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The Judge as a Fly on the Wall: Interpretive Lessons from the Positive Political Theory of Legislation

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The Judge as a Fly on the Wall: Interpretive Lessons from the Positive Political Theory of Legislation[1]

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How should judges interpret statutes? Addressing this question has been a preoccupation of legal scholars for decades and debate continues to rage about the proper approach to discerning statutory meaning in difficult cases. For some scholars and judges, the proper method of interpreting statutes requires little more than a close examination of statutory language, perhaps with the help of dictionaries and interpretive canons.[2] For others, the interpretation of statutes must be based upon an assessment of the underlying statutory purpose,[3] upon an evaluation of society's current norms and

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[2] Manning, John F. (2001) "Textualism and the Equity of the Statute," 101 *Columbia Law Review* 1; Easterbrook, Frank H. (1998) "Textualism and Democratic Legitimacy: Textualism and the Dead Hand," 66 *Geo. Wash. L. Rev*. 1119; Scalia, Antonin (1997) *A Matter of Interpretation: Federal Courts and the Law*. Princeton: Princeton University Press.

[3] Hart, Henry M. Jr. and Albert M. Sacks (1958) *The Legal Process: Basic Problems in the Making and Application of Law.*

values,[4] or upon some overriding normative objective, such as the "law's integrity."[5] With the differences among these approaches squarely framed in the literature, a well-read academic might well ask, with exasperation, "is there anything interesting left to say about statutory interpretation?"

Naturally, the four of us believe that the answer to this question is yes, and we gladly accept the burden of explaining what, after all, can be said that has not already been said by others. To us, the principal lacunae in the modern statutory interpretation debate are twofold: First, much of the theoretical literature on statutory interpretation lacks a coherent, nuanced description of the *proper objectives of interpretation*. What goals, aims, and purposes is the process of statutory interpretation meant to serve? With a few exceptions, the leading voices in the statutory interpretation debate are rather unclear (and therefore unconvincing) in their analysis of the objectives of interpretation. Second, most theories of statutory interpretation do not explain *the positive theory, or even the assumptions, upon which the normative theory of statutory interpretation is based*. Statutes are the products of legislative decision making; they do not come to the courts fully formed from the head of Zeus. They are neither novels nor poems, and whatever the utility of various analogies that help us better understand how to interpret texts, we would do well to remember that, with apologies to Chief Justice Marshall, "it is a *statute*…we are interpreting."[6] Nonetheless, contemporary theories of statutory

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[4] Eskridge, William N., Jr. (1990) "Gadamer/Statutory Interpretation," *Colum. L. Rev.* 90: 609; Alienikoff, T. Alexander (1988) "Updating Statutory Interpretation," *Mich. L. Rev.* 87: 20.

[5] Dworkin, Ronald (1986) *Law's Empire*. Cambridge: Belknap Press.

[6] *Mc'Culloch v. Maryland*, 17 U.S. 316 (1819).

interpretation rarely tie together satisfactorily their guide to interpreting a statute to their analysis of how the statute is created by legislators acting within the framework of the Constitution and the contemporary legislative process.[7]

Our analysis in this paper, and in other work,[8] aims to fill these lacunae by considering the proper objectives of statutory interpretation and the connection between prescriptive theories of interpretation and positive theory. We draw together these two issues deliberately in this way: We explain how and why statutes are best understood as communications from the constitutionally authorized lawmaker, the legislature, and how these communications are constructed through the modern lawmaking process.

Like many others, we view the process of statutory interpretation as a quest by judges to figure out through the best available theory and the best available information "what statutes mean." To answer this question successfully, we need to first understand that statutes are a form of communication, that all communication involves the

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[7] Dworkin also recognizes the importance of linking together normative and positive theories. Indeed, he states, "Ultimately, one's political theory is the foundation of one's constitutional theory" Dworkin, Ronald (1977) *Taking Rights Seriously*. London: Duckworth, 282.

[8] See, e.g., Boudreau, Cheryl, Mathew D. McCubbins, and Daniel B. Rodriguez (2005) "The Intentional Stance," *Loyola Law Review*; Lupia, Arthur and Mathew D. McCubbins (2005) "Lost in Translation: Social Choice Theory is Misapplied Against Legislative Intent," *Journal of Contemporary Legal Issues*; McNollgast (1992) "Positive Canons: The Role of Legislative Bargains in Statutory Interpretation," *Geo. L. J.* 80: 705; McNollgast (1994) "Legislative Intent: The Use of Positive Theory in Statutory Interpretation," *L. and Contemp. Probs.* 57: 3-37; McCubbins, Mathew D. and Daniel B. Rodriguez (2005) "Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon," *Journal Of Contemporary Legal Issues*; McCubbins, Mathew D. and Daniel B. Rodriguez (2005) *What Statutes Mean: Positive Political Theory and the Interpretation of Federal Legislation*; Rodriguez, Daniel B. and Barry R. Weingast (2003) "The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation," 151 *University Of Pennsylvania Law Review* 1417.

compression and expansion of information, and that discerning the meaning of any communication (be it a statute, a book, or a gesture) requires a correspondence between the way that information is compressed and the way that it is expanded. Applying this lesson to the realm of *legislative* communications, we must first discern to whom legislators are communicating. We must then ask how this communication is understood by legislators and how it is best understood by parties external to the legislative process, such as judges.

Moreover, we must also understand well the process by which the legislature creates statutes. In this quest, we must dig deeper than merely tracking the traditional process by which a bill becomes a law; rather, we need to draw upon the positive political theory of lawmaking to understand how the legislature configures their instruments of communication, their statutes. Typically, in passing legislation, legislators are conversing with each other. They are presenting evidence and arguments about the proposed legislation, trying to secure support or build opposition. To be sure, legislators communicate with non-legislators and for purposes other than the facilitation or defeat of legislative proposals. Sometimes, legislators are grandstanding for the media and/or their constituents; sometimes, they are issuing warnings or planting hints for executive agencies or even courts; and sometimes, they are complaining about being shut out of the legislative process altogether (as is often the case for minority party members). Some of this communication is of dubious interpretive value, as we may question its sincerity or veracity, and some of it is valuable. Our contribution in this paper and in other work is in providing a method for distinguishing valuable (i.e. sincere and trustworthy) communications from those that are not and for clarifying the distinction between

legislative communications that are aimed at legislators within the legislative process and strategic rhetoric crafted for external, and frequently dissembling, purposes.[9]

This paper proceeds as follows: We begin, as is proper, by describing and justifying the assumptions upon which our analysis relies. Turning then to the heart of the analysis, we offer an extended discussion of the communication process, emphasizing how successful communication requires a correspondence between the compression and expansion of information. Next, we provide a brief description of how legislators compress statutory meaning when passing statutes, and we demonstrate that our intentionalist approach founded on positive political theory and the economics of signaling enables judges to expand accurately such meaning. We then draw upon the economics of signaling to identify the conditions required for sincerity and trust, and we apply these conditions to the legislative process. This application suggests that jurists should interpret statutes as though they are "flies on the wall" of legislators' "conversations" about the meaning of statutes, and it also provides jurists with simple guidelines for how to sort through the many statements that legislators make and use only those that are trustworthy, within the context of the legislative process, in their interpretations. We conclude with a demonstration of how textualism, purposivism, and other legal or politically-valued approaches ignore the legislative process and are, therefore, improper methods of interpretation – or, perhaps more accurately, not methods of interpretation at all.

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[9] McNollgast (1992) "Positive Canons: The Role of Legislative Bargains in Statutory Interpretation," *Geo. L. J.* 80: 705; McNollgast (1994) "Legislative Intent: The Use of Positive Theory in Statutory Interpretation," *L. and Contemp. Probs.* 57: 3-37; Rodriguez, Daniel B. and Barry R. Weingast (2003) "The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation," 151 *University Of Pennsylvania Law Review* 1417.

I. A Brief Discussion of our Assumptions and their Justifications

Our analysis builds upon the following core assumptions:

First, we assume that ***statutes are authoritative policy communications from the legislature to agencies, courts, and society.*** Communication is defined as the "exchange of thoughts, messages, or information, as by speech, signals, writing, or behavior."[10] Although communication may generally involve everything from speech to the frequency modulation of radio waves, statutes are written communications of policy and of the processes by which policy is to be made.

Second, we assume that ***communication requires a sharing in common*** (from the Latin root comm$\bar{u}$nis), which in the case of statutes is the common meaning of information conveyed by written text.

Finally, we assume that ***written communication requires interpretation.*** Just as books, law review articles, court decisions, pictures, and other forms of written communication require interpretation, so too do statutes. The task of interpretation requires an interpreter to discern the meaning of the communication. The interpreter may be unable to do so for two different reasons. First, there may be no shared meaning; for instance, the communicator and interpreter may speak a different language. Second, there may be insufficient or inadequate information to guide the interpreter. If, for either reason, the interpreter is unable to discern adequately the meaning of the communication, there is, for all intents and purposes, no communication.

[10] *American Heritage Dictionary of the English Language*, fourth edition.

Communications need not be unambiguous, however, for interpreters to recover successfully their meaning. The following figure of a circle with two triangles and six straight lines illustrates this point.

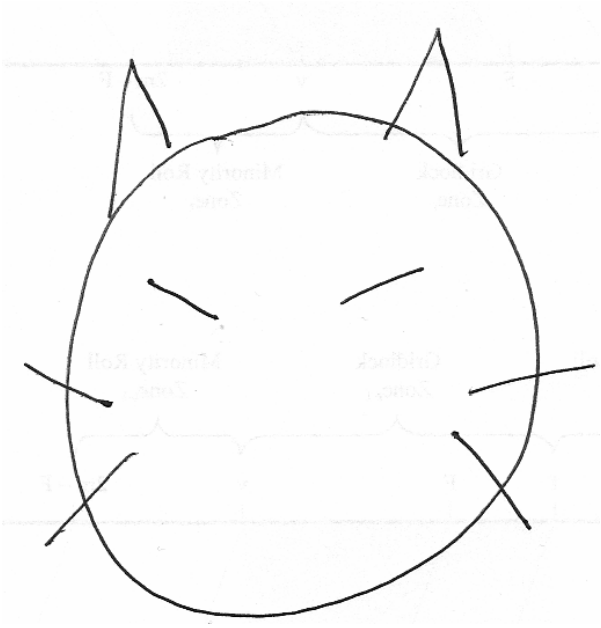

Figure 1: Mat's Cat

The purpose of this drawing is to present an analogy. The shared meaning that we intended to convey by the drawing is "cat." The drawing itself is very simple and involves some ambiguity. Yet, everyone to whom we have shown this drawing, young and old, from near and far, even those without an elementary school education, when we asked them to tell us what the drawing was said "cat." Indeed, almost everyone, when sighting a similar drawing without the whiskers, also interpreted the drawing as a cat. Thus, although the drawing, because of its simplicity, presents some ambiguity, no one yet has interpreted its meaning incorrectly.

Before turning, in the next part of this paper, to the heart of our analysis, we offer a brief defense of our assumptions. We note that these assumptions each raise complex, analytically rich issues that have been worked over by legal scholars, political scientists,

philosophers, and other smart folk for many years. Since the objective of our paper is not to reconfigure this interdisciplinary debate or to develop a brand new theory of law or communication, we will keep our discussion in this section fairly simple and straightforward. It is important, nonetheless, for the reader to understand clearly what we believe in order to press ahead in his examination of whether and to what extent the analysis of positive political theory, communication theory, and statutory interpretation is adequately supported by these beliefs and their rationale.

Let us begin with the venerable question of whether statutory interpretation reflects our fidelity to legislative supremacy and the Constitutional structure of legislative and judicial power. We believe firmly that interpreting the meaning of statutes is truly a project defined by Article I, Section 7 of the Constitution; in other words, the legislature's communications are supreme precisely because the Constitution so says. Because Article I of our Constitution grants sole legislative authority to Congress and the president, the interpretation of statutes requires interpreters to discern the legislature's intended meaning. Though the text of the Constitution does not say so explicitly, its architecture and history is best understood as prohibiting interpreters from substituting their own meaning for that of the legislature. Indeed, as Hamilton noted in *Federalist No. 78*:

> It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature…The courts must declare the sense of the law; and if they should be disposed to exercise *will* instead of *judgment*, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.[11]

[11] *Federalist No. 78*, emphasis in original.

This fundamental assumption is a common one in the literature on statutory interpretation. Not surprisingly, many influential scholars believe in this view of judicial discretion and the proper objective of statutory interpretation. As a leading "textualist" scholar, Manning notes:

> [I]f Congress legislates within constitutional boundaries, the federal judge's constitutional duty is to decode and follow its commands, particularly when they are clear…the U.S. Constitution explicitly disconnects federal judges from the legislative power and, in so doing, undercuts any judicial claim to derivative lawmaking authority.[12]

Yet, the assumption of legislative supremacy is embraced more generally by a wide range of scholars writing on statutory interpretation. Judge Mikva and Lane capture the point:

> Most simply put, Congress makes laws and the courts are intended to resolve those relatively few disputes that arise from the application of these laws. Few would disagree (at least in theory) with Judge Posner's frequently quoted expression of legislative supremacy: a statute is "a command issued by a superior body (the legislature) to a subordinate body (the judiciary)."[13]

To summarize the argument, an overt effort to substitute the judge's sense of what the statute ought to mean for the meaning that the legislature intended to convey is an unconstitutional exercise of legislative power on the part of judges, essentially equivalent to statutory amendment or revision.

Beyond the constitutional argument, however, the idea embedded in the first assumption described above (that is, that statutes are authoritative policy communications) can be grounded in what scholars would regard as the nature of legislation as a form of communication. Dworkin writes that "legislation is an act of

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[12] Manning, John F. (2001) "Textualism and the Equity of the Statute," 101 *Columbia Law Review* 1, 5-6, 58-59.

[13] Mikva, Abner J. and Eric Lane (2000) "The Muzak of Justice Scalia's Revolutionary Call to Read Unclear Statutes Narrowly," 53 *Southern Methodist University Law Review* 121, 124.

communication to be understood on the simple model of speaker and audience, so that the commanding question in legislative interpretation is what a particular speaker or group 'meant' in some canonical act of utterance."[14]

In a similar vein, Farber and Frickey[15] argue that statutes enable legislators to communicate, and they, like us, emphasize that ambiguity often surrounds the interpretation of statutes. Specifically, they note that:

> The idea of a statute as an unclear communication can be easily translated into a model by assuming that the statute has a number of interpretations (each of which is unambiguous); the problem is that the recipient is unsure of which interpretation is intended. Let us call the various interpretations x[1], x[2], x[3], . . . x[n]. Some of the interpretations are more probable than others as descriptions of the drafter's actual intent.

Even scholars of communication theory recognize that statutes are communications. Indeed, as early as the 1960's, Pierce[16] emphasized that:

> If we regard language as an imperfect code of communication, we must ultimately refer meaning back to the intent of the user. It is for this reason that I ask, 'What do you mean?' even when I have heard your words. Scholars seek the intent of authors long dead, and the Supreme Court seeks to establish the intent of Congress in applying the letter of the law.

Although less explicit than the above statements, the assumption that statutes are communications pervades the literature on statutory interpretation.[17] Indeed, this

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[14] Dworkin, pp. 348-349.

[15] Farber, Daniel A., and Philip P. Frickey (1988) "Legislative Intent and Public Choice," *Va. L. Rev.* 74: 461-464.

[16] Pierce, John R. (1961) *Symbols, Signals, and Noise: The Nature and Process of Communication*, Harper and Brothers: 118.

[17] There are notable exceptions to this generalization. Alienikoff (1988), for example, assumes that statutes are like ships, while Langdell assumed implicitly that statutes are like tumors. Alienikoff, T. Alexander (1988) "Updating Statutory Interpretation," *Mich. L. Rev.* 87: 20.

assumption is reflected in McNollgast's[18] discussion of how statutes are like instruction manuals, in Eskridge's[19] assumption that statutes are like novels, and in the standard description of 19th century (Holmes[20]) and 20th century views among influential legal theorists (from Pound[21] to Posner[22] and beyond) that statutes are best viewed as authoritative commands from the sovereign.

Lastly, there is a practical aspect to our assumption – our fundamental belief –that statutes are communications. This aspect involves the distinction between a communication that purports to be authoritative and one that is merely illustrative. Although statutes are, in their form, textual communications not unlike books, speeches, and even drawings, we would emphasize one crucial difference between the interpretation of statutes and the interpretation of these other types of communications: When interpreting ordinary communications, the consequences of failing to discern the author's intended meaning are relatively minor; however, when interpreting statutes, failing to discern the legislature's intended meaning violates the command of the

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[18] McNollgast (1989) "Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies." *Virginia Law Review* 75: 431–82; McNollgast (1987) "Administrative Procedures as Instruments of Political Control," *Journal of Law, Economics, and Organization* 3: 243-277.

[19] Eskridge, William N., Jr. (1990) "Gadamer/Statutory Interpretation," *Colum. L. Rev.* 90: 609.

[20] Holmes, Oliver Wendell (1899) "The Theory of Legal Interpretation," 12 Harvard Law Review 417.

[21] Pound, Roscoe (1907) "Spurious Interpretation," 7 *Columbia Law Review* 379.

[22] Posner, Richard A. (1987) "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution," *Case Western Reserve L. Rev.* 37: 179.

legislature, framed by the Constitution as discussed above, to its audience to obey the law.

Perhaps the best way to illustrate the distinction between the interpretation of statutes and the interpretation of ordinary communications is to return to our drawing of Mat's cat. In the context of that drawing, the consequence of either a mistaken interpretation or a deliberately contrary substitution of meaning is rather minor, for our drawing is not authoritative; it is merely illustrative. It may indicate that the viewer is ignorant or defiant, but the consequence of the obstruction is not great. Statutes, however, are authoritative and binding. When an interpreter substitutes his or her own meaning for the meaning intended by Congress and the President, the interpreter is usurping the authority granted to the legislature by the Constitution and consented to by the public. Such actions are illegitimate, in that they serve to undermine democratic principles.

The second and third assumptions are based upon overlapping common sense views about the nature of communication. By definition, communication requires a sharing in common. Not only is this part of the etymology of the term – communication derives from the Latin "communis" — but it also makes good sense that efforts by one person to communicate with another supposes that they have shared purposes. Two individuals who do not speak one another's language will, without further aids, find it rather difficult to make sense of what the other says; similarly, someone who does not understand the terms and symbols common to say, modern calculus, will hardly be able to understand what the mathematician intends to communicate with her formula. So, we offer no particularly sophisticated view about how the "sharing in common" is

accomplished; disciplines ranging from communication theory to linguistics to anthropology continue to advance our understanding of these vital questions. Our point here is just the simple one that communication requires, *at the very least*, a sharing in common in order to assess its meaning.

Relatedly, discerning the meaning of any written communication, including statutes, requires interpretation. Therefore, the declaration by steely-eyed textualists that statutory interpretation frequently requires little more than simply reading the words of the statute and applying them to the facts at hand is misleading. All written communications, whether expressed clearly or ambiguously, require interpretation to discern their meaning and, therefore, to give effect to the objective of the communicator – in the case of statutes, the legislature.

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The analysis in the rest of this paper is forged from these assumptions. We are interested here in exploring how the elements of communication theory, cognitive science, and modern positive political theory help illuminate the raging debate about statutory meaning and interpretation. To the extent that the reader views any of the foregoing assumptions as flawed, then the connections between communication theory, lawmaking theory, and prescriptive theories of interpretation, will naturally be unconvincing. A more thorough defense of the assumptions described above lies beyond

the scope of this paper.[23] We proceed, then, to an extended discussion of communication – of written texts and, in particular, of statutes in the modern administrative state.

II. Communication Theory and Statutory Meaning

A. Communication, Compression, and Expansion

The process of communication and the requirements for accurate interpretation are the same for statutes as they are for other forms of communication. Indeed, the literature on communication theory and cognitive science suggests that the process of communication is ubiquitous; that is, whether we are communicating written words, electrical signals, spoken language, gestures, or viruses, all communication involves the processes of ***compression*** and ***expansion***.[24] In general, compression takes a large domain of information and transforms it flexibly so that the compression can be carried forward for future expansion. Ideas and concepts are compressed into language and transmitted by actions such as speaking, writing, and gesturing; this is analogous to the process by which our voices are compressed into electrical signals, transmitted through wires, and then expanded back into sound waves when we talk on the phone.

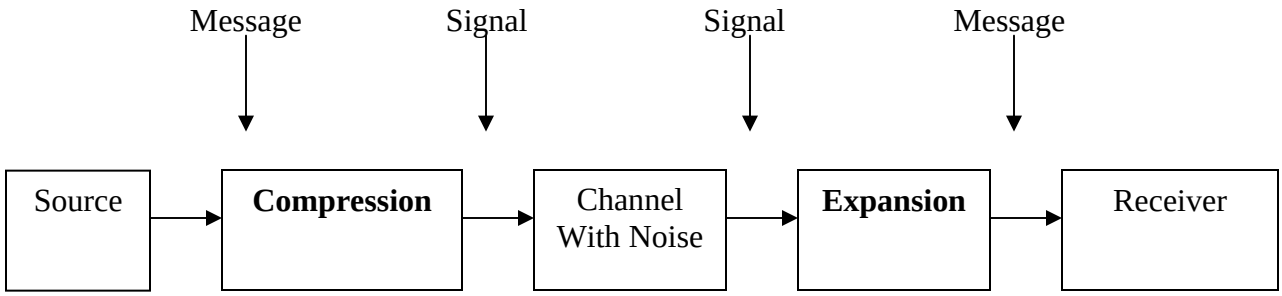
The compression and expansion of information is nowhere more apparent than in the communication of electronic data, something we do every time we click the keys on

[23] See McCubbins, Mathew D. and Daniel B. Rodriguez (2005) *What Statutes Mean: Positive Political Theory and the Interpretation of Federal Legislation.*

[24] Shannon, C. E. (1948) "A Mathematical Theory of Communication," *The Bell System Technical Journal*, 27: 379-423; Pierce, John R. (1961) *Symbols, Signals, and Noise: The Nature and Process of Communication*, Harper and Brothers: 118; Fauconnier, Gilles and Mark Turner (2002) *The Way We Think: Conceptual Blending And The Mind's Hidden Complexities*. New York: Basic Books; Jackendoff, Ray (1994) *Patterns in the Mind*. New York: BasicBooks, A Division of Harper Collins Publishers.

our computer keyboards. For example, when communicating data, there are various stages that the sender's signal must go through before it reaches the receiver. The two most crucial stages of this process are compression and expansion.[25] As shown in Figure 2, in the communication process the signal begins as a message that the sender transmits through a channel. In the channel, the message is compressed into an electrical signal, which then passes through a transmitter. The transmitter then expands the signal back into a message that it relays to the receiver. What the receiver is able to discern from the message at the end of this process is the information that was successfully transmitted.

Figure 2. The Process of Communication.



While the model of compression and expansion of information was developed in the context of electrical signals, the concepts are not unique to this technological example, but characterize as well human communication. To take a simple example, consider Figure 3's depiction of the simple act of communication between two men. In

[25] Pierce, John R. (1961) *Symbols, Signals, and Noise: The Nature and Process of Communication*, Harper and Brothers: 118; MacKay, David J.C. (2003) *Information Theory, Inference, and Learning Algorithms*. Cambridge: Cambridge University Press; Shannon, C. E. (1948) "A Mathematical Theory of Communication," *The Bell System Technical Journal*, 27: 379-423.

this example, the man labeled "George" has a thought that he wishes to communicate with the man labeled "Dick." Before George can communicate this thought, however, he must compress it into a sound wave that can be transmitted through the air to Dick. Although not reflected in the figure, the compression of George's thought is achieved through networks of interconnected neurons that compress his thought into motor instructions, which then signal his vocal tract to produce sound waves.[26] Also not reflected in the figure are the menu of signals that George may choose from to send to Dick and that there may or may not be a one-to-one correspondence between thoughts and signals.[27] The sound waves that George produces are then transmitted through the air to Dick, whose ear turns the sound waves into auditory patterns, matching a pattern of interconnected neurons, that his brain can further expand back into a thought. In this way, the compression and expansion of information enables humans to communicate successfully with one another.[28]

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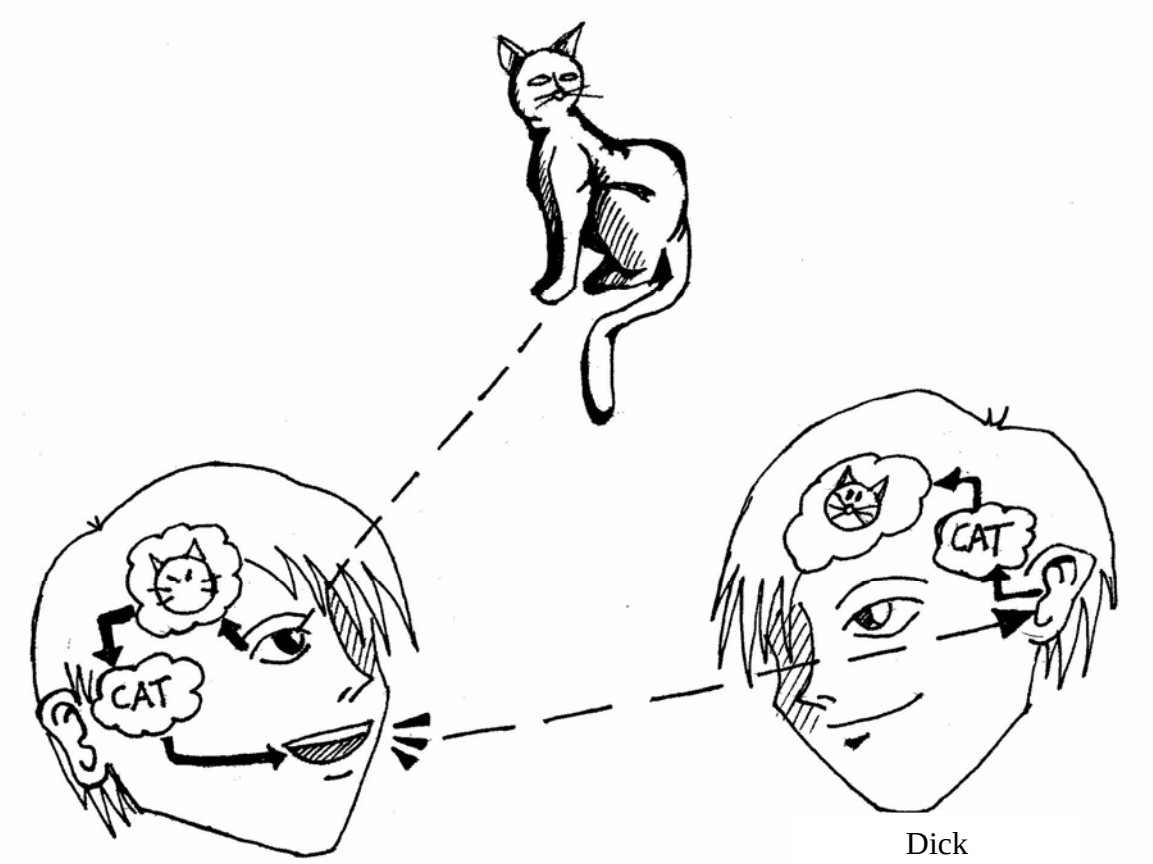
[26] Churchland, Patricia S. and Terrence J. Sejnowski (1992) *The Computational Brain*. Cambridge: The MIT Press; Jackendoff, Ray (1994) *Patterns in the Mind*. New York: BasicBooks, A Division of Harper Collins Publishers.

[27] Fauconnier, Gilles and Mark Turner (2002) *The Way We Think: Conceptual Blending And The Mind's Hidden Complexities*. New York: Basic Books; Jackendoff, Ray (1994) *Patterns in the Mind*. New York: BasicBooks, A Division of Harper Collins Publishers. To see how there may not be a one-to-one correspondence between thoughts and signals, one need only return to Figure 2. There, we depict how three-dimensional objects in the world around us are compressed into two-dimensional images in our brains and, ultimately, into sound waves. In this process of compression, some information and detail is inevitably lost, but such loss usually does not prevent us from discerning meaning. For a discussion of such "lossy" compression, see Shannon, C. E. (1948) "A Mathematical Theory of Communication," *The Bell System Technical Journal*, 27: 379-423.

[28] Jackendoff, Ray (1994) *Patterns in the Mind*. New York: BasicBooks, A Division of Harper Collins Publishers; Fauconnier, Gilles and Mark Turner (2002) *The Way We Think: Conceptual Blending And The Mind's Hidden Complexities*. New York: Basic

Figure 3. The Process of Human Communication



Whether we are compressing and expanding electrical signals, human thoughts, or some other type of information, *successful communication requires a correspondence between the way that information is compressed and the way that it is expanded*. To understand exactly what we mean by this, consider the following elaborations of the two examples described above: With respect to the communication of electrical signals, communication theorists have long noted that the algorithms used to compress and expand information must correspond to each other (i.e. the compression algorithm must

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Books; Churchland, Patricia S. and Terrence J. Sejnowski (1992) *The Computational Brain*. Cambridge: The MIT Press.

be the inverse of the expansion algorithm). These theorists then note that if this correspondence is lacking, there is a risk that error will be added to the signal that is being transmitted.[29] The addition of error drastically reduces the probability that the receiver will be able to interpret the signal accurately—an outcome that harms both the sender and the receiver.[30] Given the harm that the loss of information in this context may cause, communication theorists strive to design communication systems so that the compression and expansion algorithms correspond to one another.

Returning to our example of communication between two men, it again becomes apparent that compression and expansion processes must correspond to each other. Indeed, if Dick's ears and brain were not equipped to expand the sound waves that George's brain compressed and voice transmitted, then there could be no communication between them. In this way, communication between humans is made possible by our corresponding ways of compressing and expanding information.

The point to take away from the forgoing discussion is simple: *Discerning the meaning of any communication requires compression and expansion processes that correspond to one another.* Indeed, communication requires, to as great a degree of perfection as possible, that the expansion algorithm used be the inverse of the compression algorithm employed. This statement is true of any form of communication—be it written, spoken, electrical, or even cellular—but because our focus

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[29] Pierce, John R. (1961) *Symbols, Signals, and Noise: The Nature and Process of Communication*, Harper and Brothers: 118; MacKay, David J.C. (2003) *Information Theory, Inference, and Learning Algorithms*. Cambridge: Cambridge University Press.

[30] Pierce, John R. (1961) *Symbols, Signals, and Noise: The Nature and Process of Communication*, Harper and Brothers: 118; MacKay, David J.C. (2003) *Information Theory, Inference, and Learning Algorithms*. Cambridge: Cambridge University Press.

is on discerning the meaning of the legislature's written communications, we devote the remainder of this paper to an analysis of the compression, expansion, and interpretation of statutes.

B. The Compression of Legislative Meaning

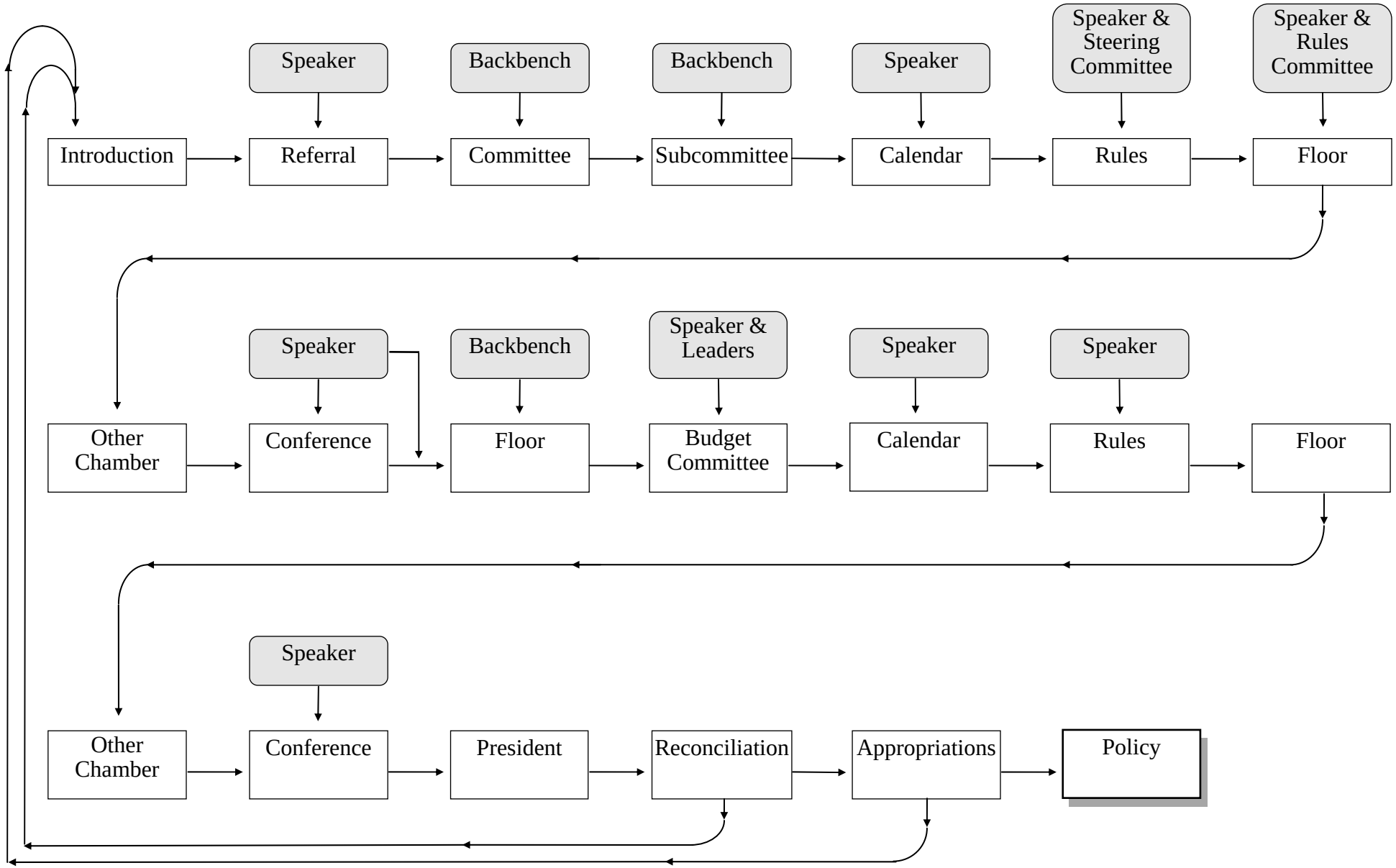
In our view, statutes are compressed policy instructions or procedural guidelines,[31] chosen by the legislators who pass them (specifically, by members of the majority party), and subsequent actors (such as judges, agencies, or citizens) are left to expand their meaning when applying or interpreting them. Because discerning the meaning of such communications requires corresponding compression and expansion schemes, the interpretation of federal statutes *must* begin with an examination of the legislative process of the U.S. Congress. Indeed, if we ignore the process by which members of the majority party compress meaning when writing statutes, how are we to develop an expansion scheme that accurately discerns such meaning? We cannot develop a proper expansion scheme without an understanding of the legislative process. For this reason, we now briefly discuss the various stages of the legislative process with an eye toward developing a corresponding expansion scheme that jurists can use when interpreting statutes.

[31] Note that our analysis applies to "framework legislation," as well. As Garrett notes, framework legislation creates guidelines that structure congressional lawmaking, and it also establishes internal procedures that structure legislative voting and deliberation. Far from being mere frameworks, however, such legislation is frequently part of more comprehensive laws that include delegations of authority to the executive or that have legal effects beyond merely influencing congressional procedure; Garrett, Elizabeth (2004) "The Purposes of Framework Legislation," USC Law and Public Policy Research Paper No. 04-3. See also Rubin (1988). Although Congress may provide such procedural guidelines, these statutes remain communications even if the policies are developed later and through implementation instruments such as agencies.

As shown in Figure 4, federal legislators in the United States must go through a number of stages in order to pass statutes, and each of these stages is controlled by members of the majority party.[32] Indeed, legislators typically delegate the legislature's agenda-setting authority and the task of allocating the legislature's scarce resources to the majority party leadership. Given this delegation of authority, the issue becomes how members assure that the people to whom agenda-setting power has been delegated do not take advantage of this authority and use it for their own, personal gain. In general, legislators use checks and balances to solve this dilemma. They provide others with a veto over the actions of agenda setters and give these others an opportunity and incentive to act as checks. These checks and balances may be very subtle. In the United States House of Representatives, for example, backbenchers may check the actions of their leaders through the committee process and must give their consent and approval to their leaders' actions in plenary meetings.

[32] Cox, Gary W. and Mathew D. McCubbins (1993) *Legislative Leviathan: Party Government in the House*. Berkeley: University of California Press; Cox, Gary W. and Mathew D. McCubbins (2005) *Setting the Agenda: Responsible Party Government in the U.S. House of Representatives*. Cambridge: Cambridge University Press; Kiewiet, D. Roderick and Mathew D. McCubbins (1991) *The Logic of Delegation: Congressional Parties and the Appropriations Process*. Chicago: University of Chicago Press; Gamm, Gerald and Steven S. Smith (2002) "Policy Leadership and the Development of the Modern Senate." In *Party, Process, and Political Change in Congress: New Perspectives on the History of Congress*, eds. David Brady and Mathew D. McCubbins, Stanford: Stanford University Press; Jones, Charles O. (1968) "Joseph G. Cannon and Howard W. Smith: An Essay on the Limits of Leadership in the House of Representatives." *Journal of Politics* 30: 617-46.

Figure 4. How a Proposal Becomes a Policy in the US House of Representatives, Highlighting Aspects of Party Control



For our purposes, it is important to note the numerous places where a statute may be discussed, revised, or amended by legislators in the majority party. For example, in the initial stages of the congressional lawmaking process, the majority party members of substantive committees in each chamber possess significant agenda control within their jurisdiction. It is at this stage where the drafting of statutes begins, where the writing of committee reports takes place, and where conversations between committee chairs and majority party committee members are held. Additionally, because the majority party in Congress always has a majority of seats on each substantive committee, members of the minority party are largely shut out of even this early stage of the legislative process.

As a given proposal approaches the floor, the majority party's influence continues to grow. Indeed, the majority party's members delegate to their leadership to represent their interests on a broad variety of matters. The Rules Committee and the Speaker—as well as the Appropriations Committee if any funding is required to implement the proposal—check committee members' ability to propose legislation, for these two central coordinating bodies control access to plenary time. If a substantive committee's proposal is not representative of the majority party's collective interests, and if it is an issue of importance to the majority party, then either the Speaker or the Rules Committee is likely to kill the proposal.

Before a proposal leaves the chamber, there are floor debates, floor amendments, and the votes themselves. During floor debates, the bill manager for the majority party controls the time that is devoted to debate and to particular amendments, determining which members speak and for how long. It is not unusual for a number of amendments to be added to a proposal during this stage, unless, of course, the majority party-controlled

Rules Committee grants a special rule that limits the number and nature of amendments. Further, given the majority party's influence at nearly every stage of the legislative process, by the time the proposed legislation reaches a final-passage vote on the floor, the majority party has typically ensured its own victory[33] (although there are occasionally instances where the majority party and its leaders must corral a few additional votes on the floor, and although these marginal votes typically come from within the ranks of the majority, majority party leaders have been known to reach across the aisle for marginal support, which in turn makes one or more members of the minority pivotal in closely divided congresses).[34]

Daniel Rodriguez and Barry Weingast (2005) provide an example of a famous situation in which legislators in the majority party collaborated successfully with pivotal members of the minority party to secure assent on a controversial piece of legislation. In 1963-64, Congress struggled with civil rights legislation. Ardent supporters of a strong civil rights bill could not, under the circumstances of the 89th Congress, collect enough sympathetic legislators in the Senate to overcome the formidable Southern filibuster. At the same time, ardent opponents of civil rights could not kill civil rights legislation once and for all. To the rescue came key moderate Republican legislators, led by Senator Everett Dirksen of Illinois. Senator Dirksen's support of a strong, but not extreme,

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[33] Cox, Gary W. and Mathew D. McCubbins (2005) *Setting the Agenda: Responsible Party Government in the U.S. House of Representatives*. Cambridge: Cambridge University Press.

[34] Rodriguez and Weingast (2005) provide an excellent example and analysis of the process by which a minority Senator becomes the pivotal player in the passage of landmark legislation. Rodriguez, Daniel B. and Barry R. Weingast (2003) "The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation," 151 *University Of Pennsylvania Law Review* 1417.

version of federal legislation, was critical in swaying a sufficient number of Republicans to join with their Democratic allies to accomplish the remarkable feat of enacting civil rights legislation in 1964. The civil rights story illustrates well the imperative of majority party strategy in situations of contentious legislative policymaking efforts. The majority party sets the agenda and structures the decision making process; yet, the cobbling together of coalitions essential to overcome organized dissent and to accomplish the aims of the party requires considered strategic behavior.[35]

The congressional process is, in essence, a running conversation, wherein some members, specifically those to whom the majority party has delegated authority to set the agenda and write statutes, use the tools required by their principals, such as committee reports, statements by the bill manager, communications by the party whips, and so on, to signal the meaning of their actions, the statutes they have written, to the remaining members of the majority party. As we will discuss below, checks and balances within the legislative process serve to make these communications trustworthy. The system may not be transparent to members of the minority party, who are often even left out of committee meetings and hearings, and who are limited in their ability to affect the choice of statutory language, both in committee and on the floor.

However, this system is transparent for members of the majority party, as the above discussion demonstrates. Throughout the legislative process, the compression of legislative meaning occurs in a number of ways and at a variety of stages, beginning with the drafting of statutes, proceeding to the writing of committee reports and to the

[35] See McNollgast (1994) "Legislative Intent: The Use of Positive Theory in Statutory Interpretation," *L. and Contemp. Probs.* 57: 3-37, for further discussion of the role of pivotal legislators in structuring intra-legislative compromise and in shaping the interpretation of statutes.

debating of statutes on the floor, and ending with the bill manager's statements and floor amendments. Because each of these stages involves the compression of meaning on the part of legislators in the majority party, a proper expansion scheme must correspond to these stages. In other words, to properly expand the compressed communication, the interpreter must understand well the processes by which the communication worked its way through the legislative process.

III. The Expansion of Legislative Meaning

A. Proper Expansion: Intentionalism

An intentionalist approach, founded on positive political theory (PPT) and the economics of signaling, is an expansion scheme that corresponds directly to the ways that legislators compress statutory meaning.[36] The modern PPT approach begins and ends

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[36] McNollgast (1992) "Positive Canons: The Role of Legislative Bargains in Statutory Interpretation," *Geo. L. J.* 80: 705; McNollgast (1994) "Legislative Intent: The Use of Positive Theory in Statutory Interpretation," *L. and Contemp. Probs.* 57: 3-37; Vermeule, Adrian (1998) "Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church," 50 *Stanford Law Review* 1833; Vermeule, Adrian (2005) "The Judiciary is a They, Not an It: Interpretation and the Fallacy of Division," *Journal of Contemporary Legal Issues*; Vermeule, Adrian (forthcoming) "Three Strategies of Interpretation," *University of San Diego Law Review*; Rodriguez, Daniel B. and Barry R. Weingast (2003) "The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation," 151 *University Of Pennsylvania Law Review* 1417; Schwartz, E.P., P.T. Spiller, and S. Urbiztondo (1993) "A Positive Theory of Legislative Intent," *Law and Contemporary Problems*, 57: 51-76; Gely, R. and Spiller, P. (1990) "A Rational Choice Theory of Supreme Court Statutory Decisions, with Applications to the State Farm and Grove City Cases" 6 *Journal of Law Economics and Organizations* 263; Marks, Brian (1989) "A Model of Judicial Influence on Congressional Policymaking: *Grove City College v. Bell* (1984)" (doctoral dissertation available on microfiche at the University of Michigan Library).

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with the recognition that the legislative process reflects a "conversation" among legislators. Indeed, at each stage of the legislative process, legislators communicate with each other and compress meaning by drafting statutes, writing committee reports, participating in floor debates, offering amendments, and engaging in various other legislative tasks. Key to our approach is the notion that judges must "listen to" and interpret these "conversations" from the vantage point of *a fly on the wall*; that is, judges must not assume that legislators were speaking to them in their conversations, nor may judges treat legislators' conversations as though legislators were listening naively to everything or being lied to about everything. Rather, judges must passively listen to legislators' conversations so that their expansions (interpretations) correspond to the way that statutory meaning was compressed.

So what tools enable judges, as flies on the wall, to achieve a correspondence between the compression and expansion of statutory meaning? We advocate two such tools—namely, the intentional stance and (portions of) legislative history—both of which reflect how legislators compress statutory meaning and enable judges to expand such meaning accurately.

In another paper, [37] we describe intentionalist theories of interpretation as an approach to discerning statutory meaning in which courts take, to use philosopher Daniel Dennett's terminology, an "intentional stance."[38] Courts should not suppose that legislators necessarily have a coherent intent in the ordinary sense in which we view

[37] Boudreau, Cheryl, Mathew D. McCubbins, and Daniel B. Rodriguez (2005) "The Intentional Stance," *Loyola Law Review*.

[38] Dennett, Daniel C. (1987) *The Intentional Stance*. Cambridge: The MIT Press.

individuals as having intentions; rather, the intentional stance provides the tool used by all humans (be they judges, legislators, or ordinary citizens) on a constant basis to figure out what the actions and statements of others mean; it requires us to do nothing more than treat the individual or collectivity whose meaning we seek to understand as a rational actor with beliefs, desires, and intentions.[39]

This process of imputing intentions to those we seek to understand is a fundamental characteristic of human cognition, and for this reason, it should pose no problems for judges observing the legislative process as flies on the wall. Indeed, all the intentional stance requires of judges is that they treat legislators as though they are rational actors with beliefs, desires, and intentions and then interpret their statements in this light. *Such a method of interpretation necessarily corresponds to the ways that legislators compress statutory meaning because legislators, like all humans, also adopt an intentional stance when communicating with each other and interpreting one another's statements and actions.* In this way, the use of the intentional stance guarantees a correspondence between the compression and expansion of statutory meaning.

A second tool that enables judges as flies on the wall to discern accurately statutory meaning is legislative history.[40] In contrast to canons of construction, legislative history is created by legislators as they pass specific statutes, and it allows judges to be privy to legislators' conversations about particular statutes. Indeed, because

[39] *Id*. at 15.

[40] Legislative history is widely, though often clumsily, used. For a discussion of such clumsy uses, see McNollgast's analysis of *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972). McNollgast (1992) "Positive Canons: The Role of Legislative Bargains in Statutory Interpretation," *Geo. L. J.* 80: 705; McNollgast (1994) "Legislative Intent: The Use of Positive Theory in Statutory Interpretation," *L. and Contemp. Probs.* 57: 3-37.

committee reports, legislators' speeches, amendment votes, and other pieces of legislative history are generated in the legislative process, using these sources to discern the meaning of statutes provides the necessary correspondence between the way that legislators compress statutory meaning and the way that judges expand it.

IV. Not all Legislative History is Created Equal

Having advocated legislative history as a tool for statutory interpretation and as a key component of our approach, we in no way suggest that judges ought to use legislative history indiscriminately. In what follows, we emphasize that not all legislative history is created equal, for some aspects of legislative history are trustworthy indicia of legislative meaning and others are not. Thus, the task for judges interpreting statutes is to determine which aspects of legislative history are trustworthy and to rely only upon those when discerning the meaning of statutes.

How are judges to sort through the many sources of legislative history and determine which sources are trustworthy? At first blush, the proper use of legislative history does indeed seem to be an onerous task—one to which scholars often refer when they discuss the intractability of legislative history and the need for other, simpler methods of interpretation. Rather than throw our hands up in capitulation and dismiss the use of legislative history as an impossible endeavor, we emphasize that judges, as flies on the wall, should deem trustworthy only those sources that were trustworthy for legislators at the time of the communication. Stated differently, if legislators in their conversations ignore certain sources of information because they are not trustworthy, then so, too, should judges. In this way, our approach identifies trustworthy sources of legislative

history, corresponds to the sources that legislators relied upon, and provides judges with simple guidelines for the proper use of legislative history.

Given the importance of identifying trustworthy sources of information, we now draw upon the economics of signaling to identify various conditions required for trust. We then show that the conditions for trust identified by the economics of signaling are valid by surveying laboratory experiments that test their validity. We next apply the conditions for trust to the legislative process and analyze the various sources of information that legislators can (and cannot) trust. We then argue that judges "innocently eavesdropping" on legislators' conversations should interpret statutes based only upon those sources that legislators themselves would trust. It is to a discussion of the conditions for trust and their implications for the use of legislative history that we now turn.

A. The Conditions for Sincerity and Trust

The economics of signaling helps judges draw reliable judgments about the sincerity and trustworthiness of the statements that legislators make when passing statutes. We say that a legislator is *sincere* when either internal interests or external forces appear to induce him to make truthful statements. Since a legislator can be induced into speaking sincerely, sincerity is not to be confounded with any lofty notion of virtue. We simply say that an actor is sincere when his self-interests are consistent with making statement that he believes to be true.

To help judges gauge legislators' sincerity, we discuss the set of institutional, contextual, and personal factors that affect legislators' incentives when making

statements. A benefit of our framework is that it integrates elements from the economic theory of the firm, as well as insights from economic cheap-talk and signaling models.[41] This integration is beneficial because it allows us to identify a rather broad class of factors that are substitutes for each other as determinants of sincerity.

When are legislators sincere? That is, when do they make statements based on what they believe to be true? Sincerity, or truthful revelation as it is often called, is a familiar concept to economic theorists. However, sincerity is more often invoked as an assumption than it is treated as a strategic choice. In contexts such as the legislative process, incentives to grandstand, exaggerate, or misrepresent the truth may be great. Thus, it is important to understand the conditions under which legislators have incentives to speak sincerely when making statements. Assuming sincerity is not good enough.

Of course, not all theories assume sincerity. Many previous answers to questions about when a rational actor will reveal private information suggest that "reputation," "repeated play," or personal attributes of the actor are key.[42] A fundamental problem

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[41]See Lupia, Arthur and Mathew D. McCubbins (1998) *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* Cambridge: Cambridge University Press, or Tirole, Jean (1988) *The Theory of Industrial Organization.* Cambridge, Mass.: MIT Press, for a survey of these approaches.

[42] Many political scientists and economists, following an Aristotelian perspective, find that sincerity can be induced by factors including repeated play, reputation, common interests, common ideology, common partisan identification, common racial identity, common ethnicity, common social interaction patterns, or common gender. See, e.g., Downs, Anthony (1957) *An Economic Theory of Democracy*. New York: Harper; Campbell, Angus, Philip E. Converse, Warren E. Miller, and Donald E. Stokes (1960) *The American Voter*. New York: Wiley; Crawford, Vincent, and Joel Sobel (1982) "Strategic Information Transmission." *Econometrica* 50: 1431–51; Calvert, Randall L. (1985) "The Value of Biased Information: A Rational Choice Model of Political Advice." *Journal of Politics* 47: 530–55; Milgrom, Paul, and John Roberts (1986) "Relying on the Information of Interested Parties." *Rand Journal of Economics* 17: 18–31; Banks, Jeffrey S. (1991) *Signaling Games in Political Science*. Chur, Switzerland: Harwood Academic

with these answers, which provides the starting point for our explanation of sincerity, is that they are either question begging or incorrect.

Arthur Lupia and Mathew McCubbins have examined whether and how political decision makers can adapt to the strategic interactions that characterize politics.[43] They built the model from premises in cognitive science and psychology, lessons from the study of political institutions, and the strategic communication models first developed by Crawford and Sobel.[44] They then identified the conditions under which one strategic actor can learn from the statements of another, conditions under which cognitively limited actors can use the advice of others to adapt to their own limited information, and the conditions under which the design of institutions affects communication and decision making. We can apply an element of that research to the problem at hand -- identifying necessary and sufficient conditions for sincerity in the legislative context.[45] In what follows, we provide the intuition behind these conditions.[46]

Publishers; Popkin, Samuel L. (1991) *The Reasoning Voter: Communication and Persuasion in Presidential Campaigns*. Chicago: University of Chicago Press; Sniderman, Paul M., Richard A. Brody, and Philip E. Tetlock (1991) *Reasoning and Choice: Explorations in Political Psychology*. Cambridge: Cambridge University Press.

[43] Lupia, Arthur and Mathew D. McCubbins (1998) *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* Cambridge: Cambridge University Press; Lupia & McCubbins (2000).

[44] Crawford, Vincent, and Joel Sobel (1982) "Strategic Information Transmission." *Econometrica* 50: 1431–51.

[45] When should a person be believed? There are, of course, several well-known answers. Aristotle was only the first to argue that personal character is the key determinant of sincerity; Barnes, Jonathan, ed. (1984) *The Complete Works of Aristotle: The Revised Oxford Translation.* Princeton, N.J.: Princeton University Press, p. 2194. Social psychologists posit emotional explanations (e.g., Hovland, Carl I., Irving L. Janis, and Harold H. Kelley (1953). *Communication and Persuasion: Psychological Studies of Opinion Change*. New Haven, Conn.: Yale University Press; O'Keefe, Daniel J. (1990) *Persuasion: Theory and Research.* Newbury Park, Calif.: Sage, Chapter 7).

The goal of their previous research was to derive the conditions under which persuasion and enlightenment (e.g., gaining knowledge) are the consequence of strategic communication.[47] In the context of that research, Lupia and McCubbins proved that sincerity requires neither reputation, nor repeated play nor any shared attribute such as *common interests, partisanships, ideologies, or backgrounds.* A person's attributes—past history (reputation), ideology, partisanship, reputation, actual level of knowledge, or affective relationship to the listener—may in fact have no bearing whatsoever on whether or not he is sincere.

Instead, they found that external forces, such as the institutional context within which the actor makes a statement, can substitute for personal attributes as determinants of sincerity. To see how, consider that institutions affect incentives in ways that make clear to all observers that false statements are more costly than others. For example, in a court of law where there exist penalties for perjury and the threat of cross-examination, these institutions supply witnesses with a rationale for telling the truth, and consequently provide jurors with a rationale for believing what they hear.

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[46] Readers interested in the formal derivation of these conditions should consult Lupia, Arthur and Mathew D. McCubbins (1998) *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* Cambridge: Cambridge University Press.

[47] Note that our interest here is in whether or not a speaker will reveal what he knows. Note that understanding this dynamic is but one part of answering questions about when a strategic listener should believe a strategic speaker. Therefore, only an element of our previous work is relevant here. It should be noted that this particular element – in which the attributes and knowledge of the listener are ignored -- is more similar to the extant literature on signaling games than is the whole of our model. Note also that we did not use the term sincerity in Lupia, Arthur and Mathew D. McCubbins (1998) *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* Cambridge: Cambridge University Press. The term as we use it here applies only to the element of that research directly relevant to whether or not the speaker reveals what he knows.

Lupia and McCubbins identify the following four conditions for sincerity. If any of these conditions is met and if the principal perceives the speaker to have the private information she desires, then the speaker should be regarded as sincere:[48]

1) The listener and speaker share common interests.[49]
2) The listener observes events that can occur only if the speaker pays a sufficiently high opportunity cost.[50]
3) The listener correctly infers that the speaker faces a sufficiently high statement-specific cost (such as a penalty for lying.)[51]
4) The listener and speaker believe that the truthfulness of the speaker's statement will be verified with a sufficiently high probability.[52]

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[48] Note that this definition implies nothing about the speaker's actual knowledge. So a speaker can be sincere, but can be offering false information. Note that the possibility of a sincere, but uninformed, speaker makes capability and sustainability necessary for credibility in the context of economic reform.

[49] The listener and the speaker have common interests when outcomes that are good for one are good for the other and outcomes that are bad for one are bad for the other. Lupia, Arthur and Mathew D. McCubbins (1998) *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* Cambridge: Cambridge University Press, pp. 77-78.

[50] When the speaker takes a costly effort, "he reveals something to others about how much the outcome of a particular course of action is worth to him." (*Id* at 81). This is known as costly signaling in economics (see, for example, Spence, Michael (1973) "Job Market Signaling." *Quarterly Journal of Economics* 87: 355–74).

[51] A speaker faces a penalty for lying when any statement he makes "requires the payment of an opportunity cost--at a minimum saying something at one point in time costs you the opportunity to say either nothing or all other things at that moment. In addition, some statements impose greater costs on the person who makes them than do other statements." Lupia, Arthur and Mathew D. McCubbins (1998) *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* Cambridge: Cambridge University Press, p. 83.

[52] A speaker's statement is verified when a third party authenticates it. If the speaker's statement will be verified, then he cannot benefit from making a false statement.

We turn now to a discussion of laboratory experiments that assessed each of these conditions empirically.

B. Laboratory Experiments on the Conditions for Sincerity and Trust

Lupia and McCubbins[53] conducted a series of experiments to clarify how external forces affect sincerity, trust, persuasion, and reasoned choice. Most of these experiments took place in a formal laboratory setting and were designed to be close analogies to the situations faced by a speaker and a receiver. Indeed, in these experiments, the receiver's job was to choose one of two alternatives, while the speaker's job was to make one of two statements to the receiver about his or her choice. Specifically, Lupia and McCubbins asked the receiver to predict the outcome of a coin toss, about which he or she was uncertain (i.e., they asked the receiver to predict whether an unobserved coin toss landed on heads or tails). They then asked the speaker to make a statement to the receiver that could inform the receiver about whether heads or tails would be a better prediction.

To make subjects' incentives analogous to the receiver's and speaker's incentives in their model, Lupia and McCubbins[54] paid the receiver and speaker for their actions. Specifically, they paid the receiver a fixed amount, usually $1.00, for a correct prediction. They then tested some of their theory's hypotheses by varying the speaker's information and incentives. In some cases, the receiver knew that the speaker also earned $1.00 when

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Therefore, speakers "should be less likely to make statements that they know, or believe to be, false as the likelihood of verification increases." (*Id.* at 85).

[53] Lupia, Arthur and Mathew D. McCubbins (1998) *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* Cambridge: Cambridge University Press.

[54] *Id.*

the receiver made a correct prediction (i.e., the speaker and receiver had common interests). In other cases, the receiver knew that the speaker earned $1.00 when the receiver made an *incorrect* prediction (i.e., the receiver and speaker had conflicting interests).

Simultaneously, Lupia and McCubbins[55] varied the extent to which external forces such as penalties for lying, the opportunity for verification, or the ability to engage in observable, costly effort were present. They also varied the speaker's knowledge and the receiver's beliefs about the speaker's knowledge. In sum, they tested their theory's hypotheses by varying perceived speaker attributes, actual speaker attributes, and external forces.

Figures 5, 6, and 7 summarize the results of Lupia and McCubbins's[56] experiments. They show how two dependent variables, persuasion and reasoned choice, varied over different experimental trials. Their measure of persuasion was the percentage of times that the receiver's prediction matched the speaker's statement, and their measure of reasoned choice was the percentage of times that the subjects predicted the coin toss correctly. When these observed percentages were significantly greater than the percentages that would most likely occur by chance (which, in most cases, was 50%), they observed evidence of persuasion and reasoned choice. Note that all numbers reported in the figures refer to experimental trials in which the receiver *did not* observe the coin toss that he or she was asked to predict.

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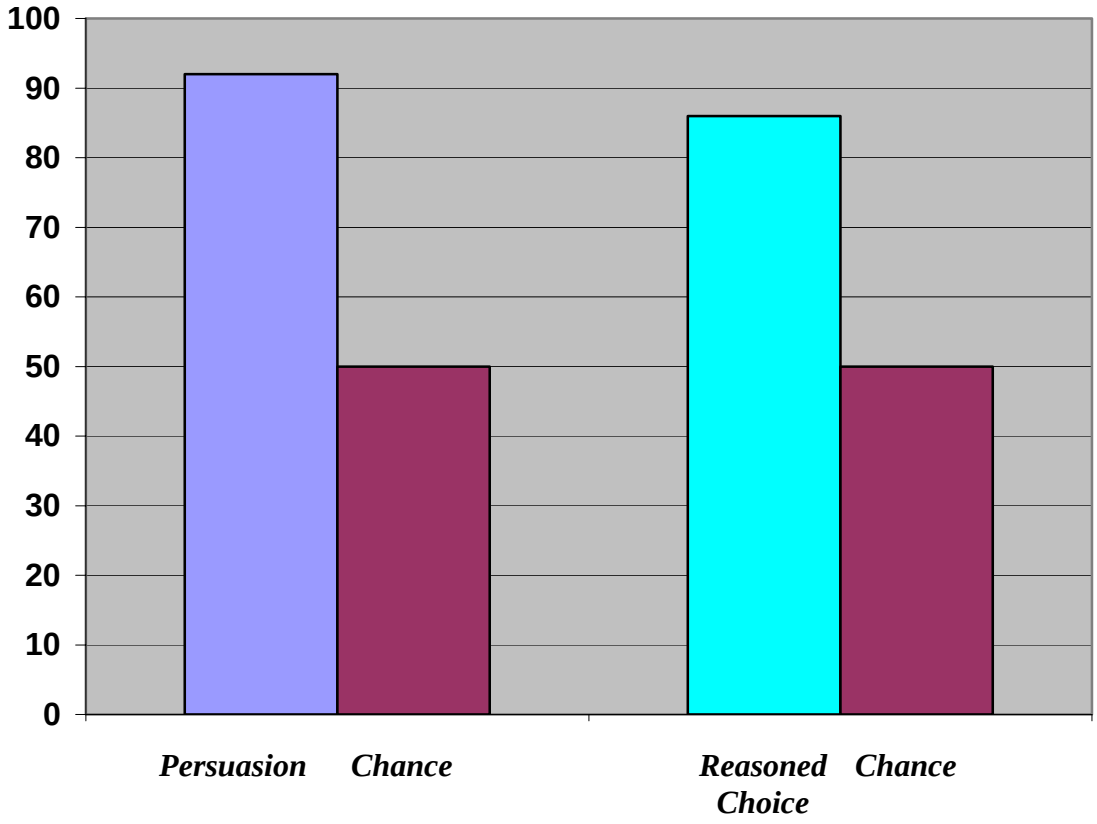
[55] *Id.*

[56] *Id.*

Figure 5 depicts those experimental trials in which it was common knowledge that the speaker knew the outcome of the coin toss and had common interests with the receiver. These are the trials where Lupia and McCubbins[57] expected to see persuasion and reasoned choice without the presence of external forces (i.e., without an institutional intervention). And this is what they observed. In these trials, the frequency of persuasion was 92% (174/190) and the frequency of reasoned choice was 86% (164/190). As shown in the figure, both of these frequencies are significantly greater than the frequencies expected by chance (i.e. 50%).

[57] *Id.*

Figure 5. Persuasion and Reasoned Choice with Common Interests[58]



[58] Adapted from Lupia, Arthur and Mathew D. McCubbins (2000) "The Institutional Foundations of Political Competence: How Citizens Learn What They Need to Know," In Arthur Lupia, Mathew D. McCubbins, and Samuel L. Popkin, eds. *Elements of Reason*. Cambridge: Cambridge University Press.

Similarly, Figure 6 shows the results from the experimental trials in which there was an institutional intervention (such as a penalty for lying, a threat of verification, or observable, costly effort) sufficient to allow the receiver to distinguish speakers who made truthful statements from speakers who did not. As depicted in the bars labeled "persuasion" and "reasoned choice," the frequency of persuasion was 89% (394/444) and the frequency of reasoned choice was 83% (368/444). These percentages are similar to the frequencies observed when the speaker and receiver knew that they shared common interests (and significantly greater than the 50% predicted by chance). As a result, the experiments support the claim that external forces substitute for common interests under the conditions specified by Lupia and McCubbins's[59] theory.

[59] Lupia, Arthur and Mathew D. McCubbins (1998) *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* Cambridge: Cambridge University Press.

Figure 6. Persuasion and Reasoned Choice with Institutional Interventions[60]

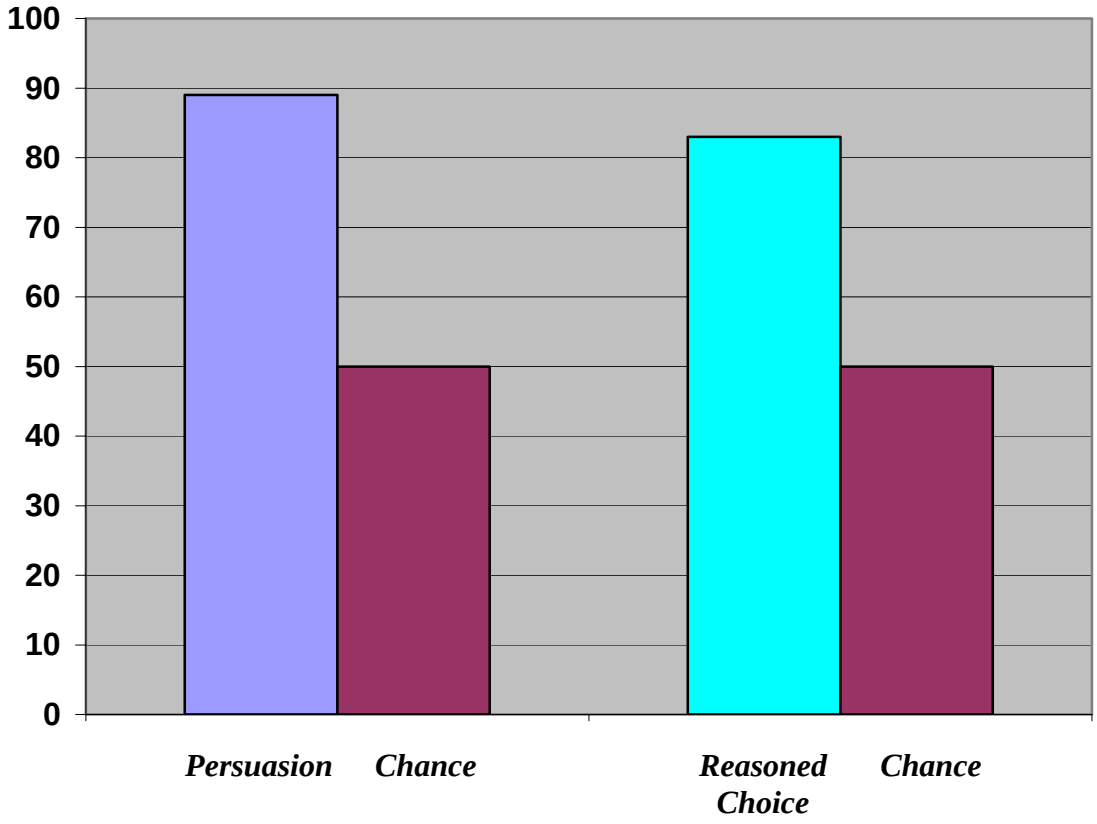


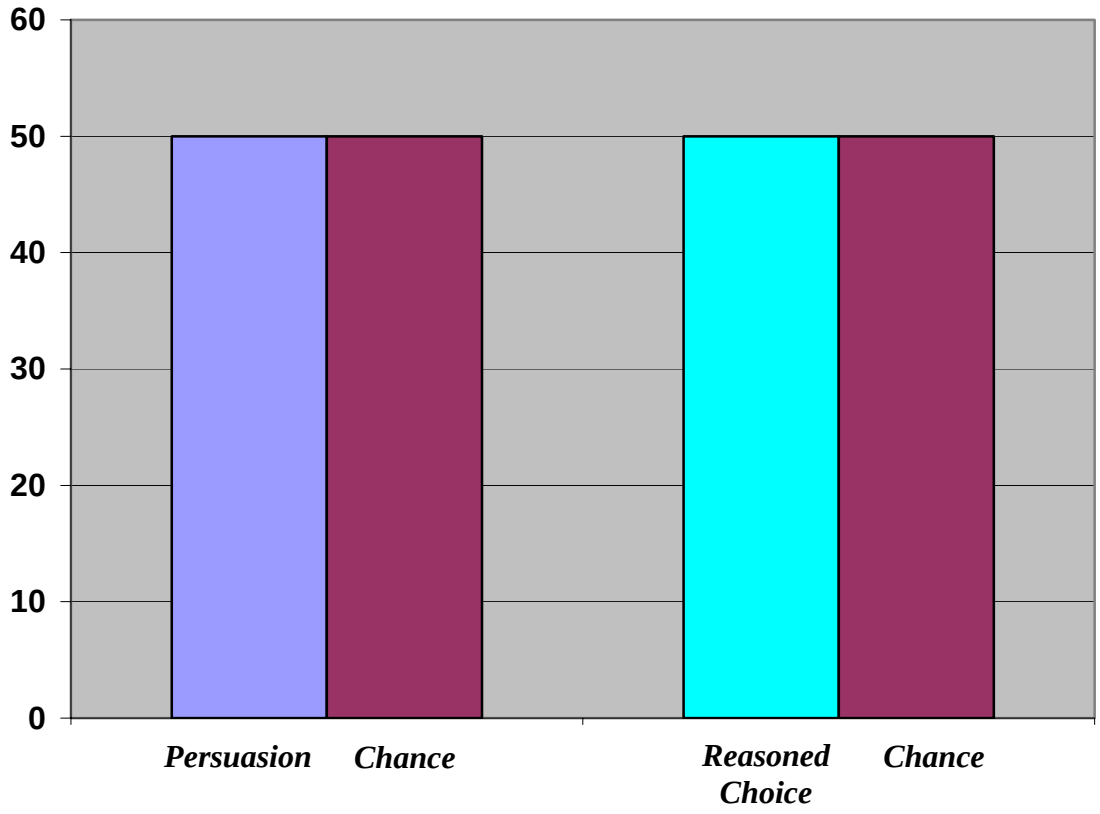
Figure 7 summarizes the experimental trials in which neither the conditions for persuasion nor the conditions for reasoned choice were satisfied. In these trials, Lupia and McCubbins[61] instituted penalties for lying or verification probabilities that, according to their theory, would be too small to induce the receiver to trust the speaker. In these cases, they expected that the receiver's predictions would be *independent* of the speaker's statement and that the receiver would make a correct prediction approximately 50% of

[60] Adapted from Lupia, Arthur and Mathew D. McCubbins (2000) "The Institutional Foundations of Political Competence: How Citizens Learn What They Need to Know," In Arthur Lupia, Mathew D. McCubbins, and Samuel L. Popkin, eds. *Elements of Reason*. Cambridge: Cambridge University Press.

[61] Lupia, Arthur and Mathew D. McCubbins (1998) *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* Cambridge: Cambridge University Press.

the time (the rate expected by chance for predicting a coin toss). Figure 7 shows that Lupia and McCubbins's expectations were again fulfilled, as neither their measure of persuasion, nor their measure of reasoned choice, is significantly different from 50%.

Figure 7. Persuasion and Reasoned Choice Absent Institutional Interventions[62]



[62] Adapted from Lupia, Arthur and Mathew D. McCubbins (2000) "The Institutional Foundations of Political Competence: How Citizens Learn What They Need to Know," In Arthur Lupia, Mathew D. McCubbins, and Samuel L. Popkin, eds. *Elements of Reason*. Cambridge: Cambridge University Press.

C. Learning from the Legislative Process

Because Lupia and McCubbins's[63] experimental results demonstrate that, under certain conditions, institutional interventions can substitute for common interests, induce sincere statements, foster trust between speakers and receivers, and allow speakers to learn from receivers, they suggest a number of important lessons about the sources of legislative history that are (and are not) trustworthy. Thus, in what follows, we discuss the ways that the institutional interventions used in the above experiments 1) allow legislators to learn from and trust each other in the U.S. Congress and 2) enable judges, as flies on the wall, to identify those sources of legislative history that are trustworthy indicia of legislative meaning.

1. Common Interests

Throughout the legislative process, legislators spend a substantial amount of time and energy identifying the people and groups they can trust.[64] For example, at the beginning of each Congress, the election of leaders and the appointment of members to committees are two of the most important business items. Members of Congress place

[63] Lupia, Arthur and Mathew D. McCubbins (1998) *The Democratic Dilemma: Can Citizens Learn What They Need to Know?* Cambridge: Cambridge University Press.

[64] Fenno, Richard F. (1973) *Congressmen in Committees*. Boston: Little, Brown; Fenno, Richard F. (1978) *Home Style: House Members in Their Districts.* Boston: Little, Brown; Kingdon, John W. (1977) "Models of Legislative Voting." *Journal of Politics* 39: 563–95.

great importance on screening those who control the House's agenda,[65] and seek to align the interests of committees and leaders to the broader interests of the majority party.[66]

Further, on many issues, for which they lack expertise, legislators turn to like-minded colleagues or their party whips for advice. For example, on various issues for which they lack expertise, members of Congress identify knowledgeable and like-minded members whose endorsements and actions they can follow.[67]

Of course, in some instances, the interests of the membership of a committee are sufficiently different from the interests of the rest of the majority party (e.g., the members of the U.S. House Agriculture Committee are often seen to be more sympathetic to farm and rural interests than are other members[68]). Absent external forces, we would not

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[65] Polsby, Nelson W. (1968) *The Citizen's Choice: Humphrey or Nixon?* Washington, D.C.: Public Affairs Press; Polsby, Nelson W., Miriam Gallagher, and Barry Spencer Rundquist (1969) *The Growth of the Seniority System in the US House of Representatives.* Berkeley, Calif.: The Institute; Fenno, Richard F. (1973) *Congressmen in Committees*. Boston: Little, Brown; Shepsle, Kenneth A. (1978) *The Giant Jigsaw Puzzle: Democratic Committee Assignments in the Modern House*. Chicago: University of Chicago Press; Smith, Steven S., and Christopher J. Deering (1990) *Committees in Congress*. Washington, D.C.: Congressional Quarterly Press; Krehbiel, Keith (1991) *Information and Legislative Organization*. Ann Arbor: University of Michigan Press.

[66] Cox, Gary W. and Mathew D. McCubbins (1993) *Legislative Leviathan: Party Government in the House.* Berkeley: University of California Press; Kiewiet, D. Roderick and Mathew D. McCubbins (1991) *The Logic of Delegation: Congressional Parties and the Appropriations Process*. Chicago: University of Chicago Press.

[67] Kingdon, John W. (1973) *Congressmen's Voting Decisions.* New York: Harper & Row; Jackson, John E. (1974) *Constituencies and Leaders in Congress: Their Effects on Senate Voting Behavior*. Cambridge: Harvard University Press; Matthews, Donald and James Stimson (1970) "Decision-Making by U.S. Representatives." In S. Sidney Ulmer, ed., *Political Decision Making.* New York: Van Nostrand Reinhold; Matthews, Donald and James Stimson (1975) *Yeas and Nays*. New York: Wiley; McConachie, Lauros G. (1898) *Congressional Committees.* New York: Thomas Y. Crowell.

[68] See Cox, Gary W. and Mathew D. McCubbins (1993) *Legislative Leviathan: Party Government in the House.* Berkeley: University of California Press.

expect endorsements from these committees to be persuasive (as Krehbiel[69] has so argued). Similarly, differences between party leaders and backbenchers may render leadership stands unpersuasive. In cases where common interests are absent, persuasion and trust require external forces. In what follows, we describe examples of such forces.

2. Penalties for Lying

Legislators use penalties for lying to create a basis for trust in contexts where trust would otherwise be absent. For instance, trustworthiness and, implicitly, penalties for breaking a trust, are the basis of many behavioral norms in the U.S. Congress.[70] Often, penalties for breaking a trust are enforced not by the chamber or the membership, but by party leaders.[71] Indeed, in the U.S. Congress, penalties for lying can be quite large, including loss of leadership positions.

Of course, if a penalty for lying or the likelihood of its enforcement is small, then the penalty will dissuade few lies. As a consequence, the penalty may be insufficient to generate trust. For example, scientists' opinions, expert testimony, and remarks made during open floor time by representatives while the House is in recess are not greatly affected by penalties for lying. This may be one reason why legislators frequently ignore this type of testimony.

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[69] Krehbiel, Keith (1991) *Information and Legislative Organization.* Ann Arbor: University of Michigan Press.

[70] Fenno, Richard F. (1973) *Congressmen in Committees*. Boston: Little, Brown.

[71] Cox, Gary W. and Mathew D. McCubbins (1994) "Bonding, Structure, and the Stability of Political Parties: Party Government in the House." *Legislative Studies Quarterly* 19: 215–31; Schickler, Eric, and Andrew Rich (1997) "Controlling the Floor: Politics as Procedural Coalitions in the House." *American Journal of Political Science*.

3. Verification

Political philosophers and institutional designers alike have recognized the benefits of competition among information providers.[72] The constitutional structure of government determines the number and quality of competing information sources available to legislators. In legislatures that are open to the opposition, to the media, and to interest groups, for example, verification becomes much more likely than when it is closed.

The design of legislative structure and process is the key to creating competition between information providers. As two of us have argued elsewhere, legislative procedure is an example.[73] Take, for example, the legislative process in the U.S. House of Representatives wherein a bill must pass many steps before it can be sent to the Senate and the president and be implemented as a new policy.[74]

Let us return for a moment to Figure 4, which depicts two important facts about the legislative process. First, the process by which bills are passed sets up a dual system

[72] See, e.g., Machiavelli, Niccolo (1958) *The Prince*. London: Dent; New York: Dutton; Montesquieu, Baron de (1989) *The Spirit of the Laws*, Translated and edited by Cohler, Anne M., Basia Carol Miller, and Harold Samuel Stone. Cambridge: Cambridge University Press; Madison, James. *Federalist #10.* In Clinton Rossiter, ed., *The Federalist Papers.* New York: Penguin; Milgrom, Paul, and John Roberts (1986) "Relying on the Information of Interested Parties." *Rand Journal of Economics* 17: 18–31; Cameron, Charles M., and Joon Pyo Jung (1992) "Strategic Endorsements." Columbia University. Typescript.

[73] Lupia, Arthur and Mathew D. McCubbins (1994) "Who Controls Information and the Structure of Legislative Decision Making." *Legislative Studies Quarterly* 19: 361–84.

[74] Tsebelis describes a similar procedure for parliamentary systems; Tsebelis, George (1995) "Veto Players and Law Production in Parliamentary Democracies." In Herbert Doring, ed., *Parliaments and Majority Rule in Western Europe*. New York: St. Martin's Press.

of agenda control wherein control over the agenda is shared by both committees and party leaders.[75] Furthermore, there are numerous places in the legislative process where backbenchers can check the actions of the majority party leadership. Prominent among these is the control over the agenda exercised by congressional committees. These many steps establish a system of checks and balances whereby the ambitions of the majority party leadership are pitted against the ambitions of the party's backbenchers. The House legislative process thus makes it likely that statements made by both the House leadership and House committees will be verified. Figure 4 also highlights the positions in the legislative process that are controlled by the majority party leadership, such as the Speakership or the Steering and Policy Committee,[76] as contrasted to the positions that are responsive to the party's backbenchers, such as committees and subcommittees.

Figure 4 also depicts a second way in which the legislative process pits ambition against ambition. As the figure shows, a bill must be introduced, referred to a committee, and then to a subcommittee. From there, important measures also go through the Rules Committee before being debated and voted on the House floor. Once enacted, new legislation is then subject to the budget and reconciliation process, and the appropriations process, each with its own sets of committees, and each with its own rules and procedure.

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[75] Recognition of a dual system of agenda control brings together Weingast and Marshall's theory of the industrial organization of Congress with Cox and McCubbins' theory of party government. Weingast, Barry R., and William J. Marshall (1988) "The Industrial Organization of Congress: or, Why Legislatures, Like Firms, Are Not Organized as Markets." *Journal of Political Economy* 96: 132–63. Cox, Gary W. and Mathew D. McCubbins (1993) *Legislative Leviathan: Party Government in the House.* Berkeley: University of California Press.

[76] Cox, Gary W. and Mathew D. McCubbins (1993) *Legislative Leviathan: Party Government in the House.* Berkeley: University of California Press; Kiewiet, D. Roderick and Mathew D. McCubbins (1991) *The Logic of Delegation: Congressional Parties and the Appropriations Process*. Chicago: University of Chicago Press.

Proposals must run this gauntlet before the policy enacted by the legislation can be implemented. Through this process, policymaking substantive committees (such as the aforementioned Agriculture Committee) are checked by the Appropriations Committee, the Rules Committee, and the Budget Committee (which are "control" committees, designed and appointed for this purpose[77]). In this way, members of various committees, each with expertise on the important legislation before the House, can verify the statements and claims made by others in the legislative process. To the extent that the ambitions of these various actors are adversarial, or to the extent that other institutional features make one or more of these actors trustworthy, the system of checks and balances described in Figure 4 will generate the context for verification.

4. Costly Effort

Legislative rules, procedures, and practices often impose costs on the actions of legislators, thereby establishing the conditions for enlightenment and reasoned choice. For instance, drafting legislative proposals, holding hearings and investigations, writing committee reports, striking deals, and whipping up support for legislation all require the expenditure of valuable resources (e.g., time, effort, and money).

Furthermore, in the United States, large changes in the spending appropriated for a program require either a written explanation for the change or new legislation that

[77] See Cox, Gary W. and Mathew D. McCubbins (1993) *Legislative Leviathan: Party Government in the House*. Berkeley: University of California Press.

changes the program's authority.[78] Thus, the creation of new budget authority or substantial changes in budget authority require the expenditure of costly effort on the part of the proponents of these budget shifts. Again, without any other information, legislators can infer that the proposals represent a large change in policy. By observing the effort involved in making these proposals, legislators can infer something about the magnitude of the change being proposed. This inference alone may be sufficient to enable legislators to make reasoned choices about accepting or rejecting the proposals.

D. Judges as Flies on the Wall

As should be clear from the above discussion, throughout the legislative process, legislators rely principally upon those sources of information that satisfy the conditions for trust. Such trustworthy sources may include statements or documents generated by members of the majority party, committee reports, and bill managers' statements. The important thing to note for our purposes is that judges should also rely solely upon these trustworthy sources when interpreting statutes. To mix metaphors, judges as flies on the wall should piggyback on the conditions for trust and base their interpretations of statutes only on the sources of information that legislators themselves could trust. Indeed, if legislators could not trust certain sources of information when passing a given statute, why should judges? The answer, of course, is that judges should not trust these sources

[78] Kiewiet, D. Roderick and Mathew D. McCubbins (1991) *The Logic of Delegation: Congressional Parties and the Appropriations Process*. Chicago: University of Chicago Press.

of information, both because they are unreliable indicia of legislative meaning and because they do not correspond to how legislators actually passed a given statute.[79]

Equally important for our analysis is to understand how to assess which sources of legislative history are particularly unreliable. From the above discussion, it is clear that statements offered during the legislative process by members of the minority party or, more precisely, by opponents to the legislation, ought to be heavily discounted. This discounting is appropriate because such statements do not meet any of the conditions for trust. In particular, there are no penalties for lying; majority leadership cannot punish members of the minority party; rather, minority party members have little to lose from spinning legislative proposals in the hopes of sealing the proposal's doom. And, if the proposals pass despite their opposition, they have everything to gain from spinning the legislation in a way that furthers their aims once the statute comes before a court for interpretation.

In their study of the Civil Rights Act of 1964 and its interpretation by the federal courts in the 1970's and 1980's, Rodriguez and Weingast[80] described how the courts relied upon self-interested statements of "untrustworthy" legislators in order to interpret

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[79] See Cohen, Linda R., and Matthew L. Spitzer (1994) "Solving the *Chevron* Puzzle," *L. and Contemp. Probs.* 57: 65; Cohen, Linda R. and Matthew L. Spitzer (1996) "Judicial Deference to Agency Action: A Rationale Choice Theory and an Empirical Test," 69 *Southern California Law Review* 431; Spitzer, Matthew L. (1990) "Extensions of Ferejohn and Shipan's Model of Administrative Agency Behavior," 6 *Journal of Law, Economics, and Organization* 29. For a discussion of how this argument implies the need for a greater reliance of administrative agencies as key statutory interpreters – an approach that we call "instrumental statutory interpretation" – see McCubbins, Mathew D. and Daniel B. Rodriguez (2005) *What Statutes Mean: Positive Political Theory and the Interpretation of Federal Legislation.*

[80] Rodriguez, Daniel B. and Barry R. Weingast, "The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation," 151 *University Of Pennsylvania Law Review* 1417 (2003).

statutes in an expansive, and fundamentally inaccurate, way. Building upon McNollgast's[81] analysis of strategic legislative rhetoric, this study's assessment of legislative strategic behavior and the courts' selective use of legislative history, illustrates the perils of relying on untrustworthy legislative history; further, it helps frame the distinction between correct and incorrect expansion of statutory communications.[82]

One of the conclusions drawn by Professors Rodriguez and Weingast is that the misuse of legislative history has important implications for legislative policymaking. Recall their analysis of the politics of the 1964 civil rights act and, in particular, the pivotal role of moderate legislators. Such legislators were willing to go along with an essentially moderate version of civil rights legislation; and while they were content to permit President Johnson and Senator Humphrey (among others) to insist that the final version of the civil rights act was broad and expansive, they believed that the truth was that the ultimate bill reflected carefully constructed compromises between ardent supporters and pivotal, moderate legislators. To their chagrin, federal courts in the 1970's and 80's drew upon statements in the legislative history made by ardent supporters and thereby expanded the civil rights legislation beyond the acceptable range of agreement among this pivotal coalition. Had moderate legislators understood that these expansionist interpretations were likely, there is serious doubt that they would have been as willing to compromise and thereby to enable the civil rights bill to become law. Moreover, moderate legislators would have been unlikely to participate in the

[81] McNollgast (1992) "Positive Canons: The Role of Legislative Bargains in Statutory Interpretation," *Geo. L. J.* 80: 705; McNollgast (1994) "Legislative Intent: The Use of Positive Theory in Statutory Interpretation," *L. and Contemp. Probs.* 57: 3-37.

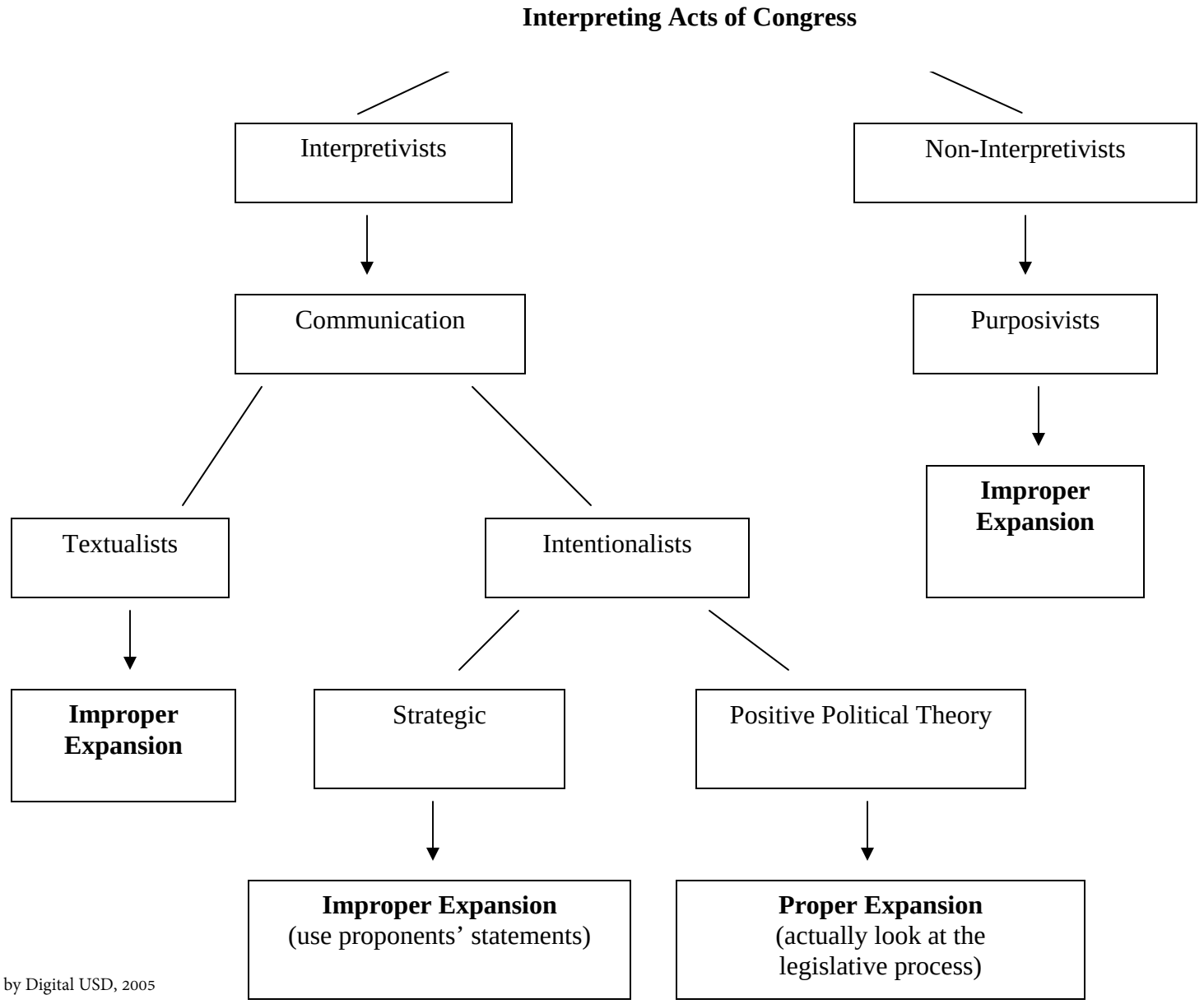
[82] See also Rodriguez and Weingast (2005) for a more general discussion of the political consequences of these expansionist interpretations.

compromises that were necessary to enact other major pieces of socially progressive federal legislation of this era. As Rodriguez and Weingast (2005) posit, one of the key conditions of the Great Society period was the securing of assent by pivotal legislators. Paradoxically, the misuse of legislative history by eager liberal courts (prodded, naturally, by liberal interest groups) made it considerably more difficult to secure legislative assent during the period – 1970's to early 1980's – in which major efforts at enacting watershed national legislation were undertaken by the majority Democratic Party and its allies.

V. Interpretation Theory and the Compression-Expansion Mismatch

Having demonstrated that our intentionalist approach is a proper method of expanding the meaning of statutes, we conclude by considering other schools of statutory interpretation in light of the requirement that the expansion of statutory meaning correspond to the way that it was compressed. As we emphasize below and illustrate in Figure 8, three of the main schools of statutory interpretation — textualism, purposivism, and other approaches that substitute legal or social values for legislative intent — advocate improper expansion schemes because they ignore or misunderstand important aspects of the legislative process.

Figure 8. Schools of Statutory Interpretation in terms of Compression and Expansion



A. Improper Expansion: Textualism

The plain meaning approach to statutory interpretation has been a prominent approach for most of the 20th Century and the early years of the 21st. Justice Holmes declared, famously, that:

> It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists. If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute.[83]

In the past twenty years, this approach has obtained a new lease on life, with prominent advocates such as Justices Scalia and Thomas and several influential lower court judges advocating a robust form of textualism in which courts may not consult external indicia of legislative intent but, instead, should simply apply the so-called "plain meaning" of the statute's text to the case at hand. This plain meaning "must be the alpha and the omega in a judge's interpretation of the statute."[84]

How is the court/interpreter to discern this plain meaning? Says Professor Eskridge summarizing the new textualist view, "[t]he apparent plain meaning is that which an ordinary speaker of the English language - twin sibling to the common law's

[83] *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928).

[84] Eskridge, William N. Jr. (1998) "Textualism, the Unknown Ideal?" 96 *Michigan Law Review* 1509, 1511. See also Scalia, Antonin (1997) *A Matter of Interpretation: Federal Courts and the Law*. Princeton: Princeton University Press; Easterbrook, Frank H. (1990) "What Does Legislative History Tell Us?" *Chi.-Kent L. Rev.* 66: 441-450; Kozinski, Alex (1998) "Should Reading Legislative History be an Impeachable Offense?" 31 *Suffolk University Law Review* 807.

reasonable person - would draw from the statutory text."[85]

The key consequence of this textualist approach is the rejection of the use of legislative history when discerning statutory meaning. Indeed, as Judge Kozinski, a leading proponent of textualism, forcefully argues:

> [R]eliance on legislative history actually makes statutes more difficult to interpret by casting doubt on otherwise clear language…Legislative history is often contradictory, giving courts a chance to pick and choose those bits which support the result the judges want to reach…This shifts power from the Congress and the President--who, after all, are charged with writing the laws--to unelected judges. The more sources a court can consult in deciding how to interpret a statute, the more likely the interpretation will reflect the policy judgments of the judges and not that of the political branches.[86]

Whether and to what extent *other* extrinsic aids ought to be consulted in interpreting statutory language that is not plain is a source of disagreement among self-styled textualists. For some, the principal extrinsic aid is a dictionary; for others, courts may rely on canons of construction, at least those canons that purport to guide courts in construing ambiguous language – what Manning calls "a default set of assumptions about how the legislature uses language, grammar, punctuation, and structure."

Construing statutes that are compressed via the legislative process by way of the new textualism represents an improper method of expansion. As we discussed above, meaning is conveyed and transmitted among legislators in several ways, most of which are ignored by the textualists. By focusing exclusively on the text of statutes, by rejecting the use of legislative history, and by failing to consider the statements of bill

[85] Eskridge, William N. Jr. (1998) "Textualism, the Unknown Ideal?" 96 *Michigan Law Review* 1509, 1511, 1511.

[86] Kozinski, Alex (1998) "Should Reading Legislative History be an Impeachable Offense?" 31 *Suffolk University Law Review* 807.

managers, committees and their chairs, and other members of the majority party, the textualists ignore important aspects of how legislators compress and thereby share information about the meaning of statutes during the legislative process.

Perhaps the most glaring example of how textualists improperly expand the meaning of statutes is their use of canons of construction.[87] The so-called grammatical canons of construction entail a series of assumptions about how legislators use language, assumptions that are created by judges and developed in case law.[88] For this reason, canons of construction do not reflect the ways that legislators compressed meaning when writing statutes and, therefore, do not enable the proper expansion of statutory meaning.

To take a concrete example of the ways that such canons fail to expand properly statutory meaning, consider the 9th Circuit's reliance on the "Whole Act rule"—a canon that assumes that every word legislators write imparts new meaning—when interpreting the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in *Carson Harbor Village, Ltd. v. Unocal Corporation*. CERCLA grants the Federal government broad authority to respond directly to releases or threatened releases of substances that might endanger public health or the environment, and throughout the

[87] See Eskridge, William N. Jr., Philip P. Frickey, and Elizabeth Garrett (2000) *Legislation And Statutory Interpretation*. New York: Foundation Press, for a list and discussion of canons of construction. See McCubbins, Mathew D. and Daniel B. Rodriguez (2005) "Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon," *Journal Of Contemporary Legal Issues* for a survey and debate.

[88] See Eskridge, William N. Jr., Philip P. Frickey, and Elizabeth Garrett (2000) *Legislation And Statutory Interpretation*. New York: Foundation Press.

statute, legislators use series of similar words to convey what they mean.[89] For example, Section 96903, subsection 3 states:

> The term "disposal" means the *discharge, deposit, injection, dumping, spilling, leaking, or placing* of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters… (Emphasis added).

Similarly, Section 9216, subsection e (2) states:

> A State may enforce any Federal or State *standard, requirement, criteria, or limitation* to which the remedial action is required to conform under this chapter in the United States district court for the district in which the facility is located. (Emphasis added)

According to the Whole Act rule, judges interpreting these subsections of CERCLA must discern the meaning of each italicized word in the series of words that the legislators wrote. That is, judges must analyze the meaning of the word "standard," the meaning of the word "requirement," the meaning of the word "criteria," and the meaning of the word "limitation," and they should assume that the meaning that legislators intended to convey was different for each word.

This is very much the approach that the 9th Circuit took in *Carson Harbor*.[90] When interpreting the meaning of the word "disposal," the court considered each of the

[89] One example of redundancy used commonly in digital compression is the widespread use of codes that use parity checks to verify data expansion.

[90] This is also similar to the approach that Justice Scalia took in *West Virginia University Hospitals v. Casey* (1991). Writing for the majority, Justice Scalia interpreted the words "attorney's fee" in 42 U.S.C. section 1988, and he concluded that these words do include expert fees because "the record of statutory usage demonstrates convincingly that attorney's fees and expert fees are regarded as separate elements of litigation costs. While some fee-shifting provisions, like section 1988, refer only to 'attorney's fees,' many others explicitly shift expert witness fees *as well as* attorney's fees." Justice Scalia then explained that, if attorney's fees include expert fees, "*dozens of statutes referring to the two separately become an inexplicable exercise in redundancy"* (Emphasis added).

slightly different meanings of the words "discharge, deposit, injection, dumping, spilling, leaking, or placing," and it then held that the passive migration of contaminants through soil did not constitute a "disposal" under the definition of this word in the statute. Writing for the majority, Judge McKeown emphasized that despite the logical difficulties associated with considering each word in the definition of "disposal," legal canons of construction require such an analysis. She stated:

> We are bound…to give meaning to every word of a statute. Frustratingly, this canon of construction leads to the shortest of logical cul-de-sacs in this case…If we give meaning to both "disposal" and "placement," how are the words different, particularly if we consider that "placement" is included in the statutory definition of "disposal"? And if the defense is available to anyone who purchases after "disposal," why repeat "placement"—a mere subcategory of "disposal"?[91]

Judge McKeown raises an important question: Why *did* Congress repeat the word "placement," given that it is merely a subcategory of "disposal"? The Whole Act rule and other canons of construction give us virtually no purchase on this question because they require judges to interpret statutes based upon abstract assumptions about how legislators use language. Indeed, in this example, the Whole Act rule forced Judge McKeown into "the shortest of logical cul-de-sacs" because it required her to interpret the words of the statute as though legislators meant something different by each word that they wrote. As research in communication theory and cognitive science suggests,

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[91] Judge McKeown went on to state: "Clearly, neither a logician nor a grammarian will find comfort in the world of CERCLA. It is not our task, however, to clean up the baffling language Congress gave us by deleting the words "or placement" or the word "disposal" from the innocent landowner defense. Transported to Washington D.C. in 1980 or 1986, armed with a red pen and a copy of Strunk & White's *Elements of Style*, we might offer a few clarifying suggestions. But in this time and place, we can only conclude that Congress meant what it said, and offered the innocent landowner defense to both those who purchased land after "disposal" or after "placement," thereby giving "disposal" its statutory meaning and "placement" its ordinary one, despite their overlap.

however, *redundancy* (that is, writing or saying things multiple times in slightly different ways) is a key part of all communication because it enables humans to convey more effectively what they mean. This is, of course, true of legislators, who write and speak similar statements in slightly different ways in order to compress meaning during the legislative process and to ensure that they successfully communicate with each other, with agencies, with courts, and with society. For this reason, judges interpreting statutes, if they are to expand statutes in a way that corresponds to how they were compressed, must abandon grammatical canons of construction like the Whole Act rule and instead examine critically the (often redundant) communication process among legislators.[92]

B. Improper Expansion: Purposivism

Another method of statutory interpretation is purposivism. In contrast to textualism, purposivists interpret statutes based upon their underlying purpose and use the text of statutes only as a vehicle for (or a check on) the fulfillment of that purpose.[93] This approach has been advanced most prominently by Hart and Sacks, who set forth the following guidelines for proper purposivist interpretation:

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[92] Substantive canons are yet another matter that we address in McCubbins, Mathew D. and Daniel B. Rodriguez (2005) "Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon," *Journal Of Contemporary Legal Issues*.

[93] Note that some scholars consider textualism to be a weak form of purposivism. For example, Manning states, "it is worth suggesting why textualism, properly understood, does not permit interpreters to ignore context, purpose, rationality, or established notions of justice in the application of a statutory text. Four considerations support this conclusion. First, textualists do not forswear purposive interpretation of statutes. Rather, they are weak purposivists, willing to consider purpose when the text of a statute is ambiguous as applied." Manning, John F. (2001) "Textualism and the Equity of the Statute," 101 *Columbia Law Review* 1, 106. If textualism is in fact a weak form of purposivism, however, then it also falls prey to the criticisms that we describe in this section.

> In interpreting a statute a court should: 1. Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then 2. Interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either--(a) a meaning they will not bear, or (b) a meaning which would violate any established policy of clear statement.[94]

It is clear from these guidelines that, for purposivists, the determination of statutory purpose is of paramount importance, while the actual words that legislators wrote are secondary. What is not clear from these guidelines, however, is how exactly judges are to determine the purpose of statutes absent an examination of statutory language. For example, Hart and Sacks explicitly state that judges should *first* decide the purpose of a given statute and *then* interpret the words of that statute. But if this is how judges are to interpret statutes, then how should they determine statutory purpose? The answer, according to purposivists, is that judges are free to determine the purpose based upon their own views of what is reasonable. Indeed, Schanck summarizes this aspect of purposivism when he states:

> [In the] purposive legal process approach,…courts determine which interpretation best fulfills the purpose of the statute. The judge would assume that legislators were reasonable people intending reasonable results who would have wanted the judge to identify a reasonable public purpose and decide cases in light of recent experience. This approach…decides cases according to the judge's views of the best result.[95]

In this way, purposivism encourages judges to interpret statutes based upon the assumption that legislators are "reasonable" and upon their own views of what constitutes

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[94] Hart, Henry M. Jr. and Albert M. Sacks (1958) *The Legal Process: Basic Problems in the Making and Application of Law*.

[95] Schanck, Peter C. (1992) "Understanding Postmodern Thought and Its Implications for Statutory Interpretation," *S. Cal. L. Rev.* 65: 2592.

a "reasonable public purpose." However, as a brief comparison of the purposivist approach and the ways that legislators compress and share meaning in the legislative process reveals, the necessary correspondence between compression and expansion is absent. Indeed, in advancing their approach to statutory interpretation, purposivists misunderstand and then completely ignore the legislative process.

Purposivists clearly misunderstand the legislative process when they assume that legislators are "reasonable people intending reasonable results."[96] This attribution of benign intentionality has been roundly criticized already,[97] and as our previous discussion of the legislative process suggests, this assumption is based upon naive notions of how legislatures actually work. Indeed, a large body of research within political science has demonstrated that the legislative process is characterized not by "reasonable" legislators intending "reasonable results," but rather by a majority party that seizes agenda control, by a minority party that is virtually shut out of the lawmaking process,[98] and by legislators who care first and foremost about re-election.[99] Purposive interpretation,

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[96] *Id.*

[97] Eskridge, William N., Jr., and Philip P. Frickey (1990) "Statutory Interpretation as Practical Reasoning," *Stan. L. Rev.* 42: 334; Eskridge, William N., Jr. (1990) "Legislative History Values," *Chi.-Kent L. Rev.* 66: 398); Farber, Daniel A., and Philip P. Frickey (1988) "Legislative Intent and Public Choice," *Va. L. Rev.* 74: 423-469.

[98] Cox, Gary W. and Mathew D. McCubbins (1993) *Legislative Leviathan: Party Government in the House.* Berkeley: University of California Press; Cox, Gary W. and Mathew D. McCubbins (2005) *Setting the Agenda: Responsible Party Government in the U.S. House of Representatives*. Cambridge: Cambridge University Press; Aldrich, John and David Rohde (2000) "The Republican Revolution and the House," *The Journal of Politics*, 62(1): 1-33.

[99] Mayhew, David R. (1974) *Congress: The Electoral Connection.* New Haven: Yale University Press; Fenno, Richard F. (1978) *Home Style: House Members in Their Districts.* Boston: Little, Brown; Fiorina, Morris P. (1977) *Congress: Keystone of the Washington Establishment.* New Haven: Yale University Press; Cain, Bruce, John

therefore, misfires as method of discerning statutory meaning. It can be defended, if at all, on grounds extrinsic to the objective of implementing the will of the authoritative lawmaker through the understanding of the statutory communication.[100]

C. Improper Expansion: Non-Interpretivism

There are several approaches to statutory interpretation that suggest, ultimately, that some meaning other than the meaning expressed in the statute and intended by the legislature be substituted for the statute's meaning. This may involve interpreting statutes to enhance the "integrity of law"[101] or to reflect "current social values."[102] It may involve an effort to interpret legislation "dynamically,"[103] in order to update the statute to

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Ferejohn and Morris P. Fiorina (1987) *The Personal Vote: Constituency Service and Electoral Independence*. Cambridge: Cambridge University Press.

[100] We elide here a rather different defense of purposivism, that is, that it acts to promote, for sound normative reasons, a more deliberative process. Thus reconfigured, the Hart and Sacks assumption that legislators are pursing "reasonable" aims "reasonably," becomes an entirely prescriptive point, that is, that legislators *ought* to be so regarded. A full-fledged discussion of this argument lies beyond the scope of this paper. See McCubbins, Mathew D. and Daniel B. Rodriguez (2005) "Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon," *Journal Of Contemporary Legal Issues*; McCubbins, Mathew D. and Daniel B. Rodriguez (2005) *What Statutes Mean: Positive Political Theory and the Interpretation of Federal Legislation*.

[101] Dworkin, Ronald (1986) *Law's Empire*. Cambridge: Belknap Press.

[102] Eskridge, William N., Jr. (1990) "Gadamer/Statutory Interpretation," *Colum. L. Rev.* 90: 609; Eskridge, William N., Jr. (1994) *Dynamic Statutory Interpretation*. Harvard University Press.

[103] Eskridge, William N., Jr. (1994) *Dynamic Statutory Interpretation*. Harvard University Press.

meet modern purposes and needs.[104] As Eskridge, Frickey, and Garrett summarize these approaches:

> [T]he courts can act to update the statute so that it reflects modern opinion or modern circumstance…judges should move past the legislative clues regarding the meaning of a statute and take into account the "evolution of the statute" and ultimately, "current values."[105]

Whatever the case for these theories, we join with others in describing these approaches as clearly non-interpretivist.

Among the more influential of non-interpretivist theories is Ronald Dworkin's. In *Law's Empire*, Dworkin describes the relative role of the legislature and courts as follows:

> [A judge interpreting a statute]…will treat Congress as an author earlier than himself in the chain of law, though an author with special powers and responsibilities different from his own [as a judge], and he will see his own role as fundamentally the creative one of a partner continuing to develop, in what he believes is the best way, the statutory scheme Congress began.[106]

Dworkin views his theory as a guide to legal interpretation; statutory interpretation is one element of the more general template. Yet, there is precious little to suggest that courts ought to pay any special fidelity to the will of the authoritative lawmaker; nor does Dworkin offer a coherent explanation grounded in a view of the Constitution that we would credit as small "d" democrats. His theory, while elegant and plausible, is not properly viewed as a theory of statutory interpretation, where

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[104] See Calabresi, Guido (1980) *A Common Law for the Age of Statutes*. Harvard University Press.

[105] Eskridge, Frickey, and Garrett (1990, p. 241).

[106] Dworkin, Ronald (1986) *Law's Empire*. Cambridge: Belknap Press.

interpretation concerns the discerning of statutory meaning in order to implement the policy objectives of the elected legislature; rather, it is a non-interpretivist theory that propounds a distinct normative view of the role of law in implementing substantive justice.

A different agenda for statutory interpretation is offered with considerable skill by a diverse group of scholars, including Cass Sunstein[107] and Jonathan Macey.[108] These scholars view the role of courts aspirationally, suggesting courts ought to interpret statutes to improve the legislative process in discernable ways. For Macey, courts ought to increase the costs to pressure groups by insisting that throw-away public-regarding language in statutes, particularly in the statute's preamble, be interpreted strictly, therefore reducing the private-regarding benefits to interest groups who have demanded this policy. For Sunstein, courts should rely on various substantive canons in order to improve public lawmaking in the modern administrative state. While some of these canons implement key values, the principal advantage to such strategically configured canonical construction is that it helps "perfect" the legislative process. Whatever the strengths of these eloquently defended approaches, they are avowedly non-interpretivist; they do not purport to match the expansion of the legislature's communications with the lawmakers' efforts to compress this communication in the legislative process – in other words, there is a deep compression-expansion mismatch; as a result, they do not in any way assist the court in properly *interpreting* the communication.

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[107] Sunstein, Cass R. (1989) "Interpreting Statutes in the Regulatory State," *Harv. L. Rev.* 103: 405.

[108] Macey, Jonathan (1986) "Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model" *Colum. L. Rev.* 86: 223-268.

In a very different vein, Judge Frank Easterbrook has argued for an approach to statutory interpretation that eschews reliance on legislative history and concentrates on either the plain text of the statute, where the text is clear and, therefore, the interpretive issues is resolved within the "statute's domain," or on the evolving common law of the subject at issue.[109] In the latter circumstances, the court's task is not to interpret the statutes at all; interpretation in such situations is beside the point. Rather, the court ought to be guided by the common law, by judge-made law. Certainly interpretation in such circumstances is non-interpretive; Easterbrook's theory supposes as much. Yet, we would claim that so-called interpretation *in the first instance* is similarly non-interpretivist; after all, the construction of the statute's domain is a creative act; it is an act dislodged from the compression-expansion process; it does not reveal the statute as a communication between an authoritative lawmaker and an interpreter. As such, the process of resolving the dispute is not in any discernible way an act of discerning the statute's meaning. Indeed, Easterbrook's view could just as credibly be viewed as one in which the judge infuses the statute with his or her own preferences for policy outcomes. Whatever the case for this heroic conception of judicial imagination, it is decidedly non-interpretivist in the sense we have described.

A more recent non-interpretivist theory is Eskridge and Ferejohn's approach to interpreting "super-statutes."[110] According to Eskridge and Ferejohn, so-called super-statutes are those laws that penetrate society's culture and norms to such an extent that

[109] Easterbrook, Frank H. (1983) "Statutes' Domains" *U. Chi. L. Rev.*50: 533-552.

[110] Eskridge, William N. Jr. and John Ferejohn (2001) "Super-Statutes," 50 *Duke L.J.* 1215.

they deserve quasi-constitutional status and require a distinct method of interpretation. These scholars consider the Sherman Antitrust Act of 1890 and the Civil Rights Act of 1964 to be quintessential examples of such statutes, and after describing why statutes such as these should be considered "super,"[111] Eskridge and Ferejohn instruct judges in how to interpret them:

> Ordinary rules of construction are often suspended or modified when such statutes are interpreted. Super-statutes tend to trump ordinary legislation when there are clashes or inconsistencies, even when principles of construction would suggest the opposite…For *super-statutes*, which are to be construed liberally and purposively, interpreters should apply words broadly and evolutively, the way the courts have applied terms like "restraint of trade" (Sherman Act), "discriminate" (Civil Rights Act), and "take" (ESA).[112]

Given Eskridge and Ferejohn's emphasis on interpreting super-statutes' language "broadly and evolutively" and on allowing super-statutes to "trump" other pieces of legislation, it is clear that their approach to interpretation is a variant of the non-interpretivist approach that Dworkin, Eskridge, and others advocate.

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[111] Specifically, Eskridge and Ferejohn set forth the following definition of a super statute: "A super-statute is a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does "stick" in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law -- including an effect beyond the four corners of the statute. Super-statutes are typically enacted only after lengthy normative debate about a vexing social or economic problem, but a lengthy struggle does not assure a law super-statute status. The law must also prove robust as a solution, a standard, or a norm over time, such that its earlier critics are discredited and its policy and principles become axiomatic for the public culture. Sometimes, a law just gets lucky, catching a wave that makes it a super-statute. Other times, a thoughtful law is unlucky, appearing at the time to be a bright solution but losing its luster due to circumstances beyond the foresight of its drafters." Eskridge, William N. Jr. and John Ferejohn (2001) "Super-Statutes," 50 *Duke L.J.* 1216.

[112] *Id.* at 1216, 1249.

However, the above descriptions make clear that these legally or socially-valued approaches ignore the ways that legislators compress statutory meaning via the legislative process. Indeed, this approach explicitly encourages judges to "move past the legislative clues regarding the meaning of a statute"[113] and to substitute current norms and values for the meaning that the legislature intended to convey. "As conditions and attitudes change," says Eskridge describing Dworkin's view, "a statute's meaning evolves."[114] Judges and law scholars may or may not have good reasons for advocating methods of interpretation that eschew interpretation. But, these methods should be recognized for what they are: an eschewing of interpretation, in favor of other forms of judicial decision making; and, albeit more controversially, they represent a rejection of the principle of legislative supremacy embodied in Article I of the U.S. Constitution. These approaches may be appropriate nonetheless, yet they entail, in any event, a tradeoff between legislative supremacy (and the democratic principles embodied therein) and some other end. Whatever that end is, however, it does not seem based on democratic principles.

VI. Conclusion

In this paper, we revisit the debate over statutory interpretation – a debate that has occupied more than its share of scholarly energy in the past quarter century – and look at the interpretive project through the lens of positive political theory. Many of the prescriptive theories of interpretation build upon central metaphors. One of the more conspicuous of these metaphors is "communication;" that is, legislation is viewed as a communication between a properly authorized lawmaker and a judicial audience. We

[113] Eskridge, Frickey, and Garrett (1990, p. 241).
[114] Eskridge.

accept this metaphor; indeed, we believe it captures an essential truth about the legislative process and the process by which ambiguous terms and provisions in a statute are interpreted. With the benefit of contemporary communication theory and the positive political theory of lawmaking, we extend and embellish this "communication" metaphor; moreover, we offer a series of lessons drawn from PPT about how statutory interpretation ought to reflect the compression-expansion notion described well in the literature on communication and cognitive theory. And, building on the earlier work of Lupia and McCubbins, we discuss how the interpreter ought to sort reliable from unreliable sources of legislative history. Lastly, we contrast these lessons with some of the key themes in the modern literature on statutory interpretation. When stacked against contemporary theories, including textualism, purposivism, and non-interpretivism, PPT's interpretive lessons shed useful light on the enduring statutory interpretation debate.

We conclude with a brief comment on how these interpretive lessons also apply to the interpretation of judicial opinions. As Vermeule[115] astutely notes, scholars often overlook the similarities between the legislature and the judiciary, and they fail to pay sufficient attention to the fact that the judiciary, like the legislature, is a collectivity. In a similar manner, we emphasize that scholars ought to pay more attention to the fact that judges, like legislators, are communicating with each other and with other political institutions (namely, lower courts) when writing their opinions. Given this similarity, the interpretive lessons that we have described throughout this paper also apply to the "conversations" between appellate and lower courts.

[115] Vermeule, Adrian (2005) "The Judiciary is a They, Not an It: Interpretation and the Fallacy of Division," *Journal of Contemporary Legal Issues.*