The Judge as a Fly on the Wall: Interpretive Lessons from Positive Theories of Communication and Legislation[1]

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How should judges interpret statutes? For some scholars and judges, interpreting statutes requires little more than a close examination of statutory language, with perhaps a dictionary and a few interpretive canons nearby.[2] For others, interpretation must be based upon an assessment of a statute's underlying purpose,[3] an evaluation of society's current norms and values,[4] or a normative objective, such as the "law's integrity."[5] With

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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.*

[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.

such differences squarely framed in the literature, it is reasonable to ask whether anything of value can be added. We contend that there is.

Like many others, we begin with the premise that statutory interpretation is a quest by judges to use the best available theory and information to determine "what statutes mean." When seen in this light, two attributes of statutes merit attention.

- Statutes are a form of communication.
- Statutes contain a constitutionally-privileged command of the form "If you are in situation X, then you must do Y."

In other words, statutes are manufactured by a constitutionally authorized legislative body and are directed towards those who are constitutionally-obligated to implement, enforce, or follow the law. We contend that the purpose of statutory interpretation is to produce a constitutionally legitimate decoding of statutory commands in cases where the meaning of X and/or Y is contested. This perspective leads us to a unique conclusion about the conditions under which judges can use legislative records to more accurately decode a statute's X's and Y's.

Our attention to *communication* leads to these conditions because it clarifies how legislators compress the ideas in their heads, and in the collective understandings they reach, into the descriptions of X's and Y's that appear on statutory parchment. Many prominent claims about statutory interpretation are based on unrealistic (or unrecognizable) theories of how people decide which words to use when attempting to convey ideas to others. The consequences of proceeding in such a manner include opaque interpretative proscriptions that are difficult to apply uniformly or to reconcile with constitutional imperatives.

We argue that importing a few basic scientific propositions about human communication dynamics can aid those who seek to determine what a statute's authors meant when they chose to include (or not to include) particular words in a piece of legislation. To this end, we build from well-known communication theories. Their key insight is that successful inference about meaning requires the manner in which the communication is decoded (i.e., the *expansion* of the signal into information) relate to aspects of its manufacture (i.e., the *compression* of information into a signal) in particular ways. This insight highlights the importance for interpretive attempts of understanding the procedures by which legislators choose their words. It also provides important clues about the kinds of informational sources that can be useful to those who want to clarify the meaning of a statute's X's and Y's.

Turning our attention to *command* yields refined interpretative guidelines. It does so by leading us to examine how constitutional authority affects the credibility of potential sources of information about a statute's meaning. To see how, note that the Constitution empowers Congress to issue statutory commands. However, much of the process by which Congress manufactures its commands is left to its discretion (Article I, Section 5). Both houses, in turn, have chosen rules that empower legislative majorities, confer important benefits to the majority party (particularly since the late nineteenth century), and reward and punish selected activities. These rules are relevant to questions of statutory interpretation because they affect the communicative incentives of those who participate in the lawmaking process. These rules provide some actors with incentives to grandstand or dissemble in their descriptions of particular statutes. They provide others

with strong incentives to communicate exactly what they are thinking, or exactly what a group of legislators are agreeing to, at important moments in a statute's development.

Better understanding the relationship between legislative rules and communicative incentives provides an improved framework for sorting credible sources of information about a statute's meaning from sources that should be ignored. To this end, we use a positive political theory of communication-based legislative decision-making to help readers differentiate conditions for communicative sincerity from conditions for grandstanding and dissembling.[6] The theory clarifies the conditions under which particular kinds of legislative records can be useful in decoding a statute's X's and Y's (e.g., when they include detailed testimony about the meaning of an X or Y by either constitutionally empowered actors or by actors to whom constitutional authority was rightly delegated) by examining when legislative rules do, and do not, induce sincere communication. These conditions provide a template for better understanding when judges should ignore claims about a statute's meaning and when legislative records can aid their search for meaning.

At the end of this essay, we compare the interpretative guidelines the follow from our emphasis on communication and command with those offered by textualism, purposivism, and other legal or politically-valued approaches. We find that each of these approaches is difficult to reconcile with even very basic insights from the communication and legislative decision making theories that we introduce. Such inconsistencies suggest

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[6] 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.

that even widely-held interpretative edicts very different that what guidelines based the best available theory and information would produce. This outcome undermines the normative aims of some approaches and raises deep questions about the uniform applicability of others. In sum, we claim that treating statutes as communications of constitutionally-privileged commands can yield more effective advice about the conditions under which judge can use select pieces of the legislative record to more accurately decode statutory meaning.

I. Statutes as Communications

In this section, we begin by offering three foundational assumptions and saying a bit about the collective challenge they offer to questions about a statute's meaning. We relate basic insights from a seminal communication theory to fundamental questions of statutory interpretation.

A. Three Core Assumptions and their Implications

First and foremost, we assume that statutory interpretation reflects a fidelity to legislative supremacy and the Constitutional structure of legislative and judicial power. Interpreting the meaning of statutes is a project defined by Article I, Section 7 of the Constitution. We regard the legislature's communications as supreme precisely because the Constitution so says.

Second, since Article I grants to the legislative branch sole authority to create statutes, we assume that interpreters should restrict themselves to discerning 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.[7]

In this regard, we follow many influential scholars who 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.[8]

Of course, this assumption is embraced more generally, as this passage from Judge Mikva and Lane suggests:

> 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)."[9]

We agree with both that an overt effort to substitute an interpreter's sense of what the statute ought to mean for the meaning that which the legislature intended to convey is an

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

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

[9] 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.

unconstitutional exercise of legislative power, essentially equivalent to statutory amendment or revision.

Third, statutes are a form of communication. As Dworkin states, "legislation is an act of 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."[10] While we regard this assumption as non-controversial, its implications are anything but trivial.

As a form of communication that is manufactured by, and intended for, humans, questions of ambiguity and interpretation arise. In such cases, the search for meaning focuses our attention on a message's source. As Pierce – an early communication theorist -- explained: "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."[11]

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[10] Dworkin, pp. 348-349.

[11] Pierce, John R. (1961) *Symbols, Signals, and Noise: The Nature and Process of Communication*, Harper and Brothers: 118. Although less explicit than the above statements, the assumption that statutes are communications pervades the literature on statutory interpretation. This assumption is reflected in the discussion of how statutes are like instruction manuals in McNollgast. (1989) "Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies." *Virginia Law Review* 75: 431–82 and McNollgast (1987) "Administrative Procedures as Instruments of Political Control," *Journal of Law, Economics, and Organization* 3: 243-277), as well as in William N. Eskridge Jr.'s (1990. "Gadamer/Statutory Interpretation," *Colum. L. Rev.* 90: 609) assumption that statutes are like novels, and in the standard description of 19th century (Oliver Wendell Holmes (1899) "The Theory of Legal Interpretation," 12 Harvard Law Review 417) and 20th century views among influential legal theorists (from Roscoe Pound (1907) "Spurious Interpretation," 7 *Columbia Law Review* 379 to Richard A. Posner (1987) "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution," *Case Western Reserve L. Rev.* 37: 179 and beyond) that statutes are best viewed as authoritative commands from the sovereign. There are notable exceptions to this generalization. Alienikoff (1988), for example,

The challenge of inferring meaning from words is endemic to human communication. The reason is, as a cursory inspection of any advanced dictionary will reveal, that most words have multiple meanings. As a result, the meaning of any particular word in a communicative attempt tends to depend on the context in which it is offered. At a minimum, the meaning that any particular word in a passage is meant to convey usually depends on the words that follow and proceed it. This is why, in many cases, simply examining one word in isolation (e.g., “duck”) is insufficient for an accurate decoding of what meaning the sender wanted to convey (e.g., “an animal with feathers and a bill” or “A large, heavy object is approaching your head, bend down!”)

This fact of our language complicates interpretative mechanics. Complicating matters further is the fact that written or spoken passages are composed of strings of words that can be ordered in an infinite number of ways. When most of the words themselves can take on multiple meanings, the inferential possibilities multiply. And yet, upon learning even a little about the rules and procedures that others use when attempting to convey ideas through words, humans gain the ability to communicate very complicated ideas accurately in a wide range of circumstances. Some very effective rules are grammatical, but others are not. Some of the non-grammatical rules that help us accurately decode others’ messages come from learning more about how particular kinds of communicative attempts are generated. For example, we learn to treat the statement “The sky is falling” differently when it comes from a three-year old, a fictional chicken, or a world-renowned climatologist. For the same reason, we may infer very different

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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.

meanings of the same words uttered by the same person depending on what we know about the circumstances under which they chose these words (e.g., such as whether or not the person was "under oath.")

Scientific attempts to understand human communication continue to evolve. This science clarifies conditions under which the recipient of a message can correctly discern its meaning. We contend that prominent claims about statutory interpretation should be more informed by this work. More to the point, a theory of interpretation should not be considered viable unless it is based on – or, at a minimum, consistent with -- the fact that statutes are a form of human communication. This conclusion follows as much from our first two assumptions as it does from our third. After all, statutes are authoritative and binding. When an interpreter substitutes his or her own meaning for the meaning intended by Congress, the interpreter is usurping the authority granted to the legislature by the Constitution. Such actions are illegitimate, in that they serve to undermine democratic principles. Whether such a substitution is the consequence of an intentional exercise in political power or an interpretative philosophy that is based on easily-falsifiable claims about human communication is irrelevant – the constitutional distribution of authority is violated either way.

The analysis that follows is forged from these assumptions as well as our belief that highlighting the importance of reconciling the practice of statutory interpretation with the best available theory and evidence about the communicative properties of statutes will protect and enhance modern constitutional governance. In what follows, we describe some initial steps for proceeding in this manner.

B. Communication, Compression, and Expansion

Whether we are communicating written words, electrical signals, spoken language, gestures, or viruses, all communication involves the processes of ***compression*** and ***expansion***.[12] Compression is a process that draws elements from a large domain of information and transforms them into the form of a signal. Humans, for example, compress ideas into language by actions such as speaking, writing, and gesturing. The signals are then carried forward for subsequent expansion by others.

Figure 1 depicts a very simple model of a communicative process involving electronic data transmission to convey basic properties of compression and expansion.[13] The communicative attempt originates with the source that intends to convey a piece of information. The information is compressed into the form of a message whose physical attributes allow it to be transmitted through a communicative channel, such as a telephone line. In this example, the information 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. A device at the receiver's end of the transaction uses an algorithm to expand the transmission into data that it can use. This final algorithm is the analogue to an interpretative procedure.

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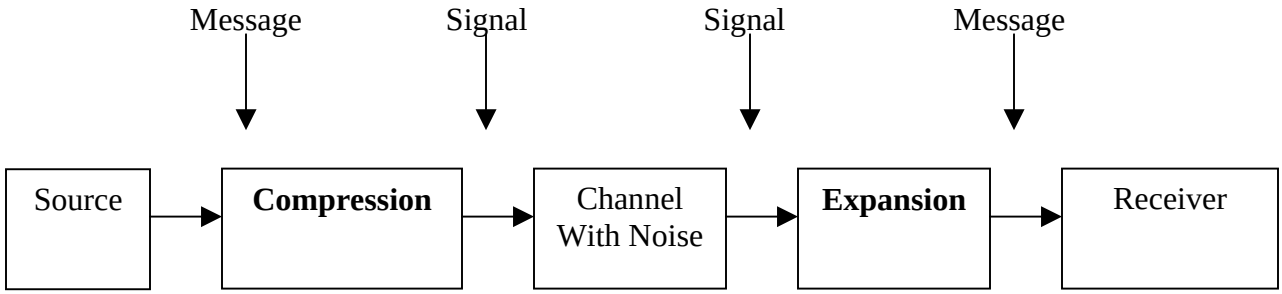
[12] Shannon, C. E. (1948) "A Mathematical Theory of Communication," *The Bell System Technical Journal*, 27: 379-423; Pierce, John R. (1961) *Symbols, Signals, and Noise: The Nature and Process of Communication*, Harper and Brothers: 118; Fauconnier, Gilles and Mark Turner (2002) *The Way We Think: 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.

[13] 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.

Figure 1. The Process of Communication.

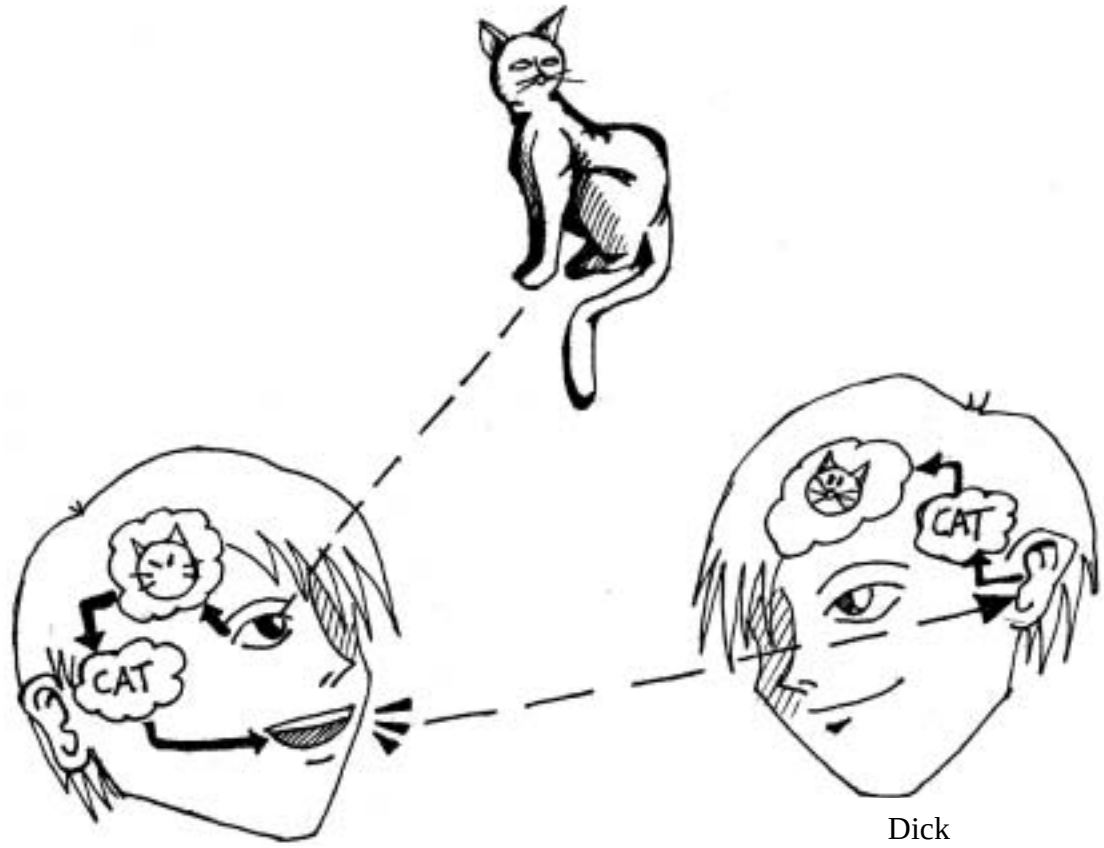


A different kind of example now relates the same basic sequence to an example of human communication. Figure 2 depicts a communicative attempt between two men. Here, the man labeled "George" has a thought that he wishes to communicate with the man labeled "Dick." Before George can communicate this thought, 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.[14] Also not reflected in the figure is the menu of signals from which George may choose. 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

[14] 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.

can further expand back into a thought. The compression and expansion of information allows Dick and George to communicate with one another.[15]

Figure 2. A Depiction of Human Communication



Whether we are compressing and expanding electrical signals, human thoughts, or some other type of information, *successful communication* – a sequence where the recipient of a message decodes its meaning accurately -- *requires a correspondence*

[15] In this process of compression, some information and detail is inevitably lost, but such loss is not sufficient to prevent accurate decoding. 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. Fauconnier, Gilles and Mark Turner (2002) *The Way We Think: Conceptual Blending And The Mind's Hidden Complexities*. New York: Basic Books.

between the way that information is compressed and the way that it is expanded. This statement is true of any form of communication—be it written, spoken, or electrical. In all cases, deriving meaning from a signal an interpretative act whose success depends on the correspondence between the expansive algorithm it employs (i.e., an interpretative procedure) and the compression algorithm that produced it. Therefore, the declaration by some 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 simply misleading. Since the true meaning of the words is the meaning of the statute's source, proper interpretation requires an understanding of the constitutionally-priveleged compression procedure that produced it.

C. <u>Principles of Legislative Compression</u>

Statutes are compressed policy instructions or procedural guidelines.[16] Their meanings, as well as the words used to convey these meanings, are chosen by the legislators who pass them. Subsequent recipients of the messages are charged with expanding meaning from these words when applying or interpreting them. Recipients have no constitutional authority to add or subtract their own meaning.

As a result, claims about how to interpret federal statutes *must* be based on a viable understanding of the relevant compressive dynamics. The most relevant of these

[16] 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.

dynamics are those defined by the Constitution. The Constitution, in turn, instructs us to begin with an examination of the legislative process of the U.S. Congress. Indeed, if we ignore the process by legislators compress meaning when writing statutes, how are we to develop an expansion scheme that accurately discerns such meaning? For this reason, we now briefly discuss the legislative process with an eye toward developing a corresponding expansion scheme that jurists can use when interpreting statutes.

As shown in Figure 3, federal legislators in the United States – in this case those who work at the House of Representatives – develop procedures that any successful statute must survive. These procedures are approved by the legislature and, therefore, have constitutional legitimacy. All legislators consent to the procedures that produce the statutes.[17] Therefore, if we can use knowledge of how legislative procedure affects statutory compression to clarify statutory meaning, the inference will not be poisoned by the fact legislators may have different feelings about the procedure.

This point is particularly relevant because both houses of Congress have chosen procedures that give particular actors substantial control over the process by which statutes pass. This unequal distribution of power, in turn, means that the statements of some actors in some situations can provide reliable information about what a

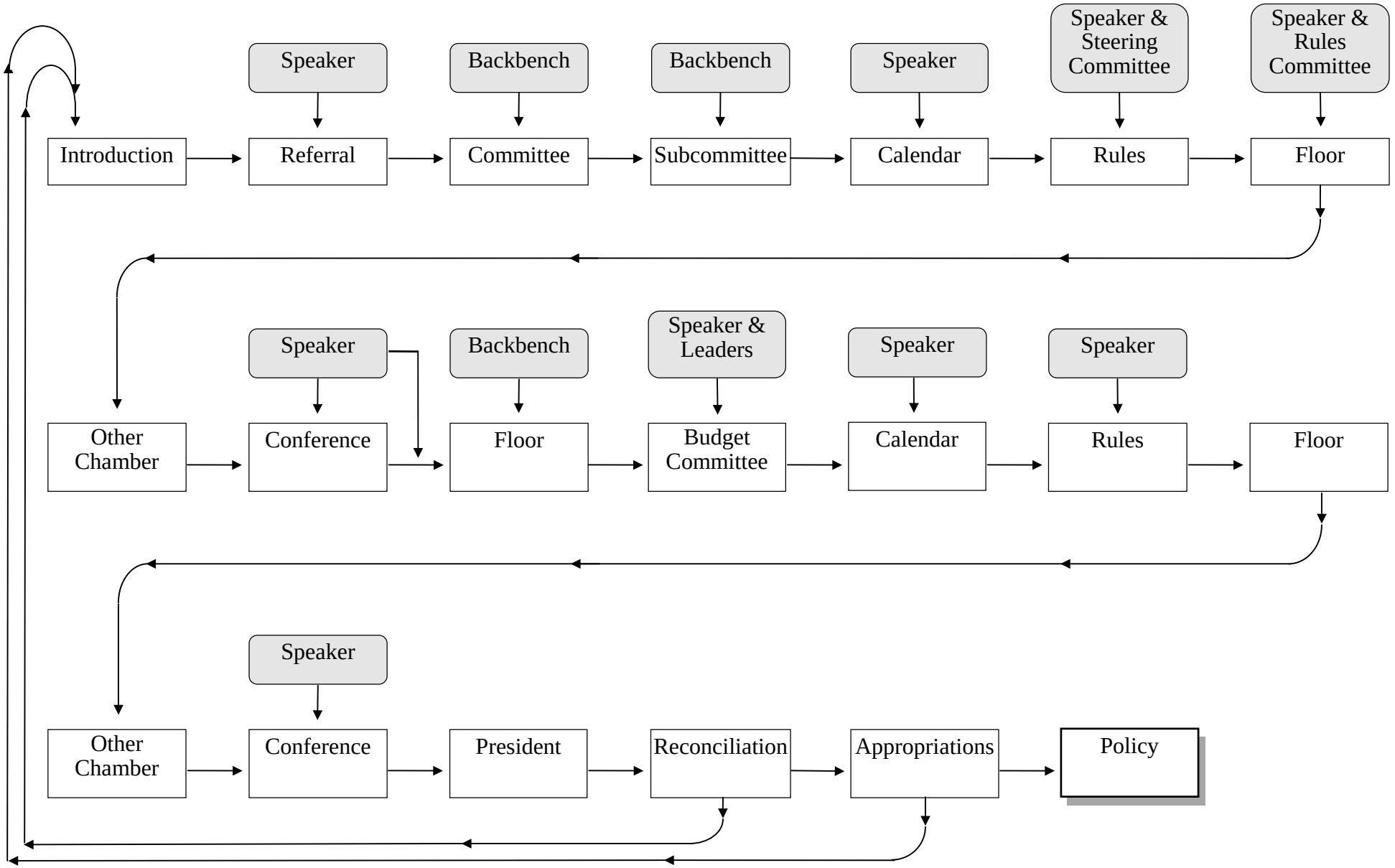
[17] Note that this consent extends all the way to what it means for a statute to pass. It is common to presume that, with the exception of a few-explicitly mentioned cases, a majority is sufficient to pass a bill in each legislative chamber. However, nowhere in the Constitution is a legislative majority directly empowered to pass a law. While a majority is required for a quorum (I:5), and while majority requirements are explicitly mentioned in descriptions of Congress's role in executive branch selection (Article II:1, 12th Amendment) and succession (25th Amendment) procedures, the power of majorities comes from somewhere else. Instead, the power of a legislative majority comes from Article I, Section 5 (Each House may determine the Rules of its Proceedings). In the House, majority rule is used to the chamber's rules – though the constitution does not prevent it from switching to other rules, such as 55% approval by the Committee of the Whole as a necessary condition for passage.

procedurally, and hence constitutionally, empowered subset of legislators meant when they constructed a statute' s meaning. This implies that communications amongst members of the legislative majority that supported a statute at key moments in the drafting and internal evaluation processes are, all else constant, a better place to find such information. In cases of party-line votes, where all members of the majority party vote together against all members of the minority party, majority party communications are particularly relevant.

For the purpose of deriving a statute's meaning, it is important to understand when legislators can discuss, revise, or amend a statute – for this set of circumstances provides the general pool from which constitutionally-validated records of legislative reasoning can be drawn.

In the initial stages of the congressional lawmaking process, 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. These committees are almost always controlled by the majority party.

Figure 3. How a Proposal Becomes a Policy in the US House of Representatives, Highlighting Aspects of Party Control



Indeed, since the late 19th century, legislative procedures have given extraordinary powers to a chamber's majority party.[18] This is particularly true in the House of Representatives. The first act of every legislative session typically entails legislators delegating the legislature's agenda-setting authority and the task of allocating the legislature's scarce resources to the majority party leadership. At the same time, however, legislators do not give away all authority, nor do they grant authority unconditionally. The distribution of power is regulated by an internal system of checks and balances. Legislative procedures provide some actors with a veto over the actions of agenda setters and give others an opportunity and incentive to act as checks. These procedures may be very subtle. In the House, 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.

As a given proposal approaches the floor, 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. All of these entities are strongly controlled by the majority party. Therefore, during floor debates, the bill manager for the

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[18] 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.

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. From beginning to end in passing legislation, legislators are conversing with each other in ways that are controlled directly by the leadership of the majority party and indirectly by other forces such as potential bi-partisan legislative majorities. Throughout the process, legislators are presenting evidence and arguments about proposed laws, 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. Some of this communication is of dubious interpretive value, as we may question its sincerity or veracity, and some of it is valuable.[19]

However, there are circumstances where some members, specifically those to whom the legislature (often through its constitutionally-privileged delegation to the majority party and that party's subsequent delegation to its leadership) have the authority to set agendas and write statutes. There are circumstances in which select members use

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[19] 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.

tools required by the legislature, such as committee reports, statements by the bill manager, communications by the party whips, and so on, to signal the meaning of the statutes they have written to the remaining members of the chamber who the legislature as a whole has empowered to speak on its behalf. Do all of these circumstances produce equally valuable information about a statute's meaning? No. The checks and balances that legislators agree to impose on one another affect the extent to which particular pieces of legislative history constitute credible statements of the meaning to which constitutionally-empowered actors understand themselves to be agreeing. Next, we provide a template for developing an interpretative expansion scheme that is consistent with such compression dynamics.

III. Expansion of Legislative Meaning

A. Constitutionally-Privileged Commands and "Flies on the Wall"

The legislative process is a "conversation" among legislators. At each stage of the legislative process, legislators communicate with one other. In the process, they 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 these statutes are constitutionally-privileged commands. They are directed towards everyone who is charged with interpreting, implementing or following the law. As a result, judges must listen passively to legislators' conversations so that their expansions correspond to the way that statutory meaning was compressed into words. They must not assume that legislators were speaking only to them in their conversations. They must "listen to" and interpret these "conversations" from the vantage

point of *a fly on the wall*. Moreover, our initial examination of legislative compression suggests that judges should not treat legislators' conversations as though legislators were listening naively to everything or being lied to about everything.

Given this perspective, what tools enable judges to decode statutory meaning accurately? We advocate two — the intentional stance and (portions of) legislative history. These tools reflect how legislators compress statutory meaning and enable judges to expand such meaning accurately.

Boudreau, McCubbins, and Rodriguez[20] describe intentionalist theories of interpretation as an approach to discerning statutory meaning. Here, courts take, to use Daniel Dennett's terminology, an "intentional stance."[21] They should not suppose that legislators necessarily have a coherent intent in the ordinary sense in which we view 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 -- be they individuals or groups – mean.[22]

This process of imputing intentions to those we seek to understand is a fundamental characteristic of human cognition. To make an inference about what someone means requires a theory of how they think. To see why a theory is needed, it is possible for a random word generator to produce the sentence "Don't step on my hand." In such a case, the meaning that the statement's source meant to convey is quite different than the meaning that we would infer if the source was a human whose hand was being

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

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

[22] *Id*. at 15.

quickly eclipsed by the shadow of another's shoe. The intentional stance is a theory of what humans mean when they speak.

In the context of statutes, the intentional stance requires that judges treat legislators as: rational actors with beliefs, desires, and intentions and then interpret their statements in this light. In our reading, the intentional stance includes the recognition that such legislators have the ability to delegate to select colleagues, the ability to communicate about a statute's meaning on behalf of the group with constitutionally validated authority. So, for example, if I give you the explicit authority to speak on my behalf, and if I do not exercise a subsequent option to say that you are not speaking on my behalf, then it is reasonable for other people to infer that your words reflect my thoughts.

Legislative history is a second tool that enables judges to decode statutes accurately.[23] In contrast to canons of construction, legislative history is created by legislators as they pass specific statutes. These histories can allow judges to be privy to legislators' conversations about particular statutes. Indeed, because committee reports, legislators' speeches, amendment votes, and other pieces of legislative history are generated in the legislative processes, which itself is the direct consequence of constitutional instructions, judges may be able to use information about the correspondence between these procedures and the communicative incentives they

[23] 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.

produce to better understand the way that legislators compress statutory meaning and the way that they should expand it.

B. Not all Legislative History is Created Equal

Having advocated legislative history references as an interpretative tool, we in no way suggest that judges ought to use legislative history indiscriminately. Not all legislative history is created equal. 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 decoding statutory meaning.

How are judges to sort through the many sources of legislative history? At first blush, the proper use of legislative history seems 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 summarily dismissing the use of legislative history as an impossible endeavor, judges should deem trustworthy only those sources that were trustworthy for the constitutionally-empowered set of legislators who passed the bill 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. Using this idea, we offer an approach that helps to identify trustworthy sources of legislative history, in that it clarifies the sources on which legislators have incentives to rely, and provides judges with new guidelines for using legislative history more effectively. We begin by drawing upon strategic communication theories from economics and political science to identify conditions for trustworthy communication. Next, we describe laboratory experiments that document the conditions'

viability. We then apply these conditions for trust to the legislative process and analyze sources of information that legislators can (and cannot) trust. We conclude this section by claiming that judges can use legislative history to better interpret statutes if they restrict themselves to relying only sources that constitutionally-empowered legislators themselves would trust.

C. The Conditions for Sincerity

Strategic communication models can clarify the sincerity of statements made during the legislative process. Sincere statements are those that can be trusted to represent what the speaker is thinking. We say that a legislator is *sincere* when either internal interests or external forces appear to induce him to state what he believes to be true. We contend that components of legislative history offered by legislators who are: constitutionally-authorized to speak on the behalf of a legislative majority, speaking to each other about the meaning of a statute, and speaking under conditions that elicit sincere communications (as described below) can help judges decode statutory meaning accurately.

Sincerity is a familiar concept to people who study communication. However, it is often invoked as an assumption rather than treated as a communicative 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.

Some communication models derive sincerity as an emergent property of a communicative equilibrium. Arthur Lupia and Mathew McCubbins developed one such

model.[24] It clarifies 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 communicative incentives. Next, we use their work to identify necessary and sufficient conditions for sincerity in the legislative context.[25]

A direct implication of these conditions, which were proven using formal logic, that sincerity requires neither reputation, nor repeated play nor any speaker 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, external forces, such as the institutional context within which the actor makes a statement, can substitute for personal attributes as determinants of

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

[25] 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. 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. Instead, we derived conditions under which persuasion and enlightenment (e.g., gaining knowledge) would emerge from strategic communication. 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.

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. The fact that institutional factors can substitute for personal attributes as a cause of sincerity is helpful to questions of statutory meaning, because of their latter's observability. In cases where a person's attributes provide limited information about their incentives to communicate sincerely, the substitutability gives an analyst an opportunity to derive this information from other sources – such as well-documented legislative procedures.

Lupia and McCubbins' model yields at least three conditions for sincerity. If any of these conditions is met, then the speaker should be regarded as sincerely expressing his meaning.[26]

1) The listener and speaker share common interests.[27]
2) The listener correctly infers that the speaker faces a sufficiently high statement-specific cost (such as a penalty for lying.)[28]

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[26] 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.

[27] 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.

[28] 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

3) The listener and speaker believe that the truthfulness of the speaker's statement will be verified with a sufficiently high probability.[29]

As these conditions were derived from a formal model of legislative communication, it is reasonable to ask whether they are viable empirically. Since it is difficult to vary the attributes of actual legislative contexts, the question cannot be answered directly. Lupia and McCubbins, however, conducted a wide range of empirical evaluations of the logic of their model, including a rigorous set of laboratory experiments. This range of activities provides strong support for the model.

This research demonstrates that institutional factors can induce sincere communication under certain conditions. These conditions, in turn, suggest guidelines for the use of legislative histories to decode a statutes' meaning. We now discuss examples of how the kinds of institutional variables cited above 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.[30] For example, at the

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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.

[29] 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. 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).

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 great importance on screening those who control the House's agenda.[31] Further, on many issues, for which they lack expertise, legislators turn to like-minded colleagues or their party whips for advice about what to do.[32]

Of course, in some instances, the interests of the membership of a committee are sufficiently different from the interests of other legislators (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[33]). Absent external forces, we would not expect

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[30] 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.

[31] 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.

[32] 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.

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

endorsements from these committees to be persuasive (as Krehbiel[34] has so argued). 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. Penalties for breaking a trust are the basis of many behavioral norms in the U.S. Congress.[35] These penalties 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, remarks made during open floor time by representatives while the House is in recess are not greatly affected by penalties for lying. This is one reason why legislators frequently ignore this type of testimony and judges should follow suit.

3. Verification

One way that verification can be accomplished is through competition. As philosophers and institutional designers have long recognized, competition can induce trustworthy communications. [36] The constitutional structure of government and

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

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

[36] 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–

subsequent decisions about legislative procedure 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.

Take, for example, the legislative process in the U.S. House of Representatives (depicted in Figure 3). There, a bill must pass many steps before it can be sent to the Senate and the president and be implemented as a new policy.[37] In it, there are places where the ambitions of the majority party leadership are pitted against the ambitions of the party's backbenchers. Such occasions increase the likelihood that statements made by some legislators will be verified by others.

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. 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,

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31; Cameron, Charles M., and Joon Pyo Jung (1992) "Strategic Endorsements." Columbia University. Typescript.

[37] 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.

designed and appointed for this purpose[38]). 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 induce these actors to speak sincerely, the system of checks and balances described in Figure 3 will generate conditions for judges to learn about what constitutionally-empowered actors meant in their construction of a particular statute.

D. Judges as Flies on the Wall

Throughout the legislative process, legislators rely principally upon those sources of information that emerge within a constitutionally-privileged set of procedure satisfy and that occur in contexts where the conditions for sincerity are satisfied. Judges should also rely solely upon these trustworthy sources when using legislative histories to interpret statutes.[39] 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

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

[39] 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.*

discounted. This discounting is appropriate because such statements do not meet any of the conditions for sincerity. In particular, since majority party leaders never ceded control of powerful committees to the minority party, one form of penalties for lying is harder to impose on members of the minority party than it is to impose on members of their own party (e.g., such threats are meaningless to the minority since they believe that they have no shot at such positions in the first place). To the extent that minority party members cannot suffer from majority party retribution – and given that the minority is likely to lose all legislative battles anyways, this is not a difficult criterion to satisfy – 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[40] described how the courts relied upon self-interested statements of "untrustworthy" legislators in order to interpret statutes in an expansive, and fundamentally inaccurate, way. Building upon McNollgast's[41] analysis of strategic legislative rhetoric, that study's assessment of legislative strategic behavior and the courts' selective use of legislative history, illustrates

[40] 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).

[41] 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.

the perils of relying on untrustworthy legislative history; further, it helps frame the distinction between correct and incorrect expansion of statutory communications.[42]

One of the conclusions drawn by Professors Rodriguez and Weingast is particularly relevant. At the time, pivotal legislators from both parties were willing to go along with an moderate version of civil rights legislation. 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 themselves. To their subsequent 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 such 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. As Rodriguez and Weingast (2005) posit, the misuse of legislative history by eager liberal courts made it considerably more difficult to secure legislative assent for analogous measures during the subsequent period – 1970's to early 1980's – an era in which major efforts at enacting watershed national legislation was undertaken by the majority Democratic Party and its allies.

IV. On the Viability of Existing Claims

Having advocated an approach to statutory interpretation that emphasizes its communicative and constitutionally-privileged command attributes, we now reconsider

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

the viability of other schools of statutory interpretation. We contend that 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 process by which statutory commands are compressed.

A. <u>Textualism</u>

> 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.[43]

In the past twenty years, an updated version of Justice Holmes' "plain meaning" approach to statutory interpretation has gained an influential following. Prominent advocates such as Justices Scalia and Thomas advocate a robust form of textualism in which courts may not consult external indicia of legislative intent but, instead, should simply apply the "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."[44]

How is the court/interpreter to discern "plain meaning?" Says Professor Eskridge summarizing the new textualist view, "[t]he apparent plain meaning is that which an

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

[44] 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.

ordinary speaker of the English language - twin sibling to the common law's reasonable person - would draw from the statutory text."[45]

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.[46]

While we do not disagree with the facts laid out in this quote, we note a logical leap that is required to get from these facts to bold textualist pronouncements. The leap is one from the term "difficult" to the term "impossible." Facts such as those stated complicate interpretative attempts and allow for legislation from the bench. These facts, however, are far from sufficient to establish the conclusion that the practice of referring to select components of legislative history can never help a judge decode a statute's meaning with greater accuracy. Claims to the contrary are sheer folly.

To be fair, many textualists would not draw such a severe conclusion. 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

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

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

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."

Nevertheless, we contend that the interpretative advice offered by the new textualism is suspect, and likely improper, because it entails a method of expansion that is inconsistent with the legislative compression processes described above. So while we concur with the textualists' suspicion of the ways in which legislative histories can be used by activist interpreters, the wholesale rejection of legislative history is inconsistent with the goal of basing interpretation on the best available theory and information. By rejecting the use of legislative history, and by failing to consider the statements of bill managers, committees and their chairs, in circumstances where they represent a constitutionally-empowered legislative majority and have incentives to offer sincere descriptions of what this majority is agreeing to, the textualists ignore important aspects of how legislators compress and thereby share information about the meaning of statutes during the legislative process.

A further implication of the textualists' hesitance to link their preferred expansion procedures to the compression procedures that produce statutes can be seen in how they use "canons of construction."[47] These so-called grammatical entail a series of

[47] 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.

assumptions about how legislators use language -- assumptions that, to the best of our knowledge, were created by judges and developed in case law.[48] Such canons do not reflect the ways that legislators compress meaning when writing statutes and, therefore, do not permit accurate decoding of statutory meaning.

To take a concrete example, 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 statute, legislators use series of similar words to convey what they mean. 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

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

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*.[49] When interpreting the meaning of the word "disposal," the court considered each of the 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"?[50]

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[49] 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 not 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).

[50] 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

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.

However, *redundancy* (that is, writing or saying things multiple times in slightly different ways – such as we are doing within these parentheses) is a key part of human communication. It enables humans to convey more effectively what they mean. Legislators, too, 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.[51]

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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.

[51] 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*.

B. <u>Purposivism</u>

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. This approach has been advanced most prominently by Hart and Sacks, who set forth the following guidelines for proper purposivist interpretation:

> 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.[52]

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

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

> 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.[53]

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 a "reasonable public purpose." However, 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."[54] This attribution of benign intentionality has been roundly criticized already,[55] 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 legislative majority (usually the majority party) that seizes agenda control[56] and by legislators who care first and foremost about re-

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

[55] 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.

[56] 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

election.[57] Purposive interpretation, 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.[58]

It is worth noting, moreover, 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." [59]If textualism is in fact a weak form

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and David Rohde (2000) "The Republican Revolution and the House," *The Journal of Politics*, 62(1): 1-33.

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

[58] 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*.

[59] Manning, John F. (2001) "Textualism and the Equity of the Statute," 101 *Columbia Law Review* 1, 106.

of purposivism, however, then it also falls prey to the criticisms that we have just described.

C. <u>Non-Interpretivism</u>

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"[60] or to reflect "current social values."[61] It may involve an effort to interpret legislation "dynamically,"[62] in order to update the statute to meet modern purposes and needs.[63] 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."[64]

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

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

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

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

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

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

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.[65]

Dworkin views his theory as a guide to legal interpretation; statutory interpretation is one element of a 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. His theory, while elegant and plausible, is not properly viewed as a theory of statutory interpretation, where 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[66] and Jonathan Macey.[67] 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

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[65] Dworkin, Ronald (1986) *Law's Empire*. Cambridge: Belknap Press.
[66] Sunstein, Cass R. (1989) "Interpreting Statutes in the Regulatory State," *Harv. L. Rev.* 103: 405.

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

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.

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.[68] 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 legislative compression-expansion process; it does not reveal the

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

statute as a communication of a command from an authoritative lawmaker. 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."[69] According to Eskridge and Ferejohn, super-statutes are those laws that penetrate society's culture and norms to such an extent that 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,"[70] Eskridge and Ferejohn instruct judges in how to interpret them:

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

[70] 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.

> 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).[71]

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.

However, the above descriptions make clear that these legally or socially-valued approaches are not focused on 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"[72] 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."[73] 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

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[71] *Id.* at 1216, 1249.
[72] Eskridge, Frickey, and Garrett (1990, p. 241).
[73] Eskridge.

between legislative supremacy and some other end. Whatever that end is, it does not seem based on constitutional 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 – and examine the interpretive project through a lens that regards statutes as communications of constitutionally-privileged commands. With the logically-coherent theories of communication and lawmaking, we offer a template for improving how judges decode statutes. Our emphasis highlights the importance of considering the mechanics of legislative compression when advocating, as an interpretative method, a particular expansion algorithm. Building on the earlier work of Lupia and McCubbins, we then discuss how the interpreter ought to sort reliable from unreliable sources of legislative history. Lastly, we contrast these lessons with key themes in the modern literature on statutory interpretation. When stacked against contemporary theories, including textualism, purposivism, and non-interpretivism, we contend that our approach sheds useful light on how to decode statutory meaning.

We conclude with a brief comment on how these interpretive lessons also apply to the interpretation of judicial opinions. As Vermeule[74] 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

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

institutions (namely, lower courts) in ways that the constitution sanctions directly. Given that their opinions are proffered using the same language from which statutes are drawn, commensurate problems of interpretation follow. Given this similarity, the interpretive lessons that we have described throughout this paper also apply to the "conversations" between appellate and lower courts. Accurate decoding of such communications are, therefore, more likely if they are informed by the mechanics of judicial compression.