Statutory Interpretation as a Parasitic Endeavor

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Once again demonstrating the Ricardian advantages of collaborations between legal scholars truly expert in law and social scientists genuinely expert in their own discipline, *What Statutes Mean* is another outstanding "public-private" partnership between the University of San Diego and the University of California's campus in that fair city. Perhaps the most lasting contribution of the article is its effective articulation of a simple paradigm to view the entire process of statutory interpretation: "Statutes contain a constitutionally privileged command of the form, 'If you are in situation *X*, then you must do *Y*.'"[1] From this, it follows that "the purpose of statutory interpretation is to produce a constitutionally legitimate decoding of statutory commands in cases where the meaning of *X*, *Y*, or both is contested."[2]

These interdisciplinary collaborators, henceforth referred to as "D-Rod and the Tritons" in the playful spirit of McNollgast,[3] are at their

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1. Cheryl Boudreau, Arthur Lupia, Mathew D. McCubbins & Daniel B. Rodriguez, *What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957, 958 (2007).

2. *Id*. at 958–59.

3. McNollgast is clever nomenclature referring to landmark tri-authored contributions to the legal literature by pioneering exponents of positive political theory, Mathew McCubbins, Roger Noll, and Barry Weingast. *See* William N. Eskridge, Jr., *The Circumstances of Politics and the Application of Statutes*, 100 COLUM. L. REV. 558, 568 n.14 (2000) (reviewing JEREMY WALDRON, LAW AND DISAGREEMENT (1999)).

best when explaining how to use a variety of social science insights to facilitate an accurate determination of what Congress meant in enacting federal laws.[4] Their project sails into rougher waters in attempting to demonstrate that the only proper role for a judicial interpreter is to accurately discern legislative meaning, and that judicial canons other than those that accurately generalize legislative behavior are improper. In this regard, their "core assumption" that interpreters "should restrict themselves to discerning the legislature's intended meaning"[5] requires greater analysis.

The principal theme of this essay is that statutory interpretation is a project that requires advocates and judges to utilize the insights of three discrete disciplines apart from law: *communications and linguistics* to understand the way that legislative drafters use words to communicate to others, either in text or in extratextual legislative material; *political science* to describe the way that legislators behave in enacting statutes; and *political theory* to provide a normative guide for courts interpreting statutes in a constitutional democracy. Judges, lawyers, and academics would find the process of interpretation more coherent if they transparently acknowledged when and how they drew upon these other disciplines in crafting their work. I apply this theme to make three specific points about this work and a related one by Professors McCubbins and Rodriguez. First, in applying communications/linguistics and political science, *What Statutes Mean* significantly contributes to statutory interpretation by demonstrating the foundational flaws and antidemocratic and hypocritically activist stance of many so-called textualists.[6] Second, their insights do not logically lead to the conclusion that judges should only ascertain legislative meaning; rather, there are several reasons why judges should in some circumstances pursue another approach. Determining when judges appropriately interpret a statute using other tools requires insights from the discipline of political theory. Third, I apply the methodology of *What Statutes Mean* to McCubbins and Rodriguez's earlier critique of the judicially created "appropriations canon," agreeing that the case law's hostility to appropriations legislation is unjustified; however, I conclude

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McNollgast's major interdisciplinary contributions to the legisprudential literature include McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3 (1994) [hereinafter McNollgast, *Legislative Intent*] and McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992).

4. Because their first "core" assumption is that interpretation "is a project defined by Article I, Section 7 of the United States Constitution," it appears that interpretation of state and local law would require another law review article. Boudreau et al., *supra* note 1, at 961.

5. *Id*.

6. *Id*. at 981–86.

that the canon is actually a defensible generalization about legislative behavior.

I.

D-Rod and the Tritons clearly and helpfully synthesize basic insights in communications theory to explain the process of statutory interpretation as one in which ideas conceived by the drafter are "compressed" into verbal symbols, and then these symbols are "expanded" into ideas in the mind of the interpreter.[7] They conclude that "successful communication . . . requires a correspondence between the way that information is compressed and the way that it is expanded."[8] Perhaps the best way for novices to appreciate this is with regard to miscommunications due to mistranslations. I recall a British graduate student's aghast reaction when I referred to a former colleague best known for walking around the halls in his suspenders. The British use the term "bracers" to describe the clothing article that holds up pants; suspenders are used to hold up ladies' nylons, or "garters" in American English. To assure this "correspondence" between the drafter's "compression" and the interpreter's "expansion," the interpreter must have an understanding of the drafting process. Thus, the insights of political science are essential to effective understanding of statutes as communications. These insights can aid the interpreter in identifying reliable communications made by legislative leaders who, under the rules established by the House and Senate under constitutional mandate,[9] have been delegated authority to control the agenda and to weed out unreliable comments made by others.[10]

What Statutes Mean offers a powerful paradigm that significantly contributes to the *corpus* of legisprudence. The combination of linguistics/ communication sciences and positive political theory that they offer demonstrate the need for transparency in the parasitic endeavor of statutory interpretation. Their paradigm also reveals the hypocrisy in the current judicial politics of statutory interpretation.

Consider their persuasive critique of the "Whole Act Rule," a judicially created interpretive canon that presumes that each word in text

7. *Id.* at 964–66.
8. *Id.* at 966 (emphasis omitted).
9. U.S. CONST. art. I, § 5 ("Each house may determine the rules of its proceedings . . . .").
10. Boudreau et al., *supra* note 1, at 971–73.

must have new and distinct meaning.[11] There is no empirical support from communications or political scientists for the canon's necessary assumption that drafters are never redundant. Anecdotally, I recall from my own experience as a former legislative drafter several occasions when lobbyists or counsel for other senators sought to add additional language to a bill, despite my well-considered explanations that their concerns were fully addressed in the existing language. Faced with the choice of adding redundant language or having to explain to my quite busy boss why some other senator or powerful interest group would not join his bill, I clearly opted for the former. But communications science is not sufficient; an understanding of the legislative process is also required. Even though redundancy may be a "key part of human communication,"[12] the Whole Act Rule and its cousin, the doctrine against "surplusage,"[13] may well reflect sound practice in other legislatures. In parliamentary systems characterized by strict party discipline, legislative amendments rarely succeed without the support of the relevant minister. Well-established conventions preclude the minister from approving amendments until they have been vetted by professional drafters in the Ministry of Justice, who are trained to remove such problematic syntax as redundancies.[14]

The Whole Act Rule is not just wrong, as *What Statutes Mean* demonstrates, but systematically wrong. Because its intellectual foundation remains opaque, some who find the canon problematic, such as the circuit judge in the case criticized in *What Statutes Mean*, feel uncritically bound to accept the canon even though it lacks an empirical foundation.[15] Even D-Rod and the Tritons fall into the muck, erroneously referring to the rule as one of the "so-called grammatical canons."[16] Professors

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11. *Id.* at 983–86. I analyze the Whole Act Rule in this broader sense, rather than the narrower and more descriptive sense of simply requiring that text be understood in the broader context in which the drafters were writing. *See, e.g.*, William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1097 (2001).

12. Boudreau et al., *supra* note 1, at 985.

13. *See, e.g.*, Pa. Dep't of Pub. Welfare v. Davenport, 495 U.S. 552, 562 (1990) (expressing "deep reluctance" to interpret statutory provisions "so as to render superfluous other provisions in the same enactment"). *But see* Landgraf v. USI Film Prods., 511 U.S. 244, 257–61 (1994) (acknowledging that petitioner's textual argument based upon "the canon that a court should give effect to every provision of a statute" "has some force," but refusing to accept the averred meaning because it was "unlikely that Congress intended the [disputed clause] to carry the critically important meaning petitioner assigns it").

14. *See* Stephen F. Ross, *Statutory Interpretation in the Courtroom, the Classroom, and Canadian Legal Literature*, 31 OTTAWA L. REV. 39, 56 n.70 (1999).

15. Carson Harbor Vill., Ltd. v. Unocal Corp., 270 F.3d 863, 883 (9th Cir. 2001).

16. Boudreau et al., *supra* note 1, at 983. This is somewhat puzzling in light of prior work distinguishing between canons designed to improve either specific legislative

Eskridge and Frickey, in their essential reference appendix compiling Supreme Court canons, are only a bit clearer, differentiating the Whole Act Rule from those based on "linguistic inferences" or "grammar and syntax" and placing it with other canons in a category called "textual integrity."[17] This broad use of the Whole Act Rule falls into a wide category of "normative canons" that reflect judicial views on how statutes *should* be drafted, in contrast with "descriptive canons" that actually reflect how drafters write.[18]

The judicial bungling of the Whole Act Rule is symptomatic of the lack of transparency among us legal parasites in identifying the host discipline from which we derive our insights. A quick trip to linguistics texts would show that humans do not emphasize the absence of redundancy in communications, and most political observers—either scholars or practitioners—would readily acknowledge that in American legislatures redundancy is useful, rather than abhorred. We are then left with political theory to justify a judicial preference for "textual integrity," which might be justified,[19] but tends not to be.

My second comment about their paradigm relates to judicial politics and the foundations of textualism. D-Rod and the Tritons conclude that textualism "is suspect, and likely improper, because it entails a method of expansion that is inconsistent with the legislative compression process[]."[20] This claim is far too understated. *What Statutes Mean* significantly contributes to the cannonade attacking a critical foundation of the textualist project, the premise that textualism lessens judicial discretion and promotes effectuation of policy by elected officials.[21]

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outcomes or the legislative process and canons that purport to mirror legislative intent. Mathew D. McCubbins & Daniel B. Rodriguez, *Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon*, 14 J. CONTEMP. LEGAL ISSUES 669, 690 (2005).

17. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 97–98 (1994).

18. Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992).

19. *See, e.g.*, William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1037–38 (1989).

20. Boudreau et al., *supra* note 1, at 983.

21. *See, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 14, 36 (Amy Gutmann ed., 1997); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 62–63 (1988).

William Eskridge offers another fusillade.[22] In a riff on the textualist bromide that judicial use of legislative history is "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends,"[23] Eskridge responds that textualism of the sort practiced by Justice Scalia "is like looking out over a crowd and finding your friends already there, preselected."[24]

The textualists' refusal to employ basic insights of communication sciences reveals that they are not really trying to discern legislative meaning, but impose their own. A wonderful illustration is *Blanchard v. Bergeron*,[25] which interpreted the scope of a statute granting attorneys' fees to prevailing plaintiffs in civil rights cases. Concurring, Justice Scalia castigated his eight colleagues for interpreting the statute in accord with a committee report which approvingly cited the approach taken by three lower court cases. Assuming that a member of the committee staff or a lobbyist had drafted the report language, Justice Scalia wrote: "What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself."[26] Although Justice Scalia disapproved of the majority opinion's reliance on the committee report, he nonetheless concurred in the judgment, endorsing the additional justifications that the majority offered to explain why its ruling was "reasonable, consistent, and faithful to [the statute's] apparent purpose."[27] In other words, Justice Scalia concluded that fees should be awarded based on what *judges* thought was a reasonable standard, rejecting the only evidence as to what the *legislature* thought was a reasonable standard. Although criticized during her confirmation as a beacon of liberal activism,[28] Judge Patricia Wald asked, in regard to this same question, whose meaning of the text should matter:

> Which, then, is the best source: 1) the ruminations of an article III judge who has turned *away* from legislative materials to discern independently a "pattern" or a "reasonable purpose" in a statute in order to shed light on an issue that the statutory language itself fails to clearly settle; or, 2) the admittedly non-binding,

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22. *See* William N. Eskridge, Jr., *No Frills Textualism*, 119 HARV. L. REV. 2041 (2006) (reviewing ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY (2006)).
23. Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).
24. Eskridge, *supra* note 22, at 2073 n.116.
25. 489 U.S. 87 (1989).
26. *Id.* at 99 (Scalia, J., concurring).
27. *Id.* at 100.
28. Judge Wald was among a group of President Carter's judicial nominees criticized by Senator Orrin Hatch as "avant garde liberal activists who will legislate from the bench." *Carter's Appointees Examined for Clues on Supreme Court Possibilities*, N.Y. TIMES, Oct. 3, 1980, at A20.

> but often illuminating, declarations of a House or Senate report explaining what the committee thought it was doing, or the speech of a bill's sponsor in which the sponsor declares his or her objectives in introducing the legislation? Given a choice, I would pin my hopes for fidelity to the "intentions of Congress" on the latter.[29]

According to *What Statutes Mean*, an express statement in a committee report that identified judicial precedents as illustrative of the drafters' meaning is reliable. There would be significant consequences to members and the staffers they employ if the cases cited in the committee report did not accurately reflect the majority's approach to the legislation. And what better way for a lawyer-drafter to communicate meaning to a judge than to provide three precedents rather than try to summarize their meaning in narrative text? As Professor Arthur Corbin argued in the context of the interpretation of contracts, "when a judge refuses to consider relevant extrinsic evidence on the ground that the meaning of written words is to him plain and clear, his decision is formed by and wholly based upon the completely extrinsic evidence of his own personal education and experience."[30]

The verdict on textualism and activism is strengthened when we consider how, even when textualist judges cannot resolve interpretive problems via reference to their own personal views as to the plain meaning of textual language, they substitute judge-created presumptions for actual evidence of legislative intent. Several empirical studies have demonstrated that the textualist attack on the use of legislative history and the materials that D-Rod and the Tritons demonstrate are reliable and helpful to determine congressional meaning has resulted in a significant increase in the use of what I call "normative canons."[31]

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29. Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 305 (1990).

30. Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 164 (1965).

31. This theme has played a major role in work by leading legisprudes Jim Brudney and Jane Schacter, most notably James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005) and Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998). "Reliance on the judicially constructed canons is especially problematic because it is not clear that Congress, with its steadily declining proportion of lawyer-members, has any serious awareness of their existence, much less their specific applicability." James J. Brudney, *Recalibrating Federal Judicial Independence*, 64 OHIO ST. L.J. 149, 180 n.113 (2003). Judge Mikva has suggested that during his

To refuse to utilize techniques that help explain what legislators meant in crafting statutes, and to substitute for these techniques a personal view of words' meaning or a judicially created canon consistent with one's own ideology, are the hallmarks of activism. Some liberal activists openly acknowledge this.[32] Whether judicial activism is a good idea requires assistance from the third discipline critical to statutory interpretation, political theory, a topic to which I will turn next. With regard to those who publicly criticize activism, *What Statutes Mean* provides an excellent and thoughtful demonstration that the endorsement of textualist judges constitutes raw political hypocrisy.[33]

II.

What Statutes Mean extensively applies insights from communication science and political science to aid in accurately ascertaining legislative meaning. D-Rod and the Tritons glide over a major problem in

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extended tenure in the House, the "only 'canons' we talked about were the ones the Pentagon bought that could not shoot straight." Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 629 (1987). *See also* James J. Brudney, *A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process*, 74 N.C. L. REV. 939, 1028 (1996) (noting instances where courts use avoidance canon to frustrate original meaning of National Labor Relations Act in favor of nonunion employee rights); James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 46–47 (1994) [hereinafter Brudney, *Congressional Commentary*] (noting increased Congressional overrides of Supreme Court decisions that ignore legislative history in favor of judicially created canons); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 347–48 (1991) (concluding that Congress is more likely to override "plain meaning" decisions than any others, since nearly half of the overrides since 1967 address decisions in which the primary reasoning was plain meaning or canons-of-construction reasoning, whereas overrides of decisions based on statutory "purpose" are rare); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 600–01 (2002) (observing that legislative staffers do not give canons the same degree of weight that judges do).

32. *See, e.g.*, Jerry L. Mashaw, *As If Republican Interpretation*, 97 YALE L.J. 1685, 1692–93 (1988).

33. *J'accuse* only those in the political realm who defend and appoint textualist judges while assailing "judicial activism." I acknowledge that well-meaning scholars adhere to the view that textualism is a legitimate "effort to limit the discretion afforded to judges in statutory interpretation cases because of concerns about the legitimacy of judicial lawmaking." John Copeland Nagle, *The Worst Statutory Interpretation Case in History*, 94 NW. L. REV. 1445, 1455 (2000) (reviewing WILLIAM D. POPKIN, STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION (1999)). Boudreau et al., *supra* note 1, demonstrates why Nagle and his academic fellow travelers are nonetheless misguided. On the other hand, while Professor Nagle finds normative canons problematic in terms of excessive judicial discretion, *see, e.g.*, John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 819–21, studies by Jim Brudney and Jane Schacter, *supra* note 31, show how textualist judges who are championed as models of judicial restraint by politicians frequently impose clear statement rules.

legisprudence and political theory: whether judicial interpretation of statutes should ever be more than an effort to ascertain legislative intent, and if so when. Fully utilizing all three relevant disciplines, in contrast, reveals at least three situations where judges might properly dispense with an approach limited to their best effort to ascertain legislative meaning: (1) cases where clues as to meaning are extremely weak (true ambiguity), (2) cases where changed circumstances cast serious doubt on the accuracy of meaning as a democratic effectuation of elected officials' policy preferences (dynamic interpretation), and (3) cases where political theory justifies a non- or semi-interpretivist stance (constitutional values).

The social sciences of linguistics/communications studies and political science provide, as D-Rod and the Tritons demonstrate, some excellent tools in allowing judges to discover helpful clues about legislative meaning. However, these clues are not infallible. Just as amazing technological and biochemical innovations in forensic science do not allow CSI teams to solve every murder, there will be statutes commanding courts to do *Y* in situation *X* when the words used for *X* are truly ambiguous and there is absolutely no political or legislative history to help resolve the specific question whether *X* covers the case *sub judice*. Even when clues exist, they may be conflicting. The political theory of legislative supremacy that underlies the effort to interpret according to ascertained meaning has significantly less force when a judge lacks any real confidence that she has gotten it right.[34] As Einer Elhauge observes, statutory interpretation involves both how courts should determine the meaning of statutes, as well as how courts decide a case when it cannot divine a statute's meaning.[35]

A second area where political science and political theory combine to justify a departure from the pure ascertainment of legislative meaning arises when circumstances change. The clearest case is reflected in the "absurd result" rule, dating back to English practice, that authorizes departure from "plain meaning" when "so applied [the words] produce an inconsistence, or an absurdity or inconvenience so great as to convince

34. McNollgast, *Legislative Intent*, *supra* note 3, at 23–24, poses some examples where probabilistic analysis could result in several alternative interpretations, all with .3–.49 probability of accuracy. To choose among these alternatives using a constitutionally based political theory hardly seems contrary to D-Rod and the Tritons' goal of a "constitutionally legitimate decoding." Boudreau et al., *supra* note 1, at 958–59.

35. Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2029 (2002).

the Court that the intention could not have been to use them in their ordinary signification."[36] Somewhat more controversial is the practice of dynamically interpreting statutes when the judge is confident that the enacting legislature did not mean to "do *Y* in situation *X*" when situation *X* arises in the unforeseen context of the case *sub judice*.

Embracing the principal/agent paradigm encompassed in D-Rod and the Tritons' formulation "when in situation *X*, you shall do *Y*," especially in the context of a long-term, repeating relationship between the principal (Congress) and the agent (judges who serve for life terms), academic advocates of dynamic interpretation observe that there are many nonlegal situations when the principal expects the agent to exercise discretion not to follow literal instructions in the face of changed circumstances.[37] To a significant degree this reflects either the actual intent of the enacting Congress, or a general "meta-intent" that reflects an empirical claim about the general expectation of legislators. As to both claims, science and theory play a role. I am reminded of a wonderful insight shared with my Statutory Interpretation students by eminent Circuit Judge Levin Campbell, who served as a Massachusetts state legislator and state judge before appointment to the federal bench. Judge Campbell reported that as a state judge he adopted a strict and literal approach to statutory interpretation; absent a complete travesty of justice, he applied the words of the text without regard to context, and made it a practice to correspond frequently with his former legislative colleagues, confident that outmoded statutes would be appropriately revised. In later years he became convinced that, in contrast with his understanding of the legislative process on Beacon Hill, the difficulties in passing reform legislation through the United States Congress were so great that he could not presume that outmoded legislation would be updated, and that some form of dynamic interpretation was necessary. Likewise, Circuit Judge Jon Newman is inclined to construe legislation that is reviewed frequently by Congress, such as tax law, quite literally, while favoring a broader approach to foundational statutes unlikely to be amended like the nineteenth-century civil rights statutes.[38]

Although the problem of outmoded statutes is significantly ameliorated by the presence of administrative agencies that can update the statute,[39]

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36. River Wear Comm'rs v. Adamson, [1877] 2 App. Cas. 743, 764–65 (H.L.) (appeal taken from Eng.).

37. William N. Eskridge, Jr., *Spinning Legislative Supremacy*, 78 GEO. L.J. 319 (1989).

38. Jon O. Newman, *Between Legal Realism and Neutral Principles: The Legitimacy of Institutional Values*, 72 CAL. L. REV. 200, 209–10 (1984).

39. Absent text or reliable legislative history demonstrating that Congress had considered the "precise question at issue" in the case, federal courts are supposed to

the same issue arises with statutes that require interpretation without the benefit of intermediating agency determinations. When political science[40] suggests either a specific intent that judges enforce the statute in accordance with legislative purpose or a general intent that judges do so, insisting on an interpretation in accordance with original legislative meaning cannot be justified by logic or by labeling the judicial role as a "core assumption." It needs to be justified by a political theory, to which this essay now turns.

D-Rod and the Tritons only slightly embellish their claim that judges should seek only to ascertain legislative meaning by citing the reverential *Federalist No. 78*, where Alexander Hamilton famously wrote that the judiciary was the "least dangerous" branch because, lacking power over the sword or the purse, judges "have neither FORCE nor WILL, but merely judgment . . . ."[41] In defending the authority of the judiciary to refuse to enforce laws repugnant to the Constitution, Hamilton conceded that judges might be able to "substitute their own pleasure" for the "constitutional intentions of the legislature," but to do so would be highly inappropriate.[42] Judges should "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."[43]

But there is significantly more to *Federalist No. 78*. Expounding on his views of what constitutes appropriate "judgment" in contrast to the inappropriate imposition of judicial "will," Hamilton wrote:

> But it is not with a view to infractions of the constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humours in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance

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defer to any reasonable agency interpretation. Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). When unforeseen circumstances intervene, the intentional question that judges need to answer—aided by political science—is whether the drafters preferred literal enforcement until Congress had the opportunity to review the issue or preferred a sensible updating by the delegated agency. *See, e.g.*, Regions Hosp. v. Shalala, 522 U.S. 448, 460 (1998) (deciding Congress more likely preferred "the Secretary's exercise of authority to effectuate the Legislature's overriding purpose" rather than "[e]rror perpetuation until Congress plugged the hole").

40. I include here the analysis of past political science, recognizing that experts in this regard are often housed in departments of history.

41. THE FEDERALIST NO. 78, at 412 (Alexander Hamilton) (J.R. Pole ed., 2005).

42. *Id*. at 416.

43. *Id*.

> in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more states than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested.[44]

Bill Eskridge has identified one of the cases where the "benefits of the integrity and moderation of the judiciary have already been felt" in a contemporarily famous lawsuit argued by none other than Alexander Hamilton himself, *Rutgers v. Waddington*.[45] The action was a writ of trespass brought by a patriot whose property had been seized during the Revolutionary War by the British and then handed over to two loyalists.[46] The loyalists relied on the common law defense that use of abandoned property was justified in time of war when authorized by military authorities.[47] The patriot demurred in reliance of a recent New York statute designed to disallow the common law defense when arising out of the British occupation.[48] Hamilton denounced the statute as contrary to the law of nations as incorporated in the New York constitution and the state's common law.[49] The judge, "mitigating the severity and confining the operation of" what Hamilton called "unjust and partial laws," refused to apply the statute and upheld the loyalist's defense.[50] As Eskridge recounts:

> Paraphrasing Blackstone, the court insisted that judges were required to apply unreasonable statutory directives, so long as they were "clearly expressed, and the intention manifest," but when generally worded statutes yield unreasonable results in particular cases, courts are at liberty to "expound the statute by *equity*." The opinion recast the legal issue as whether the legislature clearly intended to revoke the law of nations and create a clash with the treaty of peace. "The repeal of the law of nations, or any interference with it, could not have been in contemplation, in our opinion, when the Legislature passed this statute; and we think ourselves bound to exempt that law from its operation . . . ."[51]

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44. *Id.* at 416–17.
45. Opinion of the New York Mayor's Court, Aug. 27, 1784, *reprinted in* 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 393–419 (Julius Goebel Jr. ed., 1964), *described in* Eskridge, *supra* note 11, at 1025–26.
46. Eskridge, *supra* note 11, at 1025.
47. *Id*.
48. *Id*. at 1025–26.
49. *Id*. at 1027.
50. *Id*.
51. *Id.* at 1026 (footnote omitted).

It does not require political scientists of the caliber of Boudreau, Lupia, and McCubbins to discern the New York legislature's choice between rigorously respecting the law of nations and allowing loyalists to profit at the expense of patriots during British occupation.

Decisions by independent magistrates to mitigate the effects of unjust and partial laws is not a matter of political science but of political theory. In this case it is about why the benefits of adherence to principles of international law justifies, even in a democracy, judges putting their thumb on the scale by increasing the difficulty of passing legislation contrary to international norms. It is beyond the scope of this essay to debate the validity of this theory, or the propriety of other "clear statement rules" grounded in norms derived from the Constitution.[52] The claim here is that the purposes of sound jurisprudence in a democracy are best served when the theory is transparently debated and argued.[53] Lawyers and judges should debate whether judges should apply an interpretive canon requiring certain kinds of meaning to be explicit, and whether such a canon is appropriate in the particulars of the case *sub judice*. By the same token, the claim that clear statement rules are never appropriate is plausible, but it too reflects a political theory that, contrary to Hamilton's view in the eighteenth paragraph of *Federalist No. 78* quoted above, judges should not, absent a clear inconsistency with constitutional mandate, provide an "essential safeguard against the effects of occasional ill humours in the society" reflected in "unjust and partial laws."

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52. These include the presumption of innocence (the rule of lenity in criminal cases), equal protection (the "*Carolene* canon" that construes ambiguous statutes in favor of discrete and insular minorities unable to participate equally in the political process), and federalism (the currently fashionable practice of construing federal statutes to preserve state prerogatives and state statutes).

53. Rehearsing a rich debate about judicial candor is also beyond the scope of this essay. The strongest argument against candor, Nicholas S. Zeppos, *Judicial Candor and Statutory Intepretation*, 78 GEO. L.J. 353, 406 (1989), focuses on the *public perception* of legitimacy if judges were candid about more dynamic techniques of interpretation. Even accepting Zeppos's argument, it is not clear that transparency in grounding judicial holdings in linguistics, political science, or political theory raise the same public perception problems. And forcing judges to transparently justify "normative canons" that trump likely legislative meaning would seem to improve public legitimacy. I note that the progenitor of the concept of dynamic interpretation argues for increased candor. William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1543, 1546 (1987); *see also* Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 558 n.117 (1992); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

A second way in which political theory is necessary to determine whether or not interpreters should ascertain actual legislative meaning arises in the context of a conflict between the apparently plain meaning of a statute and seemingly reliable legislative history that suggests a contrary intent. Most judges believe that when careful consideration reveals no textual ambiguity, they are bound to give effect to the text.[54] Social scientists are likely to ask the highly relevant question with regard to this apparent conflict: Why would legislators use clear text and then create evidence of a contrary intent? Textualists often presume that the contrary legislative history is a red herring.[55] Indeed, political science insights can often provide the tools that can explain why the contratextual evidence is in fact not very reliable. At other times the political history seems to clearly and reliably demonstrate that the legislative intent is contratextual. Some courts will give effect to this intent, especially where the statute was hastily drafted, while other judges insist on giving effect to last minute textual additions that clearly do not reflect the legislative bargain.[56] A judge drawing on communications science will readily understand that people do not always mean what they say. The example I use in class is that of a parent who will not hesitate to punish a child for refusing to come when called, if the child is the only one in the house and knows she is being called, even if she is being summoned by her sibling's name. A judge drawing on political science will readily understand that deals are often made and reflected in the legislative history without the appropriately careful revision of text that would have occurred if time permitted careful drafting. I have previously argued that persuasive and reliable evidence that the legislature attached a meaning to the text different than the one held by the court would seem to be prima facie evidence that the text's meaning is not plain.[57] What justifies the strong judicial view that text is all that matters is not that textualists actually believe that each legislator pores over the text while ignoring committee reports and other relevant legislative history. For textualists, political history is disregarded because of political theory, not political science.

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54. ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 10 (1997).

55. See Justice Scalia's critique of legislative history in *Blanchard v. Bergeron*, 489 U.S. 87, 97–100 (1989) (Scalia, J., concurring).

56. *Compare* Shine v. Shine, 802 F.2d 583, 587–88 (1st Cir. 1986) (departing from literal interpretation that would allow spouse to discharge a debt that historically was nondischargeable, in light of absence of congressional intent and harried drafting process), *with* In re Sinclair, 870 F.2d 1340, 1344–45 (7th Cir. 1989) (giving effect to literal language regarding transition provisions of Bankruptcy Act, despite evidence that language was contrary to purpose and specific legislative intent and relevant provision was inserted during last minute conference).

57. Ross, *supra* note 14, at 63.

Judges give effect to text because that is the way judges think the legislative process *should* work.

Finally, parasitic interpreters can draw on both political science and political theory to craft canons that enhance our constitutional democracy by facilitating the sort of deliberative political process the Constitution envisions. As Einer Elhauge has observed, a number of canons are both explicable and justified as "neither efforts to divine statutory meaning nor attempts to further judicial or legislative preferences, but rather reflect default rules designed to elicit legislative preferences under conditions of uncertainty."[58] Fully consistent with the principal thrust of *What Statutes Mean*, Elhauge argues that the best way to assure successful ongoing communication between Congress and the courts is for statutes to be interpreted by use of default rules designed to "provoke a legislative reaction that resolves the statutory indeterminacy" when (1) the actual meaning of the enacted legislation is unclear, (2) it is much more likely that the legislature will react to judicial adoption of one party's proposed interpretation than the other's, and (3) the interim costs inflicted by the adopted rule are acceptable.[59] Elhauge's approach invokes the parasitic nature of statutory interpretation. It is grounded in political theory that views overcoming antidemocratic obstacles to ongoing review of political choices by current elected officials as a good thing; and political science which recognizes that existing statutes may not reflect current policy preferences because of countermajoritarian veto gates. Implementation requires application of (1) linguistics and communications science, but only if techniques such as those offered by D-Rod and the Tritons, McNollgast, et al. do not yield a confident estimation of the meaning of the original communication; and (2) political science, as ruling for one side is predicted to facilitate congressional focus on the issue, resulting in new legislation that accurately reflects modern policy preferences.[60]

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58. *See* Elhauge, *supra* note 35, at 2165.

59. *Id.* at 2165, 2166. These default rules are a function of a variety of obstacles and veto gates that make the passage and interpretation of federal legislation so interesting. In Judge Campbell's perhaps idealized view of the Massachusetts Legislature, *see supra* text accompanying notes 37–38, preference eliciting rules are not necessary; all that is necessary to get the desired response is a letter from a judge. Such is clearly not the case with Congress.

60. Elhauge, *supra* note 35, at 2168 n.9, acknowledges that his approach was "inspired" by Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989). This is significant in light of McNollgast's express reliance on the economics of contracting with regard to the

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The ill effects of nontransparent parasitic behavior by judicial and academic interpreters are reflected in both case law regarding the appropriations canon and its criticism in another major article by two of *What Statutes Mean*'s authors, Mat McCubbins and Dan Rodriguez.[61] The canon in question is a clear statement rule that requires express textual support in appropriations legislation for changes in substantive legislation. Opaque reasoning in judicial decisions led courts to what McCubbins and Rodriguez demonstrate is the erroneous conclusion that the use of appropriations legislation to make changes in substantive legislation is a bad idea that should be discouraged by judges through the use of a normative canon. However, this insightful critique appears to overstate positive political science insights about the role that legislators actually intend to give to their colleagues serving on the powerful Appropriations Committees. Specifically, the desirability *vel non* of enacting substantive legislation as part of the appropriations process does not address an alternative justification for the appropriations canon, that nontextual legislative history reflecting the deliberations of the Appropriations Committee and the intent of appropriators is not reliable evidence of what the vast majority of nonappropriators intend with regard to specific substantive legislation that, under House and Senate rules, would ordinarily need to be considered by another committee.

Judicial precedent requires a clear statement to effect congressional policy decisions if the chosen means is substantive legislation contained in a statute originating from the House or Senate Appropriations Committee.[62] Courts base their antipathy to this particular legislative strategy on an almost casual judicial perception that substantive legislation originating in appropriations committees is less likely to be well considered.[63] McCubbins and Rodriguez largely debunk these arguments.[64] Using political science, they demonstrate that the appropriations process is no more or less deliberative than the process by which substantive legislation is enacted.

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application of positive political theory to statutory interpretation. McNollgast, *Legislative Intent*, *supra* note 3, at 9.

61. McCubbins & Rodriguez, *supra* note 16.

62. *Id.* at 676–85 (citing, inter alia, Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978)).

63. *Id.* at 686–90.

64. I put to the side the plausible argument that, as a matter of political science, the complexity of the must-pass nature of appropriations legislation makes it an easier target for special interests and that as a matter of political theory, judges should interpret statutes in a manner to counter collective action problems recognized by public choice theory. If this argument is valid, then it would justify a broader *Carolene* canon in favor of politically powerless minorities, regardless of whether the affected legislation was part of an appropriations measure.

They then use political theory to argue that there is no basis for a judicial preference that Congress enact legislation in any particularly deliberative way.[65] However, courts and commentators appear to have overlooked an alternative justification for the appropriations canon as a legitimate effort to discern legislative meaning.

The leading case is *Tennessee Valley Authority v. Hill*, where Congress appropriated substantial sums for a major dam and hydroelectric project whose construction allegedly violated the Endangered Species Act.[66] The Supreme Court held that the project violated substantive law, and that the declaration in Appropriations Committee reports that the project should proceed was not sufficient to displace the text-based conclusion that the program was repugnant to substantive law.[67]

First, the Court observed that the language of the Endangered Species Act plainly required that any federal agency action "authorized, funded, or carried out by them [did] not jeopardize the continued existence" of an endangered species or "result in the destruction or modification of habitat of such species."[68] Although the government and dissenting Justice Lewis Powell contended that this language was ambiguous, capable of being interpreted as applying only to the initial decision to commence a project, the Court observed that no evidence was offered to support this alternative meaning other than Justice Powell's own declaration that it was so. Insightfully referring to Lewis Carroll's Humpty Dumpty, the majority thus recognized that a textual approach allows judges to declare a statute to mean whatever they want it to mean,[69] and so concluded that the "language, structure, and history" of the Act demonstrated that Congress intended species protection to be a top priority, and this reading was consistent with the application of the Act to block the

65. They note that the Appropriations Committee is the largest and most representative committee, whose very jurisdiction attracts the attention of the most number of stakeholders. McCubbins & Rodriguez, *supra* note 16, at 695. Appropriations bills are more likely to be amended, *id.* at 697, and the bargaining process necessary to achieve sufficient votes to pass appropriations bills results in more deliberation than may occur with substantive legislation. *Id.* at 701–07.

66. 437 U.S. 153 (1978).

67. *Id*. at 172–74.

68. *Id*. at 160 (quoting 16 U.S.C. § 1536 (1976)) (emphasis and internal quotation marks omitted).

69. *Id.* at 172–74. "'When *I* use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what *I* choose it to mean—neither more nor less.'" *Id.* at 173 n.18 (quoting LEWIS CARROLL, *Through the Looking Glass*, *in* THE COMPLETE WORKS OF LEWIS CARROLL 196 (1939)).

opening of an almost-operationally complete dam.[70] Significantly, the Court relied upon the fact that previous legislation had required agencies to try to protect endangered species "insofar as is practicable and consistent with [the agencies'] primary purposes,"[71] a provision expressly criticized by environmentalists during committee hearings, and that the Endangered Species Act expressly omitted such qualifying language.[72]

The Court refused to be guided by language in the committee reports of the House and Senate Appropriations Committees explaining that in continuing to fund the controversial dam, those committees viewed the project as consistent with the terms of the Endangered Species Act.[73] The majority reasoned that the general interpretive approach disfavoring an argument that a subsequent statute impliedly repealed an earlier one applied "with greater force" to appropriations measures.[74] Rejecting the argument that the clearly expressed view of appropriators contained in their committee reports was sufficient evidence of congressional intent to justify an interpretation contrary to the ordinary language of the substantive statute, the majority observed:

> We venture to suggest that the House Committee on Merchant Marine and Fisheries and the Senate Committee on Commerce would be somewhat surprised to learn that their careful work on the substantive legislation had been undone by the simple—and brief—insertion of some inconsistent language in Appropriations Committees' Reports.[75]

Significantly, the Court further noted that there was no evidence that legislators on the substantive committees or elsewhere were aware of the views of the government or their appropriations colleagues.[76] This implies that, notwithstanding language in the opinion suggesting that a textual repeal of substantive law is essential, the result might well have been different if there was awareness and endorsement of the Appropriations

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70. *Id*. at 174.

71. *Id.* at 175 (quoting Endangered Species Act of Oct. 15, 1966, Pub. L. No. 89-699, § 1(b), 80 Stat. 926 (repealed 1973)).

72. *Id.* at 182 (citing *Endangered Species Act: Hearing on H.R. 4758 Before the Subcomm. on Fisheries and Wildlife Conservation and the Env't of the H. Comm. on Merchant Marine and Fisheries*, 93d Cong. 251, 335 (1973) (statement of Cynthia E. Wilson, Rep., National Audubon Society; statement of Robert C. Hughes, Chairman, Sierra Club's National Wildlife Committee)).

73. *See, e.g.*, H.R. Rep. No. 95-379, at 104 (1977) ("It is the Committee's view that the Endangered Species Act was not intended to halt projects such as these in their advanced stage of completion, and [the Committee] strongly recommends that these projects not be stopped because of misuse of the Act."); S. REP. NO. 94-960, at 96 (1976) ("The Committee does not view the Endangered Species Act as prohibiting the completion of the Tellico project at its advanced stage and directs that this project be completed as promptly as possible in the public interest.").

74. *TVA*, 437 U.S. at 190–91.

75. *Id.* at 191.

76. *Id.* at 192.

Committee reports, such as defeat of an amendment to the appropriations legislation that would have conditioned funding on full compliance with the Act or perhaps even a colloquy between advocates of the dam project and leading members of the relevant substantive committee that indicated a consensus that the project was consistent with the Act.[77]

Obviously, the clear statement requirement of the appropriations canon would be met if the funding measure had contained language that the funds should be spent "notwithstanding the Endangered Species Act" or, even more generally, "notwithstanding any other provision of law."[78] When no such statement exists, a range of possible meanings can be inferred from the fact of appropriation. A decision to appropriate money for a dam could reflect (i) congressional intent to have the project go forward notwithstanding any other provision of law; (ii) a considered congressional determination that the funded project did not, in fact, violate substantive law; (iii) the unconsidered assumption that the funded project was lawful, with no reliable indicator of congressional intent if this assumption were proven false; (iv) a policy judgment that the funded project meets spending priorities, but should proceed only if it were separately determined that the project was lawful.

Political science can aid in determining whether any of these alternatives are more or less probable. The Court properly found it significant that each house's internal rules disfavored the enactment of provisions of substantive law as part of appropriations legislation.[79] In

77. *Cf.* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION 1013–19 (3d ed. 2001) (discussing litigation involving the application of an easement-granting proviso in the Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980), to forest land in Colorado and Montana). In *Montana Wilderness Ass'n v. United States Forest Service*, 655 F.2d 951 (9th Cir. 1981), the court initially held that the proviso did not extend to Montana, but reconsidered when it was brought to its attention that a conference report on the Colorado Wilderness Act explained that the easement-granting proviso had been deleted from that bill because the matter had already been addressed in the Alaska statute.

78. Significantly, appropriations legislation funding the Tellico Dam did include a specific provision appropriating funds to carry out the purposes of the Energy Reorganization Act of 1974 "notwithstanding the provisions of section 3617 of the Revised Statutes (31 U.S.C. 484)." Public Works for Water and Power Development and Energy Research Appropriation Act, 1976, Pub. L. No. 94-180, tit. I, preamble, 89 Stat. 1035, 1035 (1975).

79. The Court observed:

> House Rule XXI (2), for instance, specifically provides:
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> > "No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously

other words, the House Rules make clear that the legislative command "spend money" plainly means "spend money subject to existing substantive law" unless the text indicates otherwise.[80] Legislative rules and practice provide a ready means for the majority to work its will in these cases: the Rules Committee can, when reporting the House Resolution governing terms of floor consideration of an appropriations measure, explicitly waive the rule and clearly signal an intent to permit an appropriations measure to change substantive law. Indeed, this approach is precisely what Speaker Newt Gingrich did to enable the more loyal Appropriations Committee to bypass substantive committees to enact a Republican legislative agenda after forty years of Democratic control.[81]

The appropriations canon does not impose a *judicially* created requirement that "Congress must pursue their reform objectives through the ordinary legislative process, that is, through adjustments to the authorizing legislation."[82] The canon does no more than enforce the *legislatively* created requirement that Congress must reform substantive legislation through substantive committees absent an explicit rule waiver. Indeed, giving effect to appropriations that changed substantive legislation would frustrate House Rules. If the Appropriations Committee had inserted in text a provision that exempted the Tellico Dam from the Endangered Species Act, it would have been subject to a point of order; it is not exactly clear how the chair of the Merchant Marine and Fisheries Committee could lodge a parliamentary objection to report language.[83] Under these

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> authorized by law, unless in continuation of appropriations for such public works as are already in progress. *Nor shall any provision in any such bill or amendment thereto changing existing law be in order*." (Emphasis added.)
>
> *See also* Standing Rules of the Senate, Rule 16.4. Thus, to sustain petitioner's position, we would be obliged to assume that Congress meant to repeal *pro tanto* § 7 of the Act by means of a procedure expressly prohibited under the rules of Congress.

TVA, 437 U.S. at 191. While the majority party leadership can use the Rules Committee to secure a rules waiver in order to legislate on an appropriations bill, the entire membership can also work its will by overturning a point of order. For an illustration of an unsuccessful effort to pass substantive legislation with regard to the war in Iraq, see Charles Tiefer, *Can Appropriation Riders Speed Our Exit from Iraq?*, 42 STAN. J. INT'L L. 291, 307–09 (2006).

80. I thank Abner Mikva for this observation.

81. *See* John H. Aldrich & David W. Rohde, *The Republican Revolution and the House Appropriations Committee*, 62 J. POL. 1, 19 (2000).

82. McCubbins & Rodriguez, *supra* note 16, at 691.

83. As the Court noted:

> When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the

circumstances, a statement inserted into a committee report of the Appropriations Committee, which if included in the text would have been subject to a point of order for violating House Rules, is not the act of a legislator "acting as an agent for the majority."[84] If House leaders really wanted to exempt the Tellico Dam, the modest cost of explicitly doing so and waiving the rules could achieve the goal. Therefore, it is more likely that the report language reflected the House leaders' tolerance for appropriators scoring political points with special interests by inserting "cheap talk" report language demonstrating their support for a contested interpretation of existing law. Thus, in McNollgastian terms, the House Rules demonstrate both a desire to permit substantive committees to act as veto gates on changes in substantive legislation[85] and a view

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> expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need.

TVA, 437 U.S. at 190–91.

84. McNollgast, *Legislative Intent*, *supra* note 3, at 24.

85. *Id.* at 18. McCubbins and Rodriguez believe that *Tennessee Valley Authority v. Hill* incorrectly ascertained legislative meaning, and others believe it was an unnecessary triumph of formalism over reality. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 15–23 (1986). My analysis suggests that the prompt overturning of the Court's decision, Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (codified at 16 U.S.C. §§ 1531–1543 (1982)), doubtless required Tellico Dam advocates to pay some political price to secure the acquiescence of environmentalists on the Merchant Marine and Fisheries Committee, which is exactly the design of the House Rules in giving the substantive committee exclusive jurisdiction over substantive law. Indeed, the statute was strongly supported by the Tennessee congressional delegation and was part of a political deal to obtain a three-year authorization of the Endangered Species Act. *See* Environmental Law Institute, *96th Congress, 1st Session: Environmental Issues in Limbo*, 10 ENVTL. L. REP. 10,009, 10,013 n.54 (1980). A provision in the new legislation creating a cabinet-level committee to resolve exemption issues may actually have strengthened the statute because exemptions became so difficult to obtain. *See* Zygmunt J.B. Plater, *In the Wake of the Snail Darter: An Environmental Law Paradigm and Its Consequences*, 19 U. MICH. J.L. REFORM 805, 828 (1986). *Cf.* Brudney, *Congressional Commentary*, *supra* note 31, at 16–20 (describing how new Supreme Court decisions restrictively interpreting civil rights laws required use of additional political capital that doomed other legislation that likely would have passed). For this reason, I respectfully disagree with Bill Eskridge, *supra* note 31, at 339–40, that the failure to credit the Appropriations Committee report language is "blinking reality"; while Eskridge is agnostic on whether the decision and responsive legislation authorizing the dam "imposed unnecessary burdens on the congressional agenda (which is very limited)," *id.* at 340 n.76, I conclude that the burden of passing new legislation is precisely that intended by the House Rules that designate the Merchant Marine and Fisheries Committee as a veto gate. Elhauge, *supra* note 35, at 2220–21, defends the decision along similar lines.

that the interests reflected in substantive committees are presumed to be influential in most legislative bargains. Language in appropriations reports to the contrary are efforts to evade congressionally designated veto gates and are thus unreliable.[86]

McCubbins and Rodriguez reach a contrary conclusion, as they read too much into prior work about the reasons why overall fiscal policies are delegated to the Appropriations Committees, whose perspective and composition are more likely to reflect the policy preferences of the majority party leadership than majorities on substantive committees.[87] But it is quite a leap in the logic of delegation to suggest that, contrary to the express design of the rules of each chamber, the Appropriations Committees are intended to serve as general committees of revision empowered to update the vast body of statutes Congress has previously passed. McCubbins and Rodriguez assert that *Tennessee Valley Authority v. Hill* "misunderstands the legislative process"[88] in predicting that the overwhelming majority of legislators who are *not* members of the Appropriations Committees acquiesce in allowing their vaunted colleagues to undo substantive legislation by inserting language in Appropriations Committee reports. It is with extreme temerity that I dispute a political scientist of Mat McCubbins's caliber in his own pond, so to speak; I confess my skepticism draws largely from my own experience as a staff

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86. McCubbins and Rodriguez's critique of the district court decision in *U.S. Security v. FTC*, 282 F. Supp. 2d 1285 (W.D. Okla. 2003), *rev'd in part sub nom. Mainstream Mktg. Servs. v. FTC*, 358 F.3d 1228 (10th Cir. 2004), misses the point in this regard. McCubbins & Rodriguez, *supra* note 16, at 673–74. In holding that the FTC lacked authority to create a do-not-call registry, the judge disregarded appropriations legislation that funded the creation of the registry by the FTC from fees. *U.S. Security*, 282 F. Supp. 2d at 1292. The legislative history recounted in McCubbins & Rodriguez, *supra* note 16, at 671–75, shows that the substantive legislation governing the FTC did indeed allow such an authorization, and so the judge was properly reversed. If one accepted the judge's misguided claim that the lack of express authority to promulgate a do-not-call list precluded the FTC's doing so, and his further misguided claim that a specific statute, the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101–08 (1994), did not create sufficient authority, then I do not believe that appropriations for unauthorized activities should suffice to effectively expand the FTC's jurisdiction.

Consider instead a closer debate about FTC authority: its contested authority to regulate the commercial activities of nonprofit organizations designed to serve the profit-seeking interests of their members. The Supreme Court held in *California Dental Ass'n v. FTC*, 526 U.S. 756, 759 (1999), that the FTC had such jurisdiction, although the issue was sufficiently in doubt to require a grant of certiorari. *Id*. at 764–65. In my view, the inclusion in the legislative history of the FTC's 1998 appropriations of comments by the House and Senate committees that a portion of the FTC's funds should go to investigating anticompetitive practices of nonprofit professional associations should not have been particularly relevant to the Court's determination of the issue. *See id*. at 768–69.

87. D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS 132–33 (1991).

88. McCubbins & Rodriguez, *supra* note 16, at 699.

attorney for a substantive committee (Senate Judiciary), but for scholarly purposes I will limit my argument to an assertion that the political science literature cited in *Canonical Construction* simply does not demonstrate their claim.[89] They argue that substantive committees are not representative of the entire chamber, and that the ability of substantive committees to achieve undesired policy outcomes is inhibited by the Rules Committee, the majority party leadership, and the need for many policies to receive adequate funding to be effectuated, thus requiring support from appropriators. But they acknowledge that veto gates exist that can frustrate passage of policies that may well attract majority support.[90] Curiously, they fail to reach the conclusion that among the veto gates are substantive committees, and that each house's rules are expressly designed to make it difficult, albeit not impossible, for a chamber's majority (much less the tacit acquiescence of the majority to the views of a majority of appropriators) to work its will over the objection of the relevant substantive committees.[91] It is unclear why and on what evidence we are now supposed to conclude that the House leadership believe this

89. *See, e.g.*, *infra* note 94.

90. McCubbins & Rodriguez, *supra* note 16, at 700–01. Substantive committees are archetypical veto gates if we accept the definition by the concept's originators: a person or committee whose actions can significantly affect the course of legislation, most importantly by imposing costs on subsequent decisionmakers seeking to reverse their policy choices. McNollgast, *Legislative Intent*, *supra* note 3, at 7.

91. One can certainly imagine a legislature designed to enhance majority party control by allowing the Speaker to appoint members of the fiscal committee and giving such a committee revision powers over substantive legislation before the bills went to the floor. Indeed, this describes the California legislature. WILLIAM K. MUIR, JR., LEGISLATURE: CALIFORNIA'S SCHOOL FOR POLITICS 28–29 (1982). As McNollgast observed: "[T]he legislature can choose a degree of difficulty for changing a policy bargain through its choice of institutional rules and structures." McNollgast, *Legislative Intent*, *supra* note 3, at 11. Thus, successful legislation must pass through numerous veto gates: "[A]greement must be reached *among House and Senate committees*, the majority party leadership in both chambers, majorities in both chambers, and the president." *Id*. (emphasis added).

The accuracy of the appropriations canon as a means of preserving desired veto gates should not be confused with periodic moves to enhance the effectiveness of the Appropriations Committee as a veto gate as well. Thus, over its history the House has created a notable exception to the ban on substantive legislation on appropriations legislation (the so-called Holman Rule) when the effect is to limit expenditures. *See* KIEWIET & MCCUBBINS, *supra* note 87, at 66–71. This does not, as claimed, "erase[] the boundary between the jurisdiction of Appropriations and that of other House committees." *Id*. at 66. Certainly, where the Appropriations Committee desires to spend money on programs that violate substantive law, such as the Tellico Dam, the exception would not apply. Rather than allowing an evisceration of the substantive committee's veto powers, it simply adds another veto gate.

degree of difficulty is so great that party leaders should now be able to easily amend substantive law by securing favorable language in an Appropriations Committee report.[92] Although McCubbins and Rodriguez demonstrate that "the intra-Congressional structure of policymaking delegation and control works as effectively in the appropriations process" as in the process of enacting substantive legislation,[93] this does not support the claim that report language or other indicia of the views of key appropriators are reliable in determining whether appropriations legislation was intended to supplant substantive law.[94]

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92. Even at the apex of leadership control under Speaker Newt Gingrich, reflecting an expressed desire to achieve the majority party agenda by using appropriations legislation to secure changes in substantive law by evading the veto gates of the substantive committees and President Clinton, the leadership used express waivers proposed by the Rules Committee to effectuate these changes. Aldrich & Rohde, *supra* note 81, at 7–22.

93. McCubbins & Rodriguez, *supra* note 16, at 701.

94. In connection with its claim that *TVA* "misunderstands the legislative process" in its solicitude for the turf-protecting interests of substantive committees, McCubbins & Rodriguez, *supra* note 16, at 698–701, also cites two other political science resources: GARY W. COX & MATHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE 83–135 (1993) (miscited in McCubbins & Rodriguez, *supra* note 16, at 700 n.117) and Gary W. Cox & Mathew D. McCubbins, *Agenda Power in the U.S. House of Representatives, 1877–1986*, *in* PARTY, PROCESS, AND POLITICAL CHANGE IN CONGRESS: NEW PERSPECTIVES ON THE HISTORY OF CONGRESS 107 (David W. Brady & Mathew D. McCubbins eds., 2002). Each discusses positively (and implicitly normatively) how and why party leaders control the legislative agenda. *See, e.g.*, COX & MCCUBBINS, *supra*, at 83; Cox & McCubbins, *supra*, at 110. Neither of these sources demonstrates the claim that party leadership control over the work of substantive committees is so strong that House members do not want the substantive committees to serve as veto gates, or that it is too costly to impose the burden on party leaders and their agents on the Appropriations Committee of expressly repealing substantive law and getting a waiver from the Rules Committee.

Some prior work suggests a normative hostility to rules designed to preserve the veto power of substantive committees, which are less representative of the entire chamber than the party leadership or appropriators. *See, e.g.*, KIEWIET & MCCUBBINS, *supra* note 87, at 12, 239 n.4 (noting that detailed rules limiting jurisdiction of Appropriations Committee to preclude substantive legislation is "ironic" because "Congress has attempted to establish through a web of tradition and precedent a distinction that cannot be made in principle"). Consistent with the thesis of this essay, McCubbins and Rodriguez are of course free to make a transparent normative argument that courts should give effect to unreliable legislative history in the form of Appropriations Committee report language on the grounds that unrepresentative substantive committees should not serve as veto gates and judges should facilitate the process by which their work can be easily evaded. However, McCubbins & Rodriguez, *supra* note 16, does not seek to make this argument. With similar opacity from the opposite perspective, see Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 296–97 (1989). Farber praises the Court's decision as faithful to legislative supremacy, while arguing that the effect of a contrary result would be to require careful scrutiny by all members of all Appropriations Committee reports, which "would have undesirable effects on the legislative process" and would "merely invite special interests to abuse the appropriations process as a means of undercutting substantive legislation." *Id*. at 296. Responding to Ronald Dworkin's claim that legislators who voted to enact the

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What Statutes Mean is an important contribution to the literature. Its contributions are somewhat obscured, however, by the lack of transparency in the interpretive approach the authors take, an opacity widely shared by judges and academics. Clearly recognizing that statutory interpretation requires lawyers to borrow from linguistics and communications sciences, positive political science, and normative political theory will improve the quality of reasoning that underlies the interpretive effort. Such transparency reveals that judicial textualists, who prefer their personal views on the meaning of a text to insights from communications and political sciences about what legislative drafters actually meant, are activists effectively replacing legislative judgments with their own. It also shows that a variety of political theories can in some cases justify the displacement of the search for actual legislative meaning. Applying these insights to the prior work by two authors of *What Statutes Mean* suggests that judges should not narrowly construe appropriations legislation because of a hostility to the use of such legislation to reform substantive law, but may properly refuse effect to textual ambiguities or even clear extratextual evidence of the intent of appropriators about the meaning of substantive legislation outside their committee's jurisdiction.

Endangered Species Act did not really mean what they said—or, more to the point, intended judges to apply the statute in a contratextual way (a point belied by the post-decision legislation placing such authority in the hands of a cabinet-level committee), Farber likewise responds normatively, not positively: "If judges want the legislature to act with integrity, they must hold legislators to their public positions. Judges must not allow legislators to use statutes to strike poses, knowing that courts will bail them out later." *Id*. at 298 (discussing DWORKIN, *supra* note 85).