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Legislation as a Site of Contested Meaning in United States Congressional Debates

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LEGISLATION AS A SITE OF CONTESTED MEANING IN UNITED STATES
CONGRESSIONAL DEBATES

by

JOHN ROUNTREE

Under the direction of Mary E. Stuckey, PhD

ABSTRACT

Rhetoric and public policy scholars have shown interest in uncertainty and polysemy in Congress, but they have traditionally treated legislation as a given. Members of Congress disagree about what policy should be, but they also disagree about what any given bill proposes to do. From a rhetorical perspective, I investigate the creation of uncertainty about legislation through the 2013 Senate debate on immigration. I argue that legislation is inherently ambiguous because legislative debate is consistently pushed behind the language of statutes. Rather than consider statutes unto themselves, members of Congress understand them in terms of the potential acts they sanction. Legislation thus becomes a framework for action, and legislators work to construct the probable acts that will result from its passage. By conceptualizing legislation as a framework for action, I shed new light on an unexplored source of disagreement in policy debate.

INDEX WORDS: United States Congress, Legislation, Rhetoric, Uncertainty, Public Sphere

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JOHN ROUNTREE

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May 2015

DEDICATION

To my parents, Jennie and Clarke, the two greatest teachers I could ever ask for.

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1 Introduction

The rationality problem thus consists in this: how can the application of a contingently emergent law be carried out with both internal consistency and rational external justification, so as to guarantee simultaneously *the certainty of law* and its *rightness*?

—Jürgen Habermas, *Between Facts and Norms*, 1996¹

Jürgen Habermas rightly puts communication, law, and deliberation all into conversation with one another, and by doing so, he provides a great model for the field of rhetoric. Studies of the rhetoric of law and the rhetoric of public policy have become de facto separated. Scholars of rhetoric and law simply do not study Congress, and scholars of rhetoric and public policy do not integrate legal insights into discussions on proposed and enacted legislation. As a result, we have created an a-legal understanding of policymaking that must be corrected if we are to fully appreciate deliberative encounters. Whether intentionally drawn or not, we should not respect any territorial boundaries between the rhetoric of law and rhetoric of public policy. Public policy and law are integrally connected and should be treated as such.

One casualty of the current analytic separation of policy and law is an understanding of the polysemy of legislation.² Rhetoricians tend to look at legislation as a political rather than legal act, and thus, do not conceptualize legislation as polysemous in policy disputes because other disputes take center stage. Habermas provides a good language through which we can discuss this problem. He sees a legitimation crisis for the law; a tension exists between facticity and validity, between the coercive force of the law and its validity amongst society's various

¹ Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge, MA: The MIT Press, 1996), 199.

² I accept Leah Ceccarelli's definition of polysemy as multiple but not indefinite meanings in a text. See Leah Ceccarelli, "Polysemy: Multiple Meanings in Rhetorical Criticism," *Quarterly Journal of Speech* 84, no. 4 (1998), 398.

lifeworlds.³ For Habermas, if morality is contingent, then the law requires some basis on which to legitimize itself. Although he acknowledges that the law is uncertain, in the face of validity, he allows it to function as a social fact.⁴ The law thus becomes the stable side of the equation—an existent thing waiting for its legitimizing rhetoric. Ronald Dworkin calls this the “plain fact” view of the law, the view that disagreements over law are actually disagreements over the morality or fidelity of law. Law itself, according to this view, is not actually uncertain.⁵ As I show in the next section, most of the rhetoric and public policy literature investigates the uncertainty of validity, the uncertainty in the premises for the law, and the issue becomes not how we interpret what statutes do but how we interpret the justification for statutes. Without denying the ambiguity of the legislative act, rhetoric and public policy scholarship has allowed it to function as a social fact in order to put other uncertainties center stage. In order to fully understand policy disagreements that so often trouble the American political system, we should understand proposed policies themselves as uncertain and rhetorically constructed.

In response to this gap in the scholarship, I analyze how legislative ambiguity arises and problematizes policy debate. I argue in this thesis that legislation deflects clear understanding by directing attention outside of itself. When legislation is considered an “enactment” within a context, senators strategically construct the context to leverage understanding of what legislation does. Legislation, in this sense, must be understood by analogy to past legislation. Our understanding of legislation rests on the policy history constructed as its backdrop, history which

³ Habermas, *Between Facts and Norms*, 8-9.

⁴ There can be no doubt that Habermas understands the uncertainty that exists in legal statutes. He spends an entire chapter covering legal schools of interpreting the law, but his main project of understanding the law’s legitimation largely leaves those uncertainties to one side. See *Between Facts and Norms*, 197-203.

⁵ Ronald Dworkin, *Law’s Empire* (Cambridge, MA: Harvard University Press, 1986), 6-11.

always involves selection and reconstruction.⁶ When considered for its statutory language, legislation calls our attention not to one legislative act but to many potential acts contained within the framework it established by the law. We are called to understand not what legislation does but what different interpretive agents might do with it. We are either called to situate the legislation in an uncertain history or to look deeper into the framework created by the legislation for all potential acts it allows. Both the inside and outside of legislation are inherently polysemous.

This chapter sets the groundwork for this argument. I first explain the trend in the rhetoric and public policy literature towards questioning previously accepted “givens,” a trend which sets the stage to question the given of legislation. Then, I show how the rhetoric and public policy literature has neglected legislation’s uncertainty by instead focusing on other uncertainties, essentially allowing legislation to function as a social fact. Next, I cover my methods for this project, starting with how I picked the text for analysis—the 2013 Senate immigration debate—and ending with an explanation of Burkean pentadic analysis that I will be employing. Finally, I preview the rest of the chapters for the project.

1.1 The Rhetorical Construction of Policy Givens

When the president and members of the Congress of the United States “go public,” they make sense of policy issues facing the nation and construct meaning through their discourse.⁷ Not only is this point widely accepted in the rhetoric and public policy literature, but it has also drawn

⁶ For a discussion of history as constructed, see Patrick H. Hutton, “Collective Memory and Collective Mentalities: The Halbwachs-Ariés Connection,” *Historical Reflections* 15, no. 2 (1988): 311-322.

⁷ Samuel Kernell, *Going Public: New Strategies of Presidential Leadership* (Washington, D.C.: CQ Press, 1986), 1.

significant study. Scholars in this literature have mostly dedicated themselves to uncovering the observations implicit in constructions of a policy context, in other words, to understand the “politics of representation.”⁸ An understanding of policy context has normative force that calls for specific action.

Rhetorical critics have begun to question how the “givens” in policy debates constitute a policy context and implicate the policy decision. They demonstrate that the power of policy rhetoric is often not that of a direct argument. Rather, policy rhetoric alters the argumentative terrain by constructing a social reality that calls for the outcome members present. In Burkean terms, they build a scene implicit with a desirable or necessary act of Congress in response.⁹ I will consider three types of premises that have been questioned in the rhetoric and public policy literature.

First, rhetorical critics have shown how policy problems are constructed to implicate the types of solutions that are needed. Robert Asen, Lisa Gring-Pemble, and David Zarefsky all demonstrate that the rhetorical construction of poverty helps to rationalize certain policy outcomes.¹⁰ By depicting welfare recipients as amoral and feckless, for example, policymakers justify contracting with religious organizations to provide social services because they will supply recipients with a moral foundation.¹¹ Alternatively, if policymakers depict the poor as good-natured, vulnerable, and struggling, it may justify an increase in welfare payments or even

⁸ See Robert Asen, *Visions of Poverty: Welfare Policy and Political Imagination* (East Lansing, MI: Michigan State University Press, 2009), 12.

⁹ Kenneth Burke, *A Grammar of Motives* (Berkeley, CA: University of California Press, 1945).

¹⁰ Asen, *Visions*; Lisa Gring-Pemble, “‘Are We Now to Govern by Anecdote?’: Rhetorical Constructions of Welfare Recipients in Congressional Hearings, Debates, and Legislation,” *Quarterly Journal of Speech* 87, no. 4 (2001): 341-365; David Zarefsky, *President Johnson’s War on Poverty: Rhetoric and History* (University, AL: The University of Alabama Press, 1986).

¹¹ Gring-Pemble, “Govern by Anecdote,” 355-356.

income redistribution.¹² Rhetoricians have taken up the constructed nature of the problem in other instances as well. Brian Amsden shows that the youth suffrage debate shifted in its construction of the established problem, a shift from the individual's capacity to make good decisions and toward young people as a political force that need to be represented.¹³ David Levasseur argues that the exigence of the 1995 budget battle between Clinton and the Republicans in Congress called for comparing the two budgets rather than comparing them to the status quo.¹⁴ The policy problem thus is framed as a choice between two seemingly different budget proposals, when in reality they were very similar when compared to current budget levels.¹⁵ Kirt Wilson reveals how members of Congress in the 1874 civil rights debate came to two separate conclusions because they had two different understandings of the current state of racial inequality, thus the prudent course of action was different for opponents and proponents of the civil rights legislation.¹⁶ It is clear from these studies that the construction of the policy problem will justify different solutions.

Second, scholars have shown how public will or opinion, supposedly the legitimating force behind policy in a representative democracy, is uncertain in policy debates. Even the idea of the public has changed considerably over the centuries, which Habermas outlines in *The Structural Transformation of the Public Sphere*, so public opinion is even more difficult to

¹² Amsden, *Visions*, 97-101.

¹³ Brian Amsden, "Democratic Prudence and the Youth Suffrage Debate," *Argumentation and Advocacy* 48 (2011): 22-38.

¹⁴ David G. Levasseur, "The Rhetorical Construction of Economic Policy: Political Judgment and the 1995 Budget Debate," *Rhetoric & Public Affairs* 3, no. 2 (2000): 183-209.

¹⁵ *Ibid.*, 185.

¹⁶ Kirt H. Wilson, "The Contested Space of Prudence in the 1874-1875 Civil Rights Debate," *Quarterly Journal of Speech* 84 (1998): 131-149.

identify.¹⁷ As Levasseur points out, public opinion does not simply amount to modern day Gallup polls.¹⁸ Publics and thus public opinion are not existent—they are made through discourse. G. Thomas Goodnight and Kathryn Olson argue that publics are created and mobilized through argument, and they mirror Michael Calvin McGee’s assertion that the public is a “fantasy” with a “strictly linguistic” existence.¹⁹ As a result, the supposed self-evidence of the public and its opinions creates the “myth” of public opinion.²⁰ J. Michael Hogan has done a significant amount of work in this area to show both how public opinion is ambiguous and situationally deployed in policy disputes.²¹ Scholars have thus problematized the notion that public will is understandable and can be used as a premise for policy decisions.

Third, the institution of Congress itself has come under scrutiny. The institution is neither natural nor neutral, and it privileges certain voices over others. The structure and rules for interaction in Congress have been studied because they provide rhetorical opportunities and difficulties within the institution. Chris Darr, for instance, questions whether Senate civility rules provide for civility and robust debate, which, upon the assumption of many deliberative theorists, provides for a better policy.²² As Tarla Rai Peterson argues, the procedures for debate help cloak

¹⁷ Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger (Cambridge, MA: The MIT University Press, 1991).

¹⁸ David G. Levasseur, “The Role of Public Opinion in Policy Argument: An Examination of Public Opinion Rhetoric in the Federal Budget Process,” *Argumentation and Advocacy* 41 (2005): 152.

¹⁹ G. Thomas Goodnight and Kathryn Olson, “Entanglements of Consumption, Cruelty, Privacy, and Fashion: The Social Controversy over Fur,” *Quarterly Journal of Speech* 80 (1994): 272; Michael Calvin McGee, “In Search of ‘The People’: A Rhetorical Alternative,” *Quarterly Journal of Speech* 61 (1975): 239-240.

²⁰ Richard Vatz, “Public Opinion and Presidential Ethos,” *Western Journal of Speech Communication* 40, no. 3 (1976): 198-200.

²¹ J. Michael Hogan and Leroy Dorsey, “Public Opinion and the Nuclear Freeze: The Rhetoric of Popular Sovereignty in Foreign Policy Debate,” *Western Journal of Speech Communication* 55 (1991): 334.

²² Christopher Darr, “Adam Ferguson’s Civil Society and the Rhetorical Functions of (In)Civility in United States Senate Debate,” *Communication Quarterly* 59, no. 5 (2011): 604.

power structures operating within the institution of Congress.²³ Scholars also point to the exclusionary tendencies of the institution. Daniel C. Brouwer shows how ACT UP activists participated in congressional hearings—an intrusion of a counterpublic into highly traditional public arena. The institution, in this case, becomes a site of potential co-optation of the movement by Congress, hence ACT UP’s ambivalence towards the hearings and fear of lending legitimacy to congressional policies on AIDS.²⁴ In addition, Zornitsa Keremidchieva charts how the Congressional Women’s Caucus has struggled to represent women’s issues with a general dearth of institutional resources such as funding and space. The resulting institutional barriers made it more difficult to raise awareness about the difference between men and women’s needs, especially when most representatives in Congress are men.²⁵ Far from a neutral, the structures of the congressional institution favor some policy outcomes over others.

While previous studies of public policy rhetoric take up the constructed nature of the policy situation (public opinion, the problem, the institution, etc.), they have not taken up the primary act of Congress—legislation—as a site of contested meaning. While members may even agree on what legislation says, we have yet to recognize that members of Congress come to different conclusions about what legislation does. Legislation lends itself to many interpretations, redefinitions, and reconstructions. Members of Congress battle to control the meaning of legislative acts in order to frame public understanding of policy debates. If we do not recognize this aspect of legislative rhetoric, then we miss one of the primary sites of contestation and

²³ Tarla Rai Peterson, “The Rhetorical Construction of Institutional Authority in a Senate Subcommittee Hearing on Wilderness Legislation,” *Western Journal of Speech Communication* 52 (1988): 273.

²⁴ Daniel C. Brouwer, “ACT-ing UP in Congressional Hearings,” in *Counterpublics and the State*, eds. Robert Asen and Daniel C. Brouwer (Albany, NY: State University of New York Press, 2001), 88.

²⁵ Zornitsa Keremidchieva, “Legislative Reform, the Congressional Caucus for Women’s Issues, and the Crisis of Women’s Political Representation,” *Women & Language* 35, no. 1 (2012): 32.

rhetorical construction in policy debates. Therefore, this study contributes to the rhetoric and public policy literature by investigating legislation as a site of contested rhetorical constructions.

A few scholars have shown, to some extent, that legislation itself is rhetorically constructed, though none have explicitly made that claim or draw much attention to it. Gring-Pemble explains that legislation reinforces dominant ideologies by “legislating” families, but the main thrust of her argument is that the depictions of welfare families throughout the debate resulted in legislation that affirmed the vision of an “ideal nuclear family.”²⁶ Keremidchieva notes in passing that Senator Reed called the 19th Amendment a “certificate of democracy to other lands,” thus demonstrating that legislation can be used to construct American identity abroad.²⁷ G. Thomas Goodnight goes farther than either Gring-Pemble or Keremidchieva, but he does not develop the point fully. He notes that Republicans focused on the 2002 Iraq War Resolution as a “vehicle for sending a message” and that political actors often disagree on “the nature and meaning of the proposed policy.”²⁸ Interestingly, both Goodnight and Keremidchieva seem to have side-noted a phenomenon whereby political actors consider legislation as not just a material act but also as rhetorical, thereby further contesting the act’s meaning. In sum, the conversation about rhetoric in public policy is moving towards revealing the constructed-ness of different premises of policy-making. Particularly, Keremidchieva, Gring-Pemble, and Goodnight call attention to but do not take full account of the legislative act as constructed and contested.

Rhetoricians should already to some extent understand that legislation is rhetorically constructed. Whether we consider appeals so superficial as naming legislation “The Patriot Act”

²⁶ Lisa Gring-Pemble, “Legislating a ‘Normal, Classic Family’: The Rhetorical Construction of Families in American Welfare Policy,” *Political Communication* 20 (2003): 475.

²⁷ Zornitsa Keremidchieva, “The Congressional Debates on the 19th Amendment: Jurisdictional Rhetoric and the Assemblage of the US Body Politic,” *Quarterly Journal of Speech* 99, no. 1 (2013): 65.

²⁸ Goodnight, “The Metapolitics of the 2002 Iraq Debate: Public Policy and the Network Imaginary,” *Rhetoric & Public Affairs* 13, no. 1 (2010): 78-79, 83.

or “The Affordable Care Act,” or whether we consider the merits of members looking like they are actively solving problems by putting forward bills, it seems obvious that legislation is a rhetorical construction. At the same time that we know this about legislation, policy critics frequently allow legislation to function as transparent background information, not as a rhetorical construction, and no real corrective has been offered. In Asen’s analysis of Lyndon Johnson and George W. Bush’s use of key education policy terms, for instance, he shows how the terms justified the policies which were ultimately implemented by refiguring the problems in our educational system and the relative capabilities of different educational institutions. His analysis, while commendable for showing how key terms can help constitute a policy problem to be solved, falls short once he gets to the legislative acts in question—namely, the Elementary and Secondary Education Act and No Child Left Behind. He takes it as a given that the ESEA provides a “basic floor” for poor communities and that NCLB required more strenuous testing for education.²⁹ Additionally, Asen dedicates his entire book on welfare policy debates to understanding how images of the poor justified repealing parts of the Aid to Families with Dependent Children (AFDC). The repeal of AFDC legislation becomes a starting point, a social fact that calls for explanation and is legitimized by a shift in collective imagining about the poor.³⁰

I am not saying that the legislative acts did not do what Asen claims they did, but too frequently policy critics leave the legislative act alone without taking up its polysemous nature. Consider what Gring-Pemble said about the purpose of her article on the rhetorical construction of welfare recipients: “Ultimately, I show in this essay how depictions of welfare recipients and

²⁹ Asen, “Lyndon Baines Johnson,” 310.

³⁰ Asen, *Visions*, 9.

their families form the basis of the enacted welfare legislation.”³¹ The main focus for Gring-Pemble, as for Asen, is on the construction of the problem and how the problem implicates a solution. David Zarefsky argues quite clearly in his book on Johnson’s “War on Poverty” that the situation is rhetorically constructed to demand a specific policy response:

Since the meaning of a situation is not intrinsically given, it must be chosen. By selecting which symbols indicate the situation, people define what it means. . . . This understanding will determine the appropriate response to the situation. If the phenomenon of a person lacking work is symbolized as indolence, sloth, or sinfulness, then stern admonition might be called for but public employment programs would seem extremely inappropriate. Conversely, if the same phenomenon is seen as a specific manifestation of a maladjusted economy, then moralizing or temporizing would seem ineffective if not hypocritical; the situation clearly calls for public action.³²

Zarefsky separates out the public action from the rhetorically constructed situation. In line with a deliberative tradition, public policy becomes a response to rhetoric. The question thus is not what the policy is but whether or not it is an appropriate response to the situation. Levasseur, who teases out so many different ways that public opinion gets interpreted and contested, does not stop to consider how the federal budget itself is polysemous.³³ Likewise, Michael Steudeman shows how the education policies of Lyndon Johnson are undergirded by a “heroic teacher” myth.³⁴ I doubt that if any of these scholars were questioned that they would deny that legislation is rhetorically defined, but they do seem to allow legislation to sit somehow separately from the rhetorical work being done, to function, as I noted in the introduction, as a social fact.

We need to stop talking about legislative acts as mere byproducts of prior rhetoric and instead consider them for the rhetorical constructions they are. This means opening up the other

³¹ Gring-Pemble, “Govern by Anecdote,” 343.

³² Zarefsky, *War on Poverty*, 3.

³³ Levasseur, “The Role of Public Opinion in Policy Argument.”

³⁴ Michael Steudeman, “‘The Guardian Genius of Democracy’: The Myth of the Heroic Teacher in Lyndon B. Johnson’s Education Policy Rhetoric,” *Rhetoric & Public Affairs* 17, no. 3 (2014): 477-510.

side of the equation by looking at facticity rather than validity. The deep concern that policy critics have for polysemy should extend to the hotly contested meanings of the policy actions themselves. These studies seem to imply that policy actors agree on what legislation does, and as I will show, legislation is actually a key site of contestation.

This review leads me to two conclusions. First, the rhetoric and public policy literature will continue to investigate aspects of policy debates to reveal the partiality of previously accepted givens. Second, the literature has not yet seriously considered the given of legislative acts. Thus, I seek to answer two research questions with my study:

- (1) How do policymakers reconstruct the legislative act?
- (2) What implications do any reconstructions of the legislative act have for our political discourse?

The answers to both questions will inform future studies of public policy and congressional discourse. This study will provide a critical corrective to current conceptions of the legislative act, and it will allow rhetorical critics to appreciate the fullness of polysemy in policy debates.

Now that I have addressed the impetus for my study, I cover my approach to answering my research questions. There are three key aspects I explain about my approach: the type of texts I chose to analyze, the case study, and the method of analysis. To begin, I explain how I decided the types of policy texts to analyze.

1.2 Finding the Public Policy Text

The current literature offers little guidance to determine what type of texts to analyze in order to get at public policy rhetoric. Previous studies of public policy rhetoric have drawn upon hearings, popular discourse, memoirs, media appearances, and presidential speeches without any explicit reasoning why these fragments are relevant. Asen, for example, says that in order to fully

appreciate the policy rhetoric of FDR on social security, he would “have to place FDR’s address in dialogue with congressional committee hearings, House and Senate floor debates, government agency reports, news media coverage, public advocacy campaigns, and more.”³⁵ There seems to be little explicit reasoning for why critics focus on one type of text over another. This methodological problem unfortunately starts with the vagueness of the term “public policy rhetoric.” Most scholars do not even offer a definition before they launch into their analyses, and as a result, any text even remotely touching on a political controversy may seem relevant to this study. Therefore, before looking at how to select policy texts to analyze, it is necessary to step back and take account of how I am defining public policy rhetoric.

Goodnight defines public policy argument as “a productive, situated communication process where advocates engage in justifying and legitimating public interests.”³⁶ Vanessa Beasley tries to distinguish presidential rhetoric which is relevant to public policy rhetoric, and in doing so, she says that public policy rhetoric responds to some public need or the ongoing debate surrounding a public need.³⁷ Zarefsky says the unit of analysis delineates public policy rhetoric from presidential rhetoric, that unit being “the controversy rather than the rhetor or the text.”³⁸ Asen circles around the issue in his works on education, welfare, and social security debates, but he does not explicitly address it. Generally, he construes policy argument as any discourse from political actors brought publicly to bear on the laws that Congress passes. These

³⁵ Asen, “Reflections on the Role of Rhetoric in Public Policy,” *Rhetoric & Public Affairs* 13, no. 1 (2010): 139.

³⁶ Goodnight, “Metapolitics,” 66.

³⁷ Vanessa Beasley, “The Rhetorical Presidency Meets the Unitary Executive: Implications for Presidential Rhetoric on Public Policy,” *Rhetoric & Public Affairs* 13, no. 1 (2010), 10.

³⁸ David Zarefsky, “History of Public Discourse Studies,” in *The SAGE Handbook of Rhetorical Studies*, eds. Andrea A. Lunsford, Rosa A. Eberly, and Kirt H. Wilson (Thousand Oaks, CA: Sage, 2009): 445.

definitions are broad but somewhat helpful. We know that policy rhetoric is a pragmatic debate over public interests.

Insofar as policy rhetoric is pragmatic, it is a means to very specific end: legislation. Rarely do scholars who “public policy rhetoric” investigate the policies exclusive to the executive branch.³⁹ Beasley, who is studying the president’s role in policy-making, even says “[the rhetorical presidency] literature suggests that rhetorical presidents must garner popular support for their public policies and/or policy agendas as a prerequisite for successful implementation via congressional approval.”⁴⁰ If the focus is on congressional implementation of policy, then the focus is on legislation.

Given the aforementioned definitions and given that I am trying to understand how legislation is contested, I do my analysis of public policy rhetoric with the legislative debates which immediately surround the ultimate policy decision. For my purposes, it makes sense to analyze floor debates for two reasons. First, floor debates are highly intertextual—members of Congress typically create a patchwork of political voices within the floor debate by including letters from interest groups, recounting of news reports, popular culture, stories from constituents, and references to presidential speeches. It is for this reason that so many scholars turn to floor proceedings to study historical controversies,⁴¹ and it is why Brian Amsden refers to the *Congressional Record* as “the most sustained historical archive.”⁴² Second, floor debates

³⁹ A notable exception is Denise Bostdorff discussing Nixon’s policies on China. See Denise Bostdorff, “The Evolution of a Diplomatic Surprise: Richard M. Nixon’s Rhetoric on China, 1952–July 15, 1971,” *Rhetoric & Public Affairs* 5, no. 1 (2002): 31-56.

⁴⁰ Beasley, 10, emphasis added.

⁴¹ For instance, Wilson; Susan Zaeske, “‘The South Arose as One Man’: Gender and Sectionalism in Antislavery Petition Debates, 1835-1845,” *Rhetoric & Public Affairs* 12, no. 3 (2009): 341-368; Asen, *Visions*.

⁴² Amsden, 24.

feature legal arguments over statutory construction in ways that seldom reach the media, memoirs, presidential speeches, and so on. Floor debates thus provide insight into the legal side of congressional rhetoric.

1.3 Case Study: The 2013 Senate Immigration Debate

For my case study, I analyze the debates over bill S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act. In 2013, the Senate passed a comprehensive immigration reform bill to increase border security and to provide a pathway to citizenship for illegal immigrants in the country. Despite passing the Senate 68 to 32, the bill has been stalled from 2013 to 2015 because Speaker of the House John Boehner will not bring it to the floor in the House of Representatives. With President Obama's executive order on immigration to defer deportation of five million illegal immigrants, the issue has only become more polarizing.

Immigration provides an ideal case to study polysemy in legislation. Although the issue is politically contentious, advocates of reform on both sides of the aisle claim to have very similar goals. Widespread agreement exists that the immigration system is "broken," and Republicans and Democrats generally agree that a solution needs to involve both added security and a tough pathway to legalization for illegal immigrants who are already in the country. No one calls for mass deportation. Both parties even agree on the metrics for a secure border—100 percent situational awareness and 90 percent apprehension rate--and both agree that border security should come prior to permanent legalization. Senator Mike Lee (R-UT) claims it does nothing to secure the border by building fencing or increasing border patrol agents, that it does not live up to the expectations.⁴³ Similar claims come from all opponents, such as Senator Tom Coburn (R-

⁴³ *Congressional Record* 159, pt. 81 (June 10, 2013): S 4033.

OK) who asserts the bill has no “teeth” to secure the border, Senator Ted Cruz (R-TX) who says the border security provisions will never be implemented, and Senator Chuck Grassley (R-IA) who says border security provisions are false promises.⁴⁴ Meanwhile, Senator Chuck Schumer (D-NY) calls the bill “tough as nails” on border security, and other key proponents such as Senator Harry Reid (D-NV), Senator Patrick Leahy (D-VT), and Senator John McCain (R-AZ) tout the increased border security that the bill offers.⁴⁵

The question boiling underneath the immigration debate is not what actions should be taken but whether immigration legislation takes those actions. As Grassley keenly observes, “the rhetoric was spot on, but the details were dubious.”⁴⁶ As a result, both sides of the immigration debate have located uncertainty in the 2013 legislation, making it an ideal case study.

1.4 A Pentadic Approach to the Texts

For this study, I employ Kenneth Burke’s pentad to analyze the Senate immigration debate. Burke’s pentad accounts for fundamental forms of human thought about action. Any complete statement of action accounts for a person (agent) doing something (act) within a given background (scene) by some means (agency) for a reason (purpose). Whenever we answer questions of motive, whenever we explain “what people are doing and why they are doing it,”

⁴⁴ Coburn, S 5009; Cruz, S 5012; Grassley, S 5205.

⁴⁵ Jessica Taylor, “Immigration Fight Just Getting Started: 5 Takeaways,” *MSNBC*, last modified September 13, 2013, <http://www.msnbc.com/the-daily-rundown/immigration-fight-just-getting-started-5-tak>; Reid, S 4624; Leahy, S 4361; McCain, S 4748.

⁴⁶ *Congressional Record* 159, pt. 81 (June 10, 2013): S 4030.

Burke says we must necessarily draw on the resources of these five pentadic terms. Even when the terms are not present by name, they are present in function.⁴⁷

Burke's pentad is useful because it highlights how rhetors leverage motivational assumptions in one term to change an audience's understanding of the rest of the terms of action. He explains that one term is often "featured" in that all the other terms are derived from its substance.⁴⁸ Rhetors develop pentadic terms in logical coordination with one another. In congruence with Burke's theory of form, we understand that the featuring of the agent, for instance, results in the "agentification" of the scene, act, agency, and purpose because we desire logical consistency between terms.⁴⁹ The term "teacher" implies certain types of acts (instructing, grading), scenes (classroom, office, library), purposes (education), and agencies (textbook, lecturing). Our assumptions about what goes with what are leveraged to a rhetor's advantage.

The pentad is particularly appropriate for analyzing legal discourse because discussions of the law must consider several acts in conjunction with one another. As Clarke Rountree argues, interpreters of the law must make sense of the past, present, and future, and that interpretative work involves accounting for action.⁵⁰ In order to make sense of the present legislation, senators must reconstruct past acts in contextualizing the legislation and analyze potential future acts in the construction of statutes. Past policy acts are not isolated from potential future acts—they are brought to bear on one another. The pentad offers a language to discuss the

⁴⁷ Burke, *Grammar*, xv-xvi.

⁴⁸ *Ibid*, 127-128.

⁴⁹ *Ibid*, 128; Burke explains form as the creation of an appetite and fulfilling of that appetite in the mind of the audience. See Kenneth Burke, *Counter-Statement* (Berkeley, CA: University of California Press, 1931), 31.

⁵⁰ Clarke Rountree, "Instantiating 'the Law' and Its Dissents in *Korematsu v. United States*: A Dramatistic Analysis of Judicial Discourse," *Quarterly Journal of Speech* 87, no. 1 (2001): 3-4.

connection between acts.⁵¹ One pentadic set, one particular configuration of the scene, act, agent, agency, and purpose, necessarily implicates another. If an agent is constructed with regards to a scene, then that agent has been “grammatically limited” for other pentadic sets. Our understanding of that agent is not isolated to one particular configuration of the pentad, thus acts can be considered in conjunction with one another.

Before I proceed further, I should address two possible objections to my use of the pentad. First, I do not formally employ ratios in my analysis although ratios are frequently used as an analytic tool when doing pentadic criticism. Second, I use the pentad to analyze the rhetoric of multiple senators. More traditional critics may see this as unwieldy if they believe pentadic analysis implies one rhetor with one audience and one coherent persuasive strategy. I will address each objection in turn.

Many pentadic critics will use what Burke calls “ratios” to formally analyze the relationship between two terms in a pentadic set, what he refers to as “a formula indicating a transition from one term to another.”⁵² For example, a scene-agent ratio would document the transition of features of the scene onto the agent. I will not be explicitly using ratios in my analysis. A ratio is a reduction of scope from looking at the entire pentadic set to looking at only two terms, so they do not tell us anything new about the relationships between terms that we cannot learn from the pentadic set as a whole. Instead, they are an invitation to look more closely at two terms in isolation. When Burke originally wrote the *Grammar of Motives*, he saw ten possible permutations of ratios. However, once we get into the multiple pentadic sets in policy

⁵¹ I am indebted to my father for his work on the “collision” of acts in pentadic analysis. He presented on this at a past Kenneth Burke conference but never published this research.

⁵² Burke, *Grammar*, 262.

discourse, the permutations increase exponentially. Drawing out, for instance, a scene-act-agency relationship will only overcomplicate and distract from more important aspects of my analysis.

Rhetorical critics have found the pentad amenable not just to one rhetor's strategy but to situations involving multiple rhetors. The pentad is particularly amenable to the study of constitutive rhetoric because it does not rely on identifying a group's common rhetorical strategy, only on identifying a common epistemology. For instance, in their analysis of a hunting controversy, Mari Boor Tonn, Valerie A. Endress, and John N. Diamond use the pentad to reveal prevalent motivational assumptions of the Maine community.⁵³ As Burke claims, everyone draws on the resources of the pentad, so the functions of the terms are going to be present whether a coherent rhetorical strategy exists or not.⁵⁴

1.5 Chapter Preview

In chapter two, I briefly outline the history of United States immigration policy with a particular focus on the modern immigration debate. This history is important because past acts play such a vital role in interpreting the statutes of the 2013 immigration bill. Senators leverage past acts to implicate future acts. I draw special attention to attempts over the last thirty years to control illegal immigration and the impetus for Congress to consider these attempts as policy failures, signs of our broken immigration system.

Chapter three deals with policy history as constructed by senators on both sides of the immigration debate. Every piece of legislation occurs within a policy context, and I analyze how senators reconstruct the policy history of the last thirty years in order to attribute blame for the

⁵³ Mari Boor Tonn, Valerie A. Endress, and John N. Diamond, "Hunting and Heritage on Trial: A Dramatistic Debate over Tragedy, Tradition, and Territory," *Quarterly Journal of Speech* 79 (1993): 165-181.

⁵⁴ Burke, *Grammar*, xv-xvi.

current broken system. I use Burke's theory of the "constitution-behind-the-constitution" to guide my search for the legislation-behind-the-legislation, the contextualizing work that reframes the 2013 legislation. Opponents of the 2013 bill allocate blame in scenic terms to construct a powerless legislature in the face of a line of broken promises, while proponents make the Congress into an active agent that has consistently increased security at the border. The two different attributions of action and motion have ramifications for interpreting potential future acts. Specifically, the construction of history allows opponents and proponents to place blame on different subversive agents that should not be empowered by the statutory construction of the 2013 bill.

In chapter four, I turn to the statutory construction of the 2013 legislation. Statutes always permit leeway in interpretation because they are not acts as much as they comprise a framework for future acts. Congress has to speculate as to the probable future acts they will be taken under the allowance of statutes. Senators' allocation of blame for the broken immigration system in chapter three leads them to interpret different subversive potentialities within statutes. Proponents fear that giving more interpretive power to Congress will mean giving the subversive agent from past policy (Congress) the capacity to undermine the legalization process of the eleven million illegal immigrants in the United States. They attempt to mitigate those potential subversive acts by allocating interpretive authority of statutes away from Congress. Meanwhile, opponents insert the executive branch as the subversive agent to accompany the past broken promises. They fear that giving interpretive power to the executive branch will allow the legalization to proceed without actually securing the border. Both sides use the construction of potential subversive acts to argue for giving statutory interpretation power to different parties.

In the final chapter, I draw out three important implications for the incorporation of legal insights into legislation's polysemy. Because the law undergirds each branch of government, I argue that we need more studies of the law permeating through each branch, thus putting Congress, the president, and the Supreme Court in conversation with one another. Second, I argue we should, given this legal framework, understand the Congress as a technical legal sphere of deliberation. This perspective raises troubling questions about the public's ability to hold legislators accountable for their policy actions, particularly when they disagree over what statutes do and do not permit. Finally, I call for rhetoricians to look at the opportunities for rhetors to manufacture different understandings of legislation by leveraging public expectations of democratic debate, expectations that are integral even to our own scholarship on public deliberation.

2 A Brief History of American Immigration Legislation

Not like the brazen giant of Greek fame,
 With conquering limbs astride from land to land;
 Here at our sea-washed, sunset gates shall stand
 A mighty woman with a torch, whose flame
 Is the imprisoned lightning, and her name
 Mother of Exiles. From her beacon-hand
 Glows world-wide welcome; her mild eyes command
 The air-bridged harbor that twin cities frame.

“Keep, ancient lands, your storied pomp!” cries she
 With silent lips. “Give me your tired, your poor,
 Your huddled masses yearning to breathe free,
 The wretched refuse of your teeming shore.
 Send these, the homeless, tempest-tost to me,
 I lift my lamp beside the golden door!”

—Emma Lazarus, “The New Colossus,” 1883

The United States is a nation of immigrants, yes, but one with a troubled history of strife and exclusion.⁵⁵ Irony emerged in full form when Emma Lazarus’s “The New Colossus” was first venerated at the foot of the Statue of Liberty in 1903. Its placement came a mere year after the renewal of the Chinese Exclusion Acts, one of the most racist and prohibitive immigration policies in American history. The plaque now stands as a monument to America’s cognitive dissonance, a thin veil concealing an inconvenient history with golden-eyed sentiment.

United States’ immigration policy historically follows patterns. Restrictive immigration policies surface when a powerful public fears losing its influence to the foreign “other.” Whether they blame the Chinese on the west coast during the 1880s or Latinos today, some Americans tend to fear the economic influence of cheap foreign workers depressing wages for labor across

⁵⁵ Aristide R. Zolberg, *A Nation by Design: Immigration Policy and the Fashioning of America* (Cambridge, MA: Harvard University Press, 2006), 1-2.

the board.⁵⁶ This fear extends to those with cultural and political power, particularly with the potential influence of the French, Jews, Germans, Japanese, Irish, and Mexicans immigrating to the United States.⁵⁷ On the other hand, when the American economy is strong or when labor is in high demand, the U.S. opens its borders and pushes for more immigration in the hope that cheap labor will bolster the economy, whether that means using immigrants to settle the western frontier or to make up for labor shortages during wartime. The give and take, the opening and closing of American borders, demonstrates that immigration policy has much to do with the struggle for economic and political advantage, and it also demonstrates that during times of trouble, the American people find immigrants to be convenient scapegoats. Immigration policy is neither simple nor cyclical, but common patterns do emerge throughout the nation's history.

I recognize the difficulty and irony in writing a legislative history of immigration reform in a project aimed at elucidating the uncertainty in legislative provisions. That is, how can I explain what past legislation did while also emphasizing the ambiguity of legislation in general? To be clear, I maintain that legislation makes demonstrable changes to our legal system beyond the ambiguities produced in policy discourse. As Robert Asen argues, policy involves the mediation of rhetorical and material forces.⁵⁸ While policy is rhetorical because it necessarily involves the written language of the law and the interpretation of meaning therein, it is also necessarily material because it produces material results. Receiving or not receiving a Social Security check is a tangible result, as is putting more agents on the border between the United States and Mexico. Thus, legislative uncertainty should partially be stabilized by identifiable

⁵⁶ Dorothee Schneider, "I Know All about Emma Lazarus': Nationalism and Its Contradictions in Congressional Rhetoric of Immigration Restriction," *Cultural Anthropology* 13, no. 1 (1998): 95.

⁵⁷ See, for example, J. David Cisneros, "Contaminated Communities: The Metaphor of 'Immigrant as Pollutant' in Media Representations of Immigration," *Rhetoric & Public Affairs* 11, no. 4 (2008): 590-591.

⁵⁸ Asen, "Reflections," 126-127.

material actions. In addition to the demonstrable material effects of laws, the passage of time usually irons out any major dissensus among historians and policy analysts on the meaning of most past legal provisions regarding immigration. Where uncertainty still persists over more recent legislation, I acknowledge that controversy remembering that, many of the provisions that are hazy in previous laws become renewed points of controversy in the 2013 immigration debate.

I have divided up the history of immigration policy into three main sections. First, I review the early immigration policies of the United States. The government between 1787 and 1921 mostly left immigration unrestricted, although it made serious forays into exclusionary policies with regards to the French and the Chinese. Next, I explain the turn away from mostly free immigration to quotas and other types of systems of preferences that applied to all immigrants starting in 1921. Finally, I show how the modern immigration debate shifted from a focus on legal immigration to one on illegal immigration. I go into more detail in the third section because the 2013 immigration debate closely ties into the debates that began in 1986. Illegal immigration rapidly increased starting in the 1960s and turned the nation's attention to border security. The nation's attention remains on border security to this day.

2.1 Mostly Unrestricted Immigration and First Precedents for Exclusion: 1787-1921

For the first hundred years of the new republic, the United States did little to limit immigration into the country and even aggressively encouraged it. Thomas Jefferson claimed that the country wanted to “produce rapid population by as great importations of foreigners as possible.”⁵⁹

⁵⁹ Zolberg, 58.

Americans mainly saw immigration as a means to improve industry and populate the West.⁶⁰ The U.S. had available, temperate land that it was eager to market to northern Europeans, especially to help pay the country's debts. In simple economic terms, open immigration policies increased demand for U.S. land.⁶¹

Of course, the land of the western frontier was already occupied by American Indians. Despite denials from U.S. government officials, the country seemed intent on conquering the west and deposing native tribes. Jefferson's vision of an agrarian society depended on an abundance of land available to farmers, and settlers drove westward largely in hopes that they would find material success in an "errand into the wilderness."⁶² Andrew Jackson believed that westward settlement marked the inevitable march of civilization.⁶³ The policy of economic expansion and high immigration conflicted with national security goals. The more immigrants pushed the frontier west, the more antagonistic the country's relationship with native communities became. Indeed, Indian affairs were placed under the newly created War Department in 1789. The early 1800s brought more warfare between the government and indigenous nations until finally Jackson began the process of forcibly relocating tribes to reservations in 1830 with the Indian Removal Act.⁶⁴ That process became complete with the massacre at Wounded Knee in 1890.

⁶⁰ Maldwyn Allen Jones, *American Immigration, Second Edition* (Chicago: The University of Chicago Press, 1992), 58.

⁶¹ Zolberg, 66.

⁶² Takaki, 80; Judith Nies, *Native American History: A Chronology of a Culture's Vast Achievements and Their Links to World Events* (New York: Ballantine Books, 1996), 222-223.

⁶³ Ronald Takaki, *A Different Mirror: A History of Multicultural America* (Boston: Little, Brown and Company, 1993), 86.

⁶⁴ Nies, 212, 244-245.

Although national security concerns over native sovereignty did not impede unrestricted immigration, security concerns did lead to more restrictive immigration policies during the French Revolution. The mob violence in France led many refugees to flee to the New World, and the U.S. government felt leery about the refugees' potential political influence.⁶⁵ More specifically, the Federalists in power thought the immigrants would bolster the pro-French Republican Party, who they believed in turn would hand the nation over to France.⁶⁶ Thus, Federalists saw immigration-control as both a matter of political power and national security. In response to the influx of foreign "radicals," the Federalist Congress passed a group of controversial laws in 1798 called the Alien and Sedition Acts. These laws did not restrict immigrants' ability to come to the United States but instead made it more difficult for immigrants to gain the political power afforded citizens.⁶⁷ Collectively, the Alien and Sedition Acts increased the residency requirements for citizenship from five to fourteen years, gave the Adams administration the power to remove foreigners in times of war, and made it illegal to harbor foreigners without express permission from the government. After Thomas Jefferson became president, he allowed the acts to expire, but the short-lived laws set the precedent for restricting immigrants based on national security fears.⁶⁸

Other than the Alien and Sedition Acts, the U.S. did not make any major changes to immigration law for another century and allowed immigrants to enter the country in large

⁶⁵ Jones, 59-60.

⁶⁶ John C. Miller, *Crisis in Freedom: The Alien and Sedition Acts* (Boston: Little Brown and Company, 1951), 11-14.

⁶⁷ Lisa Magaña, *Straddling the Border: Immigration Policy and the INS* (Austin, TX: University of Texas Press, 2003), 13.

⁶⁸ Miller, 47; Steven G. Koven and Frank Götske, *American Immigration Policy: Encountering the Nation's Challenges* (New York: Springer, 2010), 126-127.

numbers. Chinese workers especially started pouring into the west coast in the 1840s, and they were welcomed because they provided a cheap labor source.⁶⁹ Economic opportunity for the country and for working class Americans kept the nation's borders open. The American Civil War especially created a shortage of working men, and industry and government began pushing immigrant labor to help finish construction on railroads.⁷⁰ However, from the 1850s to the 1880s, anti-Chinese sentiment on the west coast developed. American workers mistakenly assumed that the Chinese were "coolies," cheap servitude laborers, and that their presence hurt the standing of free labor.⁷¹ When the economic security of working Americans is threatened, American workers tend to blame immigration. The market downturns in the 1870s turned public sentiment and the government towards restrictive policies.⁷² In 1882, Congress passed the Chinese Exclusion Act to prevent Chinese workers from immigrating for ten years.⁷³ Measures in 1892, 1902, and 1904 reinforced the anti-Chinese provisions and in some cases made them more draconian by placing additional barriers to Chinese naturalization in the United States.⁷⁴ Not only were these the first laws to restrict immigration to the United States based on race and nationality, but they also lent legitimacy to future exclusionary immigration policies to come in the 20th century. The federal

⁶⁹ Koven and Frank Götske, 127.

⁷⁰ Andrew Gyory, *Closing the Gate: Race, Politics, and the Chinese Exclusion Act* (Chapel Hill, NC: University of North Carolina Press, 1998), 19.

⁷¹ Jones, 213.

⁷² Ibid.

⁷³ Michael C. LeMay, *Illegal Immigration: A Reference Handbook* (Santa Barbara, CA: ABC-CLIO, 2007), 118-119.

⁷⁴ Ibid.

government had institutionalized racism and exclusion, setting the precedent for future quotas and restrictive immigration policies.⁷⁵

At the end of the 19th century, immigration restrictionists attempted to get more laws passed to weed out “undesirable” immigrant populations. Specifically, the restrictionist coalition attempted to impose mandatory literacy tests to exclude immigrants coming from Southern and Eastern Europe. The literacy laws failed to pass through Congress because they were opposed by business leaders and immigrant groups and also largely because economic prosperity from the end of the 19th century until World War I subdued much of the nativist sentiment and sense of impending disaster.⁷⁶ For the moment, the country did not require an immigrant scapegoat. More crises, however, always lurk around the corner.

2.2 America Restricts Legal Immigration: 1921-1986

America’s entry into World War I spurred on existing nativist sentiment, especially against German-Americans who were erroneously deemed spies or traitors despite their support for the war effort. For a while, the war drew attention away from other immigrants from Southern and Eastern Europe whose home countries were resisting the Germans. Unfortunately, the end of the war did not do much to dampen American xenophobia. The Red Scare, labor strikes, and the economic depression from 1920 to 1921 all created social unrest, and such unrest historically breeds restrictive immigration policies.⁷⁷ On cue, Congress debated new immigration restrictions from 1920 to 1921. With the 1921 Quota Act and the 1924 Johnson-Reed Act, Congress sought

⁷⁵ Gyory, 258.

⁷⁶ Jones, 222-224.

⁷⁷ Ibid, 232-238.

to establish strict limits on how many immigrants could come to the country based on current immigrant residence in the U.S. The Quota Act only allowed immigration each year up to three percent of the current foreign-born population of the country in question, and the Johnson-Reed Act took the number down to two percent.⁷⁸ These laws cut immigration levels down to fractions of what they had been in previous years.⁷⁹ Because they were based on populations already residing in the U.S., immigration quotas heavily favored Northwestern Europe to the detriment of immigrants from Asia and Eastern Europe.⁸⁰

The U.S. Border Patrol was also created by the 1924 Act to guard the southern and northern borders of the country. Compared to today, the original 1930 Border Patrol was miniscule—875 men on horseback covering roughly 2,000 miles. Because the quotas only applied to immigrants from the eastern hemisphere, patrol officers looked for Europeans and Asians trying to cross the border. They almost never detained Mexican crossers, and when they did, they simply took them to an entry checkpoint so they could pay fees and enter the U.S. legally.⁸¹

Given that economic troubles normally lead to more restrictive immigration laws, it is somewhat surprising that the Great Depression did not lead to any major immigration bills from Congress. There were certainly calls for more restriction, even for a suspension of immigration completely until the Depression lifted. For three reasons, no major restrictive bill passed in the Depression Congress. First, the Republicans were the main restrictionists, and Democrats took back the House of Representatives in 1930 and won both chambers and the presidency in 1932.

⁷⁸ LeMay, 121-122.

⁷⁹ Zolberg, 243; LeMay, 122.

⁸⁰ Ibid.

⁸¹ Zolberg, 266-267.

A Republican government, such as that in the 1920s under Calvin Coolidge, probably would have passed strict legislation.⁸² Second, both Herbert Hoover and Franklin Roosevelt took administrative action to limit immigration. Specifically, they enforced a provision in the law that denied visas to people likely to become dependent on the government, so both administrations only allowed in the most prosperous immigrants. Finally, Europeans were not coming to America in large numbers during the Depression. The United States was not so appealing with an economy in tatters, and many immigration quotas were not even being filled.⁸³

The Depression and war era from in the 1930s and 1940s created a sense of crisis that did not bode well for either Jewish or Japanese communities. Despite little immigration during the Depression, Jewish refugees fleeing Nazi Germany were anxious for an American asylum from persecution in Europe. Unfortunately, the American government did almost nothing to help Jewish refugees get into the country at the time, partly because of the prevalent anti-Semitism among Americans and partly because they would become an economic burden for the government.⁸⁴ Some like Father Charles Coughlin even claimed that Jews orchestrated the Depression, and many American Jews, fearing immigration would result in increased anti-Semitism, did not advocate for increased quotas. Although Roosevelt took some administrative measures to increase the amount of Jewish immigrants under the 1924 quota law, overall very little red tape was removed to help ease immigration restrictions for Jewish refugees. There was simply no political will to do so, even given a Democratic Congress.⁸⁵

⁸² Ibid, 268.

⁸³ Jones, 240.

⁸⁴ David M. Kennedy, *Freedom from Fear: The American People in Depression and War, 1929-1945* (Oxford: Oxford University Press, 1999), 413.

⁸⁵ Zolberg, 275-277.

After Pearl Harbor, American antipathy and hostility also turned to Japanese communities. The government, authorized by President Roosevelt, argued that the presence of Japanese-Americans on the west coast, 70,000 of whom were born in the U.S., represented a danger to the public. The war-time government forcibly moved 110,000 Japanese-Americans from their homes in the west into internment camps for the duration of the war. National security again became the justification for oppressing an entire community of people. Contemptuous feelings towards those of Japanese heritage did not spring up out of nowhere on December 7, 1941. The Japanese were stereotyped before the war as subversive and sneaky, a rogue “other.”⁸⁶ Much like during the French Revolution and during World War I, the public believed that ideology, radicalism, and loyalty had been imported from overseas, and Pearl Harbor ignited those basic American fears to the detriment of an entire community of citizens.⁸⁷

During the war, the United States faced labor shortages again, and the government created the Bracero Program in 1942 to fill the worker gap. The program was the result of the Bracero Treaty with Mexico and amounted to one of the most pro-immigrant labor agreements in U.S. history. Partially, American desire for a new workforce came from employers’ prejudice against hiring African-Americans or women.⁸⁸ The program enabled temporary guest workers to come the U.S. for nine months out of the year, and the U.S. even paid for transportation and minimum wage benefits.⁸⁹ Even after the war ended, the expanding U.S. economy enabled employers to keep hiring temporary guest workers, and with every new labor shortage, such as

⁸⁶ Jones, 261.

⁸⁷ Koven and Götske, 133-134.

⁸⁸ Kennedy, 777.

⁸⁹ Terri E. Givens, Garry P. Freeman, and David Leal, *Immigration Policy and Security: U.S., European, and Commonwealth Perspectives* (New York: Routledge, 2009), 17.

during the Korean War, Mexico was in a position to renegotiate the terms of labor contracts.⁹⁰ On average, 200,000 guest workers were employed in the United States between 1948 and 1964.⁹¹

Major reform came right after the end of the Bracero program in 1964. Largely in response to the Civil Rights movement of the 1960s, Congress passed the 1965 Immigration and Nationality Act (INA) to end the race-based discrimination that endured under the quota system. In its place, the INA allowed a maximum of 20,000 immigrants for any given country and was not based on the current makeup of the United States.⁹² The law also implemented an ordered preference system for immigrants that heavily favored family of citizens and current residents and skilled workers or people of “exceptional ability.”⁹³ The shift away from national origin quotas changed the makeup of immigrant populations with the majority of immigrants now coming from Mexico or Central America. The new policy also had the side effect of increasing illegal immigration. The number of apprehensions at the border in 1965 was less than 100,000, but by 1985 it increased to over 1.2 million.⁹⁴ Between the 60s and the 80s, this surge in illegal immigration completely changed the face of immigration policy.

⁹⁰ LeMay, 4.

⁹¹ Koven and Götske, 134.

⁹² Jones, 267.

⁹³ Koven and Götske, 137.

⁹⁴ Ann Chih Lin, *Immigration* (Washington, D.C.: CQ Press, 2002), 17.

2.3 Immigration Policy Becomes Illegal Immigration Policy: 1986-Present

The United States has always shown some level of concern with securing the border, but the modern period of policymaking starting in 1986 is marked by a major shift of policy focus from legal immigration to illegal immigration. Rather than discussing quotas or other criteria for selecting those who can relocate here, the U.S. Congress discusses how to further militarize its border with neighboring Mexico. The government in the last thirty years has appropriated an over forty billion dollars to the Border Patrol.⁹⁵ This period can be just as fairly characterized by congressional and executive attempts to deal with the illegal population already living in the United States. Because deporting millions of people would devastate the American economy, the federal government has attempted policies that would allow illegal immigrants to remain in the country while also deterring future illegal immigration.

The modern policy chapter begins in 1986 with the debate and enactment of the Immigration Reform and Control Act (IRCA). For many Republicans in the 2013 Senate debate, the IRCA is a direct analogue to the proposed Border Security, Economic Opportunity, and Immigration Modernization Act of 2013. The plan for the IRCA was tougher enforcement combined with legalization measures and guest worker programs. The bill had four major provisions.

First, the bill targeted employers who hire illegal immigrants as a means to “demagnetize the magnet” that incentivized illegal immigration in the first place.⁹⁶ The new employer sanctions were a new enforcement tool for the INS who previously could not punish

⁹⁵ Lisa Seghetti, “Border Security: Immigration Enforcement between Ports of Entry,” *Congressional Research Service*, December 31, 2014.

⁹⁶ Nancy Humel Montwieler, *The Immigration Reform Law of 1986: Analysis, Text, and Legislative History* (Washington, D.C.: The Bureau of National Affairs, Inc., 1987), 31.

employers who enabled violations of the law.⁹⁷ The law made it illegal for employers to knowingly hire undocumented aliens, which for the first time punished employers for their role in perpetuating border crossings and visa overstays. Penalties ranged from modest fines to prison sentences.⁹⁸ Employers were required to keep records and verify employees' documentation, though they were not penalized if misled by falsified documentation.⁹⁹

Second, Congress mandated that the border with Mexico be secured. However, considering the emphasis given to fences, patrol agents, surveillance, and other barriers in the 2013 debate, the requirements in the 1986 bill barely touched on border enforcement. They appropriated nearly \$450 million to the Immigration and Naturalization Service (INS) to increase the number of agents patrolling the border. The law required that the INS use those funds to ensure "that the average level of [border personnel] in each of the fiscal years 1987 and 1988 is at least 50 percent higher than such level for fiscal year 1986."¹⁰⁰ These border personnel levels proved untenable in the short term as the INS was not able to recruit and train people fast enough to come anywhere near the IRCA's goal.¹⁰¹

Third, Congress expanded the temporary guest worker program, similar to the Bracero program. The program allowed illegal immigrants working in agriculture to be put on a path to citizenship, opened the doors for employers to hire more foreign workers, and even provided

⁹⁷ Jason Juffras, *Impact of the Immigration Reform and Control Act on the Immigration and Naturalization Service* (Santa Monica, CA: The RAND Corporation and the Urban Institute, 1991), 1.

⁹⁸ Montwieler, 34.

⁹⁹ *Ibid*, 37-48.

¹⁰⁰ *Ibid*, 115.

¹⁰¹ LeMay, 16.

financial benefits to the workers coming in, benefits such as housing and travel costs.¹⁰² Union groups and Hispanic advocacy groups railed against the proposed influx of new workers because it would lower wages for Americans. Despite this opposition, the powerful western agriculture lobby pushed the guest worker program forward to give businesses access to cheaper labor.¹⁰³

Finally, illegal immigrants who entered the United States prior to January 1, 1982 were eligible for legalization if they were healthy, paid a fee to the attorney general, lived in the U.S. continuously since 1982, and had not been convicted of a crime. They had to spend 18 months in temporary status before applying for permanent status. Anyone who was legalized under this program was not allowed welfare benefits from most agencies for at least five years, including social security.¹⁰⁴ This provision is notorious in the 2013 debate as the “amnesty” provision that legalized three million people in the hopes that the country would never have to do it again.

Despite the grand bargain of legalization and enforcement, the IRCA failed to curtail the stream of illegal immigration. By 1989, the United States faced a surge of border crossings.¹⁰⁵ Although Congress drastically increased the funding for the agency, the INS was also stretched thin after the IRCA passed. The enlarged border patrol did help prevent more crossings. However, the INS’s mission broadened to include drug enforcement and employer sanctioning, and, as a result, the percentage of border patrol officers’ hours on “line watch” dropped to 38% in 1989.¹⁰⁶ The new law also did almost nothing to deter employers from hiring illegal

¹⁰² Montwieler, 28.

¹⁰³ Ibid, 67-68.

¹⁰⁴ Ibid, 57-64.

¹⁰⁵ Joseph Nevins, *Operation Gatekeeper and Beyond: The War on “Illegals” and the Remaking of the U.S.-Mexico Boundary* (New York: Routledge, 2010), 104-105.

¹⁰⁶ Juffras, 42-44.

immigrants or to prevent employer discrimination, despite anti-discrimination statutes in the bill.¹⁰⁷ It was difficult for employers to validate the status of workers based on documentation, and an entire industry arose for false documentation.¹⁰⁸ Overall, the IRCA only had a modest impact on the INS's ability to prevent illegal immigration, and the problem continued to develop.

The next major attempt to curtail illegal immigration came in 1996 with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Unlike the balance Congress struck between compassion and enforcement ten years earlier, the new law was all stick and no carrot. It increased money for fencing and doubled the size of the Border Patrol over the next few years.¹⁰⁹ IIRIRA also added provisions to disincentivize illegal activity. It imposed new penalties for smuggling, using false documentation, or overstaying visas. Those who were found in the country illegally and deported were barred from returning for a period of three to ten years.¹¹⁰ Congress also sped up deportation procedures by making it more difficult to challenge the INS's deportation decision in court.¹¹¹ As long as immigrants were not claiming political asylum, this "expedited removal" allowed the INS to detain and deport them without any sort of hearing.¹¹² Finally, the law made it more difficult for immigrants to attain governmental benefits, which effectively put more stress on private charity groups which could not handle the new demand for services.¹¹³

¹⁰⁷ Jeffrey S. Passel, "Undocumented Immigration," in *The Debate in the United States over Immigration*, eds. Peter Duignan and Lewis H. Gann (Stanford, CA: Hoover Institution Press, 1998), 198-199.

¹⁰⁸ Koven and Götske, 140.

¹⁰⁹ Passel, 197-198.

¹¹⁰ Magaña, 84-85.

¹¹¹ Zolberg, 418.

¹¹² Givens, Freeman, and Leal, 20.

¹¹³ Lin, 62.

Scholars are almost unanimously critical of the 1996 legislation, though for different reasons. Aristide Zolberg calls the bill a “total failure,” noting that illegal immigration increased drastically in the 1990s and reached its high point at 968,000 in 1999.¹¹⁴ Ann Chih Lin and Melysa Sperber both explain that the buildup of border security has merely pushed the flow of illegal immigrants into more isolated areas, such as the desert, where the harsh conditions can make border crossing a deadly endeavor, and Joseph Nevins argues that the reliance of illegal immigrants on smugglers has actually turned illegal immigration into a form of “organized crime.”¹¹⁵ The only positive note came from the 2009 Independent Task Force Report on Immigration. It shows that the 1996 law tripled the number of deportations from 60,000 in 1996 to 180,000 in 1997, which was a clear goal of the law. The report also claims that the 1996 reforms were part of “impressive” efforts to secure the border.¹¹⁶ Clearly, scholars agree that the law increased border security, though not whether the increased security is beneficial for overall immigration reform.

Despite the IIRIRA’s goal of securing the border, the military buildup at the border certainly did not end in 1996. After the terrorist attacks of September 11, 2001, the public and Congress found new resolve to address immigration. The INS came under intense scrutiny after the attacks for its failure to enforce immigration laws, specifically because at least two of the hijackers entered the United States legally and then overstayed their visas. Had the entry-exit system mandated by the 1996 law been implemented, the federal government would have known

¹¹⁴ Zolberg, 423.

¹¹⁵ Lin, 71; Melysa Sperber, “U.S. Border Control,” in *Debates on U.S. Immigration*, eds. Judith Gans, Elaine M. Replegle, and Daniel Tichenor (Los Angeles: Sage Publications, 2012), 146-153; Nevins, 178-179.

¹¹⁶ Jeb Bush and Thomas F. McLarty III (chairs), *Immigration Policy: Independent Task Force No. 63* (New York: Council on Foreign Relations, 2009), 45-46.

that they were still in the country.¹¹⁷ In fact, the INS in 2002 ineptly sent notifications to the dead hijackers that their student visas were approved and that they were now eligible for flight-training programs.¹¹⁸ After 9/11, the issue of immigration was no longer one of economic, political, or cultural power—now, immigration was again a matter of national security.¹¹⁹ The INS was dismantled in December 2002 and its functions were taken over by the new Department of Homeland Security.

New restrictive policies post-9/11 may have been targeted at Muslim-American groups, but they had major impacts on all immigrants. For instance, a new policy required immigrants to notify the federal government within ten days of a change of address. Many immigrants were subject to deportation either because they were not aware of the new requirement or because their notifications were caught in the backlog of government paperwork.¹²⁰ Restrictions on immigrants only continued to increase after 9/11. Despite an attempt from 2005 to 2007 to hammer out a comprehensive immigration reform law, Congress only came up with more security bills with no path to legalization.¹²¹ The Real ID Act of 2005 made it more difficult to prove a legitimate asylum claim, and it set higher standards of identification prior to obtaining a driver's license.¹²² The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005 increased surveillance at the border, empowered local sheriffs to enforce immigration laws, appropriated funds to construct 700 miles of border fencing, mandated employers verify

¹¹⁷ Lin, 100.

¹¹⁸ LeMay, 131.

¹¹⁹ Lin, 100.

¹²⁰ Givens, Freeman, and Leal, 40-42.

¹²¹ Ibid, 25-27.

¹²² Koven and Götske, 142-143.

immigration status, turned “unlawful presence” into a federal crime, and made it illegal to assist undocumented immigrants.¹²³ Lastly, Congress passed the Secure Fence Act of 2006 to add even more fencing to the existing provisions.¹²⁴

All of these laws have added up to an increasingly militarized border. By 2013, the Border Patrol had over 20,000 agents, most of whom guarded the southern border with Mexico.¹²⁵ Nearly a third (650 miles) of the U.S.-Mexican border is fenced. Border Patrol spending increased by nearly a factor of ten between 1993 and 2013 to go from \$362 million to \$3.47 billion each year.¹²⁶ Overall border enforcement spending sat at \$18 billion as of 2013, a number which amounts to more than the budgets of all other federal law enforcement agencies combined.¹²⁷ It is difficult to know the exact number of illegal entrants to the country in any given year, but senators generally agreed in the 2013 debate that roughly 11 million illegal immigrants resided in the United States.

The modern immigration debate thus can be defined by its focus on illegal immigration, both how to stop the flow of illegal immigrants coming into the country and how to treat the immigrants here compassionately. After 1986, Congress took up the mantra “security first.” It has spent the last thirty years adding resources to the Border Patrol and creating new restrictions for employers to disincentivize illegal hiring. With the failure of the 2007 comprehensive

¹²³ Thomas Allen O’Rourke, “Good Samaritans, Beware: The Sensenbrenner-King Bill and Assistance to Undocumented Migrants,” *The Harvard Latino Law Review* 9 (2006).

¹²⁴ Givens, Freeman, and Leal, 25; Reed Karaim, “America’s Border Fence: Will It Stem the Flow of Illegal Immigrants?” *CQ Researcher* 18, no. 32 (2008).

¹²⁵ Seghetti.

¹²⁶ “Enacted Border Patrol Budget by Fiscal Year,” *U.S. Customs and Border Protection*, 2014, http://www.cbp.gov/sites/default/files/documents/BP%20Budget%20History%201990-2014_0.pdf

¹²⁷ Ted Hesson, “Report: U.S. Spends More on Immigration Than All Federal Criminal Enforcement Combined,” *ABC News*, 7 Jan. 2013, http://abcnews.go.com/ABC_Univision/News/us-spends-immigration-major-federal-criminal-enforcement-combined/story?id=18151143

immigration reform bill hanging over its head, the 2013 Senate tried to build upon the momentum of President Obama's reelection and finally pass a bill that addressed both security and legalization at the same time.

2.4 Conclusion

Any understanding of American immigration policy must always be rooted in both historical and legislative context. Long term trends in immigration policy follow familiar patterns. Restrictive policies come on the heels of either economic downturn or upon the public perception of a foreign threat. When their economic or national security is at stake, Americans frequently view immigrants as both a potential threat and a scapegoat for their problems. French "radicals" and Muslim "terrorists" alike inspire fear for our national safety, while Chinese, Mexican, and Central American immigrants seem to be seen as threatening the power of the American working class.

In congruence with American history, the national debate today is premised on protecting the country from foreign incursion by "illegals," on making Americans feel secure. Scholars may vehemently oppose the characterization of immigrants as threatening, but policy debates today rest on the assumption that illegal immigrants threaten the state and that the Southern border needs to be militarized. The question is not whether to ease the country's stance on immigration but how to best compensate for its vulnerability.

The legislative context shows a generation of failure to prevent illegal immigration. The Senate has thirty years of increased enforcement provisions with generally bad results. Therefore, the 2013 debate is just as much characterized by an effort to explain past failures as it is to provide security. Indeed, considering that many senators were around for the passage of the

1986 IRCA law, a sense of frustration permeates the debate. As I will show in the next chapter, the question of blame is central to the debate over immigration.

3 Contextual Ambiguity in the Legislation-behind-the-Legislation

Law as integrity denies that statements of law are either backward-looking factual reports of conventionalism or forward-looking instrumental programs of legal pragmatism. It insists that legal claims are interpretive judgments and therefore combine backward- and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness.

—Ronald Dworkin, *Law's Empire*, 1986¹²⁸

Ronald Dworkin, the leading legal theorist of the late twentieth century, emphasizes the importance of continuity in the law. Legal acts require some understanding of a cohesive narrative, a unified will that transcends any given judge.¹²⁹ He introduces the mythical character Hercules as an ideal adjudicator with knowledge of all past law. Thus, Hercules is the perfect “author” to interpret the law because he had full knowledge of all past constitutions, statutes, common law, and legal decisions and is able to fit any law he interprets into that context. In other words, Hercules understands the law better than anyone else because he has perfect understanding of context.

Unlike judges, members of Congress are not under pressure from the judicial myth which demands consistency to just “follow the law.” Legislation presumes a problem exists in the world. Rather than an act of consistency, it is by definition an act of change. Thus, the rhetorical challenge for proponents of an immigration bill is to establish inconsistency from past attempts at immigration reform, while opponents will do the opposite by trying to establish consistency with failed policies from the past. In this case, both sides establish the motivating force behind

¹²⁸ Dworkin, 225.

¹²⁹ Ibid.

past immigration policy to construct the 2013 bill as either consistent or inconsistent with past failed reforms.

In this chapter, I argue that as an enactment, legislation is contextually ambiguous. Senators in the immigration debate redefine the legislative act by redefining the context. Drawing on Burke, I call these contextual constructions the “legislation-behind-the-legislation.”¹³⁰ By reconstructing the history of immigration policy, senators are able to define the 2013 immigration bill as congruent with that history. The legislation-behind-the-legislation offers leverage on the bill from the outside. First, I explain how we can understand the law outside of itself by viewing it as an enactment. I then explain how opponents frame the policy history to argue that the 2013 legislation is merely another in a long line of broken promises. Opponents thus construct a scene of bad acts (promises) where Congress has been disempowered from enacting its preferred reforms. Proponents, on the other hand, reconstruct the policy history to argue that border security has traditionally been increased, and they feature Congress as an active agent getting its way. The contextualizing work reorients how we should think about blame for past policy failures, which, as I show in chapter four, informs how senators interpret statutes in the 2013 legislation.

3.1 Understanding the Law as an Enactment

Legislative interpretations cannot be confined the letter of the law. Contextualizing provides a tempting secondary means of interpreting law that can either complement or substitute for statutory interpretation. Contextualizing becomes unnecessary if one takes a plain fact view of the law where the law is straightforward and speaks for itself. Burke says that judicial

¹³⁰ Burke, *Grammar*, 362.

interpretation maintains this fiction of “positive law” where judges pretend that they are getting at the law in-and-of itself and thus do not need anything outside the language of statutes.¹³¹

However, according to Burke, if judges are interpreting a legal document like the United States Constitution, such an interpretation resists confinement to the language of the text “since an act in the United States has not merely the United States Constitution as its background, but all sorts of factors originating outside it, the fiction of positive law has generally served to set up the values, traditions, and trends of business as the Constitution-behind-the-Constitution that is to be consulted as criterion.”¹³² Burke explains, in other words, that legal interpretation cannot be contained within the document itself because the document “itself is an enactment.”¹³³ The fact that it was enacted contextualizes it within a given scene, as a result of specific agents, by way of an agency, and towards a purpose. Burke says the U.S. Constitution, for instance, was enacted as a reactionary measure and that it was a capitalist Constitution.¹³⁴

Legal theorists make similar points about the intrusion of context into statutory interpretation, especially when the language of a statute is unclear. A century ago, Oliver Wendell Holmes explained that the uncertainty of language forces judges to consider not just what a word means now but what a word meant then when the statute was first written.¹³⁵ Judges justify their interpretations by looking to meanings and intentions of the legislature and thus drawing the audience’s attention to extratextual evidence in order to understand what the legal

¹³¹ Ibid.

¹³² Ibid, 362-363.

¹³³ Ibid, 362.

¹³⁴ Ibid.

¹³⁵ Oliver Wendell Holmes, “The Theory of Legal Interpretation,” *Harvard Law Review*, Vol. XII 1898-1899 (Cambridge, MA: The Harvard Law Review Publishing Association, 1899), 417-418.

document says.¹³⁶ This often involves looking at the history of a bill's enactment, including committee markups and floor debates, in order to discern the legislature's original intentions.¹³⁷

In fact, policymakers will often try to sneak language into committee reports that would not have made it into the final bill in order to influence the courts' interpretation of legislative intent.¹³⁸

Although not without its textualist critics, legislative intent has long been used by the courts as a justification for interpreting the law.¹³⁹ The legal act is necessarily defined by this context, not just by critics but by the rhetors engaging in its public interpretation.

In the same way that there exists a "Constitution-behind-the-Constitution," there also is a legislation that lurks behind the legislation. Whenever members of Congress interpret what a bill does, they always look beyond the language of the bill to understand the context of its enactment. Following Burke's lead, I argue that indirect constructions of legislative acts rely on leveraging different terms of the pentad. Since I am trying to understand ambiguity in the legislative act, the bill itself, for the purposes of this analysis, must be considered the act in this pentadic set. Because of humanity's desire for form, Burke says that we seek consistency between different terms of the pentad.¹⁴⁰ Therefore, our sense of the legislative act must match up with our understanding of the other terms in the pentadic set: scene, agent, agency, and purpose. By leveraging other terms, senators can redefine the act, resulting different interpretations of the legislative act.

¹³⁶ Ibid.

¹³⁷ Abner J. Mikva and Eric Lane, *An Introduction to Statutory Interpretation and the Legislative Process* (New York: Aspen Law & Business, 1997), 27-41.

¹³⁸ Jarrod Shobe, "Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting," *Columbia Law Review* 114, no. 4 (2014), 870.

¹³⁹ Frank Cross, *The Theory and Practice of Statutory Interpretation* (Stanford, CA: Stanford Law Books, 2009), 58.

¹⁴⁰ Burke, *Grammar*, 3.

In what follows, I show how senators leverage the scene and agent to reconstruct the legislative act. They are, in other words, contextualizing factors that redefine the legislative act. Ultimately, the legislation-behind-the-legislation is a resource for creating ambiguity in proposed laws and helps explain how senators can disagree about what the immigration bill does.

3.2 Opponents' Policy History: A Line of Broken Promises

Scholars in the rhetoric and public policy literature are no strangers to constructions of a legislative scene. An approach consistent with this scholarship might look at how senators construct the immigration system as “broken” and the border as insecure. The scene would be so overpowering as to necessitate new immigration legislation that would beef up border security and streamline the legal immigration system. In this sense, the scene does help define the legislation, but such an analysis still relies on stability in the meaning of said legislation. It relies on legislation functioning as a social fact. Because my interest here is in legislation’s ambiguities, I take a different perspective. I look at how senators leverage our understanding of the policy scene to understand not just the need for legislation but also to alter our understanding of what legislation does.

Although scene is typically characterized as place, Burke says scene refers to any kind of background, including history.¹⁴¹ Thus, scene may include time as well as location. Asen explains that time is a fundamental consideration in policy debates, serving both as context and appeal. Members of Congress in policy debates may vary widely on where the debate exists in time. For example, some lawmakers may think that the privatization debates died in 2005, while others may believe we are still having them. Asen refers to this as the “meta quality” that long-

¹⁴¹ Burke, *Grammar*, xvii.

lasting debates facilitate—policymakers will “debate their debates.”¹⁴² Participants understand past policy debates in ways that inform their current positions.

Different conceptions of time cannot simply be chalked up to different sensibilities. Time serves as rhetorical appeal when policymakers invoke old debates to bolster their own positions considering that context, after all, can be strategically defined. In legislative debates, members of Congress do not merely point to recent legislative history, but they also construct their own history of events. They decidedly make a choice, and the long history of immigration policy provides ample ways to outline and present history.¹⁴³ Senators on both sides construct the legislative history of immigration in order to leverage what the current legislation means.

Opponents envision a legislation-behind-the-legislation that is scenic and disempowers Congress from enacting the changes it wants. They draw on past failures to define current legislation as another act in a long line of faulty promises. The 1986 Immigration Reform and Control Act is especially present as a proven failure, and opponents frame it as the closest analogue to the 2013 bill. Senator John Thune (R-SD) calls 1986 “promises that were never kept.”¹⁴⁴ Senator John Cornyn (R-TX) references a “trail of broken promises...that dates back to at least 1986.”¹⁴⁵ Grassley laments that the Senate is repeating the mistakes of 1986 because while “the sponsors of this bill want you to believe it is different from the 1986 legislation...the bill is legalization first, enforcement later—and I have to add, enforcement later, if ever.”¹⁴⁶

¹⁴² Asen, “Reflections,” 135.

¹⁴³ No one demonstrates the constructed connection between the past and present in legislative debates better than Kirt Wilson. See Wilson, 134-137.

¹⁴⁴ *Congressional Record* 159, pt. 84 (June 13, 2013): S 4441.

¹⁴⁵ *Congressional Record* 159, pt. 89 (June 20, 2013): S 4731.

¹⁴⁶ *Congressional Record* 159, pt. 91 (June 21, 2013): S 4998.

Opponents make 1986 the central analogue because it was the last immigration law that included some form of amnesty. By granting presence to the “mass fraud” of 1986, they focus less on legislation from 1996, 2001, and 2007, all of which involved massive increases in border security spending without any measures to legalize, making “legalization first” seem like the prevailing policy.¹⁴⁷

1986 is the most prevalent reference point, but other failures in the modern immigration debate are also sometimes referenced as evidence of the futility of congressional demands. For instance, Senator Jeff Sessions (R-AL) raises the long history of entry/exit requirements, noting that Congress required biometric entry/exit systems be implemented with bills in 1996, 2000, 2002, and 2004 with no follow-up by the executive branch.¹⁴⁸ Thune also points to the provisions in the 1996 and 2006 laws requiring 700 miles of border fence, and he claims that only 40 miles of fencing have been built by DHS.¹⁴⁹

The language of the broken “promise” ties the past debates to the current one as “promises” of the past are connected to the “promises” of the present. According to Lee, the 2013 bill is “full of promises to beef up border security, but it makes no assurances.”¹⁵⁰ Senator Bob Corker (R-TN) is quite explicit that he “[doesn’t] believe we are going to add 20,000 agents They are making promises 10 years down the road that I am saying are not likely to ever happen.”¹⁵¹ Senator Dan Coats (R-IN) admits that the entry/exit system, border security, and employee verification have been strengthened, but that’s only “assuming the promises come true” and

¹⁴⁷ Cornyn, *Congressional Record* 159, pt. 87 (June 18, 2013): S 4563.

¹⁴⁸ *Congressional Record* 159, pt. 81 (June 10, 2013): S 4065

¹⁴⁹ *Congressional Record* 159, pt. 82 (June 11, 2013): S 4205.

¹⁵⁰ *Congressional Record* 159, pt. 94 (June 27, 2013): S 5323.

¹⁵¹ *Congressional Record* 159, pt. 91 (June 24, 2013): S 4992.

“they have only been strengthened on a piece of paper.”¹⁵² Through the common term “promises,” opponents connect current legislation to a scene of policy failures. To understand the likely legislative act, senators point to a policy trail.

Although “promising” could be an act rather than a scene, the “promises” almost never have an active agent, and are best understood as scene. Edward Appel observes that the construction of a sentence with its subject, predicate, adjectives, and adverbs mirrors the functions of pentadic terms, thus sentence structure can tell us something about the motivational formulas that rhetors employ.¹⁵³ If, as Burke argues, the pentadic terms represent fundamental forms of human thought, then it makes sense that our syntax reflects those forms.¹⁵⁴ In the most basic sense, active voice puts the agent in control of the action, whereas passive voice puts the agent as the receiver of action.¹⁵⁵ Because opponents favor passive voice, broken legislative promises just become a thing to point to, sheer motion. As Rountree and Rountree point out, rhetors will often shift to a scenic terminology in order to avoid responsibility.¹⁵⁶ If senators put too much focus on allocating blame for past faulty promises, then they inevitably would have to indict themselves because many Republican senators, such as Grassley, voted for the 1986 law, and many Republican administrations since then have held responsibility for enforcing border security.

In opponents’ passive sentence constructions, proponents, mostly Democrats, can be designated as the active agents of current promises, but past promises are more obscure. Senator

¹⁵² *Congressional Record* 159, pt. 93 (June 26, 2013): S 5219.

¹⁵³ Edward C. Appel, *Language, Life, Literature, Rhetoric and Composition as Dramatic Action: A Burkean Primer* (Leola, PA: Putting-In-Your-Oar Press, 2011), 1-6.

¹⁵⁴ Burke, *Grammar*, xv.

¹⁵⁵ Appel, 2.

¹⁵⁶ Clarke Rountree and John Rountree, “Burke’s Pentad as a Guide for Symbol-Using Citizens,” *Studies in Philosophy and Education*, 2015.

Marco Rubio (R-FL) says that “for over three decades and despite many promises to enforce the law, the Federal government under both Republicans and Democrats has failed to do so.”¹⁵⁷

While Rubio certainly directs some blame at his own party, the responsible agent for promising enforcement is uncertain. Even if we accept that “the Federal government” is the agent, Rubio separates Republican and Democrat from this agent by embedding them both in a prepositional phrase. Just because the federal government was “under” the direction of one party or another does not necessarily indict them for breaking promises. He repeats his promises line on the next page of the *Record*: “In just the two years that I have been here, I have seen the games played and the promises broken and how the American people ultimately suffer the consequences,” and “after promises made in the past on immigration have not been kept....”¹⁵⁸ Again, promises are broken, but it is not clear who is breaking the promises. They are just something that Rubio witnesses, a landscape of broken promises endemic to Washington.

Similarly, Cornyn explains that “when so many promises have been made in the past that have not been kept, I think it is unreasonable to ask the American people to just trust us.”¹⁵⁹ Cornyn here seems to indict the Congress, but the indictment comes because of the scene. He does not actively put the Congress as the agent of broken promises; instead, the Congress is simply indicted by the existence of past failures. A moment later, he does add an active agent to the promises: “if we deal with the experience that we have had from 1986 and other times when we made extravagant promises to the American people how we are going to fix the system, only to find that those promises have not been kept.”¹⁶⁰ He acknowledges that Congress through the

¹⁵⁷ *Congressional Record* 159, pt. 93 (June 26, 2013): S 5216

¹⁵⁸ *Congressional Record* 159, pt. 93 (June 26, 2013): S 5217

¹⁵⁹ *Congressional Record* 159, pt. 88 (June 19, 2013): S 4626

¹⁶⁰ *Ibid.*

pronoun “we” made the “extravagant promises,” but through the passive construction “promises have not been kept,” he does not grant Congress responsibility for actually failing. In all of these instances, opponents to the legislation use passive constructions to build a scene of broken “promises,” and the scene implicates the current legislation as merely another “promise.”

Scenic constructions also help Republicans avoid blaming Ronald Reagan for the 1986 reform that he signed into law. If Congress is not responsible for past immigration policy, the presidency appears to be the obvious scapegoat, but they do not want to attribute fault to the father of modern conservatism. Cornyn says that “Reagan signed based on the premise that there would be enforcement and no need to ever provide another amnesty again, that this would actually be enforced. . . .”¹⁶¹ Cornyn does not put Reagan as an active agent in enforcing the law, even though he is the head of the executive branch. Instead, he signed it because he believed in faulty “premises,” and the blame for failing to enforce the law remains mysterious. Lack of enforcement is still embedded in passive phrases that exonerate Reagan as a tragic victim of some mysterious, hidden agent that subverted the will of both Congress and Reagan.

Coats acknowledges that Reagan signed the 1986 law but that “promises made then were not fulfilled.”¹⁶² Thus, we see similar passive construction, but Coats follows this scenic construction of “promises” up with an invocation to be more like Reagan: “The way, in my opinion, to address [broken promises] is—to borrow from Ronald Reagan trust, but verify.”¹⁶³ In fact, this “trust, but verify” language is picked up by Senator David Vitter (R-LA), Senator Rand Paul (R-KY), and Cornyn.¹⁶⁴ Paul even names his proposed amendment for increased border security the

¹⁶¹ *Congressional Record* 159, pt. 81 (June 10, 2013): S 4038.

¹⁶² *Congressional Record* 159, pt. 93 (June 26, 2013): S 5218.

¹⁶³ *Ibid.*

¹⁶⁴ Vitter, S 3728; Cornyn, S 4550; Paul, S 4650.

“Trust, but Verify” amendment.¹⁶⁵ Far from a scapegoat, Reagan is a model for immigration reform. He is not responsible for past failures.

In sum, opponents feature a scene of broken promises as the context to understand the current legislation. S. 744 is just another promise that Congress sees. Congress is disempowered. Rather than actively changing policy, it has witnessed a failure to enforce the law over the years. While the passage of time makes it difficult to pin the policy failures on any one agent, the implication of broken promises is that a subversive agent does exist. However, until opponents get into the statutory construction of the legislation, which I will discuss in the next chapter, the sequence of acts that makes up the policy scene lies in wait for an active agent to take responsibility for decades of failure.

3.3 Proponents’ Policy History: “We Have Done ‘Enforcement First’”

Proponents construct an entirely different legislation-behind-the-legislation, one with active agents. Instead of a line of broken promises, the Congress has traditionally increased border security. Congress, for proponents, becomes an active agent of change. Rather than see immigration policy happen, Congress makes it happen.

First of all, proponents construct a different scene from opponents based on more recent legislation. Their scene is one of heavily increased border security. Senator Bob Menendez (D-NJ) clearly demonstrates that different legislative histories can be drawn for any given bill before the Congress. He criticizes the opposition for only comparing the legislation to 1986 because “if there are lessons to be learned from 1986, there are just as many to be learned from the last 10 years in which ‘enforcement first’ has been the mantra of Congress’s immigration policy, with

¹⁶⁵ *Congressional Record* 159, pt. 88 (June 19, 2013): S 4650.

disastrous results.”¹⁶⁶ Senator Tom Carper (D-DE) presents a slideshow on the floor comparing the borders in 2013 to those in 2007 to argue that they are much more secure, and he attributes this security to the “unprecedented investments we have made in securing our borders over the past decade.”¹⁶⁷ Menendez also shows charts, documenting the increase in border spending over the past 26 years from \$1.2 billion in 1986 to its high point at \$20 billion in 2009.¹⁶⁸ The point, thus, is not that the border is necessarily secure now but that the policy history is one of increased enforcement. The proponents argue that the bill before the Senate is likely to actually increase enforcement because the government has a past record of doing so.

More importantly, proponents feature Congress as an active agent in changing the scene. The contrast in sentence construction between opponents and proponents is striking even by simply considering the slogan “enforcement first.” Leahy asserts that “we have done ‘enforcement first.’”¹⁶⁹ In his active sentence construction with the subject “we” and the verb “have done,” Leahy empowers Congress as the agent of change in immigration policy. Menendez asserts that the public has grown tired of the current system: “It was a rejection of the enforcement-only strategy and the idea that we must secure the border first.”¹⁷⁰ Just like Leahy, he puts Congress in the driver’s seat. By contrast, opponents make Congress passive on enforcement first. Cruz asks “Which comes first, legalization or border security? The Gang of 8 bill says let’s have legalization first.”¹⁷¹ In the first sentence, he puts the active subjects as

¹⁶⁶ *Congressional Record* 159, pt. 83 (June 12, 2013): S 4394.

¹⁶⁷ *Ibid*, S 4397-S 4398.

¹⁶⁸ *Congressional Record* 159, pt. 82 (June 11, 2013): S 4202.

¹⁶⁹ *Congressional Record* 159, pt. 83 (June 12, 2013): S 4361.

¹⁷⁰ *Ibid*, S 4394.

¹⁷¹ *Ibid*, S 4367.

“legalization” and “border security” paired with the verb “come.” In the second sentence, he suggests we can “have” a resulting policy but does not explicitly say Congress actively legalizes. Sessions mirrors Cruz’s construction that we want to “have” enforcement first, followed by the observation “the sponsors were originally saying that their bill was enforcement first.”¹⁷² Enforcement first, in this case, is just a state of being.

Going beyond the slogan of “enforcement first,” proponents in general conceptualize a scene of border security that has been actively changed by Congress. McCain has seen the growth of the Border Patrol from 4,000 to 21,000, the use of drones, the building of fences, and the deployment of the National Guard to the border.¹⁷³ He uses the phrase “I have seen” three times, suggesting a similar passive construction as opponents. However, his constructions change almost immediately to put Congress as the active agent securing the border. “We have to do more. We have to do a lot more.”¹⁷⁴ Given the immediate context of the things McCain has “seen,” he credits Congress with the increased border security. Further, he follows up these observations by discussing Congress’s active role in the future: “We can purchase a lot of equipment that way. We are going to use the Army. We are going to use the Army to tell us how we can best surveil and enforce this border....”¹⁷⁵ His continued use of “we” plus an active verb affirms that Congress has power over immigration policy, specifically over the border. Senator Bill Nelson (D-FL) notes that the borders are “a lot more secure now than they were just a few years ago.”¹⁷⁶ Senator Mark Udall (D-CO) calls the government’s commitment to border security

¹⁷² *Congressional Record* 159, pt. 89 (June 20, 2013): S 4784.

¹⁷³ *Congressional Record* 159, pt. 83 (June 12, 2013): S 4365.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ *Congressional Record* 159, pt. 80 (June 7, 2013): S 4010.

“proven record” because the United States has historically increased border enforcement.¹⁷⁷ He says “we have made some real progress,” “we have ramped up law enforcement and are deporting more criminals than ever before,” “we can do more,” and “we spend a lot of resources on immigration and customs enforcement.”¹⁷⁸

By reconstructing legislative history, both sides of the bill try to redefine the probable legislative act being undertaken on the floor. If Congress has traditionally increased border security, then the bill is likely to follow through on security provisions. If, on the other hand, Congress is not capable of actively increasing border security, then the legislation is merely another faulty “promise.”

3.4 Conclusion

When senators consider legislation as an enactment and not merely as a thing unto itself, they are necessarily pushed behind the legislation. They construct a legislation-behind-the-legislation to contextualize bills. In the courtroom, judges must establish a history of legal precedents to fit their decisions as consistent with that context. The law has a single guiding principle throughout history, even if decisions are overturned. By contrast, I have shown that the presumption in Congress leans towards discontinuity with past policy failures. Members thus are forced to define the legislation as congruent or incongruent with previous legislation.

Both sides in the immigration debate create a legislation-behind-the-legislation that informs how they understand the 2013 bill, bringing context to bear on text. Opponents attribute blame for bad past policies to a subversive scene—they do not identify the subversive agent

¹⁷⁷ *Congressional Record* 159, pt. 88 (June 19, 2013): S 4743.

¹⁷⁸ *Ibid.*

within that scene, but they do escape blame themselves through passive constructions. Congress is not responsible for the failures since 1986. Instead, Congress has witnessed failure to enforce its wishes. Proponents, on the other hand, do pin the blame on Congress for its “enforcement first” measures that favor border security to the detriment of legalization. Congress, thus, is an active agent defining immigration policy. The two sides thus disagree about the efficacy of Congress in enacting reforms and about whether the 2013 bill does what it demands to be done.

In the next chapter, I bring these constructions of the legislation-behind-the-legislation to bear on the statutory arguments in the 2013 debate. By establishing the motivating force behind past policies in either a subversive scene or a subversive Congress, senators anticipate probable acts that will occur under different statutory constructions, even if those different constructions are designed to achieve the same result. The question becomes which statutory constructions will favor discontinuity with past failures by disempowering the subversive elements.

4 Statutory Ambiguity in the Policy Lottery

The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints.

—Oliver Wendell Holmes, *Bain Peanut Co. v. Pinson*, 1931¹⁷⁹

Oliver Wendell Holmes' widely cited metaphor, "play in its joints," provokes us to think about the law as flexible, as partially ambiguous. The administration of government relies on ceding some interpretive power to those executing the law, so while it may be tempting to think of the law as compelling action it actually sets a framework for action. There are multiple correct ways to follow the law, both from the perspective of citizens and from the perspective of executive departments and agencies. After all, according to Habermas, modern law is largely justified on rights which "fix the limits within which a subject is entitled to freely exercise her will."¹⁸⁰ Statutes depend, to some extent, on this freedom to act flexibly, but flexibility also provides the potential for interpretation and subversive acts. Congress tries to craft statutes that exclude interpretations antagonistic to congressional intent.

In this chapter, I uncover the uncertainty and moments for strategic ambiguity in the statutory interpretation of legislation. In the immigration bill, the border security and legalization "triggers" by far produce the most contestation. My analysis of the competing interpretations of the trigger language indicates that statutory construction is a battle for interpretive authority, involving subversive potentialities of action within the legal framework created by the bill. Thus, statutory uncertainty arises not in considering legislation as a congressional act but as an agency for future executive and congressional action. A bill's language is ambiguous not just in what it

¹⁷⁹ Oliver Wendell Holmes, *Bain Peanut Co. v. Pinson* 282 U.S. 499 (1931), 501.

¹⁸⁰ Habermas, *Between Facts and Norms*, 82.

does but also in what it allows. As I show, senators have trouble agreeing on what the immigration bill does because they each reconstruct the motives of potential interpreters, including the president, Congress, the Secretary of Homeland Security, and even border control agents. These potential interpreters can affect the way the law is administered once it is passed, potentially redefining the nature of the legislative act. Their potential to subvert the intent of legislators creates uncertainty around the legislation. Thus, where the previous chapter dealt largely with scene, statutory construction directs our attention to agents who hold interpretive power.

To make this argument, first I explain how Congress faces a “policy lottery” whenever it passes legislation with respect to how the law will be enforced. Then, I review the key debate in the Senate immigration debate over border security “triggers.” Next, I analyze how opponents and proponents interpret subversive potential in the statutory construction of the triggers. Opponents see a potential executive subversion of border security requirements, and proponents find potential congressional subversion of legalization requirements. I conclude that the policy lottery is a rhetorical resource that leaves enough ambiguity for senators to pry multiple subversive interpretations from a statute.

4.1 Uncertainty in the Policy Lottery

Congress has a control problem in policymaking because it does not carry out its own policy directives nor does it interpret statutes once they leave Capitol Hill.¹⁸¹ While the judiciary may be the ultimate interpreter of laws, the initial interpretation comes through the executive

¹⁸¹ William N. Eskridge Jr., Philip P. Frickley, and Elizabeth Garrett, *Legislation and Statutory Interpretation* (New York: Foundation Press, 2000), 203.

departments and agencies which have to implement the legislation.¹⁸² As Habermas points out, the law is implemented and interpreted by administrations that “exercise a rather broad discretion.”¹⁸³ Legislative action certainly amounts to an act of Congress, but it also contains acts of the executive branch. In other words, Congress sets the framework by which executive departments and agencies act. Ambiguously worded statutes allow for maximum executive leeway while specifically worded statutes constrain what agencies can do, but the passing of legislation will always entail a policy lottery where the ultimate outcome of policy is uncertain but the probability of certain outcomes can be weighed.¹⁸⁴ For example, Congress wrote a two-page joint resolution for the 2001 Authorization for Use of Military Force which gave the president authorization for “appropriate and necessary force” against those “he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”¹⁸⁵ This ambiguous statute allowed maximum leeway for President Bush to respond to the September 11 terror attacks and gave the president the power to determine what Congress essentially did with that joint resolution. By contrast, the 1991 Authorization for Use of Military Force stipulated that the first President Bush was allowed to use force only to enforce specific United Nations Security Council Resolutions and further required that he confirm that he has attempted all peaceful means of resolution prior to the authorization of force.¹⁸⁶ Potential

¹⁸² See Frank H. Easterbrook, “The Role of Original Intent in Statutory Construction,” *Harvard Journal of Law & Public Policy* 11 (1988), 60. See also Frank B. Cross, *The Theory and Practice of Statutory Interpretation* (Stanford, CA: Stanford Law Books, 2009), 58-84.

¹⁸³ Habermas, *Between Facts and Norms*, 196.

¹⁸⁴ Matthew C. Stephenson, “Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice between Agencies and Courts,” *Harvard Law Review* 119 (2006), 1037.

¹⁸⁵ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

¹⁸⁶ Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991).

executive acts are always lurking beneath the surface of any statutory construction because members of Congress are not sure exactly what the executive will do with legislation.

In light of the policy lottery, Congress has good reason to scrutinize executive branch actions while drafting legislation because statutory construction can present major power struggles between the executive and the legislative branches. The Department of Homeland Security, for example, could circumvent the intention of Congress and interpret a statute in a way favorable to its policy goals. This power struggle helps explain, for example, why authors of legislation add definitions to key terms in order to limit the flexibility of executive departments and agencies and the courts.¹⁸⁷ Definitions allow the legislature to create more legal certainty when there may be multiple meanings to common words, so the choice of vocabulary may dictate the choice of laws.¹⁸⁸

If Congress wants to maintain control over executive interpretation, then it needs to account for why it would ever write ambiguous statutes. The law and political science literature provide four possible reasons for such ambiguity. First, departments and agencies need some administrative flexibility for changing circumstances.¹⁸⁹ This flexibility allows the executive branch to deal with new circumstances not anticipated by the original authors of the law. Second, legislators are fearful of attentive publics, so they will want to shift responsibility for as many rules as possible to federal agencies, whose leaders do not face electoral pressures. In other words, the public will not hold them responsible for unpopular provisions but will instead blame

¹⁸⁷ Abner J. Mikva and Eric Lane, *An Introduction to Statutory Interpretation and the Legislative Process* (New York: Aspen Law & Business, 1997), 166.

¹⁸⁸ Yaniv Roznai, “‘A Bird Is Known by Its Feathers’—On the Importance and Complexities of Definitions in Legislation,” *Theory & Practice of Legislation* 2, no. 2 (2014), 148.

¹⁸⁹ Eskridge, Frickey, and Garrett, 205.

the executive for misinterpreting statutes.¹⁹⁰ Thus, they leave the option of an executive scapegoat. Third, members of Congress may actually benefit from a runaway bureaucracy upsetting constituents by making decisions based on ambiguous statutes.¹⁹¹ Because constituent services are low-risk ways to drum up support, the more federal agencies create trouble for constituents, the more opportunities members have to step in on their behalf and fix the problem.¹⁹² Finally, Congress may not be able to agree on exact language, so delegation to executive agencies gives members a way to vote for reform without having to agree on all the details.¹⁹³

Congress cannot completely control how the executive branch enacts legislation; the legislative process inevitably involves delegation of interpretive authority. Sometimes members even rely on this delegation of authority because the resulting ambiguity provides a rhetorical resource to deny responsibility for controversial policies. Congress, however, has some capacity to inhibit the executive by writing more specific statutes. In the opposition's attempts to inhibit executive subversion, it necessarily shifts interpretive authority to Congress, which raises the proposition's fears that Congress will grant itself subversive power. As I show in the next section, the relative specificity of the statutes and their constraint of the interpretive authority sit at the heart of the 2013 senate immigration debate.

¹⁹⁰ Morris P. Fiorina, "Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?" *Public Choice* 39 (1982), 46-47.

¹⁹¹ Morris P. Fiorina, *Congress: Keystone of the Washington Establishment, Second Edition* (New Haven, CN: Yale University Press, 1989), 43-46.

¹⁹² *Ibid.*

¹⁹³ David B. Spence, "A Public Choice Progressivism, Continued," *Cornell Law Review* 87 (2002), 432.

4.2 The “Trigger” Debate

Opponents and proponents disagree about whether the immigration bill provides more border security. Opponents claim it does nothing to ensure border security. Vitter says that the bill “at its core, it is amnesty now, enforcement later, and maybe never.”¹⁹⁴ Sessions repeats this characterization asserting “Right. Amnesty—done. The promise of enforcement, the toughest bill ever in the future—no, sir, not there, not close.”¹⁹⁵ Lee insists that “the bill we are debating has very little, if anything, to make the border more secure or at least to guarantee that it will become more secure as a result of its passage.”¹⁹⁶ Meanwhile, proponents tout heavy increases in border security. Leahy calls it “virtually impossible to have more security [in the bill].”¹⁹⁷ Schumer scoffs at the suggestion that border security isn’t present, “as if the \$6.5 billion does not count.”¹⁹⁸ Even McCain was taken aback by the opposition, asking “Is it possible that one could ever argue against this legislation now by saying that it does not give us a secure border?”¹⁹⁹ Both sides agree that the bill should provide for more border security, but they do not agree whether it achieves that objective.

When it comes to the specific language of the bill, opponents focus their border security concerns on the “trigger” statutes. Essentially, the border has to be secured by the Department of Homeland Security prior to the legalization of illegal immigrants who already reside in the United States. Securing the border will “trigger” the legalization process. Section 3(c)(2)—

¹⁹⁴ *Congressional Record* 159, pt. 73 (May 22, 2013): S 3728.

¹⁹⁵ *Congressional Record* 159, pt. 80 (June 7, 2013): S 4001.

¹⁹⁶ *Congressional Record* 159, pt. 83 (June 12, 2013): S 4367.

¹⁹⁷ *Ibid.*, S 4361.

¹⁹⁸ *Congressional Record* 159, pt. 81 (June 11, 2013): S 4087.

¹⁹⁹ *Congressional Record* 159, pt. 89 (June 20, 2013): S 4748.

“Adjustment of Status of Registered Provisional Immigrants”—details what the Secretary must accomplish before moving immigrants with RPI status to more permanent legalizations.²⁰⁰ Notably, section 3(c)(2)(A)(ii) requires her to “certify that there is in place along the Southern Border no fewer than 700 miles of pedestrian fencing which will include replacement of all currently existing vehicle fencing on non-tribal lands on the Southern Border with pedestrian fencing where possible,” and section 3(c)(2)(A)(v) specifies that the Secretary may not adjust RPI status until “no fewer than 38,405 trained full-time active duty U.S. Border Patrol agents are deployed, stationed, and maintained along the Southern Border.”²⁰¹ In addition, section 5(a)(3) provides a long list of minimum requirements for the border security plan the Secretary must implement.²⁰² Even with these extensive provisions, opponents worry that the triggers have no teeth.

It may seem counterintuitive for the debate over a 1200 page piece of legislation to turn on one section. However, the meaning of legislation often does turn on one provision or even one phrase. For example, the oral arguments of *King v. Burwell* showed that the entire force of marketplace subsidies in the Affordable Care Act may hang on the word “such.”²⁰³ Certainly, with any legislative debate, more statutory disputes will arise than can be addressed in one analysis. I have chosen to focus on the trigger amendments because they are the most prevalent site of statutory contestation in the debate, as evidenced by the sheer number of amendments dedicated to changing the trigger statutes. Amendments present a good starting point for isolating a legislative controversy because they give insight into the bill that opponents would prefer. Out

²⁰⁰ *Ibid.*, S 4860.

²⁰¹ *Ibid.*

²⁰² *Ibid.*, S 4861–4862.

²⁰³ *King v. Burwell*, 14-114, p. 65.

of seventeen amendments proposed on the floor for S. 744,²⁰⁴ thirteen concerned border security, and of those, seven concerned new trigger provisions. Of the six that did not concern border security triggers, four were overwhelmingly adopted by the Senate, such as Senator Dean Heller's (R-NV) amendment to include Nevada on the Southern Border Security Commission or Senator Mark Pryor's (D-AR) amendment to promote recruitment of veterans for the Border Patrol.²⁰⁵ Two of the four amendments that did not involve border security at all were agreed on by a voice vote. Meanwhile, all of the trigger amendments were controversial. In other words, the majority of controversial amendments proposed for the bill concerned border security triggers.

In short, the main site of statutory dispute in the debate involves the triggers that must be met prior to legalization. I explain in the next section how opponents of the bill envision subversive executive authority within these statutes. If the interpretive power behind these triggers lies with an agent, then the debate rests on what potential acts the legislature perceives from that agent.

4.3 Opponents' Interpretive Fear: Executive Subversion of Border Security Triggers

Opponents contend that the bill's trigger provisions do not compel the executive to follow through on border security. They push beyond the language of the bill to focus on the interpretive authority of the executive branch. They construct the motives of the executive

²⁰⁴ While 554 amendments were "submitted," the content of those amendments is not revealed unless they are actually proposed on the floor by their sponsor. Having not been proposed, they were not part of the senate debate.

²⁰⁵ *Congressional Record* 159, pt. 88 (June 19, 2013): S 4631, 4656.

branch as subversive to congressional intent to increase border security provisions. Thus, opponents find ambiguity in the probable executive acts behind the legislative act.

The scenic constructions from the last chapter made Congress out to be impotent in the face of broken promises. Because promises were construed as acts without agents, the line of broken promises becomes a scene of acts in search of an agent. Once opponents turn their attention from policy history to the modern debate, this understanding of scene allows them to turn the debate over the legislation into a debate over Secretary Napolitano's motives. Although the Secretary obviously cannot be held responsible for decades of bad immigration policy, the broken promises (acts) have finally found an agent. They construct the Secretary as a subversive agent that will not follow through on border security if given the power to interpret the triggers. Senator Sessions says that she "already said we have better enforcement than ever before in history and indicated she does not believe we need more fencing. The contention from the Gang of 8 that we are going to have major fencing at the border has not been proven."²⁰⁶ Then Minority Leader Mitch McConnell (R-KY) claims that the bill merely offers "an assurance [from the Secretary] that the border is secure."²⁰⁷ Lee insists that the bill provides for no congressional oversight of border security and that it would grant "broad discretion to the Secretary of Homeland Security to create the rules and regulations that will determine how the bill is to be implemented as well as authorize the Secretary in hundreds and hundreds of instances to simply ignore the law as it is enacted by Congress."²⁰⁸ Grassley points to Secretary Napolitano's role in implementing a border security strategy noting that she "believes the border is stronger than ever

²⁰⁶ *Congressional Record* 159, pt. 80 (June 7, 2013): S 4003.

²⁰⁷ *Congressional Record* 159, pt. 82 (June 11, 2013): S 4070.

²⁰⁸ *Congressional Record* 159, pt. 83 (June 12, 2013): S 4368.

before” and “does not believe a biometric exit system is feasible,” and he expresses concern that the Secretary can “take action contrary to what is claimed by the authors and, hence, can undercut the intentions of the authors.”²⁰⁹ The opposition constructs the Secretary’s motives in order to further build the case that too much interpretive authority would be abused by the executive branch.

This history of congressional impotence and construction of executive subversion lead opponents to the conclusion that Congress cannot give an inch of leeway on legalization prior to confirmation that the border is secure. Registered provisional immigrant (RPI) status for immigrants is such an inch. RPI status is a form of probation prior to permanent legalization measures years down the line. Thus, illegal immigrants can “come out of the shadows” for six years while the Department of Homeland Security works to secure the border.²¹⁰ While extensive triggers exist to transition from RPI to a green card, the bill only requires the Secretary to meet two conditions before she begins granting RPI status to illegal immigrants. First, she has to submit a Southern Border Fencing Strategy, and second, she has to give Congress a notice that the department has begun implementing the strategy.²¹¹

In fact, opponents often make no distinctions between RPI status and legalization. Grassley insists that “RPI status is more than probation. RPI status is outright legalization.”²¹² Thune contends that his amendment requiring “350 miles of fence to be completed prior to RPI

²⁰⁹ *Congressional Record* 159, pt. 81 (June 10, 2013): S 4032; *Congressional Record* 159, pt. 82 (June 11, 2013): S 4093. For more references to the Secretary’s motives regarding border security, see for example Senator Flake (S4769), Sessions (S4041, S4067), Rubio (S4083).

²¹⁰ *Ibid.*, 164.

²¹¹ *Border Security, Economic Opportunity, and Immigration Modernization Act of 2013*, S 744, 113th Cong., 1st sess., as of June 27, 2013, 16.

²¹² *Congressional Record* 159, pt. 81 (June 10, 2013): S 4032.

status being granted... would have meant border security first, then legalization.”²¹³ Thune thus interchanges the words “RPI status” and “legalization,” making it RPI status the equivalent of border security after legalization. Senator Richard Shelby (R-AL) outlines the triggers prior to RPI status and contends that “no later than 6 months after this bill becomes law, those who came here illegally will be allowed to stay legally. I will clarify that further: That is amnesty.”²¹⁴ The conflation of RPI status with “outright legalization” and amnesty makes sense if opponents see no real teeth in forcing those with RPI status to ever leave. Sessions reads into the bill a completely different executive act:

So now 6 years later, they work intermittently, they are unemployed, and we have a recession, and we do not have enough jobs for people, and we are going to send out the feds and uproot them—their children are now in junior high and high school—and send them back home? Give me a break. That is one of the most bogus claims ever. That will not be enforced. There are waiver authorities in the bill, so waivers will be issued.²¹⁵

For Sessions, RPI status becomes a foothold, a six-year entrenchment of illegal immigrants into American society where it becomes unthinkable to deport them, thus robbing the bill of its enforcement provisions. As Grassley puts it, “we all know it will never be taken away.”²¹⁶ When RPI status becomes legalization, it makes no difference whether there are tough triggers between RPI and green cards. RPI is already amnesty.

In short, the ambiguity in the policy lottery permits opponents to translate potential subversive executive acts within the legislative act before the Senate. Opponents draw on past enforcement failures and current executive motives to argue that the policy lottery leans towards amnesty through RPI status without border security ever being implemented. Through

²¹³ *Congressional Record* 159, pt. 93 (June 26, 2013): S 5254.

²¹⁴ *Ibid.*, S 5253.

²¹⁵ *Congressional Record* 159, pt. 80 (June 7, 2013): S 4002.

²¹⁶ *Congressional Record* 159, pt. 84 (June 13, 2013): S 4437-4438.

amendments, they propose to put border security triggers prior to RPI status, and, as I will show in the next section, these amendments spur the fears of proponents that the policy lottery will prevent any legalization.

4.4 Proponents' Interpretive Fear: Congressional Subversion of Legalization Triggers

Although opponents' fears of losing interpretive authority are more prevalent in the debate, proponents of the bill also worry about the potential for the Congress or other actors to undermine its legalization provisions. Leahy calls Republican proposals for new triggers “unrealistic,” sees “efforts to modify the triggers in ways that could unduly delay or prevent the earned legalization path,” and even accuses the authors of the triggers of “pretending” to give a pathway to citizenship.²¹⁷ Senator Sheldon Whitehouse (D-RI) regards new border triggers as “impossible” and calls them a “cynical attempt to deny a pathway to legalization.”²¹⁸ Essentially, proponents read into new amendments the interpretive authority to permanently veto either the transition from illegal immigrant to RPI or from RPI to permanent status. Their main concerns arise with the amendments proposed by Cornyn, Grassley, and Paul.

Both Cornyn's and Grassley's amendments are based on the identical metrics of “operational control” and “effective control.” Cornyn would have required that the Secretary maintain “operational control” of the border prior to adjusting immigrants from provisional status to green cards, and he defines “operational control” in the amendment to mean that “within each and every sector of the Southern border, a condition exists in which there is an effectiveness

²¹⁷ *Congressional Record* 159, pt. 83 (June 12, 2013): S 4362; *Congressional Record* 159, pt. 89 (June 20, 2013): S 4736-4737.

²¹⁸ *Congressional Record* 159, pt. 83 (June 12, 2013): S 4394.

rate, informed by situational awareness, of not lower than 90 percent.”²¹⁹ Grassley’s “effective control” matches the definition of the existing bill and requires the same metrics as Cornyn’s “operational control,” except he would have the trigger precede RPI status.²²⁰ Both amendments conflict with the bill which does not make “effective control” a trigger for initial changes in immigrant status.²²¹ Instead, the bill says “effective control” must be certified by the Secretary of Homeland Security prior to moving those with RPI status to green card status.²²²

Proponents take issue with the ambiguity and intangibility of an “effective control” metric to serve as a trigger because its interpretation can be located in subversive agents. Senator Schumer opposes the Cornyn amendment because the triggers “are not specific and achievable.”²²³ He instead insists on triggers that can be “measured,” or, in other words, triggers that concede no interpretive authority, such as miles of fencing or numbers of drones.²²⁴ Corker calls it a trigger that can be “monkeyed with.”²²⁵ He gives the example of a border agent making subjective decisions that affect measures of border security: “what happens down on the border right now is the Border Patrol agent sees a Cheetos bag, literally, and has to decide whether 10 people ate out of that Cheetos bag and left it there or 1.”²²⁶ The uncertainty over the apprehension rate measure provides an interpretive angle unfavorable to legalization. Members

²¹⁹ *Congressional Record* 159, pt. 83 (June 12, 2013): S 4416.

²²⁰ *Congressional Record* 159, pt. 82 (June 11, 2013): S 4197-4198.

²²¹ Border Security, Economic Opportunity, and Immigration Modernization Act of 2013, S 744, 113th Cong., 1st sess., as of June 27, 2013, 12.

²²² *Ibid.*, 13.

²²³ *Congressional Record* 159, pt. 83 (June 12, 2013): S 4384.

²²⁴ *Ibid.*

²²⁵ *Congressional Record* 159, pt. 91 (June 24, 2013): S 4994.

²²⁶ *Ibid.*, S 5002.

of Congress or even border control agents could exploit the uncertainty to argue that the border is not 90 percent secure. At the very least they could engage in what Marcus Paroske calls an “epistemological filibuster” where the uncertainty indefinitely precludes Congress from verifying that the border has reached “effective control.”²²⁷ Again, senators confront the issue of ambiguity—the issue of who gets to resolve statutory ambiguity and to which provisions the ambiguity potentially diminishes. By attempting to create tangible border security goals, proponents want to turn action into sheer motion and remove agent from the equation.

In addition to Grassley and Cornyn’s amendments, Paul’s “Trust, but Verify” amendment significantly shifts the interpretive authority of a secure border to the Congress. The following identical provisions are detailed under “Year 1” through “Year 5”: “Except as provide in section 1_6, section 245B of the Immigration and Nationality Act, as added by section 2101 of this Act, shall cease to have effect beginning on December 31, 2014, unless Congress enacts a joint resolution pursuant to section 1_4 during the 1-year period ending on such date.”²²⁸ Section 1_4 details a joint resolution that Congress would have to pass each year confirming that the border fencing, illegal immigrant incarceration, entry/exit, and all other border security provisions are on track for completion.²²⁹ Additionally, the amendment stipulates that the effectiveness rate of apprehensions must be at 95 percent.²³⁰ Without the resolution each year, the provisions for legalization would be rescinded.

²²⁷ Marcus Paroske, “Deliberating International Science Policy Controversies: Uncertainty and AIDS in South Africa,” *Quarterly Journal of Speech* 95, no. 2 (2009), 151.

²²⁸ *Congressional Record* 159, pt. 88 (June 19, 2013): S 4646.

²²⁹ *Ibid.*, S 4645.

²³⁰ *Ibid.*

Paul's amendment completely redefines the legislative act before the Senate. Because it requires that Congress vote separately to begin legalization, it turns the current bill into only a measure to crack down on illegal immigration. By definition, Paul wants to separate the two pieces—security and legalization—into two separate bills. Senators then would be forced to vote not once but five times for a legalization provision that is unpopular with the conservative base. Although he does not directly mention Paul's amendment, Reid expresses concern that the Senate might repeat what happened in 2006 where the Congress only passed a border fencing bill without addressing legalization, thus creating a “backdoor way to undermine the legislation.”²³¹ Paul's amendment fits with Schumer's concern that opponents are trying to give themselves leeway to block the path to citizenship or Leahy's concern that the path to citizenship will be “rigged by some elusive precondition.”²³² For a Congress that seems out of power, that is just observing a scene of failure, it makes sense to insert Congress as an active agent of interpretation. However, to proponents who believe Congress has been active in implementing “enforcement first,” Congress does not need more power. In fact, as part of the old equation, Congress is potentially part of the problem because it has refused to pass legalization measures over the past decade. As with border patrol agents, proponents are eager to turn the triggers into sheer motion by not allowing subversive agents to act as a trigger, in this case, by voting to certify that the border is secure.

Overall, proponents' concerns center on granting opponents interpretive leeway to block the legalization. Whether through the ambiguous “effective control” or a required congressional

²³¹ *Congressional Record* 159, pt. 83 (June 12, 2013): S 4352.

²³² *Congressional Record* 159, pt. 91 (June 24, 2013): S 5009; *Congressional Record* 159, pt. 87 (June 18, 2013): S 4548.

verification, the amendments posed by the opposition would have swung the probabilities of the policy lottery the other direction towards security and away from a path to citizenship.

4.5 Conclusion

Ambiguity in legislative statutes often boils down to the interpretive authority inherently present in the policy lottery. The contest over a provision is not a contest over what the legislature intends but over the possible ways the language could give agency to subversive agents, over how much “play in the joints” the legislation gives to bad interpretations. In many cases, the potential subversive agents come from the executive branch, but they can also be members of Congress or people as unlikely as border security agents. Therefore, legislative ambiguity at least partially comes from attempts to reconstruct the motives of these interpretive authorities.

Rhetoricians have seen this kind of textual ambiguity before. Statutory constructions can easily become what Edward Sapir calls “condensation symbols,” symbols condense multiple meanings under one banner where normally said meanings would diverge from each other.²³³ Both David Zarefsky and Leah Ceccarelli explain that rhetors can use this sort of strategic ambiguity to increase the popularity of a proposal.²³⁴ If multiple groups comprise the audience, then the strategic ambiguity allows the text to be amorphous enough to appeal to all the groups.²³⁵ Denise Bostdorff recognizes this sort of strategic hedging in Nixon’s policy rhetoric. Nixon announced his position on arms buildup in a way that left his position ultimately unclear

²³³ Edward A. Sapir, “Symbolism,” in *Encyclopedia of the Social Sciences*, ed. E.R.A. Seligman (New York: Macmillan), 492.

²³⁴ David Zarefsky, “Definitions,” in *Rhetorical Perspectives on Argumentation: Selected Essays by David Zarefsky* (Cham, Switzerland: Springer, 2014), 125; Ceccarelli, “Polysemy,” 404-405.

²³⁵ *Ibid.*

and thus potentially favorable to a larger audience.²³⁶ In the case of legislation, J. Michael Hogan and Leroy Dorsey note in the debate over the nuclear freeze that for politicians “the ambiguity of the [freeze] resolution proved its greatest virtue.”²³⁷ They point out that members of Congress were able to take the confusion surrounding the freeze resolution and tell the public that it did different things. Freeze advocates can claim victory, as can freeze opponents.²³⁸ Given what Robert Asen identifies as the “multiple authorship” factor of policy texts, it is difficult to ascribe strategic intent to any given ambiguous statute.²³⁹ However, the ambiguity does permit multiple constructions of the legislative act. With antagonistic translators, the ambiguity of a law can be used to draw out the worst interpretation possible and thus be used to make the law unpopular and snatch defeat from the jaws of victory.

²³⁶ Bostdorff, 34.

²³⁷ Hogan and Dorsey, 331.

²³⁸ *Ibid*, 332.

²³⁹ Asen, “Reflections,” 132–133.

5 Conclusion

Legislation is not neutral ground. The rhetoric and public policy literature has allowed it to function as a social fact, an almost epistemological necessity in order to investigate the normative force of other policy constructions. Yet, David Zarefsky's contention about the force of rhetoric in public policy remains true, that "the facts of an episode in political life are not 'given' or univocal; they are not present in the external world awaiting discovery by political actors. . . . The *meaning* of these events depends on how they are characterized in public discourse."²⁴⁰ This is another fact we have to question—legislation is comprised of discourse and by its very nature allows for ambiguity and reinterpretation. It is not, however, discourse understood in-and-of-itself. There necessarily exists a legislation-behind-the-legislation, a constructed context which implicates the interpretation of statutes. Thus, senators in the immigration debate contest the meaning of the 2013 immigration bill by leveraging both the ambiguity of its context and the ambiguity of its statutes.

In chapter three, I looked at the legislation-behind-the-legislation to understand how both sides mobilize and reconstruct recent immigration policy. Opponents redefined the modern history of immigration reform to one of faulty promises to secure the border, thus positioning S. 744 as another bill in the line of promises. Proponents, meanwhile, constructed a history of "enforcement first" that put Congress as the active agent increasing border security over the last ten years. The 2013 bill for proponents thus was not a faulty promise but a guarantee of border security.

In chapter four, I showed how the separate policy histories and the separate attributions of motives informed statutory interpretations of the bill. Both sides use contextual ambiguity to construct probable future acts allowed under the legislation, and statutory disputes involved

²⁴⁰ Zarefsky, *War on Poverty*, 1-2; emphasis in original.

battles for interpretive authority. Opponents read into the statutes the potential for executive subversion of the border security provisions, so they attempted to pass amendments to give interpretive authority of statutes to Congress. Meanwhile, proponents constructed Congress as the likely subversive agent to undermine the legalization provisions. Therefore, proponents attempted to minimize subversion of the immigration legislation by constructing statutes that took interpretive authority away from Congress.

In order to appreciate how policies are decided and disputed, we must understand all the sites of rhetorical intervention in legislative debates. Both contextual and statutory ambiguities are inherent to the legislative process and suggest that ambiguity potentially exists in every bill that comes through Congress. Scholars of rhetoric and public policy should recognize these ambiguities inside and outside of statutes in order to fully appreciate the opportunities for rhetorical construction in policy debates.

My analysis also demonstrates the fruitfulness of bringing a legal perspective to bear on what we normally consider political issues. Legislation is law, and Congress deals with statutes as much as the courts. While this may seem obvious, the rhetoric and public policy literature rarely looks at Congress as a legal entity. Indeed, even those writing on legal rhetoric have neglected Congress in favor of the courts. We have created an artificial divide between political and legal rhetoric that should be questioned given the many intersections.

In this conclusion, I draw out three major implications that come from looking at Congress through a rhetoric and law perspective. First, my analysis draws attention to the need for more studies that put the branches of the federal government into conversation with one another. Second, the legal work that permeates each branch draws our attention to Congress as a

technical legal sphere. Finally, the public may be relying on epistemological shortcuts to access the technical sphere of Congress.

5.1 Recognizing the Undercurrent of Law in the Three Branches

The law is an undercurrent flowing through each branch of government. We need to resist the urge to think of the presidency and Congress as political and court as legal. They are all both political and legal institutions. Congress makes the laws which are enacted by the executive and adjudicated by the judiciary, thus the law connects them all together.

My study demonstrates the advantages to taking a legal perspective on congressional rhetoric, a perspective without which it would be difficult to understand the polysemy in legislative acts. However, the Congress is not merely another case of rhetoric of law. The courts and Congress are different in their responsibilities with regards to the law, and in the Bitzerian sense, they face completely different exigencies.²⁴¹ For example, I noted in chapter three that while it is incumbent upon judges to show they are consistent with past law the opposite impetus exists for Congress. Congress, in the face of failed policy, must show its inconsistency with the past that it is trying something new. The presumption is that the legislature will change the law, while the judiciary supposedly keeping the law constant. Legal precedents take a whole new meaning in congressional rhetoric.

Because the law flows through each branch, I see an opportunity for more comparative studies between the different branches. Comparative studies between the institutions of Congress, the Supreme Court, and the presidency are few and far between. Perhaps the most complete comparative study came from Craig Allen Smith and Kathy B. Smith over twenty years

²⁴¹ Lloyd Bitzer, "The Rhetorical Situation," *Philosophy & Rhetoric* 1 (1968): 1-14.

ago.²⁴² They invite us to look at each branch with an institutional perspective. Such a perspective allows rhetorical critics to focus on recurrent constraints and opportunities within the context of the institution.

Smith and Smith deal with the institutions discretely in their work, but we can also put them directly into conversation with one another. This project could involve starting in one of the institutions and looking outward at the others. Consider that the literature on the rhetorical presidency focuses on the president's attempts to sway another branch of the federal government. By "going public," the president uses the bully pulpit to push for his legislative proposals to be accepted by Congress.²⁴³ Thus, while the rhetorical presidency deals mostly with the institution of the presidency, the whole literature is still premised on interaction between the branches of the federal government, an aspect of presidential rhetoric recognized by the National Task Force on Presidential Communication to Congress in Martin Medhurst's *The Prospect of Presidential Rhetoric*.²⁴⁴ In addition to going public, they identify four arenas of "direct communication" between the president and Congress: nominations and appointments, vetoes, major policy speeches (such as the State of the Union), and war and impeachment speeches.²⁴⁵ They suggest we can study these sites of exchange to better understand the power struggles between the president and Congress. From a congressional standpoint, Trevor Parry-Giles shows that we can look at the Supreme Court through the lens of Congress. He examines Supreme Court

²⁴² Smith and Smith, 225.

²⁴³ James W. Caeser et al., "The Rise of the Rhetorical Presidency," *Presidential Studies Quarterly* 11 (1981): 159.

²⁴⁴ Mary Stuckey et al., "Report of the National Task Force on Presidential Communication to Congress," in *The Prospect of Presidential Rhetoric*, eds. James Arnt Aune and Martin J. Medhurst (College Station, TX: Texas A&M University Press, 2008), 272.

²⁴⁵ Ibid,

confirmation hearings as sites where the public debates “the character of justice,” and certainly the president is implied in such an exchange because he nominates candidates for the court.²⁴⁶ In an underappreciated article, Goodnight and Olson invite readers to look at foreign policy as a rhetorical power struggle between the legislative and executive branches, and they further suggest understanding policy as it engages all three branches in larger debates.²⁴⁷

We do not have to look to explicit moments of engagement between the branches. I have shown in the immigration debate that senators engage with the executive branch. Specifically, senators anticipate potential acts of the executive under the statutes enacted by Congress. They recognize that Congress does not have full control over the law and work to maximize that control by robbing the executive of interpretive authority. Even though I start in Congress, I am forced to look to potential executive acts to understand how the law is being written and interpreted by members of Congress. I have shown that this joint governance under the law can confuse where responsibility ultimately lies for policy. By scapegoating the different interpretive agents as subversive, Congress has pathologized public deliberation. Law necessitates interpretation by some agent, whether that agent is the executive or legislature. Deliberation cannot function when all potential interpretations of a law become reasons to reject it.

²⁴⁶ Trevor Parry-Giles, *The Character of Justice: Rhetoric, Law, and Politics in the Supreme Court Confirmation Process* (East Lansing, MI: University of Michigan Press, 2006), 21.

²⁴⁷ G. Thomas Goodnight and Kathryn M. Olson, “Shared Power, Foreign Policy, and Haiti, 1994: Public Memories of War and Race,” *Rhetoric & Public Affairs* 9, no. 4 (2006): 624.

5.2 Rethinking Congress as a Technical Legal Sphere

By recognizing the law flows through each branch of government, we also have to recognize that congressional debates largely reside not in the “public sphere” but in what scholars call the “technical sphere,” in a community built on expertise. We must partially realize this with growing interest in the institutional rhetoric of Congress.²⁴⁸ More simply, we can recognize Congress as Habermas does—as a “legal community.”²⁴⁹ Most members of the Senate are former lawyers that are actively engaged in writing the law. Congress is a technical sphere and requires legal language in order to do its job. Should the public care to engage in statutory interpretation, it would have a difficult time reading legislation. The public’s lack of direct access to the legislative act problematizes Congress’s accountability to the public and raises issues regarding how ambiguity is mobilized in debating legislation.

The United States democratic system risks being overtaken by a technocracy whenever it engages with complex policy issues. This process is what Goodnight calls the degradation of the public sphere of deliberation.²⁵⁰ The more Congress passes laws related technical issues such as ozone depletion, nuclear power, and computer hacking, the more it puts the public at the mercy of the technical sphere.²⁵¹ The public may ultimately be forced to sit on the sidelines while important policy issues are decided by experts. Although Dale Brashers and Sally Jackson have tried to give the public a way to penetrate the technical sphere, their research on ACT UP does

²⁴⁸ See for instance Keremidchieva, “The Congressional Debates”; M. Linda Miller, 375; Gring-Pemble, “Legislating.”

²⁴⁹ Habermas, *Between Facts and Norms*, 32.

²⁵⁰ G. Thomas Goodnight, “The Personal, Technical, and Public Spheres of Argument: A Speculative Inquiry into the Art of Public Deliberation,” *Argumentation and Advocacy* 48 (2012), 205-206.

²⁵¹ *Ibid.*

not offer a way for the public to challenge experts' claims of fact.²⁵² Rather, Brashers and Jackson point to public challenges regarding methods and objectives.²⁵³ The public may still take a back seat because, as Charles Willard argues, "our epistemic environment is so constituted that deference to authority...is the rational thing to do."²⁵⁴ Certainly, some levels of technical discourse can be penetrated by the lay public, but the technical sphere still grounds the public in the epistemic environment. Experts may not decide what the public should do or how it should do it, but they do decide what the public knows. In the case of legislation, they interpret what the public knows about the proposed policy and what the statutes require.

Equally troubling is the prospect of the public overriding experts on issues too complicated for the layperson to understand. The public's entrance into the technical sphere can be inherently problematic because the public's standards for evaluating technical arguments can produce irrational results. Even John Dewey, an advocate for public participation in policymaking, admits that in the face of technical issues "the public and its organization for political ends is not only a ghost, but a ghost which walks and talks, and obscures, confuses and misleads governmental action in a disastrous way."²⁵⁵ In other words, the public does not know what it is talking about but comes to decisions on technical issues, which amounts to what Nicholas Paliewicz calls "the public usurpation of the technical sphere."²⁵⁶ Indeed, this public usurpation is on full display in Leah Ceccarelli's work. She explains how rhetors seeking to

²⁵² Dale E. Brashers and Sally Jackson, "Politically-Savvy Sick People': Public Penetration of the Technical Sphere," *Argument in Controversy: Proceedings of the Seventh SCA/AFA Conference on Argumentation*, ed. Donn W. Parson (Annandale, VA: Speech Communication Association, 1991), 284.

²⁵³ Ibid.

²⁵⁴ Charles Arthur Willard, "Cassandra's Heirs," *Argument and Social Practice: Proceedings of the Fourth SCA/AFA Conference on Argumentation* (Annandale, VA: Speech Communication Association, 1985), 29.

²⁵⁵ John Dewey, *The Public and Its Problems* (Athens, OH: Ohio State University Press, 1927), 124-125.

²⁵⁶ Paliewicz, 232.

subvert policies will “manufacture” scientific controversies by asserting that scientists disagree about an issue for which there actually exists a large scientific consensus.²⁵⁷ In the case of AIDS, intelligent design, and climate change, the public is confused by media spin doctors, and disastrous policies emerge from this confusion.²⁵⁸ Noting Ceccarelli’s work, Goodnight himself acknowledges that the tide has turned and now “it may be the case that technical knowledge itself needs to find productive entry into public communication, given its status has been diminished and its findings attacked....”²⁵⁹ Overall, it seems the public has trouble assimilating technical evidence into policy debates.

Ultimately, the public’s best attempts to evaluate scientific claims rely on indirect, secondhand evidence. In the debate over intelligent design (ID), for example, ID advocates insist that schools should “teach the controversy” between evolution and creationism, a clear appeal to the societal value of fairness.²⁶⁰ Once ID is taught alongside evolution, it appears that both are equal positions with equal evidence.²⁶¹ The uncertainty is proven not by a direct evaluation of the evidence but by indirect evidence, by an appearance of disagreement. Paliewicz eventually makes a Faustian bargain by suggesting we use indirect methods of evaluation for technical issues, such as evidence for the motives of scientists.²⁶² The public may have no other means of getting at the evidence. However, these are still secondhand ways of knowing, and, as Ceccarelli

²⁵⁷ Ceccarelli, “Manufactured Scientific Controversy,” 196.

²⁵⁸ Ibid.

²⁵⁹ G. Thomas Goodnight, “The Personal, Technical, and Public Spheres: A Note on 21st Century Critical Communication Inquiry,” *Argumentation and Advocacy* 48 (2012), 265.

²⁶⁰ Ceccarelli, 208.

²⁶¹ Ibid.

²⁶² Paliewicz, 233.

shows, these indirect evaluative methods can be manipulated, leading the public into poorly grounded decisions.

5.3 Taking Stock of Epistemological Shortcuts to Legislative Meaning

As a technical document, legislation suffers the same problem of access as scientific findings. The contextualizing legislation-behind-the-legislation may be the only means for the public to understand the legislative act, and we should be attuned to the ways that the legislation-behind-the-legislation can be used to manipulate our understanding of legislation. Taking Burke's pentad again, I can imagine many ways that our assumptions about democratic deliberation can be leveraged to provide the public with epistemological shortcuts to "knowing" the legislation. Deliberative democracy scholarship already provides many cues how we get at our product—policy—without actually getting at the thing itself.

Many deliberation and argumentation theorists embody the logic of the agency-act ratio. When they argue that new methods and procedures will save our democratic system, they sign onto a powerful means-oriented philosophy.²⁶³ Dewey, for instance, locates the problem of the public in the complexity of the administration of the state.²⁶⁴ In order to avoid a technocracy, he proposes that we improve education so public citizens can have the agency to judge expert findings without necessarily becoming experts themselves.²⁶⁵ Acolytes of "strategic maneuvering" also put their faith in discussion procedures to guide interlocutors away from

²⁶³ Daniel O'Keefe refers to this means-oriented philosophy as argument₂ and Zarefsky, drawing on O'Keefe, calls it the "process" view of argument. See Zarefsky, "Process," 229; Daniel J. O'Keefe, "Two Concepts of Argument," *The Journal of the American Forensic Association* 13, no. 3 (1977), 121.

²⁶⁴ Dewey, 123.

²⁶⁵ *Ibid.*, 208-209.

fallacious arguments, and to the extent that Congress is highly procedural, expectations of good procedure can be used to leverage our means-ends understanding.²⁶⁶

I have shown in this project how the scene can be constructed in ways that reinterpret legislation as congruent with policy history, and some in deliberation scholarship also put faith in the power of the scene. In his account of the transformation of the public sphere, Jürgen Habermas locates the rise of a critical public sphere in the socio-economic conditions of the Enlightenment with the rising economic and political power of the bourgeois class, locating the motivating force of an ideal public (and presumably ideal laws) largely in scenic conditions.²⁶⁷ This explains why his recommendation for an ideal society relies on widening the public sphere, a scenic term, by making the activities of institutions and corporations more public.²⁶⁸ Goodnight similarly claims that the public sphere is being “eroded,” except in this case by the technical sphere.²⁶⁹ He and Habermas both fear that publicity is threatened. In other words, until the scene is altered, the public cannot reclaim critical deliberation. In a policy era with politicians running against the government, the government itself could be the scenic condition that does not permit the true public to voice its concerns, thus any legislation out of a poisoned government scene may reconstruct the legislative act negatively.

In pining for the conditions of the Enlightenment, Habermas incurred a famous critique from Nancy Fraser. Fraser took issue with the exclusionary practices of public sphere deliberation, the fact that Habermas’s public sphere was still decidedly a “bourgeoisie” public

²⁶⁶ Frans H. van Eemeren, “The Pragma-Dialectical Theory under Discussion,” *Argumentation* 26 (2012), 440.

²⁶⁷ Habermas, *The Structural Transformation of the Public Sphere*, 127.

²⁶⁸ *Ibid*, 209.

²⁶⁹ Goodnight, “The Personal, Technical, and Public Spheres,” 205.

sphere.²⁷⁰ She argues instead that the good state requires an inclusive view of both publics and “counterpublics.”²⁷¹ Thus, Fraser introduces a third point of stasis into the equation—agents. The good state must be comprised of the right agents; otherwise, the state will produce unjust policy.²⁷² Certainly to the extent that legislation reflects its authors can senators renegotiate our understanding of a bill by pointing to the nefarious cabal of interests propagating it, such as big business or labor unions.

Meanwhile, political scientists shift the motivational focus to purpose, arguing that the most prevalent explanation of policy is future campaign prospects. Richard Fenno notably calls reelection the primary motivation of members of Congress—a claim that has been consistently repeated by political scientists.²⁷³ Any reorientation of our political system, thus, has to deal with the centrality of the “permanent campaign” and the potential malign purposes of any legislative initiatives.²⁷⁴ Thus, campaign season itself becomes a reason to reject legislation. It almost becomes a scene of malign purposes—every politician is trying to win reelection, so they cannot be trusted to have the proper purpose of good policy.

²⁷⁰ Nancy Fraser, “Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy,” in *Habermas and the Public Sphere*, ed. Craig Calhoun (Cambridge, MA: The MIT University Press, 1992), 111.

²⁷¹ *Ibid.*, 115-116.

²⁷² *Ibid.*, 122-123.

²⁷³ Richard Fenno Jr., *Home Style: House Members and Their Districts* (Boston: Little, Brown and Company, 1978), 137. See also Douglas Arnold, *The Logic of Congressional Action* (New Haven, CN: Yale University Press, 1990), 6; William Bianco, “Richard Fenno’s Conventional Wisdom,” in *Congress on Display, Congress at Work*, ed. William Bianco (Ann Arbor, MI: University of Michigan Press, 2000), 2-4.

²⁷⁴ See Norman Ornstein and Thomas Mann (eds.), *The Permanent Campaign and Its Future* (Washington, D.C.: The American Enterprise Institute and the Brookings Institute, 2000).

My point here is not that Burke's pentad merely fits with these theories. I agree with David Zarefsky that it is not fruitful to attempt to prove nonfalsifiable theories.²⁷⁵ My purpose instead has been to show the importance of these motivational assumptions and how they can be leveraged to reinterpret legislation. Ceccarelli has shown us that balancing norms and democratic values can be "exploited" by those who wish to subvert policy.²⁷⁶ As critics, we should be attune to moments in legislative debates when assumptions about deliberative scenes, agents, purposes, and agencies are used as indirect ways to evaluate legislation or when they are manipulated to make legislation appear better or worse than it is.

With these three major implications in mind—the legal connection among the three branches, the Congress as a technical sphere, and the epistemological problems of knowing legislation—we should continue to expand the rhetoric and public policy literature by incorporating insights from legal scholars. In the words of Ronald Dworkin, "We are subjects of law's empire, liegemen to its methods and ideals, bound in spirit while we debate what we must therefore do."²⁷⁷ We must uncover the full function of rhetoric in the empire and understand what it means to be law's citizens.

²⁷⁵ David Zarefsky, "Reflections on Making the Case," *Rhetorical Perspectives on Argumentation: Selected Essays by David Zarefsky* (Cham, Switzerland: Springer, 2014), 9.

²⁷⁶ Ceccarelli, "Manufactured Scientific Controversy," 198.

²⁷⁷ Dworkin, vii.

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