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Corrections Day

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CORRECTIONS DAY

John Copeland Nagle*

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INTRODUCTION

Congress makes mistakes. So do the courts, and so do administrative agencies, when they interpret the statutes that Congress has enacted. What constitutes a “mistake,” of course, is often in the eye of the beholder.

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Sometimes Congress writes statutes with language that produces unintended consequences, sometimes Congress fails to resolve an issue because of an oversight or a failure of will, sometimes courts and agencies interpret statutes in a manner unintended by the enacting Congress, and sometimes courts and agencies interpret statutes in a manner that produces an undesirable result. In the broadest sense, these are all statutory mistakes.

How to solve such mistakes occupies much of the current judicial and academic debate concerning statutory interpretation. Theories that emphasize the statutory text and legislative intent are more likely to rely on Congress—and Congress alone—to correct statutory mistakes. Theories that consider other factors, such as current societal norms and congressional preferences, are more likely to give courts and agencies a role in correcting statutory mistakes. These more dynamic, less originalist theories justify their reliance on courts and agencies to correct statutory mistakes in part on the inability and unwillingness of Congress to correct its own mistakes and the interpretative mistakes made by courts and agencies.¹

Enter Corrections Day. Credited (and discredited) as the brainchild of Speaker of the House Newt Gingrich, Corrections Day offers an opportunity to prove the skeptics of Congress wrong. Gingrich conceived the idea of a “corrections bill” in February 1995 as he listened to San Diego Mayor Susan Golding complain about a regulatory burden imposed by the Federal Environmental Protection Agency (EPA) via the Clean Water Act.² He advanced his proposal a few days later to a group of Republican governors, announcing it publicly after Vice President Al Gore spoke to House Republicans about Gore’s reinventing government proposals. Gingrich proposed the regular scheduling of a day on which the House would enact legislation designed to correct statutory mistakes.³ As he first envisioned it, Corrections Day would involve “as many as 20 or 30 corrections acts a month . . . that would each take care of something that was passed that had an unintended consequence or that was peculiarly destructive in implementation.”⁴ The matters addressed in those corrections acts

1. For a general description of these theories, see John Copeland Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209, 2215–20 (1995).

2. See NEWT GINGRICH, *TO RENEW AMERICA* 225–27 (1995). Actually, Michigan Governor John Engler coined the term “Corrections Day” after Gingrich spoke about regulatory reform at the February 1995 meeting with Republican governors. *Id.* at 227.

3. John H. Cushman, Jr., *House to ‘Correct’ San Diego Sewage Plan*, N.Y. TIMES, Feb. 3, 1995, at B8.

4. *Id.* (quoting Speaker Gingrich).

should be "the dumbest things the federal government's currently doing,"⁵ "items so dumb that you wouldn't want to tell your mom you were busy doing it."⁶ Indeed, Gingrich added that an agency might find itself in need of "correction" if too many of the individual statutory fixes came from a particular agency.⁷

Anything designed to "fix" what is happening in Washington—especially a plan to correct the mistakes of federal bureaucrats applying silly rules—is sure to excite the public imagination, and Corrections Day is no exception. The idea proved wildly popular among the public.⁸ Gingrich encouraged state and local government officials, as well as ordinary citizens, to submit their favorite examples of federal rules in need of correction. Suggested candidates for Corrections Day—and lists of suggestions—soon filled the newspapers, television, and congressional

5. *Morning Edition: Report on San Diego's Fight with EPA over Sewage System* (NPR broadcast, Feb. 17, 1995) (remarks of Speaker Gingrich); accord Newt Gingrich, Remarks at the National League of Cities Conference at the Washington Hilton (Mar. 13, 1995).

6. *Implementation of the Clean Air Act Amendments of 1990: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 104th Cong., 1st Sess. 129 (1995) (testimony of California Governor Pete Wilson) (quoting Speaker Gingrich). For another standard of dumbness, see *Progress Report with Newt Gingrich: Effect of Government Regulation on Small Businesses* (Progress and Freedom Foundation television broadcast, Feb. 7, 1995) (noting that Corrections Day should address "something that your federal government is doing which is so dumb that you would be embarrassed to explain to your children that you were paying taxes to do").

7. See GINGRICH, *supra* note 2, at 228.

[I]f a department or agency comes up too often on Corrections Day, its oversight subcommittee may decide to hold hearings on the agency's activities. If there is a clear track record of not making sense or ignoring the facts of the local situation, then the committee may propose significant changes in the department or agency involved. . . . [I]f all this fails, Congress can zero out an agency and bring in new people with new attitudes.

Id.

8. See, e.g., 141 CONG. REC. H6104 (daily ed. June 20, 1995) (statement of Rep. Solomon) (observing that Corrections Day has "captured the imagination and enthusiastic support of our colleagues and the American people alike"); GINGRICH, *supra* note 2, at 227 (commenting that "[t]he enthusiasm [for Corrections Day] is overwhelming"). One editorial gushed that "[p]roviding machinery for clearing the enormous, noxious weeds out of the fields of legislation planted over the years could turn out to be one of this century's most positive congressional reforms." *Fixing 'Dumb' Laws*, INDIANAPOLIS STAR, May 2, 1995, at A6. For other examples of editorial support, see *A Positive Plan to Reduce Bad Government Regulations*, LANCASTER NEW ERA (Pennsylvania), June 22, 1995, at A10; *Corrections Day*, WASH. POST, May 6, 1995, at A14; *Corrections Day: House Practice Would Be Welcome Change*, TELEGRAM & GAZETTE (Worcester, Mass.), July 5, 1995, at A6; *'Corrections Day' House Takes Aim at Bad Rules, Regulations*, COLUMBUS DISPATCH, July 30, 1995, at 2B. The dissenters are cited *infra* at text accompanying note 11.

offices.⁹ The idea spread to the Illinois House of Representatives, which created its own "Common Sense Legislation" initiative patterned after the Federal Corrections Day.¹⁰

But not everyone was pleased. Corrections Day drew skeptical reactions from professors, environmentalists, and some Democrats in Congress.¹¹ The complaints increased as the House held two hearings to design the actual process to be employed on Corrections Day.¹² In June 1995, the House created a special calendar to govern floor consideration of Corrections Day legislation, but it did so over substantial Democratic objections and without a clearly defined system for identifying which bills were eligible to be considered on Corrections Day. The inauspicious debut of Corrections Day in July 1995 caused more people (including some prior supporters) to question its utility.¹³ The critics viewed Corrections Day as a forum for special interests to dismantle substantive federal law in the name of "corrections." In short, after watching the House march through

9. For lists of statutes and regulations proposed for correction, see, e.g., 141 CONG. REC. H6109 (daily ed. June 20, 1995) (statement of Rep. Collins) (inserting "Correction Inventory" of 32 statutes and regulations); GINGRICH, *supra* note 2, at 227 (describing "a ten-page, single-spaced list of specific proposals for the first Corrections Day" submitted by Illinois Governor Jim Edgar); *Readers See Plenty of Government Excess*, PEORIA J. STAR (Ill.), May 4, 1995, at A11 (reporting results of telephone calls proposing candidates for Corrections Day).

10. See Dan Rutherford, *Rutherford's Common Sense Legislation Passes House* (Feb. 8, 1996) (news release, on file with author) (reporting that the Illinois House has passed legislation "which would completely eliminate acts or amendatorily downsize 21 Acts of Illinois Law"). A local newspaper editorial apparently prompted the Illinois Legislature to develop its procedure. Compare *'Corrections Day Calendar' to Sweep Stupid Rules/Laws*, THE PANTAGRAPH (Bloomington, Ill.), July 11, 1995, at A6 (calling for analogous state Corrections Day) with *State to Focus on Eliminating "Stupid" Laws*, THE PANTAGRAPH (Bloomington, Ill.), Aug. 6, 1995, at A7 (reporting that the Illinois House planned to institute such a procedure).

11. See, e.g., Harold Krent & Jim Rossi, *Avoiding a Mistake with "Corrections Day,"* CHI. TRIB., Mar. 9, 1995, § 1, at 23, reprinted in LEGAL TIMES, Apr. 3, 1995, at 22; see also *infra* text accompanying notes 162-204 (describing objections to Corrections Day).

12. See *Corrections Day Calendar: Hearing on H. Res. 161 Before the House Rules Comm.*, 104th Cong., 1st Sess. (forthcoming 1996) [hereinafter *Corrections Day Calendar Hearing*] (transcript on file with author); *Corrections Day Repeal of Regulations: Joint Hearing Before the House Subcomm. on National Economic Growth, Natural Resources, and Regulatory Affairs and the House Subcomm. on Rules and Organization of the House*, 104th Cong., 1st Sess. (1995) [hereinafter *Corrections Day Repeal of Regulations Hearing*].

13. By the summer of 1995, several editorials questioned the Corrections Day procedure being developed by the House. See, e.g., *Beware of Corrections Day*, BUFF. NEWS, July 30, 1995, at 8F; *House's Quick-Fix Rule Could Kill Worthy Laws*, THE TENNESSEAN (Nashville), June 25, 1995, at 40; *Hurry, Hurry, Hurry*, FORT WORTH STAR-TELEGRAM, June 23, 1995, at A30; *Newt Watch*, NEW REPUBLIC, May 22, 1995, at 10; *Overboard: Don't Overdo it in Zeal to Mend Federal Rules*, HOUS. CHRON., July 18, 1995, at A16. The Washington Post reversed its position after the House held its first Corrections Day. Compare *Not Much of a Correction*, WASH. POST, July 27, 1995, at A18 with *Corrections Day*, *supra* note 8, at A14.

the Contract with America, the critics distrusted Gingrich and the House Republicans he led.

My thesis is that Corrections Day is a great idea in theory, and a workable idea in practice. Congress, administrative agencies, and courts all make mistakes when drafting, implementing, and interpreting statutes, yet only Congress has full authority to remedy all these mistakes. Corrections Day also fulfills the longstanding congressional desire to exercise better control over the implementation of the statutes Congress enacts. Neither the regular legislative process, nor oversight hearings, nor any other existing tool for fine-tuning statutory schemes have been capable of enabling Congress to keep up with the application of existing laws. Corrections Day provides Congress with a regular opportunity to fix statutory mistakes in a way that is faithful to the constitutional responsibilities of the legislature, the executive, and the judiciary.

Part I of this Article describes the problem of statutory mistakes: what they are, and who makes them. Part II explains that statutory mistakes do exist, regardless of how one defines "mistake." Congress, agencies, and the courts all make mistakes, though the responsibility for them ultimately resides with Congress, the author of the statute. Part III examines how Congress has tried to correct statutory mistakes through the periodic reauthorization of statutes, appropriations riders, using subsequent legislative history to signal approval or disapproval of an interpretation of a statute, informal pressure exerted through agency oversight hearings, and such statutory amendments as Congress is able to enact. The inadequacy of these existing congressional procedures operates as a central premise supporting the theories of statutory interpretation that rely on the courts and agencies to correct statutory mistakes.

Part IV first explains how the push for a congressional procedure to correct statutory mistakes puts Newt Gingrich in distinguished company. In a 1987 article, Justice Ginsburg called for "an alert system through which Congress could become activated to clear up mysteries it has written into federal legislation,"¹⁴ echoing similar proposals advanced by Judge Friendly,¹⁵ Justice Cardozo,¹⁶ and Roscoe Pound¹⁷ before her. Part IV

14. Ruth Bader Ginsburg, *A Plea for Legislative Review*, 60 S. CAL. L. REV. 995, 997 (1987); see also Ruth Bader Ginsburg & Peter Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417 (1986).

15. Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963).

16. Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921).

17. Roscoe Pound, *Anachronisms in Law*, 3 J. AM. JUDICATURE SOC'Y 142, 146 (1920).

then describes the Corrections Day procedure established by the House and how it worked on the seven Corrections Days held through February 1996. This review demonstrates that the principal objections to Corrections Day are misplaced and that the concerns that do merit attention can be readily accommodated.

Finally, Part V outlines the ramifications of Corrections Day for theories and doctrines of statutory interpretation that assume that Congress cannot or will not correct statutory mistakes. Corrections Day supports one of the fundamental premises of textualist theories of statutory interpretation: Courts and agencies need not (and indeed should not) attempt to correct statutory mistakes under the guise of statutory interpretation because Congress can fix its own mistakes.¹⁸ Conversely, theories of statutory interpretation that look beyond the statutory text and legislative intent object that Congress lacks the institutional competence to track how all of the statutes it has enacted are being implemented and that it is unrealistic to expect Congress to update federal statutes to account for new developments or to correct prior mistakes. Agencies and courts, the argument continues, must fix statutory mistakes lest they go uncorrected. If, however, Congress can readily amend statutes when a mistake is identified, then Corrections Day will undermine the case for theories of statutory interpretation that look beyond the statutory text or legislative intent. Corrections Day could also raise questions about the way in which courts address legislative history, arguments that Congress has acquiesced in a prior interpretation of a statute, and *stare decisis*. Even the limitations of the new procedure fail to undermine the case that Corrections Day makes for theories of statutory interpretation that rely on Congress to correct statutory mistakes.

I. WHAT NEEDS TO BE CORRECTED

The obvious, albeit unstated, premise of Corrections Day is that mistakes are being made that need to be corrected. Much of the controversy

18. See, e.g., Earl M. Maltz, *Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy*, 71 B.U. L. REV. 767, 782 (1991).

Subject to only constitutional constraints, legislatures have the authority to make rules of law. An integral part of that authority is the right to make mistakes—even mistakes that the legislators who passed the statute might later come to regret. If legislative supremacy means anything significant, those mistakes must be corrected not by the courts but by future legislatures.

Id.

surrounding recent statutory interpretation cases reflects different beliefs about the nature of statutory mistakes and who should be correcting them. But statutory mistakes exist under every theory of statutory interpretation, and each branch of the federal government can make them. The justified dissatisfaction with the current congressional procedures for correcting statutory mistakes leads some to turn to the agencies and the courts to solve the problem, but it has led others to propose congressional solutions that have now blossomed into Corrections Day.

A. The Existence of Statutory Mistakes

Consider several views of the nature of statutory mistakes. Textualists learn the meaning of a statute from statutory text alone. Any interpretation contrary to the meaning of that text, therefore, is mistaken—even if other sources suggest that Congress actually intended something else.¹⁹ Originalists who search for the intent of the Congress that enacted the statute, by contrast, are more willing to displace the statutory text when other evidence of legislative intent leads to a different result. Fidelity to the statutory text can thus sometimes produce a mistaken interpretation of the statute.²⁰

Dynamic statutory interpreters are less likely to find statutory mistakes because they disavow any single correct interpretation of a statute.²¹ A dynamic statutory interpreter who sees the process of the congressional enactment of statutes, the administrative implementation of statutes, and the judicial interpretation of statutes as an ongoing exercise may view any response by one institution (e.g., Congress) as a way of expressing its preference for a different result than that preferred by another institution (e.g., an agency or a court). So viewed, there are no “mistakes” involved, only a series of responses by a number of institutional actors.²² But dynamic statutory interpreters judge the interpretation of a statute partially on the justice of the normative result it yields, so that a statutory mistake occurs when Congress enacts an unjust statute or when an interpreter produces an unjust result. Likewise, to the extent that dynamic statutory interpreters consult the desires of the current Congress and President and not just the

19. See *infra* text accompanying notes 38–42.

20. *Id.*

21. See Nagle, *supra* note 1, at 2218–19.

22. See William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 28–29 (1994).

enacting bodies, a statutory provision that conflicts with those current desires can be viewed as a mistake.

Suppose that all of these can be counted as statutory mistakes,²³ even though the definitions of "statutory mistake" are mutually exclusive. If it is possible to construct a mechanism that will correct all statutory mistakes, no matter how they are defined, then the contested view of what constitutes a statutory mistake vanishes as an obstacle to correcting such mistakes. Therefore, my working definition of "statutory mistake" includes any provision that the current Congress determines to be in need of revision, regardless of the reason why.

B. Identifying Who Makes Statutory Mistakes

Accepting the existence of statutory mistakes does not indicate how such mistakes happen. Three possibilities exist: There can be legislative mistakes (Congress wrote the statute incorrectly), administrative mistakes (the agency misapplied the statute), and judicial mistakes (the court interpreted the statute incorrectly). Although much of the current congressional support for Corrections Day presumes that agency mistakes present the greatest problem,²⁴ and much of the academic literature has focused on congressional responses to apparent judicial mistakes in statutory interpretation,²⁵ I maintain that all three kinds of mistakes ultimately collapse into a mistake by Congress.

23. I have explained my disagreement with dynamic statutory interpretation elsewhere. See Nagle, *supra* note 1, at 2220-50.

24. See *infra* text accompanying notes 32-37.

25. See, e.g., James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1 (1994); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991) [hereinafter Eskridge, *Overriding Supreme Court*]; William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991) [hereinafter Eskridge, *Reneging on History*]; Roger Handberg & Harold F. Hill, Jr., *Court Curbing, Court Reversals, and Judicial Review: The Supreme Court Versus Congress*, 14 LAW & SOC'Y REV. 309 (1980); Beth M. Henschen, *Statutory Interpretations of the Supreme Court: Congressional Response*, 11 AM. POL. Q. 441, 443 (1983); Beth M. Henschen & Edward I. Sidlow, *The Supreme Court and the Congressional Agenda-Setting Process*, 5 J.L. & POL. 685 (1989); Abner J. Mikva & Jeff Bleich, *When Congress Overrides the Court*, 79 CAL. L. REV. 729 (1991); Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425 (1992); Harry P. Stumpf, *Congressional Response to Supreme Court Rulings: The Interaction of Law and Politics*, 14 J. PUB. L. 377 (1965); Note, *Congressional Reversals of Supreme Court Decisions: 1945-1957*, 71 HARV. L. REV. 1324 (1958).

1. Congressional Mistakes

Congress may have made a mistake when it originally wrote a statute using language that failed to achieve its goals. The example offered by Vice President Gore on the day that the idea for Corrections Day was announced is illustrative. Federal law authorizes funding for local governments who use dogs to locate illegal drugs. Portland, Oregon had experienced great success in finding drugs when it deployed its secret weapon: Harley the Pig. But Harley was not a dog. Nonetheless, Vice President Gore redefined Harley to be a dog, thus qualifying Portland for the federal drug enforcement money.²⁶ Gore recognized that his solution was inadequate, though, and he offered it as an example when he spoke to Republican House members about reinventing government. Gingrich seized the story as an example of what could be done on Corrections Day.²⁷

A statutory mistake can also include a statute that worked when enacted but which no longer fulfills its original goal due to charged circumstances. For example, a Louisiana statute provides that a man is the "natural father" of a child only if the man is alive when the child is conceived.²⁸ All other states have similar statutes. In *Hart v. Shalala*,²⁹ Ed Hart contributed his sperm at a fertility clinic, he died of cancer a few months later, and then his wife Nancy conceived a child after being artificially inseminated by her deceased husband's sperm. Judith Hart was born in June 1991, but she was denied survivor's benefits because the state law does not acknowledge her as her father's heir. The Louisiana Legislature could not have anticipated the birth of children through artificial insemination when it enacted the law years ago, but the statute continues to govern

26. See Al Gore, Remarks by Vice President Al Gore to the Democratic Leadership Council Forum at the Sheraton Washington (Dec. 6, 1994) (explaining how "with the authority vested in me as vice president of the United States . . . I declared Harley a dog"); see also 141 CONG. REC. S11,737 (daily ed. Aug. 7, 1995) (statement of Sen. Packwood) (retelling the story in support of legislation to relieve states of federal mandates).

27. See Norm Brewer, *Gingrich Uses Gore's Pig to Explain "Corrections Day,"* SEATTLE TIMES, Feb. 2, 1995, at A8. For other examples of statutes written unintentionally broadly or narrowly, see 140 CONG. REC. H6101 (daily ed. July 21, 1994) (statement of Rep. Rohrabacher) (statute prohibiting mechanized vehicles in wilderness areas except in life-threatening emergencies prevented the Forest Service from rescuing a Boy Scout lost in the New Mexico wilderness). See *infra* notes 122-126 and accompanying text (vegetable oil covered by the Oil Pollution Act).

28. LA. REV. STAT. ANN. § 40:34(B)(1)(a)(iv) (West 1992 & Supp. 1995).

29. No. 94-3944 (E.D. La. filed Dec. 12, 1994). The case is described in Mark Curriden, *No Benefits for 'Miracle' Baby*, A.B.A. J., Mar. 1995, at 18.

all births today. Thus the child's mother sued to have the courts invalidate the law, claiming that the statute is outdated in a day of artificial insemination. The question divided the Social Security Administration until the Commissioner intervened to award benefits to the Harts while the broader legal issue could be studied.³⁰ Debates about the appropriate definition of "father" in an age of artificial insemination demonstrate the need for legislative reconsideration of the statute.³¹

2. Agency Mistakes

Alternately, an agency may have made a mistake in implementing the statute, so that Congress is dissatisfied with the result produced by the statute it enacted. Members of Congress often complain about an agency's "misinterpretation" of a federal statute.³² Many of the House Republicans

30. See Alan Sayre, *Girl Conceived After Dad's Death Gets Benefits*, CHI. SUN-TIMES, Mar. 12, 1996, at 16 (quoting Social Security Commissioner Shirley Chater as stating that "[r]ecent advances in modern medical practice, particularly in the field of reproductive medicine, necessitate a careful review of current laws and regulations to ensure they are equitable in awarding Social Security payments in cases such as this"). The Commissioner reversed an administrative appeals council decision that itself had reversed an administrative law judge who had ruled that Mr. Hart is Judith's father notwithstanding the Louisiana statute. See Janet McConaughy, *No Benefits for a Life After Death: Social Security Denied Child from Stored Sperm*, CIN. ENQ., Dec. 1, 1995, at A14.

31. For example, the Harts' attorney "plan[ned] to show, using this set of facts, logic and reason, that the law is outdated and must be put aside." Curriden, *supra* note 29, at 18 (quoting William Rittenberg). On the other hand, some have objected to changing the law. See Kimberly Crockett, *Child Conceived with Dead Father's Sperm Now Wants His Legacy*, SACRAMENTO BEE, June 7, 1995, at B7 ("For a widow to artificially inseminate herself with her late husband's sperm—because this is what they wanted—is one thing. It's a personal choice. To ask for benefits is another. This act is just as irresponsible as the teenager who gets pregnant to receive welfare. Neither should be compensated."); NBC News Sunday Today: *New Technology Allowing Children to Be Born to Deceased Fathers Through Artificial Insemination Raises Legal Questions* (NBC television broadcast, Jan. 29, 1995) (quoting a Louisiana Civil Code expert who defends the existing statute because "there has to be a cutting-off point to determine inheritance rights"). For another example of an allegedly outdated law, see *infra* notes 131–134 (describing debate concerning 1954 regulation prohibiting teenagers from operating paper balers in grocery stores).

32. See, e.g., 141 CONG. REC. E1477 (daily ed. July 20, 1995) (statement of Rep. Smith) (accusing the State Department of misinterpreting a statute protecting American longshore jobs); *id.* at H6113 (daily ed. June 20, 1995) (statement of Rep. Bereuter) (describing how the Department of Housing and Urban Development "wilfully flaunted congressional intent" in its interpretation of the water purification requirements of the Housing and Community Development Act of 1987); *id.* at H4597 (daily ed. May 9, 1995) (statement of Rep. Hastert) (accusing the Department of Education of misinterpreting the provisions of Title IX of the Civil Rights Act regarding gender equality in athletics); *id.* at E590 (daily ed. Mar. 14, 1995) (statement of Rep. Fawell) (introducing legislation to overturn the Department of Labor's misinterpretation of the Portal-to-Portal Act and the Fair Labor Standards Act as applied to commuters); 140 *id.* at H6239 (daily ed. July 26, 1994) (statement of Rep. Mica) (objecting to EPA's interpretation of statutes governing risk assessment and complaining that "Congress enacts laws, and the agencies get hold of

supporting Corrections Day emphasize the need to correct agency mistakes. Some have even suggested that bringing such mistakes to light will be adequate, even if correcting legislation is never enacted. Remember that a primary purpose of Corrections Day is to increase the accountability of the administrative process to Congress, a goal Congress has pursued through a variety of avenues with varying success.³³

But the proponents of Corrections Day realize that some agency mistakes result from the nature of the statute being implemented. An agency may be forced to take a certain position because it is bound by the applicable statutory language.³⁴ In other cases, Congress disapproves of an agency's application of general statutory language in a case that Congress failed to anticipate. Complaints about the "one-size-fits-all" character of federal legislation fueled the call for Corrections Day.³⁵ Some of these

those laws, and they misinterpret them"); 138 *id.* at S11,065 (daily ed. July 31, 1992) (statement of Sen. Pressler) (accusing the State Department of licensing arms sales to Pakistan in violation of the Pressler Amendment to the Arms Export Control Act); *id.* at H2424-25 (daily ed. Apr. 8, 1992) (statements of Reps. Poshard & Bereuter) (charging that EPA misinterpreted the provisions of the Clean Air Act encouraging the use of ethanol fuels).

33. The debate over regulatory reform legislation describes many of these methods of congressional control over agency decisionmaking. See generally William W. Buxbee, *Regulatory Reform or Statutory Muddle: The "Legislative Mirage" of Single Statute Regulatory Reform*, 5 N.Y.U. ENVTL. L.J. (forthcoming Spring 1996) (discussing regulatory reform proposals in the 104th Congress).

34. For examples of proponents of Corrections Day and advocates of specific statutory amendments recognizing that some agency mistakes result from an agency being bound by the applicable statutory language, see "Corrections Day" Bills: Hearing Before the House Subcomm. on Workforce Protections of the Comm. on Economic and Educational Opportunities, 104th Cong., 1st Sess. (1995), available in LEXIS, Legis Library, CNGTST File [hereinafter *Corrections Day Bills Hearing*] (testimony of Paula Laws, President-Elect, National Court Reporters Association) (supporting a legislative reversal of a provision of the Fair Labor Standards Act because "the Department of Labor feels bound by the provisions of the statute" and commenting that "[t]he Department has been cooperative and sympathetic, but has not been able to provide any relief"); H.R. REP. NO. 387, 104th Cong., 1st Sess. (1995), available in LEXIS, Legis Library, CMTRPT File (noting that congressional hearings had raised serious questions about EPA's ability to waive or ignore the controversial Clean Air Act carpooling requirements); 141 CONG. REC. H9754 (daily ed. Oct. 10, 1995) (statement of Rep. De La Garza) (recognizing that vegetable oil was subject to the Oil Pollution Act because "Congress did not differentiate between the various types of oil in the legislative language"); *Equal Time* (CNBC television broadcast, June 23, 1995) (Rep. McIntosh acknowledging in interview that sometimes agencies cannot change a regulation "because Congress has actually passed a law that requires those stupid regulations"); *Text of House Speaker's Daily News Conference* (CNN television broadcast, Feb. 1, 1995) (Speaker Gingrich describing Corrections Day as aimed at federal policies "which we need to stop doing, but may be, currently, legally required by law to do").

35. See *Corrections Day Bills Hearing*, *supra* note 34 (testimony of Rep. Vucanovich); 141 CONG. REC. H7570 (daily ed. July 25, 1995) (statement of Rep. McIntosh); 141 CONG. REC. H6110 (daily ed. June 20, 1995) (statement of Rep. Goss); see also *id.* at H7573 (daily ed. July 25, 1995) (statement of Rep. Bilbray) (citing a 1993 National Academy of Sciences report concluding that the uniform national requirements of the Clean Water Act have failed to address regional

federal statutes, however, were written in this manner precisely because Congress wanted a uniform national standard with no local discrepancies.³⁶ More frequently, Congress enacts general legislation and relies on the agency to apply the statute in particular situations. Such general legislation can reflect trust in the administrative process, but it can also reflect congressional unwillingness to grapple with the difficult issues raised by a statute.

Whatever the initial explanation, an agency that makes the hard decision and applies the statute in a controversial situation can expect to be criticized by the very members of Congress who drafted the law. On the other hand, a coy agency may decline to state whether it promulgated a regulation because of an unavoidable statutory command or because of a deliberate agency policy choice—though that strategy collapses once Congress investigates the source of the agency's rule.³⁷

3. Judicial Mistakes

That leaves the courts. The courts may have made a mistake in interpreting the statute, so that Congress must rewrite the statute to achieve the goal it desires. Congress frequently complains that the courts have wrongly interpreted the statutes it has enacted.³⁸ Such criticisms are most powerful when they indicate the court's decision is contrary to the intent of the Congress that enacted the statute. For example, as a result of the Supreme Court's increasing use of clear statement rules requiring explicit statutory language to accomplish certain purposes and refusing to look at other evi-

variations in environmental systems or to respond to changing conditions).

36. See, e.g., 141 CONG. REC. H7565 (daily ed. July 25, 1995) (statement of Rep. Mineta) (explaining that Congress specifically chose national rather than local standards when it enacted the sewage treatment requirements of the Clean Water Act in 1972).

37. See Sen. Faircloth *Launches Attack on EPA's Clean Air Act Implementation*, INSIDE E.P.A., July 14, 1995, at 10 (describing letter from Senator Faircloth to EPA that "repeatedly questions whether controversial clean air rules are required by the statute, or if they are a result of EPA's interpretation of its own authority").

38. See, e.g., 141 CONG. REC. E74 (daily ed. Jan. 11, 1995) (statement of Rep. Orton) (asserting that a Pennsylvania state court decision denying a bank's power to collect credit card charges from Pennsylvania residents misinterpreted the Riegle-Neal Interstate Banking and Branching Act of 1994); *id.* at S520 (daily ed. Jan. 5, 1995) (statements of Sens. Bennett & Roth) (same); 140 *id.* at H7040 (daily ed. Aug. 5, 1994) (statement of Rep. Fields) (arguing that federal court congressional redistricting decisions misinterpreted the Voting Rights Act); 139 *id.* at H8960-63 (daily ed. Nov. 9, 1993) (statements of Reps. Williams, Ford, & Berman) (accusing federal courts of misinterpreting the Employee Retirement Income Security Act of 1974 to preempt certain state laws); 138 *id.* at S2948-49 (daily ed. Mar. 10, 1992) (statement of Sen. Garn) (charging that a federal district court misinterpreted a recent amendment to the Federal Deposit Insurance Corporation Improvement Act).

dence of legislative intent, Congress protests that it has had to repeatedly amend the same statutory provision in order to effectuate its original intent.³⁹ Congress also blames the courts with misreading a statute when an interpretation has become accepted in the community even if that interpretation does not necessarily reflect the intent of the enacting Congress. The criticisms of the Court in the aftermath of the 1988 Term's civil rights decisions are best explained in this way.⁴⁰ In other cases a court misinterprets a statute because Congress used ambiguous language that failed to convey congressional intent.⁴¹

These examples show that the characterization of a judicial statutory mistake depends on the chosen method of statutory interpretation. As noted above, if a court is supposed to ascertain and give effect to congressional intent, a decision that is contrary to what the enacting Congress intended is incorrect. A court that views its role differently can expect to be accused of making statutory mistakes. A textualist court that adheres to the statutory text even if the legislative history suggests a different congressional purpose may face this criticism.⁴² A dynamic court that considers current social norms and congressional attitudes may also be criticized for neglecting congressional intent, albeit not by the current congressional majority whose views a dynamic statutory interpreter gives weight. Statutory mistakes are thus more common if the interpreter and Congress have a different view of how to interpret statutes, but the difficult cases

39. I describe the sequence of judicial interpretations and statutory amendments of the Clean Water Act in John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771 (1995). William Eskridge describes a similar saga under the Education of the Handicapped Act in WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 284-85 (1994).

40. The 1989 Term's civil rights decisions, and the congressional reaction to them, are detailed in Eskridge, *Reneging on History*, *supra* note 25, at 633-41; Mikva & Bleich, *supra* note 25, at 740-43.

41. See Mikva & Bleich, *supra* note 25, at 730-31. To put it another way, a court may interpret a statute *against* the original legislative intent or simply *beyond* that intent. See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 282 (1989); see also ESKRIDGE, *supra* note 39, at 48-49.

42. The 1988 Term's civil rights decisions and other recent interactions between the Supreme Court and Congress demonstrate this point. See Eskridge, *Reneging on History*, *supra* note 25, at 677 (suggesting that "the new textualism signals that the Court . . . is willing to tolerate tension between itself and Congress"); Eskridge & Frickey, *supra* note 22, at 75 (concluding that "the textualist opinions openly invite legislative revision"); Steven R. Greenberger, *Civil Rights and the Politics of Statutory Interpretation*, 62 U. COLO. L. REV. 37, 68 (1991) ("[T]he decisions Congress is taking issue with do not involve a misreading of legislative history. To the contrary, it is the textualist approach that Congress is rejecting."); Solimine & Walker, *supra* note 25, at 448 (concluding from an empirical study that "a disproportionate number of overridden cases used a 'plain meaning' analysis").

presented under any theory of statutory interpretation mean that statutory mistakes can occur under any system.

All of these mistakes—even those made by courts or agencies—are ultimately the result of a congressional mistake. Most cases that cause courts and agencies to struggle are those where Congress has failed to clearly express its intention in the statutory language. Indeed, the courts complain of ambiguous statutory language daily.⁴³ Some mistakes occur when Congress did not foresee all the situations that would be covered by the statutory language. Or Congress may fail to update a statute to recognize developments in technology or other changed circumstances. Finally, courts may conclude that a statute produces an undesirable result, whether or not the courts then feel free to correct the problem themselves. All statutory mistakes, therefore, can be attributed to Congress being sloppy, unthinking, neglectful, or wrong.⁴⁴

II. WAYS OF CORRECTING STATUTORY MISTAKES

Congress has followed a number of other avenues for fixing statutory mistakes. These solutions include (1) relying on the general legislative process to enact such statutory amendments as Congress sees fit, (2) amending statutes when they are reauthorized, (3) adding substantive statutory provisions to appropriations legislation, (4) producing legislative history approving or disapproving the interpretation of a statute, and (5) informally overseeing and pressuring agency officials. The failure of these methods, individually and collectively, to correct many statutory mistakes has been cited in support of theories allowing judicial and administrative corrections of statutes.

43. To take only a few recent examples, see *National Ass'n of Regulatory Util. Comm'rs v. SEC*, 63 F.3d 1123, 1126-27 (D.C. Cir. 1995); *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 139 (2d Cir. 1995); *Jane L. v. Bangerter*, 61 F.3d 1493, 1501 (10th Cir. 1995); *Akindemowo v. INS*, 61 F.3d 282, 286-87 (4th Cir. 1995). That is not to say that all statutory language is ambiguous. See Nagle, *supra* note 1, at 2222-24, 2226.

44. With two exceptions: If the consequences of a statute were unforeseeable—not just unforeseen—when Congress enacted the statute, then Congress cannot be blamed for a problem it could not have anticipated. Likewise, if Congress wrote a statute when one rule of statutory interpretation applied, and then the courts announced a new rule that produced a different result, Congress cannot be blamed for such “bait-and-switch” tactics.

A. Congressional Methods of Correcting Statutory Mistakes

Congress corrects many statutory mistakes. Recent studies have demonstrated that Congress is increasingly aware of judicial interpretations of statutes and that Congress often moves to correct interpretations with which it disagrees.⁴⁵ Nonetheless, it is widely argued that Congress does not fix as many statutory mistakes as it should.

1. Statutory Amendments

Congress often enacts statutes through its regular legislative process that correct statutory mistakes. Indeed, "[a]ll lawmaking, strictly speaking, is corrective."⁴⁶ For example, much specific environmental legislation responds to what Congress faults as agency and court misinterpretations of existing statutes.⁴⁷ Existing procedures such as suspension of the rules or proceeding under unanimous consent allow Congress to consider proposed legislation on an expedited schedule.⁴⁸ But many admitted statutory mistakes remain uncorrected. Moreover, the corrections that do occur are

45. See Eskridge, *Overriding Supreme Court*, *supra* note 25, at 424–42 (collecting statutes overriding federal court interpretations of federal statutes between 1967 and 1990); Solimine & Walker, *supra* note 25, at 454–58 (listing statutes responding to Supreme Court decisions); see also *Bob Jones Univ. v. United States*, 461 U.S. 574, 599 (1983) (noting that "Congress can and often does correct" mistaken executive statutory interpretations).

46. *Corrections Day Calendar Hearing*, *supra* note 12 (statement of Dr. Roger H. Davidson); accord *United States v. Carlton*, 114 S. Ct. 2018, 2025 (1994) (O'Connor, J., concurring in the judgment) ("Every law touching on an area in which Congress has previously legislated can be said to serve the legislative purpose of fixing a perceived problem with the prior state of affairs—there is no reason to pass a new law, after all, if the legislators are satisfied with the old one."); 141 CONG. REC. H6112 (daily ed. June 20, 1995) (statement of Rep. Mineta) (noting that "[s]uch legislative corrections have been part of this Congress' activity for almost as long as there has been a Congress"); *id.* at H6114 (statement of Rep. Beilenson) (noting that "presumably every bill we pass around here is a correction of one sort or another, or an improvement of one kind or another on existing laws or regulations").

47. As Michael Herz observes, "Congress and EPA have had a running battle since the late 1970s. . . . In addition, sophisticated, particularized, and well-funded interests on all sides of the issues distrust EPA and strive to insert favorable language into new legislation." Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENVTL. L. REV. 175, 179–80 (1992).

48. See *Corrections Day Repeal of Regulations Hearing*, *supra* note 12, at 67–69 (testimony of William R. Pitts, Jr.) (former House official describing the various procedures under the House rules for specific classes of proposed legislation).

often random, or conversely, dependent on who has the greatest access to Congress. William Eskridge, for example, has demonstrated that certain groups have much greater success in convincing Congress to overturn the Supreme Court's interpretation of a statute than other groups.⁴⁹ Congress, in turn, often relies on specialized statutory and informal measures to express its discontent with an agency's or court's interpretation of a statute.

2. The Reauthorization Process

Congress amends statutes when they are reauthorized. Many statutes are authorized for a specified period, usually between two and five years. Thus, most statutory amendments are collected and enacted in an omnibus bill when Congress reauthorizes the statute.⁵⁰ The advantage of this approach lies in the ability to bundle amendments favored by different, and sometimes opposing, parties. Many reauthorization bills contain provisions that reflect a compromise among different interests.⁵¹ Of course, most statutes—not just reauthorization bills—embody compromises among competing groups, but the need to compromise is greater when existing legislation will expire absent a compromise.⁵²

The disadvantage lies in the legislative inertia that blocks amendments that have no significant opposition. If a statute is coming up for reauthorization in three years, that can operate as a disincentive against acting to solve a particular problem now. Moreover, Congress often reauthorizes a

49. ESKRIDGE, *supra* note 39, at 153 (indicating which groups have greatest access, moderate access, and little access to Congress to override Supreme Court decisions).

50. The Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685 (1977), and 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990), the Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986), and the Clean Water Act Amendments of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977), are notable examples of this procedure.

51. See, e.g., Harold H. Bruff, *Presidential Management of Rulemaking*, 57 GEO. WASH. L. REV. 533, 594 n.362 (1989) (describing compromise resolving an attempt to defund the Office of Information and Regulatory Affairs of the Office of Management and Budget); Paula Galowitz, *Restrictions on Lobbying by Legal Services Attorneys: Redefining Professional Norms and Obligations*, 4 B.U. PUB. INT. L.J. 39, 55-57 & n.87 (1994) (outlining congressional compromise that resulted in a 1984 appropriations rider restricting the activities of the Legal Services Corporation); Bradley K. Steinbrecher, Note, *The Impact of the Clinton Administration's Export Promotion Plan on U.S. Exports of Computers and High-Technology Equipment*, 15 U. PA. J. INT'L BUS. L. 675, 678-79 n.19 (1995) (describing attempted compromise legislation to reauthorize the Export Administration Act of 1979).

52. See *Corrections Day Repeal of Regulations Hearing*, *supra* note 12, at 67 (testimony of William R. Pitts, Jr.) (former House official asserting that "the best way to ensure enactment is to be part of legislation that must be enacted by some scheduled deadline").

statute on a year-to-year basis when it cannot agree to a comprehensive reauthorization package. The best recent illustration of this phenomenon concerns the failed effort to reauthorize the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in 1994. Environmentalists, industry, and other interested parties reached a compromise agreement on many issues that fell apart when some in Congress insisted on making all CERCLA cleanup projects subject to the labor requirements of the Davis-Bacon Act.⁵³ That failure prevented a number of noncontroversial amendments from being enacted. A group of provisions intended to address the problem of "brownfields"—abandoned, contaminated sites in urban areas which no developer will purchase because of the specter of CERCLA liability—was acceptable to all sides of the debate, but the insistence on an all-or-nothing amendment approach keeps such sites prohibitively unattractive to potential inner-city developers.⁵⁴ Recognizing that such examples are common, some proponents of Corrections Day have argued that a new procedure is needed precisely because the reauthorization process produces a disincentive to quickly correct mistakes.⁵⁵

3. Appropriations Riders

When committees fail to approve desired legislation, members of Congress frequently turn to the appropriations process to make substantive statutory changes. This is especially true for corrections. Appropriations riders attaching substantive changes in the law to appropriations bills commonly respond to a court or agency decision that Congress views as mistaken.⁵⁶ The recent congressional tendency to bundle many discrete issues into an omnibus continuing resolution funding the entire govern-

53. See *Environmental Bills in Congress*, L.A. TIMES, Nov. 12, 1994, at B7. George Will's solution is to use Corrections Day to repeal the Davis-Bacon Act, see George Will, *Davis-Bacon a Good Place for Corrections Day to Start*, FT. LAUDERDALE SUN-SENTINEL, Feb. 12, 1995, at 7G, but that statute lacks the characteristics of a corrections bill described *infra* at text accompanying notes 199–201.

54. For an explanation of how CERCLA operates as a disincentive to the redevelopment of brownfields, see John Copeland Nagle, *CERCLA, Causation, and Responsibility*, 78 MINN. L. REV. 1493, 1533–34 & n.180 (1994).

55. See 141 CONG. REC. H6111 (daily ed. June 20, 1995) (statement of Rep. Zeliff) ("With Corrections Day, we can make these changes without having to go through an entire reauthorization of legislation which will take months."); GINGRICH, *supra* note 2, at 226 ("I know that the traditional answer is that we would have to rewrite the entire Clean Water Act in order to change things. But what if we focused on just one bad decision?").

56. See generally Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 460–80 (describing the increasing congressional reliance on the appropriations process to respond to controversial agency and court decisions).

ment makes it more difficult for members of Congress and the President to oppose the entire bill because of a particularly objectionable provision. Most recently, President Clinton first vetoed but then reluctantly signed a 1995 funding bill that included a provision eliminating environmental obstacles to the salvage of timber in the Pacific Northwest,⁵⁷ and Congress tried to include twenty-five riders changing existing law in EPA's 1996 appropriations bills.⁵⁸ The loss of other congressional oversight devices, such as legislative vetoes, further encourages the turn to appropriations riders.⁵⁹

House and Senate rules prohibit appropriations riders, but those rules are often avoided or ignored.⁶⁰ Critics complain that appropriations riders contravene established statutory objectives, bypass committee review, and often receive hurried deliberation.⁶¹ Defenders of congressional oversight via the appropriations process note the flexibility, directness, and timeliness

57. A provision in the fiscal 1995 rescissions bill required the Forest Service and the Bureau of Land Management to promote the harvesting of salvage timber (i.e., dead or damaged trees), see H.R. 1158, 104th Cong., 1st Sess. (1995), but President Clinton vetoed the bill in part because of that provision, see Message to the House of Representatives Returning Without Approval Legislation for Emergency Supplemental Appropriations and Rescissions for Fiscal Year 1995, 31 WEEKLY COMP. PRES. DOC. 994 (June 7, 1995). When Congress reenacted the bill after making other changes but still including the timber salvage provision, see H.R. 1944, 104th Cong., 1st Sess. § 2001 (1995), the President signed the bill notwithstanding his objection to that provision, see Statement on Budget Rescission Legislation, 31 WEEKLY COMP. PRES. DOC. 1282 (July 21, 1995) [hereinafter Timber Signing Statement] (signing bill even though "I still do not believe that this bill should contain any of the provisions relating to timber"); see also Statement on Agreement with Congress on Budget Rescissions Legislation, 31 WEEKLY COMP. PRES. DOC. 1162 (June 29, 1995) (indicating intention to sign bill despite timber provisions). The President then instructed federal agencies to conduct timber salvage in compliance with all environmental laws except those expressly prohibited. See Timber Signing Statement, *supra*, at 1282; see also Dan Glickman, *Salvage Sales Will Follow Law*, THE OREGONIAN (Portland), Aug. 3, 1995, at D11 (Secretary of Agriculture explaining the President's directive to federal agencies). Environmental groups are challenging the salvage provision as contrary to the North American Free Trade Agreement. See *Trade Pact Invoked to Block Logging Law*, N.Y. TIMES, Aug. 30, 1995, at A13. But see 141 CONG. REC. H5557-63 (daily ed. May 24, 1995) (statement of Rep. Taylor) (defending the salvage program).

58. See *Full-Scale Environmental Attacks Being Finalized in Budget Bills*, OUTSIDE ONLINE NEWS VIEWS, Oct. 20, 1995, available in <http://web2.starwave.com/outside/online/news/congress/riders.html> (identifying riders in appropriations bills for EPA and other agencies that implement environmental law); *House Votes to Drop Controversial Policy "Riders" from EPA Budget Bill*, INSIDE E.P.A., Nov. 3, 1995, at 1-2.

59. *INS v. Chadha*, 462 U.S. 919 (1983), held that legislative vetoes violate the bicameralism and presentment clauses of Article I, Section 7 of the Constitution. The demise of the legislative veto serves as an argument for overturning agency regulations on Corrections Day. See 141 CONG. REC. H6113 (daily ed. June 20, 1995) (statement of Rep. Tauzin).

60. The House and Senate rules, and their exceptions, are described in Devins, *supra* note 56, at 458 n.12, 469.

61. *Id.* at 457-58.

of reliance on riders.⁶² Even though the critics probably outnumber the proponents of appropriations riders in the abstract, the ability to use the appropriations process to amend the law continues to prove irresistible when other avenues for legislative change have closed.

4. Subsequent Legislative History

Members of Congress frequently rely on statements inserted into committee reports or the Congressional Record to signal their disapproval of a judicial or agency interpretation of a statute.⁶³ This saves Congress the time needed to enact a statutory provision embodying its preferred interpretation of an existing statute. These statements, however, are of doubtful efficacy. Some judges view any legislative history skeptically. Even those judges who attribute significance to legislative history have been extremely unimpressed with the relevance of statements made by some members of Congress after the statutory provision they purport to interpret. Agencies are more inclined to take such signals seriously because of their continuing relationship with the congressional committees and members who make such statements, but the judicial dismissal of subsequent legislative history limits its usefulness for correcting statutory mistakes.⁶⁴

5. Informal Congressional Pressure on Agencies

The most informal devices by which Congress works to change an agency's interpretation of a statute produce neither a statutory provision nor a committee report. Members of Congress make their views known to

62. See 2 SENATE COMM. ON GOVERNMENT OPERATIONS, 95TH CONG., 1ST SESS., STUDY ON FEDERAL REGULATION: CONGRESSIONAL OVERSIGHT OF REGULATORY AGENCIES 31 (1977) (concluding that "appropriations oversight is effective precisely because the statutory controls are so direct, unambiguous, and virtually self-enforcing"); Ed Bethune et al., *Riding on Appropriations*, LEGAL TIMES, Feb. 12, 1996, at S36 (former congressman and Treasury official among those arguing that "the appropriations 'rider' can provide one of the most effective, flexible, and pragmatic tools" for Congress to "influence the implementation of public policy"); James A. Thurber, *The "Corrections Day" Proposal: Wrong Way to Fix Dumb Laws*, ROLL CALL, May 8, 1995, at 5 (describing the annual appropriations process as "an excellent vehicle for rectifying problems and making corrections after appropriate committee hearings and consideration on the floor of the House").

63. See Brudney, *supra* note 25, at 5-6 & nn.10-11 (citing examples); Eskridge & Frickey, *supra* note 22, at 39-40 (suggesting that congressional signals form part of an implicit bargain with the President and the courts).

64. See, e.g., ESKRIDGE, *supra* note 39, at 226-29 (outlining Justice Scalia's objections to judicial reliance on legislative history). See generally John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 249 n.225 (1993) (listing articles debating the relevance of legislative history).

agency officials at oversight hearings, through letters to an agency, and by staff contacts with agency employees. The informal approach shares the same problems as reliance on subsequent legislative history, and it suffers the additional defect of avoiding public scrutiny. But these methods frequently prove the most successful in convincing a reluctant but intimidated agency to comply with congressional wishes (or at least the wishes of some members of Congress).⁶⁵

B. Judicial and Administrative Correction of Statutory Mistakes

Dissatisfaction with these congressional procedures leads some to support letting the courts and agencies assume the responsibility for correcting statutory mistakes. The leading proponent of this view is Judge Calabresi, who has advanced a theory justifying judicial updating of anachronistic statutes in certain circumstances.⁶⁶ Calabresi addressed the problem of obsolete statutes:

[T]he feeling that, because a statute is hard to revise once it is passed, laws are governing us that would not and could not be enacted today, and that *some* of these laws not only could not be reenacted but also do not fit, are in some sense inconsistent with, our whole legal landscape.⁶⁷

The purpose of Calabresi's book is to show that the courts are necessary, capable, and justified in reading statutes in a manner consistent with the current legal framework, even if that produces an interpretation inconsistent with legislative intent. On the one hand, Calabresi finds other legal institutions—the legislature, agencies, special legislative review commissions, and advisory commissions—inadequate to identify and update anachronistic laws.⁶⁸ He acknowledges that legislative updating would be the ideal solution, but he concludes that the legislature is not up to the task.⁶⁹ Nor does he accept "liv[ing] with aging statutes and rely[ing] on

65. See, e.g., 141 CONG. REC. E590 (daily ed. Mar. 14, 1995) (statement of Rep. Fawell) (explaining how "[l]ast year, after some pressure from several members of this body, [the Department of Labor] agreed to stop enforcing the policy [requiring employers to pay employees for time spent in company vehicles commuting to work] pending a departmental review").

66. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

67. *Id.* at 2.

68. *Id.* at 62-64.

69. See, e.g., *id.* at 6-7 ("I would argue that much of the current criticism of judicial activism, and of our judicial system generally, can be traced to the rather desperate responses of our courts to a multitude of obsolete statutes in the face of the manifest incapacity of legislatures to keep those statutes up to date." (emphasis added)). Calabresi also writes:

time to render them totally irrelevant."⁷⁰ Instead, he embraces a theory that empowers a court to defeat legislative inertia by switching the burden of justifying an obsolete statute to the one seeking to rely on it. Assuming that "common law courts have the power to treat statutes in precisely the same way that they treat the common law," Calabresi would allow a court to ignore a statute's clear command if the statute has become sufficiently out of place with the rest of the legal landscape.⁷¹

A more subtle, but often just as effective, result will be accomplished by dynamic statutory interpreters. William Eskridge, for example, asserts that "statutes are bound to change" as they encounter unanticipated circumstances.⁷² He adds that the intentions of the *enacting* Congress are not necessarily dispositive and that the policy preferences of the *current* Congress can influence a court's interpretation as well.⁷³ Likewise, T. Alexander Aleinikoff defends a "nautical" approach to statutory interpretation that treats statutes like ships launched on a voyage by the enacting Congress but whose course can be set by later courts and other interpreters.⁷⁴ Under either view, a court need not wait for Congress to correct the mistake.

Judicial practice is more modest. Courts routinely defer to Congress to "correct its mistake,"⁷⁵ and dissenting judges chastise their colleagues

The most obvious response to the problems caused by the aging of statutes would seem to be freeing up of the legislatures so that they would find it as easy to revise laws as they do to pass them. Nevertheless, and perhaps surprisingly, there has been relatively little pressure to make the fundamental structural reforms that such a move would require.

Id. at 59.

70. *Id.* at 80.

71. *Id.* at 82, 160. Given that my concern here relates only to Calabresi's assumption that judicial updating of statutes is necessary because Congress fails to update statutes itself, I need not critique the wisdom of his proposal. His thesis is questioned in ESKRIDGE, *supra* note 39, at 230; Lawrence C. Marshall, "Let Congress Do It": *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 230 (1989). Nonetheless, since joining the Second Circuit, Judge Calabresi has reaffirmed his belief that "[i]t may occasionally be desirable for courts to pressure legislatures to reconsider outdated statutes so that, unless the legislatures make clear their continued preference for disparate treatment, like cases may be treated alike." *Taber v. Maine*, 45 F.3d 598, 607 (2d Cir. 1995).

72. ESKRIDGE, *supra* note 39, at 10.

73. *Id.* at 7, 11.

74. See T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 56-66 (1988).

75. See, e.g., *Reves v. Ernst & Young*, 494 U.S. 56, 63 n.2 (1990); see also *Neal v. United States*, 116 S. Ct. 763, 769 (1996) ("Congress, not this Court, has the responsibility for revising its statutes."). Hart and Sacks stated the traditional approach:

The words of the statute are what the legislature has enacted as law, and all that it has is the power to enact. . . . Courts on occasion can correct mistakes, as by inserting or striking out a negative, when it is completely clear from the context that a mistake has been

when they fail to wait for Congress to act.⁷⁶ There are, however, exceptions. Almost all courts will correct a "scrivener's error."⁷⁷ Additionally, most courts will interpret statutes contrary to the statutory language if necessary to avoid an "absurd result," assuming that the legislature could not have intended such a result and that it is therefore proper for a court to correct it. Yet the absurd results doctrine is not without problems. Judges debate the level of absurdity needed to justify a judicial correction. In *Public Citizen v. United States Department of Justice*,⁷⁸ for example, Justice Brennan's majority opinion rejected the literal reading of the statute because it produced an "odd" result,⁷⁹ while Justice Kennedy's concurrence insisted that courts could not displace the statutory text unless it yielded a truly "absurd" result.⁸⁰

The Supreme Court has also been willing to correct statutory language contrary to legislative intent. Acknowledging that statutory language is the best evidence of legislative intent,⁸¹ the Court has nonetheless found other evidence of legislative intent so compelling and the statutory language so troubling that a judicial correction was appropriate. Thus, the Court has denied that it has "a duty to enforce the statute as written even

made. But they cannot permit the legislative process, and all the other processes which depend upon the integrity of language, to be subverted by the misuse of words.

HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1375 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

76. See, e.g., *Gustafson v. Alloyd Co.*, 115 S. Ct. 1061, 1079–80, 1083 (1995) (Ginsburg, J., dissenting) (stating that she "would leave any alteration to Congress" because of the history of the statute and concluding that "[i]f adjustment is in order, as the Court's opinion powerfully suggests it is, Congress is equipped to undertake the alteration" (footnote omitted)); *Coliseum Cartage Co. v. Rubbermaid Statesville, Inc.*, 975 F.2d 1022, 1028 (4th Cir. 1992) (Wilkinson, J., dissenting) (advising that the majority's "alteration of the statutory scheme must be left to Congress" and that the majority "confers upon itself the clear prerogatives of Congress"). Let us think you can predict the Supreme Court in statutory interpretation cases, *Gustafson* was decided 5–4, with Justices Scalia, Thomas and Breyer joining Justice Ginsburg in dissent.

77. See, e.g., *Director, Office of Workers' Compensation Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 115 S. Ct. 1278, 1291 (1995) (Ginsburg, J., concurring in the judgment); *United States v. X-Citement Video, Inc.*, 115 S. Ct. 464, 474 (1994) (Scalia, J., dissenting); *United States Nat'l Bank v. Independent Ins. Agents of Am.*, 113 S. Ct. 2173 (1993).

78. 491 U.S. 440 (1989).

79. *Id.* at 453–54 & n.9.

80. *Id.* at 473 (Kennedy, J., concurring in the judgment). *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989), presented a similar problem, as discussed in ESKRIDGE, *supra* note 39, at 44–47, 51. The absurd result rule is explored in depth in Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127 (1994).

81. See, e.g., *INS v. Cardozo-Fonseca*, 480 U.S. 421, 432 n.12 (1987) (referring to "the strong presumption that Congress expresses its intent through the language it chooses").

if fully convinced that every Member of the enacting Congress, as well as the President who signed the Act, intended a different result."⁸² A striking illustration of this principle occurred in *Heppner v. Alyeska Pipeline Service Company*,⁸³ where the Ninth Circuit limited the strict liability imposed by the Trans-Alaska Pipeline Authorization Act for "damages in connection with or resulting from activities along or in the vicinity of the proposed trans-Alaskan pipeline right-of-way" to *environmental* damages.⁸⁴ Judge Wallace defended this narrow reading as supported by the general emphasis in the legislative history on environmental injuries. He further claimed that the courts can correct "a drafting error . . . when Congress uses more sweeping language than it would if it were attending carefully to fact situations, outside the scope of its purpose, to which the language might be erroneously understood to apply," provided that the court can ascertain the actual legislative intent.⁸⁵ The opposing view, articulated by Justice Scalia, asserts that evidence of legislative intent drawn from the legislative history can never displace clear statutory language, and "if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it."⁸⁶

Agencies engage in the same practices—and then some. Indeed, *Chevron, U.S.A. v. Natural Resources Defense Council*⁸⁷ may be understood to afford administrative agencies more leeway than courts in interpreting statutes to overcome mistakes.⁸⁸ *Chevron* does not say that an agency

82. *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1567 n.12 (1993). As the fictional Justice Foster opined, "The correction of obvious legislative errors or oversights is not to supplant the legislative will, but to make that will effective." Lon Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616, 626 (1949).

83. 665 F.2d 868 (9th Cir. 1981).

84. 43 U.S.C. § 1653(a)(1) (1994).

85. *Heppner*, 665 F.2d at 872. Conversely, Judge Wallace denied that the courts can correct an unexpected absurd result caused by a legislative failure "to trace through the effects of the legislation in cases in which the statute was intended by Congress to apply." *Id.* The distinction between the two kinds of mistakes seems difficult to maintain.

86. *Conroy*, 113 S. Ct. at 1572 (Scalia, J., concurring in the judgment); *accord In re M.M.D.*, 662 A.2d 837, 857 (D.C. 1995) ("It is entirely possible that every legislator who voted on the adoption statute would answer, if asked, that Congress only intended for married couples to adopt children. But the fact is, Congress did not say so.").

87. 467 U.S. 837 (1984).

88. If *Chevron* means that an agency's interpretation of a statute will be given deference by the courts so long as it is not inconsistent with the plain language of the statute, then an agency will often enjoy considerable maneuvering room to produce an interpretation that best accomplishes the agency's goals. That may or may not be the same thing as accomplishing the enacting Congress's goals, so it opens a window for using statutory interpretation to fix mistakes made by the enacting Congress. On the other hand, if *Chevron* simply means that an agency's interpretation will receive judicial deference only if the statute's plain language *and* other evidence of legislative intent fail to disclose how Congress wanted to answer the interpretive question, then

must interpret a statute in the manner most faithful to the enacting Congress; an agency need only show that its preferred interpretation is not contrary to the original legislative intent.⁸⁹

III. THE THEORY AND PRACTICE OF CORRECTIONS DAY

Corrections Day and the proposals which preceded it suggest that there may be another way. The purpose of Corrections Day is to provide Congress with a regular procedure by which to correct statutory mistakes. Such a procedure would avoid many of the pitfalls in the existing solutions described above. Rather than waiting up to five years for the next reauthorization of a statute, it would happen regularly and frequently. It would not hold appropriations bills hostage to substantive statutory concerns. And it would give Congress the power to amend legislation, unlike the expanded interpretive role permitted for agencies by *Chevron* and for courts by theories of dynamic statutory interpretation.

But will it work? A system for correcting statutory mistakes must accomplish at least two functions: it must identify the mistakes that need fixing, and it must provide an expedited procedure for correcting them. Cardozo, Friendly, and Ginsburg focused on the first function; the Corrections Day procedure established by the House performs the second. The House procedure for Corrections Day is less clear about how statutory mistakes and the legislation to correct them will be identified; the House may need a more reliable process for distinguishing corrections from other legislation. But the teachings of Cardozo, Friendly, and Ginsburg may offer an answer to this problem, if it is indeed a problem.

agencies have less ability to correct statutory mistakes as they implement the statute.

89. To be sure, forced adherence to the statutory text can prevent an agency from achieving its goals, including correcting statutory mistakes. See Herz, *supra* note 47, at 204 (arguing that "with judicial textualism ascendant, a court will not correct the error, nor will it allow an agency to do so"). But agencies still retain the power to interpret ambiguous statutory commands. Indeed, deference to agency interpretations may give the President's views more weight than they received during the enactment of the legislation. See McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 737 (1992).

A. The Prior Proposals

I begin with Justice Cardozo, though as he noted, one could find the same thought in the previous writings of Pound, Bentham, and others.⁹⁰ Cardozo was concerned about “anachronism and injustice” in the law.⁹¹ Despite his faith in the common law to adapt to changing circumstances, he concluded that at times legislative action was needed to produce speedy, needed reform.⁹² But he despaired of any mechanism for the courts, or others, to alert the legislature to the need for reform in particular circumstances. Thus he proposed a “Ministry of Justice” comprised of law professors, judges, and members of the bar to identify perceived shortcomings in the law and to propose remedial legislation.⁹³

Judge Friendly expanded on Cardozo’s proposal forty years later.⁹⁴ Friendly objected to statutes that displaced the courts yet contained mistakes that the legislature failed to correct. These mistakes included statutory language that conflicted with likely legislative intent and ambiguous

90. Cardozo, *supra* note 16, at 114. Cardozo credited Roscoe Pound, *supra* note 17, at 146, Roscoe Pound, *Juristic Problems of National Progress*, 22 AM. J. SOC. 721, 729, 731 (1917), and other earlier writers. Doug Bellis, Assistant Counsel in the House Office of Legislative Counsel, traces the concept back even further into the nineteenth century in the writings of Alexis de Tocqueville and the statutory revision movement. Letter from M. Douglass Bellis to John Nagle, (Feb. 6, 1996) (on file with author).

91. Cardozo, *supra* note 16, at 113; *see also id.* at 116 (“The ugly or antiquated or unjust rule is there. It will not budge unless uprooted.”).

92. *Id.* at 115 (“[T]here are times when deliverance, if we are to have it—at least, if we are to have it with reasonable speed—must come to us, not from within, but from without.”); *id.* at 118 (noting that there are illustrations “where speedy change is hopeless unless effected from without”).

93. *Id.* at 123–25. Cardozo was less insistent about the composition of the body than the need for it. *Id.* at 124. Nonetheless, he advised that state attorneys general were too overworked to perform the task, and he found the work of bar associations sometimes constructive but also “desultory and sporadic.” *Id.* at 123–24.

94. Friendly, *supra* note 15, at 787. By the time Friendly wrote, [v]ast areas once the province of the judges have been enclosed by the legislature. . . . I thus do not at all lament the diminished role of the judge vis-à-vis the legislator as a maker of law. What I do lament is that the legislator has diminished the role of the judge by occupying vast fields and then has failed to keep them ploughed. *Id.* at 790, 792.

and vague statutes where there was no real controversy within the legislature about the appropriate clarification.⁹⁵ Friendly listed seven reasons why the legislature was better positioned to correct statutory mistakes than the courts,⁹⁶ and he sharply criticized Congress for not making the correction of such mistakes a higher priority.⁹⁷ But Friendly found Cardozo's notion of a "Ministry of Justice" to smack of an executive department, whereas to Friendly "[i]t would seem elementary that an agency whose task is to formulate legislation and secure its enactment should be attached to the legislature."⁹⁸ Friendly envisioned a committee examining all Supreme Court and federal court of appeals decisions, addressing only noncontroversial matters (at least until it had established itself), and supporting rather than supplanting existing congressional committees by doing the work that had been left undone.⁹⁹

Justice Ginsburg picked up where Friendly left off.¹⁰⁰ She, too, focused on statutory mistakes involving noncontroversial issues that Congress tried but failed to resolve when it enacted unintentionally ambig-

95. *Id.* at 792-93; see also *id.* at 796 (describing "the manifold damnations in the veritable jungle of review of action by federal agencies" and concluding that "[n]o vital interests are at stake here; these weeds have grown simply for lack of a gardener"); *id.* at 801 ("The examples I have chosen . . . are not in those highly controversial areas in which lack of action may reflect not lack of interest or activity but equivalence of conflicting pressures—in which the chessmen have been moved and moved but the game has been a draw.").

96. Friendly noted:

[T]he legislature's superior resources for fact gathering; its ability to act without awaiting an adventitious concatenation of the determined party, the right set of facts, the persuasive lawyer, and the perceptive court; its power to frame pragmatic rules departing from strict logic, and to fashion a broad new regime or to bring new facts within an existing one; its practice of changing law solely for the future in contrast to the general judicial reluctance so to proceed; and, finally, the greater assurance that a legislative solution is not likely to run counter to the popular will: all these give the legislature a position of decided advantage, if only it will use it.

Id. at 791-92 (citations omitted).

97. *Id.* at 792 ("My criticism is not of Congress's fallibility, but of its failure to move promptly to correction."); *id.* at 793 ("[R]ectification of error does not appear to enjoy a high priority on congressional calendars."); *id.* at 795 (waiting for the Supreme Court to answer a statutory question is unsatisfactory because "I do not take even three years of confusion lightly").

98. *Id.* at 804. Instead, Friendly recommended a "committee" comprised of the chairman and ranking minority members of the House and Senate Judiciary Committees, two other members of Congress appointed by the chairmen, a retired federal judge, and several other members chosen from among legal scholars, retired judges, and senior lawyers. *Id.* at 805. The committee would have a small permanent staff but would be aided by law schools, the American Law Institute, and the American Bar Foundation. *Id.* Its task would be to attend to the "amendment or re-examination or legislative development of the laws." *Id.*

99. *Id.* at 805-07.

100. Ginsburg, *supra* note 14, at 995. Ginsburg was a D.C. Circuit judge at the time.

uous statutory language.¹⁰¹ Ginsburg also agreed that Congress should do the correcting, and she recommended that Congress should "assign[] to designated members responsibility to hear judicial pleas for a clear statement of 'what [Congress] meant (or in any event what it means now).'"¹⁰² She suggested two bodies that could solicit examples of statutory mistakes and advise concerning possible corrections from all interested parties.¹⁰³

In short, writing over a span of nearly eighty years, three eminent jurists agreed that statutory mistakes present a problem that should be solved by Congress.¹⁰⁴ The details of their preferred solutions varied, but each of their proposals posited the existence of some system for bringing statutory mistakes to the attention of Congress and empowering some body with the responsibility for proposing corrections. Some of those ideas, especially Justice Cardozo's proposals, took root in state law commissions charged with identifying statutory mistakes and recommending changes for the legislature.¹⁰⁵ A procedure by which federal courts can notify Congress about statutory mistakes is being developed by Professor Robert Katzmann.¹⁰⁶ If successful, that program could make the vision of

101. See *id.* at 997, 1013.

102. *Id.* at 1014 (quoting Arthur D. Hellman, *Case Selection in the Burger Court: A Preliminary Inquiry*, 60 NOTRE DAME L. REV. 947, 995 (1985)).

103. Ginsburg suggested that the House's Office of the Law Revision Counsel could emphasize statutory clarification. Alternately, Congress could create a new committee to review cases interpreting statutes and to draft proposed statutory amendments if necessary. *Id.* at 1016 (citing Letter from Justice Stevens to Rep. Kastenmeier (Oct. 25, 1983), reprinted in *A Bill to Establish an Intercircuit Panel, and for Other Purposes: Hearings on S. 704 Before the Subcomm. on Courts of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 34-36 (1985)). Ginsburg offered several options regarding the placement and composition of the committee, including separate committees in the House and the Senate, a joint subcommittee of the Judiciary Committees of both chambers, or a committee like that advocated by Judge Friendly that contained members from outside Congress as well. *Id.* at 1016-17.

104. Actually, the discussion here understates the judicial support for some kind of corrections mechanism. First Circuit Judge Frank Coffin has called on courts to report statutory mistakes to Congress. See Frank M. Coffin, *Grace Under Pressure: A Call for Judicial Self-Help*, 50 OHIO ST. L.J. 399, 403 (1989). Also, Wisconsin Supreme Court Justice Shirley Abrahamson has encouraged courts to use "their decisions to point out statutory deficiencies so that statutes may be more intelligible and cohesive, as well as more responsive to the conditions the legislature sought to address." Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045, 1092-93 (1991). Apart from judges, Professor Michael Herz has endorsed Justice Ginsburg's idea. See Herz, *supra* note 47, at 205.

105. See Abrahamson & Hughes, *supra* note 104, at 1070-73 (describing the work of state law revision commissions).

106. See Robert A. Katzmann, *Bridging the Statutory Gulf Between Courts and Congress: A Challenge for Positive Political Theory*, 80 GEO. L.J. 653, 665-67 (1992) (describing pilot program in which the chief staff counsel of the D.C. Circuit will forward statutory opinions to House officials including the Speaker, the minority leader, the parliamentarian, the general counsel to the clerk,

Cardozo, Friendly, and Ginsburg a reality. But notifying Congress achieves little if there is no mechanism for Congress to act on the information it receives. That is the function of Corrections Day.

B. The Implementation of Corrections Day

House Republicans were caught off guard by Gingrich's idea of a Corrections Day. Gingrich himself had not considered exactly how Corrections Day would operate, and the House was preoccupied with considering the Contract with America.¹⁰⁷ So after he established a Corrections Day Steering Group,¹⁰⁸ Gingrich testified at a joint hearing held in May 1995 by subcommittees of the Rules Committee and the Committee on Government Reform and Oversight to consider a number of questions raised by Corrections Day and a variety of alternative procedures.¹⁰⁹ Based on that hearing and further discussions, the advocates of Corrections Day proposed to amend the House rules to replace the virtually defunct Consent Calendar with a Corrections Calendar. The House approved that plan, as modified by the Rules Committee,¹¹⁰ by a 271-146 vote, having first defeated a Democratic motion to "go back to the drawing board" 236-185.¹¹¹

and the legislative counsel).

107. See 141 CONG. REC. H1188 (daily ed. Feb. 3, 1995) (statements of Reps. Gephardt & Arney); GINGRICH, *supra* note 2, at 226, 228.

108. The Corrections Day Steering Group consisted of Republican House members Barbara Vucanovich, David McIntosh, and Bill Zeff, with assistance from House Majority Whip Tom DeLay. The Steering Group is different from the Corrections Day Advisory Committee, discussed *infra* at text accompanying notes 113-114, 211.

109. See *Corrections Day Repeal of Regulations Hearing*, *supra* note 12, at 4-10 (testimony of Speaker Gingrich); GINGRICH, *supra* note 2, at 228.

110. The Rules Committee held another hearing on June 13 on the proposed new Corrections Day calendar. See *Corrections Day Calendar Hearing*, *supra* note 12. A few days later, the Committee voted 9-4 to approve a resolution establishing the proposed Corrections Calendar, after amending the resolution to require the Speaker to consult with the minority leader before placing a bill on the Corrections Calendar. H. REP. NO. 144, 104th Cong., 1st Sess. 7-8 (1995). The Rules Committee rejected Democratic motions to (1) rely on the existing suspension calendar for corrections, (2) require a 2/3 majority to approve corrections bills, (3) require the concurrence of the minority leader to the placement of a bill on the Corrections Calendar, and (4) authorize the Rules Committee to place bills on the Corrections Calendar. *Id.* at 6-7.

111. 141 CONG. REC. H6106, H6115-16 (daily ed. June 20, 1995).

Under the House approach, Corrections Day will be held on a regular basis, probably once or twice a month.¹¹² A bill must receive committee review and approval before it may be placed on the Corrections Calendar. The decision to place a bill on the Corrections Calendar rests with the Speaker, in consultation with the minority leader, and advised by the Corrections Day Advisory Committee comprised of seven Republican House members and five Democratic members.¹¹³ There is no formal definition of "corrections" bills or "statutory mistakes," though the Advisory Group has developed an informal definition of its own.¹¹⁴ Measures considered by the full House under the Corrections Calendar are subject to one motion to recommit and limited debate, and they can only be amended on the motion of the chair of the committee with jurisdiction over the bill. A sixty percent vote is required for approval. A bill that fails to receive the necessary sixty percent when considered under the Corrections Calendar may be considered at a later time under a regular calendar.

112. The new procedures amend the House Rules to provide:

4. (a) After a bill has been favorably reported and placed on either the Union or House Calendar, the Speaker may, after consultation with the Minority Leader, file with the Clerk a notice requesting that such bill also be placed upon a special calendar to be known as the "Corrections Calendar." On the second and fourth Tuesdays of each month, after the Pledge of Allegiance, the Speaker may direct the Clerk to call the bills in numerical order which have been on the Corrections Calendar for three legislative days.

(b) A bill so called shall be considered in the House, debatable for one hour equally divided and controlled by the chairman and ranking minority member of the primary committee of jurisdiction reporting the bill, shall not be subject to amendment except those amendments recommended by the primary committee of jurisdiction or those offered by the chairman of the primary committee, and the previous question shall be considered as ordered on the bill and any amendment there to final passage without intervening motion except one motion to recommit with or without instructions.

(c) A three-fifths vote of the members voting shall be required to pass any bill called from the Corrections Calendar but the rejection of any such bill, or the sustaining of any point of order against it or its consideration, shall not cause it to be removed from the Calendar to which it was originally referred.

H. RES. 168, 104th Cong., 1st Sess. (1995), *quoted in* 141 CONG. REC. H6104 (daily ed. June 20, 1995).

113. The members of the advisory panel include Republican Representatives Dreier, Ehrlich, Johnson, McIntosh, Solomon, Vucanovich and Zeff, and Democratic Representatives Becerra, Condit, Peterson, Rivers, and Waxman. 141 CONG. REC. H13,676 (daily ed. Nov. 28, 1995) (statement of Rep. Vucanovich).

114. See *infra* text accompanying note 211.

Day 1. The first Corrections Day was the most contentious to date. The House considered one bill, the San Diego Coastal Corrections Act of 1995,¹¹⁵ designed to remedy the very problem that Newt Gingrich had mentioned when he met with Mayor Golding and conceived the idea for Corrections Day. San Diego requested a waiver of the Clean Water Act's secondary treatment requirements for municipal sewage discharged into the Pacific Ocean.¹¹⁶ San Diego's supporters cited scientists, the California EPA, and municipal officials who determined that secondary treatment was unnecessary in light of the city's existing system, and they justified the permanent exemption as necessary to avoid spending millions of dollars to prepare periodic waiver applications and to protect against the EPA changing its mind in the future.¹¹⁷ The San Diego House delegation unanimously supported the bill.¹¹⁸ The opponents of the bill argued that the problem had already been solved by an imminent EPA waiver, and they

115. H.R. 1943, 104th Cong., 1st Sess. (1995).

116. Since 1972, the Clean Water Act has required all cities to install technology sufficient to achieve secondary treatment of municipal sewage, i.e., the removal of solids and biochemical oxygen demand. See 33 U.S.C. § 1311(b)(1)(B) (1994); see also 141 CONG. REC. H7563 (daily ed. July 25, 1995) (statement of Rep. Shuster) (describing the secondary treatment requirement). Congress amended the Act in 1977 to give cities a once-in-a-lifetime chance to apply to EPA before 1982 for a waiver of the secondary requirement. See 33 U.S.C. § 1311(h) (1976 & Supp. II 1978); see also 141 CONG. REC. H7565 (daily ed. July 25, 1995) (statement of Rep. Mineta) (describing the waiver provision). San Diego failed in its effort for a waiver, so the EPA sued the city in 1988. The court determined that the city's sewage disposal was "causing significant harm to the marine environment" and found the city liable for penalties for its failure to comply with the Act. *United States v. City of San Diego*, No. 88-1101-B(IEG), 1991 U.S. Dist. LEXIS 5459, at *6 (S.D. Cal. Apr. 18, 1991). After San Diego extended and deepened its outfall pipe, the court concluded that forcing San Diego to install secondary treatment would not benefit the environment. The court, however, could not ignore the statutory requirement. See 141 CONG. REC. H7563 (daily ed. July 25, 1995) (statement of Rep. Shuster) (describing the district court's decision). In 1994, Congress amended the Act to give San Diego an additional six months to apply for a waiver, and EPA reached a preliminary decision to approve the waiver on June 12, 1995. See Environmental Protection Agency, U.S. EPA Advances Wastewater Treatment Waiver for San Diego (June 12, 1995) (news release, on file with author). But San Diego continued to pursue a permanent legislative solution. In May 1995, the House included a permanent waiver from the secondary treatment requirements for certain coastal cities (including San Diego) in its comprehensive bill to reauthorize the Clean Water Act. H.R. 961, 104th Cong., 1st Sess., tit. IX (1995). The prognosis for that bill remained in serious doubt as Congress debated a host of other issues raised by the Clean Water Act, so San Diego pursued identical but separate legislation to be considered on Corrections Day.

117. See 141 CONG. REC. H7563-71 (daily ed. July 25, 1995) (statements of Reps. Shuster, Solomon, Hunter, Filner, Cunningham, McIntosh, and Johnson).

118. Democratic Representative Filner supported the bill, but he questioned the procedures for Corrections Day. See William M. Welch, *House 'Corrections' Have Bumpy Debut*, USA TODAY, July 25, 1995, at 8A (quoting Rep. Filner as opposing Corrections Day because "[i]t presents the danger of doing things by anecdote or emotion and not going through a legislative process").

opposed a permanent waiver as insensitive to future changed conditions and unfair to other cities who had followed the Clean Water Act's existing requirements (either by installing secondary treatment or by obtaining a waiver).¹¹⁹ Both sides accused the other of playing politics with the issue.¹²⁰ The House approved the bill 269-156—a sixty-three-percent majority sufficient under the Corrections Calendar, though short of the two-thirds requirement House Democrats had sought to require for that Calendar. But the Senate has not acted on the bill and both the Administration and California's own Senator Boxer have stated their opposition to it.¹²¹

Day 2. The second Corrections Day was less acrimonious. The Oil Pollution Act (OPA), enacted by Congress in 1990 in the aftermath of the Exxon Valdez oil spill, imposes significant regulatory and financial responsibility requirements on vessels carrying "oil."¹²² Congress probably did not intend the OPA to apply to *vegetable* oil, but some federal officials believed that it should,¹²³ and the unqualified statutory language supported their position. Thus the Edible Oil Regulatory Reform Act was designed to require federal regulators to distinguish between vegetable oils

119. See 141 CONG. REC. H7564-74 (daily ed. July 25, 1995) (statements of Reps. Borski, Clement, Mineta, and Pallone).

120. Compare *id.* at H7565 (statement of Rep. Mineta) (arguing that the bill "is motivated solely by politics") with *Science vs. Politics: Sewage Exemption Faces Senate Hurdles*, SAN DIEGO UNION-TRIB., July 30, 1995, at G2 (editorializing in favor of the bill because "science should take precedence over politics when crafting environmental legislation"). The debate got worse. New Jersey Representative Pallone defended the secondary treatment requirement for all cities, see 141 CONG. REC. H7568 (daily ed. July 25, 1995), causing California (and San Diego) Representative Bilbray to assert that California's state water standards were twice as stringent as New Jersey's, *id.* at H7571. Two Democratic opponents of the bill then later voiced their hope that San Diego's beaches would be polluted while the 1996 Republican Convention was held there. See *id.* at 141 E1518 (daily ed. July 26, 1995) (statement of Rep. Oberstar); Stephen Green, *House Panel Approves Permanent S.D. Waiver from Effluent Standards*, SAN DIEGO UNION-TRIB., July 13, 1995, at B6 (quoting Rep. Menendez).

121. See 141 CONG. REC. H7573 (daily ed. July 25, 1995) (letter quoting an EPA official opposing the San Diego corrections bill because it is "unnecessary, eliminates public review, and is scientifically unsound"); James Bornemeier, *House OKs Sewage Disposal Exemption for San Diego*, L.A. TIMES, July 26, 1995, at A3, A8 (quoting Senator Boxer as saying that "[y]ou can't 'correct' San Diego's fouled beaches and spoiled marine environment by throwing the Clean Water Act out the window, and if the Clean Water Act is the Republicans' idea of a dumb law, then they are profoundly out of step with the American people").

122. See, e.g., 33 U.S.C. § 2716(a) (1994).

123. See *Senate Approves Legislation on Certain Oils, Fats*, 52 CONG. Q. WKLY. REP. 2953 (1994) (noting that in 1993 the Department of Transportation attempted to classify vegetable oil as a hazardous material); see also 141 CONG. REC. H9751 (daily ed. Oct. 10, 1995) (statement of Rep. Oberstar) (detailing the environmental impact of edible oils); Jonathan P. Deason, *When Vegetable Oils Spill*, WASH. POST, July 17, 1993, at A16 (letter from EPA official describing adverse environmental effects of spills of vegetable oil).

and petroleum.¹²⁴ Under that corrections bill, vegetable oils and animal fats would remain subject to regulation, but the extent and scope of such regulation under the OPA—and any other federal law—would be less than that imposed on petroleum, greases and other oils. Representative Oberstar alone objected to the bill, the Corrections Day process, and the inability of the sponsors to identify which other laws were affected.¹²⁵ The House passed the bill, as did the Senate, and when President Clinton signed the bill, it became the first product of Corrections Day to become law.¹²⁶

Day 3. The House passed three bills on the next Corrections Day. The Senior Citizens Housing Safety and Economic Relief Act of 1995 addressed two different problems.¹²⁷ The first problem concerned elderly residents of public housing who were being terrorized by drug and alcohol users who qualified for such housing because they were disabled. The Act sought to enable public housing authorities to evict residents who were threatening the elderly, a power some House members thought the authorities already possessed but which all agreed needed legislative clarification.¹²⁸ The second part of the Act allowed senior citizens "to enter into so-called reverse mortgages through which they can remain in their homes while receiving either a lump sum payment or monthly payments based on the value of their homes."¹²⁹ The bill itself received no criticism, though some Democratic members took the opportunity to attack Republican housing policies more generally.¹³⁰

124. H.R. 436, 104th Cong., 1st Sess. § 1(a) (1995) (directing federal agencies to differentiate between edible oils (such as vegetable oils and animal fats) and other oils and greases (including petroleum) "in issuing or enforcing any regulation or establishing any interpretation or guideline related to a fat, oil, or grease under any Federal law"). The background of the problem is described in 141 CONG. REC. H9752-54 (daily ed. Oct. 10, 1995) (statement of Rep. Ewing).

125. 141 CONG. REC. H9751-52, H9757-58 (daily ed. Oct. 10, 1995) (statement of Rep. Oberstar).

126. Edible Oil Regulatory Reform Act, Pub. L. No. 104-55, 109 Stat. 546 (1995).

127. H.R. 117, 104th Cong., 1st Sess. (1995).

128. Compare 141 CONG. REC. H10,652 (daily ed. Oct. 24, 1995) (statement of Rep. Gonzalez) (remarking that although the bill is not necessary, it "clarifies current law" and satisfies housing authorities who believed that they needed "clearer legal guidance") and *id.* at H10,659 (statement of Rep. Mfume) ("While H.R. 117 does not break any new ground in terms of what a public housing authority can do to ensure the security and happiness of its senior residents, it does clarify the intent of Congress in this area.") with *id.* (statement of Rep. Hoke) ("We are saying very clearly and for the first time that there are certain" conditions for being "able to take advantage of publicly assisted housing." (emphasis added)).

129. *Id.* at H10,650 (statement of Rep. Leach). As Representative Moran noted, "[W]e have so many seniors who are asset rich and cash poor, and so this home-equity conversion mortgage extension works out very well for them and is going to relieve a lot of anxiety for them." *Id.* at H10,652 (statement of Rep. Moran).

130. E.g., *id.* at H10,657-59 (statement of Rep. Kennedy); *id.* at H10,658 (statement of Rep. Gonzalez).

Another bill was designed to overturn a 1954 Department of Labor regulation prohibiting anyone under eighteen years of age from throwing cardboard into a baler in a grocery store.¹³¹ Viewing the regulation as "frozen in time, untouched by technology for more than 40 years,"¹³² the bill proposed to allow sixteen and seventeen-year-old workers to throw cardboard into turned-off, allegedly safer modern balers that satisfied the standards of the American National Standards Institute (ANSI).¹³³ But the bill faced opposition from child labor advocates and some House members who detailed serious injuries suffered by minors working with balers.¹³⁴ The bill passed the House nonetheless.

A third bill derived from a controversial effort by Department of Justice (DOJ) employees opposed to a proposed crime bill to lobby senior DOJ officials on behalf of the National Association of Assistant United States Attorneys.¹³⁵ The Office of Legal Counsel (OLC) advised the Attorney General that federal conflict of interest laws made it a criminal offense for a federal employee to represent an employee organization in any matter in which the federal government has a direct and substantial inter-

131. 29 C.F.R. pt. 570, subpt. E. The history of the rule is described in H.R. REP. NO. 278, 104th Cong., 1st Sess. (1995).

132. *Corrections Day Bills Hearing*, *supra* note 34 (statement of Rep. Combest); *see also* 141 CONG. REC. H10,666 (daily ed. Oct. 24, 1995) (statement of Rep. Martini) (arguing that "we can no longer afford to be shackled to the past by antiquated laws that preclude technological innovations"); *id.* at H10,662 (statement of Rep. Goodling) (arguing that "paper balers and compactors were significantly more hazardous machines [in 1954] than the state of the art machines being built today"). Other supporters argued that "[a] teenager hanging out on the streets of Washington, D.C. this summer is in a heck of a lot more danger than he would be working at a local Safeway," *Corrections Day Bills Hearing*, *supra* note 34 (statement of Rep. Ewing), and that the existing regulation was "anachronistic and long overdue for change," *id.* (statement of Virginia L. Lutz, Safety Supervisor, Lowes Food Stores, Inc.).

133. H.R. 1114, 104th Cong., 1st Sess. § 1(f) (1995). The bill provides that: employees who are 16 and 17 years of age shall be permitted to load materials, but not operate or unload materials, into scrap paper balers and paper box compactors (1) that are safe for 16- and 17-year-old employees loading the scrap paper balers or paper box compactors, and (2) that cannot operate while being loaded. *Id.* The bill deemed balers "safe" only if they complied with ANSI standards, included an on-off switch, were kept in an off condition, and posted all of the above information. *Id.* § 2(b).

134. *See Corrections Day Bills Hearing*, *supra* note 34 (statement of Linda Golodner, President, National Consumers League and Co-Chair, Child Labor Coalition); 141 CONG. REC. H10,666 (daily ed. Oct. 24, 1995) (statement of Rep. Lantos) (offering "a few examples of the horrific injuries which can occur when minors were allowed or were directed to work illegally in the vicinity of paper balers and compactors"). Representative Owens objected to the bill on constitutional grounds because of its reliance on standards set by ANSI, a private organization. *Id.* at H10,662-63 (statement of Rep. Owens).

135. *See* H.R. REP. NO. 230, 104th Cong., 1st Sess. (1995); *see also* Naftali Bendavid, DOJ Opinion Limits Lobbying by Prosecutors; Memorandum Could Affect Myriad Federal Employees, *LEGAL TIMES*, Dec. 19, 1994, at 1.

est.¹³⁶ The "chilling effect" of the OLC opinion prompted the House to pass the Federal Employee Representation Improvement Act of 1995, which would amend the conflict of interest laws to allow federal employees to lobby on behalf of federal employee organizations.¹³⁷

Day 4. The Federal Reports Elimination and Sunset Act of 1995 was the first Senate bill to be considered in the House on Corrections Day.¹³⁸ It resulted from a survey of eighty-nine executive departments and agencies to identify congressional report obligations that "have outlived their usefulness."¹³⁹ For example, a requirement that each federal agency report to Congress annually on its efforts to implement the metric system and a requirement that the Secretary of the Treasury report monthly on sales of the World Cup U.S.A. 1994 commemorative coin were among the over two-hundred obsolete reports.¹⁴⁰ The House passed the bill without objection after amending the bill to drop one of the reports¹⁴¹ and the President signed the bill into law.¹⁴²

Another corrections bill repealed a provision of the Social Security Act that established a cardiac pacemaker registry.¹⁴³ That provision had become redundant when Congress added comprehensive reporting requirements to the Federal Food, Drug and Cosmetics Act in 1990. No one objected to eliminating the earlier report, though some House Democrats

136. Memorandum of Assistant Attorney General Walter Dellinger to Attorney General Janet Reno (Nov. 7, 1994) (interpreting 18 U.S.C. § 205 (1994)); see also 141 CONG. REC. H10,668 (daily ed. Oct. 24, 1995) (statement of Rep. Hoke) (describing the OLC opinion). I worked in OLC—indeed, I worked on many conflict of interest questions—from 1988 through 1991, but I do not recall having ever addressed this issue.

137. H.R. 782, 104th Cong., 1st Sess. § 2(a) (1995) (amending 18 U.S.C. § 205(d) (1994) to permit federal employees to represent "any cooperative, voluntary, professional, recreational, or similar organization or group not established or operated for profit" in most matters before the federal government). For references to the "chilling effect" of the OLC opinion, see 141 CONG. REC. H10,668 (daily ed. Oct. 24, 1995) (statement of Rep. Hoke); *id.* at H10,669 (statement of Rep. Davis).

138. S. 790, 104th Cong., 1st Sess. (1995).

139. 141 CONG. REC. H12,228 (daily ed. Nov. 14, 1995) (statement of Rep. Green).

140. *Id.*

141. After Representative Watt of North Carolina asked why a statistical report on the Voting Rights Act was on the list, he was assured that the report was duplicative, but the House unanimously agreed to drop the report just to be safe. *Id.* at H12,231–32 (daily ed. Nov. 14, 1995). Representative Stark had worried that the abolition of a required Medicare report was part of a broader attack on Medicare, but he voted for the bill anyway. *Id.* at H12,228–30 (statements of Rep. Stark).

142. Federal Reports Elimination and Sunset Act of 1995, Pub. L. No. 104-66, 109 Stat. 707 (1995).

143. H.R. 2366, 104th Cong., 1st Sess. (1995).

seized the opportunity to call for "corrections" to Republican Medicare and Medicaid proposals.¹⁴⁴

Day 5. Two weeks later, the House approved two bills in response to *Richie v. American Council for Gift Annuities*,¹⁴⁵ a pending class action alleging antitrust and securities violations by a nonprofit organization that determines annuity rates for over 1,500 charitable organizations.¹⁴⁶ The Philanthropy Protection Act of 1995 was designed to solve the securities law question by "mak[ing] it clear that charitable income funds are not investment vehicles."¹⁴⁷ The Charitable Gift Annuity Antitrust Act of 1995 eliminated antitrust liability for charitable organizations who "use, or agree to use, the same annuity rate for the purpose of issuing 1 or more charitable gift annuities."¹⁴⁸ Both bills passed the House without objection, and the Senate and the President approved both bills as well.¹⁴⁹

Day 6. The two bills passed on December 12, 1995 amended legislation drafted by Representative Waxman, now a member of the Corrections Day Advisory Committee. A 1977 statute required stores to post warnings about products containing saccharin; warnings about saccharin are now required on the packages themselves. Nonetheless, the law continued to be enforced by private parties who sued fifty-four retail stores in 1994 under California's bounty hunter statute.¹⁵⁰ Thus the House passed a corrections bill to eliminate the posted warning requirement.

The second bill transformed the Clean Air Act's employer trip reduction program from a mandatory requirement into a discretionary option. As amended in 1990, the Clean Air Act required states with serious air pollution problems to encourage large private employers to promote carpooling as part of the state's implementation plan.¹⁵¹ That provision had been the subject of open rebellion by affected states,¹⁵² yet fears of reopen-

144. See 141 CONG. REC. H12,207-08 (daily ed. Nov. 14, 1995) (statement of Rep. Stark); *id.* at H12,208-11 (statements of Rep. Brown).

145. Civ. No. 7-94CV-128-X (N.D. Tex.).

146. See 141 CONG. REC. H13,677-78 (daily ed. Nov. 28, 1995) (statement of Rep. Hyde).

147. *Id.* at H13,673 (statement of Rep. Bliley); see H.R. 2519, 104th Cong., 1st Sess. (1995).

148. H.R. 2525, 104th Cong., 1st Sess. § 2(a) (1995).

149. Charitable Gift Annuity Antitrust Relief Act, Pub. L. No. 104-63, 109 Stat. 687 (1995); Philanthropy Protection Act, Pub. L. No. 104-62, 109 Stat. 682 (1995).

150. 141 CONG. REC. H14,266 (daily ed. Dec. 12, 1995) (statement of Rep. Bilbray).

151. 42 U.S.C. § 7511a(d)(1)(B) (1994).

152. See H.R. REP. NO. 387, 104th Cong., 1st Sess. (1995), available in LEXIS, Legis Library, CMTRPT File (noting that California, Illinois, Maryland, New Jersey, Pennsylvania, and Texas all attempted to avoid the requirements of the carpooling program in 1995).

ing the delicate legislative compromise undergirding the 1990 Clean Air Act Amendments prevented any legislative changes. But the support of Representative Waxman, a key drafter and vocal supporter of the 1990 amendments, encouraged the House to pass a corrections bill to allow a state to drop the carpooling plan if the same emissions reductions were achieved in some other manner.¹⁵³ The Senate passed the bill, too, and the President signed it into law.¹⁵⁴

Day 7. Like the first Corrections Day, the most recent Corrections Day amended the Clean Water Act—and like the first Corrections Day, it sparked some opposition in the House. The Constructed Water Conveyances Reform Act of 1995 proposed to reduce the water quality goals and regulatory requirements governing “a manmade water transport system constructed for the purpose of transporting water for agricultural purposes or municipal and industrial water supply in a waterway that is not and never was a natural waterway.”¹⁵⁵ The bill responded to the objections of western states and farmers to EPA’s stringent application of the Clean Water Act to canals, irrigation ditches, and other “constructed water conveyances.”¹⁵⁶ EPA and some environmentalists objected to the bill, however, because it would give states excessive latitude to dispense with environmental restrictions on agricultural conveyances.¹⁵⁷ The House passed the bill but it has yet to be considered by the Senate.

On the first seven Corrections Days, therefore, the House passed eight of twelve bills without any stated opposition (and a ninth bill with only one dissenting member). Four of those bills amended environmental statutes, two amended housing laws, two eliminated government reporting requirements, and one bill each amended federal statutes governing antitrust,

153. 141 CONG. REC. H14,269 (daily ed. Dec. 12, 1995) (statement of Rep. Waxman) (“The bill is emissions neutral. It requires States that opt out of the [carpooling] program to make up the emission reductions from other sources. . . . I think it is a helpful piece of legislation in clarifying and correcting a problem that has come into . . . controversy in some of the States.”); see also *Waxman Changes from Foe to Fan of Corrections Day*, NAT’L JOURNAL’S CONG. DAILY, Dec. 11, 1995 (quoting Rep. Manzullo as saying that “[p]eople see that Henry [Waxman] is for the bill, so it must be OK”).

154. Clean Air Act: Optional Mandated Trip Reduction, Pub. L. No. 104-70, 109 Stat. 773 (1995).

155. H.R. 2567, 104th Cong., 2d Sess. § 2 (1996) (creating 33 U.S.C. § 1313(c)(2)(C)(iv)). H.R. 2567 was originally part of the House’s Clean Water Act reauthorization bill. See 142 CONG. REC. H750 (daily ed. Jan. 23, 1996) (statement of Rep. Shuster).

156. 142 CONG. REC. H750-51 (daily ed. Jan. 23, 1996) (statement of Rep. Shuster).

157. See *id.* at H755 (daily ed. Jan. 23, 1996) (statement of Rep. Pallone); *id.* at H753-54 (statement of Rep. Miller); Memorandum from Catherine Roberts, Congressional Liaison Officer, EPA, to Felicia Marcus, Regional Administrator, EPA (Jan. 18, 1996), reprinted in 142 CONG. REC. H753-54 (daily ed. Jan. 23, 1996) (statement of Rep. Miller).

securities, workplace safety, and federal conflict of interest law. Five of the first twelve corrections bills have already become law.

C. The Case for Corrections Day

Corrections Day promises to perform a variety of functions. It is designed to satisfy the longstanding desire—voiced by Justices Cardozo and Ginsburg, and Judge Friendly—to quickly remedy statutory mistakes.¹⁵⁸ Corrections Day can reduce the pressure on administrative agencies and state officials to remedy statutory mistakes themselves or suffer the political consequences.¹⁵⁹ It can correct those statutory mistakes the courts identify but refuse to fix themselves. It can also increase agency accountability to Congress and the public.¹⁶⁰ By doing so, Corrections Day can serve as “a much-needed antidote to public cynicism over the federal government.”¹⁶¹

At least that is the hope. The principal dissenters from Corrections Day can be divided into two groups. The first group consists of academics and others who fear that an expedited legislative process will yield bad policy that contains mistakes of its own. The second group—House Democrats, environmentalists, and others—dislike any legislation favored by Newt Gingrich and House Republicans on political grounds, and thus oppose any device that makes it easier for this Congress to enact legislation.

158. See, e.g., *Corrections Day Repeal of Regulations Hearing*, *supra* note 12, at 19 (testimony of Rep. Vucanovich) (“Corrections Day offers this body a chance to show that we can react to real needs in a timely manner. . . . I am more convinced than ever of the need for a rapid response system for misguided government.”); Krent & Rossi, *supra* note 11, at 22 (“Congress has never devoted sufficient attention to fixing prior mistakes, and an allotted period to cure drafting errors or unintentional ambiguities can only be applauded.”).

159. See, e.g., *Corrections Day Repeal of Regulations Hearing*, *supra* note 12, at 59 (statement of Peter D. Robinson) (“When a business or a community has a dispute with a federal agency, specific corrective legislation may be the only remedy, but it has also often been the last recourse.”).

160. See, e.g., 141 CONG. REC. H13,675 (daily ed. Nov. 28, 1995) (statement of Rep. Waxman) (“I am particularly pleased to report that the existence of this Corrections Calendar has persuaded agencies to correct problems on their own”); *id.* at H7567 (daily ed. July 25, 1995) (statement of Rep. Packard) (“Corrections Day signals the people’s triumph over silly, obsolete rules and regulations and the bureaucracies that thrive on them.”); *id.* at H6114 (daily ed. June 20, 1995) (statement of Rep. Solomon) (“When we bring this first corrections bill to the floor, every bureaucrat in this Government is going to pay attention . . . [and] think twice before they promulgate the kinds of rules and regulations that go far beyond what the legislative intent of Congress is.”); GINGRICH, *supra* note 2, at 227–28 (“[Corrections Day] allows the elected officials to reassert the right of citizens to supervise their bureaucracy. In the welfare state, power keeps slipping away to the bureaucrats and citizens feel defenseless. Corrections Day will shift the momentum.”).

161. *Corrections Day Repeal of Regulations Hearing*, *supra* note 12, at 11 (testimony of Rep. Solomon).

The groups overlap in some instances, with the legislative process and political objectors complaining that the bad policy results of Corrections Day will be consistently tilted in favor of the House majority. I disagree.

The legislative process critics raise several points. First, they fear that Corrections Day will shortcut congressional deliberation of legislation and discard institutional safeguards.¹⁶² This concern is not frivolous, but it is one the House kept in mind when it designed Corrections Day. The Corrections Calendar expedites floor consideration of bills, but it leaves the requirement of committee review and approval and other so-called "vetogates" untouched.¹⁶³ Many of the concerns about eliminating the deliberative process were voiced before the House established the procedures for Corrections Day, and the critics incorrectly assumed that committee review would be foregone. Indeed, the House continued to rely on the existing committee system precisely to guarantee full committee consideration of any measure before it reaches the House floor under the Corrections Calendar.¹⁶⁴ The inability of any House member (except the chair of the committee reporting the bill) to amend a corrections bill further protects the role of the committee process. The sixty percent supermajority requirement may produce greater floor deliberation in order to achieve the necessary consensus.¹⁶⁵ And the unwillingness to bundle unrelated issues in a single corrections bill provides an extra protection lack-

162. See *Corrections Day Calendar Hearing*, *supra* note 12 (testimony of Dr. Roger H. Davidson) (arguing that "[u]ndoing [administrative] rules and regulations ought to require an equivalent amount of thought and deliberation" as enacting them in the first place under the APA); 142 CONG. REC. H755-56 (daily ed. Jan. 23, 1996) (statement of Rep. Oberstar) (criticizing the Corrections Day process as "a very dangerous deviation from long-established process that protects interests that otherwise do not have an adequate voice"); Krent & Rossi, *supra* note 11, at 23 (worrying that "[w]ith only one day to consider and vote on so many 'corrections,' deliberation and debate are likely to suffer"); Thurber, *supra* note 62, at 5; Barbara F. Vucanovich, Testimony of Congresswoman Barbara F. Vucanovich Before the House Committee on Rules (June 13, 1995) (news release, on file with author) [hereinafter Vucanovich News Release] ("The challenge . . . [is] to ensure that the House not compound one mistake with yet another.")

163. "Vetogates" are the constitutional and institutional hurdles that a bill must overcome before it becomes law. See WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 44-45 (2d ed. 1995).

164. See 141 CONG. REC. H6110-11 (daily ed. June 20, 1995) (statement of Rep. Clinger); *id.* at H6111 (statement of Rep. Zeff); *id.* at H6114 (statement of Rep. Waldholtz); see also *Corrections Day Repeal of Regulations Hearing*, *supra* note 12, at 73 (testimony of Rep. Dreier); *id.* at 11 (testimony of Rep. Solomon).

165. I thank Harold Krent for this observation.

ing in most other congressional procedures.¹⁶⁶ That the resulting procedure for floor consideration is not all that different from the suspension calendar and other devices mutes the complaints that this particular process will be particularly dangerous to the legislative process.¹⁶⁷

Any concern that Corrections Day would reduce congressional deliberation on affected issues should have disappeared amidst complaints that the House devoted *too much* attention to San Diego's predicament.¹⁶⁸ And two other checks remain: the Senate and the President. The Senate has not shown any desire to establish a Corrections Day of its own because, as Senator Dole joked, "[w]e don't do many things wrong over here."¹⁶⁹ The Administration has indicated that the President is already correcting more mistakes than Corrections Day will accommodate anyway.¹⁷⁰ But even if the Senate and the President joined the House in promoting the expedited correction of statutory mistakes, the process objection fails because shortcutting the existing system is the whole point of Corrections Day. The widespread agreement that Congress needs to respond to statutory mistakes more quickly suggests a willingness to stop deliberation at some point in order to act.¹⁷¹

166. Only two of the bills considered on Corrections Day could possibly be characterized as bundling unrelated issues: H.R. 117, which simultaneously barred drug users from public housing for the elderly and authorized the elderly to enter into reverse mortgages, and S. 790, which abolished over 200 congressional reporting requirements. See *supra* text accompanying notes 127–130.

167. Under the House's suspension calendar, floor consideration of legislation is limited to forty minutes of debate, amendments are prohibited, and a two-thirds majority is required for approval. See *Corrections Day Repeal of Regulations Hearing*, *supra* note 12, at 68 (testimony of William R. Pitts, Jr.). The House is considering a change to the Corrections Day procedure that would allow the chair and ranking member of the committee with jurisdiction over a bill to agree to dispense with the committee report requirement, a change that would mirror the existing procedures for considering a bill under the suspension calendar.

168. See 141 CONG. REC. H7574 (daily ed. July 25, 1995) (statement of Rep. Mineta) ("We are here today with the full House considering the details of one permit for one community out of the thousands of permits issued by States and EPA.").

169. Jennifer Babson, *A Quicker Way and Special Day for Erasing Debatable Rules*, 53 CONG. Q. WKLY. REP. 1807 (1995) (quoting Sen. Dole).

170. See *The White House Washington, DC Regular Briefing Briefer: Michael McCurry*, FED. NEWS SERV. WASH. PACKAGE, 1995 WL 8792907 (Aug. 2, 1995).

171. See, e.g., *Corrections Day Repeal of Regulations Hearing*, *supra* note 12, at 12 (testimony of Rep. Solomon) (commenting that "we can have a truncated process without sacrificing informed and deliberative decisionmaking"); Vucanovich News Release, *supra* note 162 (asserting that the proposed approach "strikes a balance between the need for quick action on ridiculous laws and appropriate caution to ensure the cure is not worse than the disease").

Second, the process critics fear that special interest groups will be able to use Corrections Day to undo legislative compromises and gain benefits they were unable to secure in court, before an agency, or in Congress when the legislation was originally enacted.¹⁷² Another good point—but another one to which the House responded. In addition to the obstacles presented by the requirement of committee approval, the proponents of Corrections Day have repeatedly stated their desire to avoid controversial issues,¹⁷³ and any attempt to reopen a critical part of a legislative compromise can expect to be controversial. Corrections Day allowed the House to amend one specific provision of the Clean Air Act without undoing all of the compromises reached in 1990.¹⁷⁴ Nor have the wealthy and the powerful been the sole beneficiaries of the legislation approved by the House on Corrections Day. Elderly residents of public housing, farmers, cities and states, charitable organizations, federal employees, and grocery stores have been among the groups successfully promoting corrections bills. One bill was promoted by a group with “little access” to the legislative process—lesbians and gay men—to reverse a decision made by the Justice Department, which has “easily the best record” before Congress.¹⁷⁵ Thus

172. See, e.g., 141 CONG. REC. H9751 (daily ed. Oct. 10, 1995) (statement of Rep. Oberstar) (arguing that “this process of corrections day is just fraught with danger and fraught with opportunity for special interests”); *id.* at H7570 (daily ed. July 25, 1995) (statement of Rep. Waxman) (“We do not want the corrections calendar to become a fast track for special interests seeking favored treatment.”); *id.* at H6109 (daily ed. June 20, 1995) (statement of Rep. Collins) (“Corrections Day could very easily become Special Interest Protection Day.”); Krent & Rossi, *supra* note 11, at 23 (“Corrections Day may thus become a bonanza for special interests.”); Tom Teepen, *Old Pork Doled Out a New Way*, ATLANTA J. & CONST., Feb. 12, 1995, at B7 (arguing that Corrections Day “would riddle national policies with exemptions for the connected”).

173. See *infra* note 199 and accompanying text. But see 141 CONG. REC. H7568 (daily ed. July 25, 1995) (statement of Rep. Vucanovich) (asserting that corrections bills need not receive unanimous support).

174. See *supra* text accompanying notes 151–154; see also 141 CONG. REC. H14,269 (daily ed. Dec. 12, 1995) (statement of Rep. Bilirakis) (noting that H.R. 325 “demonstrates that it is possible to alter provisions of the Clean Air Act without sacrificing environmental goals”).

175. The Gay, Lesbian or Bisexual Employees of the Federal Government wrote a letter supporting H.R. 782, the bill to overturn the Justice Department’s restrictive interpretation of the federal conflict of interest laws. Letter from Leonard P. Hirsch to Hon. Barney Frank (Oct. 20, 1995), reprinted in 141 CONG. REC. H10,668 (daily ed. Oct. 24, 1995); see also text accompanying notes 135–137 (describing H.R. 782). Among the other groups that have benefited from Corrections Day, state and local governments have the “greatest access” to Congress, while organized big business, educational institutions, religious groups, and small business all have “moderate access,” according to Professor Eskridge’s pre-Corrections Day study of which groups have had the most success in persuading Congress to enact desired legislation. ESKRIDGE, *supra* note 39, at 153. To be sure, Congress was controlled by a Democratic majority during most of the period that Eskridge examined, but the divided government of much of that period persists with a Democratic President today.

Representative Waxman—the first to raise the concern about special interests—now agrees that “this has not happened.”¹⁷⁶

Moreover, the fear about the role of special interests on Corrections Day fails to adequately distinguish the role of such groups in Congress and in regulatory agencies on any other day. The existing procedures for correcting statutory mistakes, especially appropriations riders and reliance on legislative history, are susceptible to manipulation by special interests.¹⁷⁷ Corrections Day may make it easier for traditionally disadvantaged groups to convince Congress to correct statutory mistakes affecting them. Proponents of Corrections Day thus argue that it will actually discourage favoritism toward special interests.¹⁷⁸

A third legislative process objection argues that Corrections Day will produce “legislation by anecdotes”—bills addressed to solve problems that do not really exist.¹⁷⁹ Here again, the House required committee approval so that Congress “avoid[s] unreported corrections bills that would force us to base our votes only on anecdotal evidence or heat-of-the-moment impulses or passions.”¹⁸⁰ The committee approval requirement has already served that function. A bill to overturn an OSHA regulation requiring four firefighters to respond to every fire appeared much more controversial after committee hearings were completed.¹⁸¹ And even if it were to occur, legislating by anecdote would hardly be limited to Corrections Day. For example, Congress enacted CERCLA primarily in response to the hazardous waste crisis at Love Canal.¹⁸²

176. 141 CONG. REC. H13,675 (daily ed. Nov. 28, 1995) (statement of Rep. Waxman). Representative Waxman continued with a broad defense of Corrections Day. *Id.*

177. See Brudney, *supra* note 25, at 50 (observing that “regulated entities likely to be affected at the post enactment stage often lobby for the inclusion of specific report language focused on statutory decisions by federal courts”).

178. See 141 CONG. REC. H6112 (daily ed. June 20, 1995) (statement of Rep. McIntosh) (arguing that Corrections Day “is one of the critically important reforms that we are making in this House of Representatives not to cater to special interests, but to actually cater to what the American people want us to do”).

179. See *supra* note 121 and accompanying text. Representative Waxman opposed the San Diego corrections bill because “[i]t is based on false anecdote,” 141 CONG. REC. H7570 (daily ed. July 25, 1995) (statement of Rep. Waxman), but he has since become a supporter of Corrections Day. See *supra* text accompanying note 176.

180. *Corrections Day Repeal of Regulations Hearing*, *supra* note 12, at 12 (testimony of Rep. Solomon).

181. See *infra* text accompanying note 207.

182. See, e.g., *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1270 (3d Cir. 1993) (“CERCLA was passed in December 1980 during the closing days of the Carter administration in response to the Love Canal controversy.”); see also WILLIAM H. RODGERS, JR., *ENVIRONMENTAL LAW* (2d ed. 1994):

Harold Krent and Jim Rossi raise several different, but related, concerns. They suggest that Corrections Day will result in less congressional accountability, not more. They observe that Congress often avoids difficult issues by enacting broad statutory language and leaving the details for the implementing agency, and they conclude that Corrections Day will enable Congress to take credit for reversing unpopular agency interpretations of ambiguous statutes.¹⁸³ Accordingly, say Krent and Rossi, the proper solution is to promote greater accountability for agency decisions.¹⁸⁴

This solution does not follow from the problem they described. Krent and Rossi object to a perception—the view that Congress will receive credit for Corrections Day while avoiding blame for statutory mistakes in the first place. But if the statutory mistakes that Corrections Day is designed to fix are all viewed as legislative mistakes, as argued above, then Congress will receive *both* the blame for the original mistake and the credit for correcting it. Many in Congress will surely try to accept the credit and not the blame, but others (agencies, interested groups, and members of the opposition party in Congress) will have an incentive to set the story straight. The San Diego example upon which Krent and Rossi rely confirms that Congress will not be able to take credit for correcting mistakes of its own making, nor will Congress be able to claim credit for fixing mistakes that had already been remedied.¹⁸⁵

Careful historians should acknowledge that the Superfund law was well along the evolutionary path towards enactment before Love Canal burst into public prominence. Love Canal contributed to the enactment of Superfund, to be sure, but more as a reinforcer and mobilizer of official opinion than as a source of new ideas. Love Canal had everything necessary for made-for-television drama

Id. at 682.

183. The same point was made in Stanley C. Brubaker, *Slouching Toward Constitutional Duty: The Legislative Veto and the Delegation of Authority*, 1 CONST. COMMENTARY 81, 94–95 (1984); see also Teeppen, *supra* note 172, at B7 (asserting that Corrections Day “would institutionalize cheap shots at regulation”).

184. Krent & Rossi, *supra* note 11, at 23.

185. See 141 CONG. REC. H7564 (daily ed. July 25, 1995) (statement of Rep. Mineta) (contending that “no further legislative action is necessary for San Diego to be relieved from the secondary treatment requirements of the Clean Water Act”); *id.* at H7571 (statement of Rep. Borski) (arguing that “[w]hat this bill is seeking to correct has already been corrected”); Kenneth J. Cooper, *House Vote Mucks with EPA; “Corrections Day” Measure Strengthens San Diego Pollution Waiver*, WASH. POST, July 26, 1995, at A21 (noting that “in a way, the House was correcting itself more than the EPA,” and quoting EPA Administrator Carol Browner as saying that “Corrections Day proceedings cynically pretend to ‘correct’ something that was solved through President Clinton’s leadership last year”). Other Corrections Days demonstrate that the House will not be able to claim credit for mistakes that have already been corrected. See, e.g., 141 CONG. REC. H9751 (daily ed. Oct. 10, 1995) (statement of Rep. Oberstar) (observing that the regulations treating vegetable oil in the same manner as petroleum had already been withdrawn by the agency).

Krent and Rossi also fear that Corrections Day will become burdensome for Congress if it gets involved in the kinds of fact-specific decisions that are best handled by administrative procedures. The experience with Corrections Day indicates that the House has devoted more attention to statutory details, but that is precisely the result that Cardozo, Friendly, Ginsburg, and others have been advocating throughout this century. The institution of Corrections Day may also increase congressional efficiency by providing a recognized channel to address concerns that otherwise were considered on an ad hoc basis through appropriations riders, selective legislative history, and less public processes. Krent and Rossi further admonish that "Congress should focus on ways to improve agency performance,"¹⁸⁶ but there is some evidence that Corrections Day has encouraged agencies themselves to improve their performance.¹⁸⁷

The final legislative process objection claims that the kind of specific legislation produced by Corrections Day undermines the consistency of laws.¹⁸⁸ No one wants private legislation to become the rule, instead of the exception. But some problems cannot be solved by a general legislative command. In fact, complaints about "one-size-fits-all" federal regulation appear throughout the call for Corrections Day.¹⁸⁹ The consistency of the laws is not threatened when different problems are resolved by different rules.¹⁹⁰ The alternatives in such cases are to enact specific legislation or to rely on administrative agencies to fashion specific regulations and to decide particular cases based on their peculiar facts. That Congress often chooses the latter alternative does not render the first illegitimate.¹⁹¹

186. Krent & Rossi, *supra* note 11, at 23; see also *id.* ("If we provide agency bureaucrats with incentives to correct their own 'mistakes,' we can increase the accountability of—rather than further politicize—the regulatory process."). Krent and Rossi call on Congress to consider agency requests to waive regulations, a recommendation that seems at odds with their concern about congressional micromanagement of specific agency decisions.

187. See *supra* text accompanying note 160.

188. See *Corrections Day Calendar Hearing*, *supra* note 12 (testimony of Dr. Roger H. Davidson) ("Lawmaking is most effective when it pursues general principles rather than narrow problems.").

189. See *supra* note 35 and accompanying text.

190. See Abner S. Greene, Kiryas Joel and Two Mistakes About Equality, 96 COLUM. L. REV. 1, 59–65 (1996).

191. As the *Washington Post* editorialized:

[M]any mistaken regulatory decisions are made because the laws as written by Congress require a certain consistency. A rule that is reasonable in general might be unreasonable in a particular case. For regulators, the problem often lies in a desire to *avoid* being arbitrary by adhering strictly to laws passed by Congress. In such cases, *only* Congress can change the rules.

Corrections Day, WASH. POST, *supra* note 8, at A14.

The second group of Corrections Day opponents consists of House Democrats, environmentalists, and others who would like the 104th Congress to enact less legislation, not more. In one sense Corrections Day threatens groups that fear any legislation produced by the 104th Congress. Yet again, the proponents of Corrections Day worked to meet this criticism. They structured Corrections Day to include several features intended to ensure that corrections legislation receives bipartisan support. In particular, the sixty percent supermajority requirement for every proposed correction prevents a closely divided Congress from enacting controversial legislation under the Corrections Calendar. But the political objectors are not satisfied, and they may have a point.

Here the dispute returns to the definition of a statutory mistake. The political objectors to Corrections Day fear the House will enact legislation on Corrections Day that amends statutes or regulations that they do not view as mistaken. The House rule creating the Corrections Calendar lacks any definition of "correction" or "mistake." But the debate preceding the adoption of the Corrections Day procedure and the bills considered on the Corrections Days held so far indicate the kinds of measures considered in such an expedited fashion. The mistakes corrected should be obvious,¹⁹² dumb,¹⁹³ or expensive.¹⁹⁴ They can be the result of a drafting error, an

192. See Thurber, *supra* note 62, at 5; Vucanovich News Release, *supra* note 162.

193. See, e.g., H.R. Rep. No. 144, 104th Cong., 1st Sess. 1 (1995) ("ludicrous" laws); 141 CONG. REC. H10,658 (daily ed. Oct. 24, 1995) (statement of Rep. Goss) (characterizing the placement of "violent drug abusers and alcoholics intentionally into taxpayers [sic] subsidized senior housing project[s]" as "dumb"); *id.* at H6114 (daily ed. June 20, 1995) (statement of Rep. Solomon) ("silly, dumb, and ludicrous" laws); *id.* at H6111 (statement of Rep. Zeff) ("most ridiculous, outrageous, [and] dumb" laws); *supra* text accompanying notes 5-6.

194. See, e.g., H.R. REP. NO. 144, 104th Cong., 1st Sess. 1 (1995) (laws that "impose a severe financial burden on Americans"); 141 CONG. REC. H14,272 (daily ed. Dec. 12, 1995) (statement of Rep. Archer) (describing the 1990 Clean Air Act's carpooling program as a "costly . . . mandate"); *id.* at H12,228 (daily ed. Nov. 14, 1995) (statement of Rep. Green) (noting that the Federal Report Elimination and Sunset Act of 1995 "is estimated to save over \$2 million in costs in printing costs and paperwork"); *id.* at H9750 (daily ed. Oct. 10, 1995) (statement of Rep. Burr) (describing the application of the Oil Pollution Act to vegetable oil as a "burdensome problem created by certain Federal regulations"); *id.* at H6114 (daily ed. June 20, 1995) (statement of Rep. DeLay) ("unduly costly" laws); *id.* at H6104 (statement of Rep. Solomon) ("costly" laws).

unintentional ambiguity,¹⁹⁵ a judicial or agency misinterpretation,¹⁹⁶ a provision that has proved to be a failure,¹⁹⁷ or a provision that became outdated because of changed circumstances.¹⁹⁸ The legislative solutions

195. See 141 CONG. REC. H12,206 (daily ed. Nov. 14, 1995) (statement of Rep. Brown) (characterizing duplicative reporting requirements imposed by the Social Security Act and the Federal Food, Drug and Cosmetics Act as "a legislative oversight"); *id.* at H10,650 (daily ed. Oct. 24, 1995) (statement of Rep. Lazio) (asserting that the presence of drug addicts and alcoholics in elderly-only housing projects demonstrates that "[t]oo often, the best laid plans of HUD and Congress have effects that were never intended"); *id.* at H9752 (daily ed. Oct. 10, 1995) (statement of Rep. Vucanovich) (asking "Who could have predicted during the rush to respond to the Valdez accident that we would inadvertently impact consumers and farmers the way we did by not clearly defining the word oil?"). More generally, one Corrections Day supporter has observed that "[l]awmaking is simply not the means to which the Federal Government must aspire to anticipate with precision every possible situation, obligation, and exception." *Id.* at H10,664 (daily ed. Oct. 24, 1995) (statement of Rep. Ehrlich).

196. See, e.g., 142 *id.* at H751 (statement of Rep. Boehlert) (arguing that "there are times when the Clean Water Act is interpreted and applied too narrowly and the views of State and local water officials are not adequately taken into account"); 141 *id.* at H10,668 (daily ed. Oct. 24, 1995) (statement of Rep. Hoke) (asserting that OLC misinterpreted 18 U.S.C. § 205 to prohibit federal employees to represent an employee organization in any matter in which the federal government has a direct and substantial interest). But see *id.* at H10,670 (statement of Rep. Morella) (claiming that "[t]he Justice Department was correct in its interpretation of the law, but in doing so, it compromised the spirit of the law").

197. See *id.* at H14,270 (daily ed. Dec. 12, 1995) (statement of Rep. Hastert) (observing that the 1990 Clean Air Act's carpooling program "has failed nationwide").

198. See, e.g., *id.* at H12,230 (daily ed. Nov. 14, 1995) (statement of Rep. Ehrlich) ("Corrections Day was established to correct outdated . . . legislation."). For examples, see *id.* at H14,266 (daily ed. Dec. 12, 1995) (statement of Rep. Waxman) (supporting a bill repealing "a provision in law that requires the posting of a warning sign about the potential dangers of saccharin which is really no longer necessary"); *id.* at H10,666 (daily ed. Oct. 24, 1995) (statement of Rep. Stenholm) ("In 1954, heavy-duty industrial machinery, like the paper baler, was substantially more dangerous than today. . . . It's time we updated this regulation."); *id.* at H6104 (daily ed. June 20, 1995) (statement of Rep. Solomon) ("obsolete" laws); *id.* at H6110 (statement of Rep. Clinger) ("outdated" laws); *id.* at H6113 (statement of Rep. Bereuter) ("a law that has outlived whatever usefulness it may have had"); *id.* at H6114 (statement of Rep. Hayworth) ("outmoded laws"); see also *supra* note 164. The Common Sense Legislation initiative established by the Illinois House of Representatives emphasizes "archaic" laws. Dan Rutherford, Rutherford Bringing Common Sense to Springfield (Jan. 17, 1996) (news release, on file with author) (citing a statute regulating the use of mules in coal mines even though mules are no longer used in coal mines).

to the mistakes should be noncontroversial,¹⁹⁹ narrowly focused,²⁰⁰ and able to receive bipartisan support.²⁰¹

These adjectives, colorful though they may be, are not self-defining (in other words, you know a statutory mistake when you see one).²⁰² As a result, the debate over Corrections Day mirrored the simultaneous debate over federal regulatory reform. To oversimplify, House Republicans criticized "overregulation" while House Democrats sought to block the "gutting" of environmental and safety laws. House Democrats defended measures—such as the prohibition on teenagers using paper balers—that House Republicans found "dumb," "expensive," and fine candidates for Corrections Day.²⁰³ Faced with such differences, Democrats objected to the absence of a definition of "correction" for purposes of the Corrections Calendar.²⁰⁴ The permanent exemption from the Clean Water Act granted to San Diego on the first Corrections Day only increased the skepticism. The content of the Corrections Calendar lies within the discretion of the Speaker, who is advised by a bipartisan screening committee, but the political objectors distrust the Speaker—especially this Speaker—to place only noncontroversial bills on the Corrections Calendar. It is no wonder, then, that Corrections Day itself became controversial.

199. See *Corrections Day Repeal of Regulations Hearing*, *supra* note 12, at 11–12 (testimony of Rep. Solomon); *id.* at 19 (testimony of Rep. Vucanovich). For an example of legislation that fails the noncontroversial test, consider Representative Schroeder's suggestion that the repeal of a provision of the Telecommunications Act of 1996 that criminalizes the distribution of information about abortion over the Internet should be considered on Corrections Day. See *Congress Gets Bills to Repeal Telecom Act Abortion Provision*, COMM. DAILY, Mar. 7, 1996, at 2.

200. See, e.g., *Corrections Day Repeal of Regulations Hearing*, *supra* note 12, at 19 (testimony of Rep. Vucanovich) (corrections bills should avoid "far-reaching" items); 141 CONG. REC. H6114 (daily ed. June 20, 1995) (statement of Rep. Solomon) (corrections bills "will be confined to a single subject").

201. Gingrich testified that "this will not work if it is just a partisan game." *Corrections Day Repeal of Regulations Hearing*, *supra* note 12, at 7 (testimony of Speaker Gingrich); *accord id.* at 73 (testimony of Rep. Dreier); *id.* at 19 (testimony of Rep. Vucanovich). The House report encouraged such bipartisanship, see H.R. REP. NO. 144, 104th Cong., 1st Sess. 5 (1995), but the Democratic minority found it lacking. *Id.* at 12–13 (minority views of Reps. Moakley, Frost, Beilenson & Hall). All of the bills considered on Corrections Day have received substantial bipartisan support. See *infra* text accompanying notes 205–206.

202. Cf. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

203. Compare 141 CONG. REC. H10,665 (daily ed. Oct. 24, 1995) (statement of Rep. Bonilla) (describing the regulation prohibiting 16- and 17-year-olds from operating paper balers as "one of the dumbest rules we have on the books today") with *id.* at H10,662 (statement of Rep. Owens) (denying that the baler regulation is "either senseless or silly") and *id.* at H10,665 (statement of Rep. Mink) (claiming that repeal of the baler regulation "will gut vital protections for youth in the retail industry").

204. See, e.g., H.R. REP. NO. 144, 104th Cong., 1st Sess. 11 (1995) (minority views of Reps. Moakley, Frost, Beilenson & Hall); 141 CONG. REC. H6111 (daily ed. June 20, 1995) (statement of Rep. Dingell).

There are two possible solutions. Experience may prove that the Corrections Day process now in place actually works. Most of the legislation approved on Corrections Day has been drafted and approved on a bipartisan basis.²⁰⁵ Only three of the eleven bills approved by the House on Corrections Day faced more than one stated opponent; all of the bills received substantial bipartisan support.²⁰⁶ The willingness to keep once-promising candidates off the Corrections Calendar once their divisiveness appears further supports the adequacy of the existing procedures.²⁰⁷ And some of the bills approved by the House on Corrections Day would seem to satisfy anyone's definition of a statutory mistake. But it is unlikely that a rule has no defenders. Congress probably did not intend the Oil Pollution Act to apply to *vegetable* oil, but some federal officials believe that it

205. For references by House Democrats to the bipartisan nature of Corrections Day, see 142 CONG. REC. H752 (daily ed. Jan. 23, 1996) (statement of Rep. Condit) (supporting the Constructed Water Conveyances Reform Act of 1995); 141 *id.* at H14,270 (daily ed. Dec. 12, 1995) (statement of Rep. Greenwood) (supporting legislation to amend the Clean Air Act's carpooling requirements); *id.* at H13,678 (daily ed. Nov. 28, 1995) (statement of Rep. Conyers) (noting the bipartisan support for the Charitable Gift Annuity Antitrust Relief Act of 1995, though suggesting that the bill should have been considered under the suspension calendar); *id.* at H13,674 (statement of Rep. Markey) (supporting the Philanthropy Protection Act of 1995); *id.* at H12,211 (daily ed. Nov. 14, 1995) (statement of Rep. Brown) (supporting legislation to eliminate a report required by the Social Security Act); *id.* at H12,228 (statement of Rep. Green) (supporting the Federal Reports Elimination and Sunset Act of 1995); *id.* at H10,664 (daily ed. Oct. 24, 1995) (statement of Rep. Peterson) (defending the reversal of the Department of Labor's prohibition on 16- and 17-year-olds operating paper balers); *id.* at H10,665 (statement of Rep. Hoyer) (same); *id.* at H10,659-60 (statement of Rep. Mfume) (defending the Senior Citizens Housing Safety and Economic Relief Act of 1995); *id.* at H10,652 (statement of Rep. Gonzalez) (same).

206. See *supra* text accompanying notes 115-157.

207. See 141 CONG. REC. H13,675 (daily ed. Nov. 28, 1995) (statement of Rep. Waxman) (observing that the Corrections Day Advisory Committee has been "rejecting bills that do not meet the corrections day criteria because they are controversial or address significant policy issues that should be considered under regular legislative procedures"). For example, a House subcommittee held hearings in July on a bill that would overturn a recent Occupational Safety and Health Administration (OSHA) decision interpreting a regulation requiring four firefighters to respond to a fire in a building (two firefighters in the building and two firefighters remaining outside for rescue or assistance operations). Western towns and firefighters support the bill to eliminate the four firefighter requirement because of the difficulty of assembling four firefighters to respond to fires in small, remote Western communities. *Corrections Day Bills Hearing, supra* note 34 (testimony of Thomas Kraft, Gasser Assocs., & Raymond Brunstrom, Truckee Meadows Fire Protection District, in support of H.R. 1783, 104th Cong., 1st Sess. (1995)); *accord id.* (testimony of Rep. Vucanovich). But other firefighters vigorously defend OSHA's rule, taking particular exception to considering the bill on Corrections Day. *Id.* (testimony of Harold A. Schaitberger, Executive Assistant to the General President, International Association of Firefighters) ("Perhaps most disturbing is that HR 1783 is being considered for the Corrections Day Calendar. . . . Calling a regulation that protects fire fighters' lives 'dumb' is deeply offensive to the brave men and women of the American fire service."). As a result of those concerns, the bill has not been considered on Corrections Day.

should, and the unqualified statutory language can support their position.²⁰⁸ If controversy is inevitable,²⁰⁹ then which statutory mistakes should the House address on Corrections Day?

Cardozo, Ginsburg and Friendly may offer an answer. Each focused on identifying statutory mistakes and making them known to Congress; none of them worried about how Congress would decide which mistakes to correct and which to leave alone—or which were really mistakes and which were not. If the goal is to bring problems to Congress's attention so that it can act, then the House's new system to implement Corrections Day will work well. The announcement of Corrections Day produced an outpouring of letters, editorials, and other submissions to Congress highlighting alleged statutory mistakes. Contests for uncovering more mistakes have been suggested, and an Internet home page to receive proposals may be forthcoming as well. One thing is for sure: There will be no shortage of candidates for Corrections Day. Bringing such statutory mistakes to the attention of Congress satisfies the hopes of Cardozo, Friendly, and Ginsburg. And, so the argument goes, if they were not concerned about the list being over-inclusive (i.e., including statutory provisions that some do not count as a mistake), then neither should we.

That response is unlikely to satisfy the political objectors, so I turn to the second possible solution. The House may find it necessary to adjust the process in a further effort to separate the corrections from everything else. The most likely addition would be a more formal procedure for determining which bills should be placed on the Corrections Calendar in the first instance. A binding definition of "corrections" or "mistake" may be difficult because people (and members of Congress) disagree about what fits those terms or what is "dumb," but at least one state employs such a definition,²¹⁰ and the nonbinding criteria developed by the bipartisan

208. See *supra* note 122.

209. The designers of Corrections Day admit as much. See 141 CONG. REC. H7568 (daily ed. July 25, 1995) (statement of Rep. Vucanovich) ("[T]he fact that this bill does not have unanimous support does not disqualify it from the corrections procedure. . . . [I]n designing the corrections procedure we anticipated some opposition. . . . If we restrict ourselves to only those items with unanimous support we would not need the Corrections Calendar."); *id.* at H6104 (daily ed. June 20, 1995) (statement of Rep. Solomon) ("The bills should be relatively noncontroversial and bipartisan, but there is bound to be some controversy on some of these measures. Even so-called stupid rules will have their defenders.").

210. Wisconsin charges its Revisor of Statutes to inform the Law Revision Committee of the state legislature of any judicial decisions in which Wisconsin statutes "are stated to be in conflict, ambiguous, anachronistic, unconstitutional or otherwise in need of revision." WIS. STAT. ANN. § 13.93(2)(d) (West 1986). See generally Abrahamson & Hughes, *supra* note 104, at 1065-66 (describing the Wisconsin statutory revision system).

Corrections Day Advisory Committee appear to be working well.²¹¹ Absent an agreeable definition, the screening function could be served by a heightened process. The Advisory Committee meets to consider which bills are eligible for the Corrections Calendar, essentially creating a second level of committee approval (albeit one that relied on the report and information gathered by the committee with substantive jurisdiction). Or potential corrections legislation could be flagged as such before committee consideration occurred so that potential opponents would be on notice that the expedited floor consideration procedures could come into play. Simply labeling a proposed bill as a corrections bill may elicit special attention from interested parties.²¹² Finally, some of the proposals unsuccessfully offered by the minority members of the House Rules Committee may yet become useful.²¹³ But none of these alternatives need to be explored unless, and until, the fears of the political objectors are proven true.

IV. STATUTORY INTERPRETATION AFTER CORRECTIONS DAY

Corrections Day demonstrates that Congress can identify and correct statutory mistakes. Indeed, the concerns about Corrections Day center on whether it will change too much, not too little. This is contrary to conventional wisdom. Many theories and doctrines of statutory interpretation assume that Congress is too busy or uninterested in correcting statutory mistakes. What follows is an initial list, surely not exhaustive, of some of the approaches to statutory interpretation that may merit reconsideration after Corrections Day.²¹⁴

Courts and agencies should correct statutory mistakes. As noted above,²¹⁵ courts correct some kinds of statutory mistakes. More provocatively, now-Judge Calabresi has encouraged courts to explicitly update outmoded statutes, while theories of dynamic statutory interpretation support judicial resolution of some statutory mistakes.²¹⁶ All of these theories have been justified in part on the assumption that Congress

211. See 141 CONG. REC. H13,675 (daily ed. Nov. 28, 1995) (statement of Rep. Waxman) ("The guidelines we developed for the Corrections Day Advisory Committee say that a corrections bill should address laws and regulations that are ambiguous, arbitrary, or ludicrous. The bill should be noncontroversial and have broad bipartisan support. The idea was to provide a forum for correcting silly, burdensome regulations . . .").

212. See *supra* note 134 and accompanying text.

213. See *supra* text accompanying note 110.

214. For a discussion of some of these issues, see Solimine & Walker, *supra* note 25, at 428-33.

215. See *supra* text accompanying notes 77-85.

216. See *supra* text accompanying notes 66-74.

cannot, or will not, correct statutory mistakes itself. Calabresi responded to "the rather desperate responses of our courts to a multitude of obsolete statutes in the face of the manifest incapacity of legislatures to keep those statutes up to date."²¹⁷ Eskridge posits that "[b]ecause it is hard to enact statutes, the ones that are enacted have to last a long time."²¹⁸ Other writers defend a broader role for agencies in interpreting statutes because "Congress often is unable to correct its mistakes."²¹⁹

Corrections Day shows that it is possible to construct a procedure by which Congress can correct many more statutory mistakes than it has before. The mere possibility of such a procedure, whether or not Congress chooses to employ it, points toward a reduced judicial and administrative role in correcting statutory mistakes. The need for a court to update or otherwise modify a statute that Congress found unnecessary to correct becomes difficult to defend when Congress had an opportunity to do so itself. Surprisingly, the arguments *against* Corrections Day further support this claim. The inability to agree about what constitutes a statutory mistake complicates the establishment of a procedure for Congress to correct such mistakes, but that same inability calls into question any judicial or administrative assumption of the same task. Congress is free to enact new legislation even if it unfairly characterizes a previous provision as a statutory mistake; courts and agencies enjoy no such power. The presumed authority of courts to correct statutory mistakes rests on their ability to identify such mistakes, an ability the criticisms of Corrections Day call into question.

Legislative signals besides those contained in the statutory text are more suspect. Courts may rely on legislative history when interpreting a statute, some argue, because "Congress cannot resolve all relevant issues in the statutory text and still have time to transact any other legislative business."²²⁰ This hyperbole becomes less true in light of Corrections Day. Congress can more easily enact a statute overturning a mistaken court or agency decision instead of signalling its disapproval through a statement added to a committee report. This is not to say that Congress can now

217. CALABRESI, *supra* note 66, at 6-7.

218. ESKRIDGE, *supra* note 39, at 10; accord FRANCIS A.R. BENNION, STATUTORY INTERPRETATION 356 (1984) ("Constant formal updating is not practicable, so an Act takes on a life of its own.").

219. John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233, 287 (1990); accord *id.* at 283, 287 (referring to the difficulty of amending statutes).

220. Brudney, *supra* note 25, at 7; see also Eskridge & Frickey, *supra* note 22, at 40.

suddenly resolve *all* issues through statutory language that will be applied in the future to unexpected situations. Rather, the argument is relative: The easier it is to enact statutory language to solve a problem, the less justifiable it is for Congress to express its intent through other legislative signals such as legislative history.

Congressional acquiescence arguments are marginally better. Courts sometimes accord significance to what Congress has *not* done. If the courts (or, on some occasions, agencies) have interpreted a statute a particular way and Congress has not amended the statute, a court may assume that Congress agrees with the interpretation because it has acquiesced in it. The argument gains force if it can be demonstrated that Congress considered the issue but declined to act.²²¹ The Rehnquist Court has been less impressed with such arguments, and for good reasons.²²² Nonetheless, as Congress becomes aware of more alleged statutory mistakes, and as it becomes easier for Congress to correct such mistakes, the force of congressional acquiescence arguments increases.

Stare decisis should be even stronger in statutory cases. The Supreme Court adheres to a strong presumption of stare decisis once it has interpreted a statute.²²³ The presumption is stronger in statutory cases than in constitutional cases precisely because Congress can change mistaken Supreme Court statutory interpretation decisions, but it cannot change mistaken Supreme Court constitutional law decisions absent a constitutional amendment.²²⁴ Corrections Day supports this distinction, and as it makes it easier for Congress to overturn mistaken statutory interpretation decisions, it suggests that the presumption of stare decisis should be even stronger. In this respect Corrections Day supports Lawrence Marshall's call for an absolute rule of stare decisis in statutory interpretation cases.²²⁵

This list is obviously incomplete and ignores other rationales for the doctrines involved. Nor do I mean to endorse each conclusion. But this

221. See Marshall, *supra* note 71, at 184–96.

222. See generally ESKRIDGE, *supra* note 39, at 241–52.

223. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989).

224. The classic explanation of this distinction appears in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting). For another justification for statutory stare decisis, see *Neal v. United States*, 116 S. Ct. 763, 769 (1996) (“Were we to alter our statutory interpretations from case to case, Congress would have less reason to exercise its responsibility to correct statutes that are thought to be unwise or unfair.”).

225. Marshall, *supra* note 71, at 208–38. Marshall endorsed a rule of absolute stare decisis in order to prompt Congress to act; my focus has been on whether frequent congressional action would justify a stronger rule of stare decisis.

brief discussion begins to show the potential consequences of increased congressional attention to statutory mistakes.

CONCLUSION

Judges have seemed more concerned than Congress about statutory mistakes, yet Congress enjoys far more power to correct such mistakes than the courts. Most judges have responded to this situation by devising ways for Congress to learn about and correct statutory mistakes; some judges have found it necessary to take matters into their own hands. Judge Calabresi is the most direct of those judges—and he was not even a judge at the time he articulated his theory of judicial updating of statutes. Justices Ginsburg and Cardozo, and Judge Friendly, encouraged Congress to assume its responsibilities, but in many instances, Congress declined.

Corrections Day may change that. It suggests that Congress can be trusted to correct statutory mistakes when necessary. Corrections Day thus has ramifications for formalism generally. The formal constitutional procedures for enacting legislation in particular, and of separation of powers more generally, have been viewed as outmoded by many theorists. Hence the widespread condemnation of Chief Justice Burger's opinion *INS v. Chadha*.²²⁶ Corrections Day suggests that formal constitutional arrangements do work and are adaptable to modern problems in the administrative state.

Admittedly, Corrections Day will not solve all statutory mistakes. Indeed, Corrections Day alone will not solve *any* statutory mistakes—at least until the Senate adopts a comparable procedure and the President approves the results of the procedure. The case for theories of statutory interpretation that permit (or encourage) judicial or administrative corrections fails nonetheless. Congress will not correct those statutory mistakes that are unimportant or controversial. Even Corrections Day has limits: Whatever the time allotted to the procedure, it promises to leave many possible candidates uncorrected. But Corrections Day demonstrates that Congress could fix such mistakes if it thought it important enough to do so. Demands for judicial or administrative corrections must then explain why such action is justified when Congress found the need to change the law insufficiently compelling. Conversely, the controversial statutory mistakes left uncorrected by Congress are even less worthy of judicial resolution. Here, at last, the expansive definition of statutory

226. 462 U.S. 919 (1983).

mistake reaches its limit. If Congress cannot agree that it made a mistake—in other words, if those who oppose an interpretation of a statute cannot overcome those who endorse that interpretation—then the courts are ill-equipped to decide that Congress made a mistake after all.

The authors of *Corrections Day* had a much more modest goal. Congress has long needed a procedure by which it can quickly correct statutory mistakes. The speed with which state and local officials, interested parties, and the general public offered their own examples of statutory mistakes shows that *Corrections Day* strikes a chord that Congress would do well to heed. The new *Corrections Day* procedures offer the House the opportunity to revisit and revise statutes at a much smaller institutional cost than the existing mechanisms for congressional action. The concerns about such an expedited procedure are legitimate, but they can all be answered. Besides, Benjamin Cardozo, Henry Friendly, Ruth Bader Ginsburg and Newt Gingrich can't all be wrong.

