create an appeal process when a member believes that his contribution should have been acknowledged as a "valued deliberator," but he wasn't given that credit. The more rigorously this reward is administered, the more valued it will become as a signal of legislative good-citizenship. It may even facilitate, rather than detract from, a member's reelection efforts.

Grants or "free" expert staff, available on request as mentioned, could also be provided to members to do this deliberative work. Thus, dedicated members could leverage congressional resources to get assistance and yet earn credit at the same time.

Of course, not all rank-and-file members will respond to these incentives, and it is possible that few will. The overarching idea, however, is to provide still more

resources and rewards that shift the rank-and-file members' energies toward engaging in legislative deliberations. Those who do this work should be rewarded publicly; those who ride on their coattails should face some stigma by comparison.

C *Creating Greater Accountability for the Amendment Process*

One final proposal endeavors to create more accountability for the amendment process. There are at least two distinct features of the existing amendment process that could be improved.

The first reform simply seeks to ensure that the audience understands – even in the most technical sense – how the amendment fits into the preexisting legislation. In many areas of Congress, rather than provide a red-line version of the legislation that places the proposed amendments in context, the bare amendments are itemized in the proposed bill. See Figure 7.7. Readers must locate the original legislation and

6 **SEC. 4. CHEMICAL ASSESSMENT FRAMEWORK;**
7 **PRIORITIZATION SCREENING; TESTING.**
8 (a) IN GENERAL.—Section 4 (15 U.S.C. 2603) is
9 amended—
10 (1) in the heading, by striking "**TESTING OF**
11 **CHEMICAL SUBSTANCES AND MIXTURES**" and
12 inserting "**CHEMICAL ASSESSMENT FRAME-**
13 **WORK; PRIORITIZATION SCREENING; TEST-**
14 **ING**".
15 (2) by redesignating subsection (e) as sub-
16 section (l);
17 (3) in subsection (l) (as so redesignated)—
18 (A) by striking "rule" each place it ap-
19 pears and inserting "rule, testing consent
20 agreement, or order";
21 (B) by striking "under subsection (a)"
22 each place it appears and inserting "under this
23 subsection"; and
24 (C) in paragraph (1)(B), by striking "rule-
25 making"; and

FIGURE 7.7 Excerpt from S.1009, The Chemical Safety Improvement Act, 113th Cong. (Nov. 2013)

create their own red-line or similar mark-up to understand the text that is being changed. The sponsors do not provide this information.

The reform here is simple. Rather than allow these "cut-and-bite amendments," Congress should require the "amendments-in-context" style of presenting draft legislation.[192] This method "adds a visible indication of what has changed using strike and insert notation," essentially like a red-lined document in Microsoft Word. Accordingly, the sponsor would provide a red-line that shows how the amendment fits with the earlier law, thus lowering the audience's processing costs almost instantly.

The second reform focuses not on lowering the unnecessarily inflated processing costs to the audience, but on encouraging those proposing an amendment to an existing bill to take responsibility for their changes. If an amendment impairs the coherence or comprehensibility of a bill in significant ways, the member introducing that amendment should be identified easily. Accordingly, authorship of each amendment to a bill should be tracked, just as sponsorship for the bill itself.

This attribution for successful amendments to bills is not currently recorded in a user-friendly way. In theory, one can identify a particular amending member's hand in a final law by piecing together the congressional history of the bill and individual amendments. In practice, however, this is difficult and laborious work.

Our second reform would thus provide some enhanced accountability for members amending bills by providing one version of the final law in a track-changed, annotated form. This form would identify – by name – each of the members amending the bill and their contributions. If the amendments were also changed, then the elaborate track change would note that as well.

There have already been proposals for this kind of change to the existing amendment system within Congress.[193] For example, a 2016 bill (that did not make it out of the committee) proposed: "In the operation of the Congress.gov website, the Librarian of Congress shall ensure that each version of a bill or resolution which is made available for viewing on the website is presented in a manner which permits the viewer to follow and track online, within the same document, any changes made from previous versions of the bill or resolution."[194] Obviously, there are inevitable details that remain to be worked out; still, this more specific reform should increase accountability for amending activities, particularly when it positions a bill to be more, rather than less, incomprehensible.

VI CONCLUSION

Thankfully, incomprehensibility seems to afflict only a small subset of the laws that are passed. For this subset of laws, however, comprehension asymmetries and speaker incentives appear to explain in part why these laws are so difficult to understand. Moreover, our findings show that existing legislative rules and procedures sometimes exacerbate, rather than counteract, incomprehensible lawmaking.

In particular, our study of speaker incentives spotlights a number of troubling legal processes and procedures. These findings suggest that however reform is accomplished, legislative practices should be adjusted so that they provide sponsors and powerful party leaders with greater incentives for cooperative communication with rank-and-file members.

7 COMPREHENSION ASYMMETRIES IN LEGISLATIVE PROCESS

1 15 U.S.C. §§2601–2697.
2 Frank R. Lautenberg Chemical Safety for the 21st Century Act, H.R. 2576, 114th Congress (2016). See also Chapter 5C.
3 Jonathan D. Salant, "US House Passes Lautenberg Chemical Safety Bill," *New Jersey Politics*, May 24, 2016, available at www.nj.com/politics/index.ssf/2016/05/us_house_passes_lautenberg_chemical_safety_bill.html.
4 Timony Cama, "Senate Passes Overhaul of Chemical Safety Rules," *The Hill*, Dec. 17, 2015, available at http://thehill.com/policy/energy-environment/263680-senate-passes-chemical-safety-reform.
5 See Chapter 5C for an overview of the intricacies of this legislation.
6 See Chapter 5C.
7 For example, the EPA can put the burden on the manufacturer to test "high priority" chemicals, but the agency can only impose this requirement through a convoluted process. Beyond these internal contradictions are terms that are so general that they permit almost complete discretion, such as the ability to bypass the strongest features of the risk assessment by excluding "legacy" uses. See, e.g., Annie Sneed, "Trump's EPA May Be Weakening Chemical Safety Law," *Scientific American*, Aug. 16, 2017.
8 Attachment points are the arguments that can be raised to legally challenge an agency decision. In the new Lautenberg Act, these attachment points include a series of scientific quality requirements imposed on EPA's risk assessments. See discussion of 2017 legislation in Chapter 5C.
9 James M. Curry, *Legislating in the Dark: Information and Power in the House of Representatives* 2 (U Chi., 2015).
10 See House roll call vote at http://clerk.house.gov/evs/2005/roll108.xml; Senate roll call vote at www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00044.
11 Jean Braucher, "The Challenge to the Bench and the Bar Presented by the Bankruptcy Act: Resistance Need Not Be Futile," 2007 *University of Illinois Law Review* 93, 100.

12 Henry L. Sommer, "Trying to Make Sense out of Nonsense," 79 *American Bankruptcy Law Journal* 191, 192 (2005).
13 Braucher, 2007, at 96.
14 Sommer, 2005, at 193.
15 Brannon Denning and Brooks Smith, "Uneasy Riders: The Case for a Truth-in-Legislation Amendment," 1999 *Utah Law Review* 957, 959 (1999).
16 Id. at 959 (citing John Godfrey, "House Passes Spending Bill Despite Jeers," *Washington Times*, Oct. 21, 1998, at A1 (reporting legislative reaction to spending bill)).
17 Id. at 959 (citing George Haber, "House Passes Spending Bill: Massive Omnibus Measure Larded with Pet Projects," *Washington Post*, Oct. 21, 1998, at A1).
18 Id. at 960.
19 Jack O'Brien, "Ron Johnson on Senate Healthcare Bill: Leadership Wants 'to Jam this Thing Through,'" *Washington Examiner* (Aug. 25, 2017).
20 McCain's Speech on the Senate Floor, CNN (July 25, 2017), available at www.cnn.com/2017/07/25/politics/john-mccain-speech-full-text-senate/index.html.
21 The House version is 468 pages in pdf. See, e.g., H.R.1., 115th Cong., 1st Session, available at www.congress.gov/bill/115th-congress/house-bill/1/text.
22 John Cassidy, "The Republican Tax Strategy: Speed, Subterfuge, and Diversion," *The New Yorker* (Nov. 17, 2017), available at www.newyorker.com/news/our-columnists/the-republican-tax-strategy-speed-subterfuge-and-diversion.
23 Harry Edwards, "The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication," 32 *Cleveland State Law Review* 385, 424–25 (1983–84).
24 Id.
25 Henry J. Friendly, "The Gap in Lawmaking – Judges Who Can't and Legislators Who Won't," 63 *Columbia Law Rev*iew 787, 792 (1963).
26 Id.
27 Ruth Bader Ginsburg, "A Plea for Legislative Review," 60 *Southern California Law Review* 995, 996 (1987) (citing Justice Scalia in Sharp v. Weinberger, 798 F.2d 1521, 1522).
28 Id. at 996, 997.
29 Ruth Bader Ginsburg and Peter Huber, "The Intercircuit Committee," 100 *Harvard Law Review* 1417, 1420, 1421 (1987).
30 Id. at 1417.
31 Curry, 2015, at 2.
32 Id.
33 Id. at 3.
34 Lisa Schultz Bressman and Abbe R. Gluck, "Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Cannons: Part II," 66 *Stanford Law Review* 725, 733 (2014).
35 Id. at 729.
36 Ginsburg, 1987, at 996.
37 Friendly, 1963, at 793–94.
38 The ACA, for example, includes more than 40 provisions that require the implementation of regulations and the text is exceedingly long – spanning more than 900 pages. Curtis W. Copeland, Cong. Research Serv., R41180, "Regulations Pursuant to the Patient

Protection and Affordable Care Act (PPACA)," at Summary (2010), available at http://geoffdavis.house.gov/UploadedFiles/Regulations_Pursuant_to_the_Patient_Protection.pdf. It is rumored that one "staffer who took a copy home as a souvenir after the Senate passed it on Christmas Eve 2009 had to remove it from his luggage or face an excess-baggage charge." "Legislative Verbosity, Outrageous Bills," *The Economist* (Nov. 23, 2103), available at www.economist.com/news/united-states/21590368-why-congress-writes-such-long-laws-outrageous-bills. In upholding the constitutionality of the ACA in King v. Burwell, Chief Justice Roberts, writing for the majority, expressed frustration with the excessive complexity and incoherence of the statute, observing that "the Act does not reflect the type of care and deliberation that one might expect of such significant legislation." 135 S. Ct. 2480, 2493 (2015).These deficiencies, according to the Court, were at least partly attributable to problematic legislative processes, which included a secretive drafting process and the disregard for standard deliberative procedures in a way that ultimately "limited opportunities for debate and amendment." Id.

39 The Dodd-Frank Wall Street Reform and Consumer Protection Act might also be identified by some observers as "incomprehensible" despite its very elaborate (e.g., dozens of hearings in each of the House and Senate) deliberative history, www.llsdc.org/dodd-frank-legislative-history. The final statute weighs in at 848 pages, which "is 23 times longer than Glass-Steagall, the reform that followed the Wall Street crash of 1929" and more than 2-1/2 times the size of "all the laws passed by Congress during its first five years ... [in] getting the new government under way." Felix Frankfurter, "Some Reflections on the Reading of Statutes," 47 *Columbia Law Review* 527, 527 (1947). The Dodd-Frank Act is also exceedingly complex. For its implementation, it "requires a minimum of 243 rules for its implementation," Curtis W. Copeland, Cong. Research Serv., R41380, "The Dodd-Frank Wall Street Reform and Consumer Protection Act: Regulations to Be Issued by The consumer Financial Protection Bureau" 3 (2010), available at www.fas.org/sgp/crs/misc/R41380.pdf, and some of these regulations are hundreds of pages long. The resulting legal complexity embedded and created by the statute is daunting. "Just one bit [of the statute], the 'Volcker rule,' which aims to curb risky proprietary trading by banks, includes 383 questions that break down into 1,420 subquestions." Timekeeper, "Over-regulated America," *The Economist* (Feb. 18, 2012).

40 With respect to the ACA, for example, Peggy Noonan, a political commentator, criticized ACA because the bill "was 2,000 pages of impenetrable paragraphs – real word-clots, word-slabs – accompanied by long lines of swimming numbers." Peter Wilson, "The Affordable Care Act is Not 'Incomprehensible,'" *The American Thinker*, Nov. 18, 2013, available at www.americanthinker.com/articles/2013/11/the_affordable_care_act_is_not_incomprehensible.html. Michelle Bachman (R-MN) complained that there was not enough time to review the ever-changing bill. At times, only a few days were available for members to read a 1000+ page document. Angie Holman, "Speed-Reading the Health Care Reform Bill," *Politifact*, Oct. 7, 2009, available at www.politifact.com/truth-o-meter/article/2009/oct/07/speed-reading-health-care-reform-bill/. And the then-House Judiciary Committee Chairman John Conyers (D-MI) lamented: "What good is reading the bill if it's a thousand pages and you don't have two days and two lawyers to find out what it means after you read the bill?" Victoria McGrane, "Read the Bill? It might Not Help," *Politico*, Sept. 8, 2009,

available at www.politico.com/story/2009/09/read-the-bill-it-might-not-help-026846. Efforts to repeal the ACA met with much of the same criticism. See, e.g., Olivia Beavers, "GOP Senator Defends Time to Read Senate Tax Bill before Vote," The Hill, Dec. 3, 2017, available at http://thehill.com/homenews/sunday-talk-shows/362986-gop-sen-says-there-was-plenty-of-time-to-read-tax-bill-before-vote; Rebecca Savransky, "Senate Dem: Passing ObamaCare a 'Very Different Process' than GOP Plan," *The Hill*, June 12, 2017, available at http://thehill.com/homenews/senate/337380-senate-dem-passing-obamacare-a-very-different-process-than-gop-plan.

After Dodd-Frank was passed, it also received criticisms about its unjustified incomprehensibility. In 2014, Rep. Jeb Hensarling, chairman of the House Financial Services Committee, observed: "With all due respect to its authors and admirers, Dodd-Frank stands as a monument to the arrogance and hubris of man in that its answer to incomprehensible complexity is yet more incomprehensible complexity." Press Release: Hensarling: Dodd-Frank Results in Less Freedom, Less Opportunity and a Less Dynamic Economy, July 16, 2014, available at https://financialservices.house.gov/news/documentsingle.aspx?DocumentID=388236.

41 Hans A. Linde, "Due Process of Lawmaking," 55 *Nebraska Law Review* 197, 224 (1976).

42 Id.

43 Id.

44 Id. at 226.

45 Id.

46 For more recent data, go to www.brookings.edu/wp-content/uploads/2017/01/vitalstats_ch6_full.pdf.

47 Russell W. Mills and Jennifer L. Selin, "Don't Sweat the Details! Enhancing Congressional Committee Expertise through the Use of Detailees," 42 *Legislative Studies Quarterly* 611, 612 (2017).

48 Id. at 616.

49 Id. at 616–17.

50 This is based on the total number of bills enacted and the total number of words in those bills. Available from https://medium.com/@govtrack/how-a-complex-network-of-bills-becomes-a-law-9972b9624d36.

51 "Legislative Verbosity: Outrageous Bills," *The Economist*, Nov. 23, 2013.

52 Mills and Selin, 2017, at 612 (citing others).

53 Abbe R. Gluck and Lisa Schultz Bressman, "Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Cannons: Part I," 65 *Stanford Law Review* 901, 972–73 (2013) (quoting a congressional staffer).

54 Thomas Mann and Norman Ornstein, *It's Even Worse than It Looks/Was*, at xiv (Basic, 2012).

55 E.g., Part 1 of this chapter referencing these accounts.

56 E.g., Peggy Starr, "Fleming on Not Reading 10,535 Pages of Obamacare Regs: 'They're Incomprehensible,'" Oct. 15, 2013, available at www.cnsnews.com/news/article/penny-starr/fleming-not-reading-10535-pages-obamacare-regs-they-re-incomprehensible ("An average person even with a law degree or a medical degree like me can't understand them [the regulations passed under Obamacare]," Fleming said. "They're incomprehensible."); see also Orrin Hatch, "The Road to Responsible Financial Reform," *Deseret News*

(Mar. 10, 2018), available at www.deseretnews.com/article/900012617/orrin-hatch-the-road-to-responsible-financial-reform.html.

57 Jonathan Lewallen, Sean M. Theriault, and Bryan D. Jones, "Congressional Dysfunction: An Information Processing Perspective," 10 *Regulation and Governance* 179, 181–83 (2015); R. Erik Peterson et al., CRS 7–5700, "House of Representatives and Senate Staff Levels in Member, Committee, Leadership, and Other Offices, 1977–2010" at 15 (2010).

58 Lewallen, Theriault, and Jones, 2015, at 179.

59 Jesse Cross, "The Staffer's Error Doctrine," 56 *Harvard Journal on Legislation* 101 (2018a).

60 Id.

61 Peterson, 2010, at 9 and 14.

62 See Public Choice Theory, supra Section II.B.3. of this chapter.

63 Curry, 2015, at 135.

64 Mann and Ornstein, 2012, at xiv.

65 Id. at xiv–xv.

66 Curry, 2015, at 2.

67 Id. at 4.

68 E.g., Ginsburg, 1987.

69 Friendly, 1963, at 792–93.

70 Edward L. Rubin, "Legislative Methodology: Some Lessons from the Truth-in-Lending Act," 80 *Georgetown Law Journal* 236, 278–29 (1991).

71 Jesse M. Cross, "When Congress Should Ignore Statutory Text," __ *George Mason Law Review* __ (forthcoming 2018b) [at 8].

72 Gluck and Bressman, 2013, at 1024.

73 P. S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law* 320 (Clarendon, 1987).

74 Id.; Gluck and Bressman, 2013; see also Baucher, 2007; Sommer, 2005.

75 John M. Kernochan, *The Legislative Process* 8 (Foundation, 1999) (reporting that more than half of the federal legislation originates outside of Congress and congressional staff).

76 Atiyah and Summers, 1987, at 320; Bressman and Gluck, 2014, at 737–47.

77 Bressman and Gluck, 2014, at 737.

78 Id. at 740.

79 Id. at 743.

80 Id.

81 Id. at 742.

82 Id. at 743 (quoting congressional staff members).

83 Id. at 747.

84 Id.

85 Cross, 2018b, [at 4].

86 Id. at [7]. (As "legislators attempt to use expressive rhetoric in order to placate interest groups' needs by addressing them in non-operative statutory text . . . [they] seek to address them in a matter that creates opportunities elsewhere in statutes to direct courts via enforceable rules that are more public regarding.")

87 See generally Richard F. Fenno, Jr., *Congressmen in Committees* (Calif. 1973); David C. King, *Turf Wars: How Congressional Committees Claim Jurisdiction* (Chicago, 1997).

88 Bressman and Gluck, 2014, at 747–48.

89 Id. at 753.
90 Id.
91 Id. at 754.
92 Id. at 754–55.
93 Id. at 750–53.
94 Id. at 752–53.
95 2 U.S.C. § 653.
96 Bressman and Gluck, 2014, at 764.
97 Id.
98 E.g., Robert Saldin, "Gaming the Congressional Budget Office," *National Affairs* (Fall 2014), available at www.nationalaffairs.com/publications/detail/gaming-the-congressional-budget-office.
99 E.g., Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the US Congress* 88, 141 (C.Q. Press, 5th ed., 2016) (contrasting the Senate with the House).
100 Id. at 263.
101 Id.
102 Id. at 79, 149.
103 Atiyah and Summers, 1987, at 314.
104 Bressman and Gluck, 2014, at 763.
105 Atiyah and Summers, 1987, at 307–11.
106 Shep Melnick, *Between the Lines: Interpreting Welfare Rights* 11 (Brookings, 1994).
107 Kagan, 2001, at 49.
108 Michael J. Graetz, *The Decline [and Fall?] of the Income Tax* 136 (Norton, 1997).
109 Curry, 2015, at 115.
110 Gluck and Bressman, 2013, at 934 (quoting an interviewee in their study).
111 Id. at 936.
112 Rachel VanSickle-Ward, *The Devil Is in the Details: Understanding the Causes of Policy Specificity and Ambiguity* 71 (SUNY, 2014).
113 Id. at 150.
114 Id. at 53.
115 Id. at 147.
116 Id. at 5.
117 Id. at 32.
118 Note, however, that some detailed legislation could also be ambiguous, and thus ambiguous is not the opposite of detailed. For example, detailed legislation is ambiguous if it is framed in ways that lead to legal uncertainty.
119 Id. at 49 (quoting a state legislator).
120 Curry, 2015, at 3.
121 Id. at 135.
122 Id. at 93.
123 Id. at 113.
124 Id. at 116.
125 Id. at 47.
126 Id. at 103
127 Id. at 102.

128 Id. at 79.
129 Id. at 102.
130 Id. at 102.
131 Id. at 87.
132 Id. at 88.
133 Id. at 88–89, 91–92.
134 Id. at 103.
135 Id.
136 Id. at 66.
137 Id. at 34.
138 Id. at 27.
139 Id. at 49.
140 Id. at 38.
141 For an excellent example, see id. at 120–21.
142 Id. at 66–67.
143 Id. at 33.
144 Id. at 131.
145 Sinclair, 2016, at 261.
146 General tactics include the use of multiple committee referrals for a single bill; the development of omnibus (multi-subject) laws; bypassing committee; and allowing post-committee adjustments during legislative deliberations. See generally id.
147 David W. Rohde, "Committees and Policy Formulation," in *Institutions of American Democracy: The Legislative Branch* 202 (Paul Quirk and Sarah A. Binder eds.) (Oxford, 2005). This general statement must be conditioned on Fenno's important work that traces considerable variation between committees, however. Fenno, 1973.
148 Frankfurter, 1947, at 545 (quoting Representative Monroney).
149 Sinclair, 2016, at 18.
150 Id.
151 Rohde, 2005, at 206–07.
152 Sinclair, 2016, at 51.
153 Norman Ornstein, *Roll Call*, Mar. 7, 2006.
154 Bressman and Gluck, 2014, at 762.
155 Sinclair, 2016, at 267.
156 Id. at 268.
157 Id. at 114.
158 Id. at 115.
159 Denning and Smith, 1999, at 959; Peter Hanson, "Restoring Regular Order in Congressional Appropriations," *Economic Studies Discussion Paper*, Nov. 2015, at 1.
160 See generally Glen S. Krutz, *Hitching a Ride: Omnibus Legislating in the US Congress* at ch. 1 (Ohio, 2001).
161 Walter J. Oleszek, *Congressional Procedures and the Policy Process* 504 (CQ Press, 10th ed., 2015).
162 Bressman and Gluck, 2014, at 756–58.
163 Hanson, 2015, at 1.
164 Id. at 4.

165 Id. at 1.
166 Mathew D. McCubbins, Roger G. Noll, and Barry R. Weingast, "Administrative Procedures as Instruments of Political Control," 3 *Journal of Law, Economics, & Organization* 243, 272 (1987) (touting the flexibility and open-ended benefits of procedural control through legislation) [hereafter McNollgast].
167 Mathew D. McCubbins, "The Legislative Design of Regulatory Structure," 29 *American Journal of Political Science* 721, 740 (1985).
168 Id. at 731 (focusing on this feature).
169 E.g., Morris Fiorina, "Group Concentration and the Delegation of Legislative Authority" at 21, CalTech Working Paper No. 438 (1982).
170 Curry, 2015, at 138.
171 Id. at 139.
172 Id. at 41.
173 Id. at 75.
174 Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2904 (1992) (Blackmun, J., dissenting).
175 See, e.g., Krutz, 2001, at 140.
176 Sinclair, 2016, at 257.
177 Christopher J. Walker, "Legislating in the Shadows," 165 *University of Pennsyslvania Law Review* 1377, 1389, 1391, 1395 (2017).
178 Bressman and Gluck, 2014, at 792.
179 Arthur D. Hellman, "Case Selection in the Burger Court: A Preliminary Inquiry," 60 *Notre Dame Law Review* 947, 995 (1985) (footnote omitted).
180 Judith Gruber, *Controlling Bureaucracies: Dilemmas in Democratic Governance* (Calif. 1987).
181 Sinclair, 2016, at 272.
182 E.g., VanSickle-Ward, 2014, at 159 (similarly leaving the net costs and benefits of statutory ambiguity for others to examine and consider).
183 Krutz, 2001, at 76, 138–39.
184 Id.
185 James Salzman and J. B. Ruhl, "Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State," 91 *Georgetown Law Journal* 757, 806–13 (2003); Michael Mandel and Diana G. Carew, "Regulatory Improvement Commission: A Politically-Viable Approach to US Regulatory Reform" at 3 (May 2013) (Progressive Policy Institute).
186 See, e.g., James M. Curry and Frances E. Lee, "Capacity in a Centralized Congress" (draft of Feb. 15, 2018).
187 Curry, 2015, at 21.
188 Bruce Bimber, *The Politics of Expertise in Congress: The Rise and Fall of the Office of Technology Assessment* 67 (SUNY, 1996).
189 Linde, 1976, at 242–47.
190 Rubin, 1991, at Part IV.
191 Curry, 2015, at 205.
192 XC-Admin, "Transparent Legislation Should Be Easy to Read," *LegisPro* (July 8, 2013), available at https://xcential.com/transparent-legislation-should-be-easy-to-read/.

193 Jessica Yabsley, "Automatic Redlining for Legislation? Rep. Elise Stefanik Wants to Make It Happen," *Data Coalition*, July 14, 2016, available at www.datacoalition.org/automatic-redlining-for-legislation-rep-elise-stefanik-wants-to-make-it-happen/.

194 H. R. 5493, 114th Cong., 2d Sess.