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## A Decision Theory of Statutory Interpretation: Legislative History by the Rules

**ABSTRACT.** We have a law of civil procedure, criminal procedure, and administrative procedure, but we have no law of legislative procedure. This failure has serious consequences in the field of statutory interpretation. Using simple rules garnered from Congress itself, this Article argues that those rules are capable of transforming the field of statutory interpretation. Addressing canonical cases in the field, from *Holy Trinity* to *Bock Laundry*, from *Weber* to *Public Citizen*, this Article shows how cases studied by vast numbers of law students are made substantially more manageable, and in some cases quite simple, through knowledge of congressional procedure. No longer need legislative history always be a search for one's friends.

Call this a decision theory of statutory interpretation. This approach is based on how Congress does in fact make decisions and thus is a positive theory. Normatively, it has the advantage of privileging text without blinding judges either to relevant information or to their duty to implement Congress's decisions, including Congress's own decisionmaking methods. It may also have the side benefit of reducing legislative incentives to manipulate the rules or to engage in strategic behavior to induce particular statutory interpretations.

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**INTRODUCTION**

Legislative history's fires still burn, despite repeated attempts to extinguish them. The Supreme Court and the courts of appeals routinely invoke legislative history when statutory text is ambiguous.<sup>1</sup> Even textualists<sup>2</sup> suggest that legislative history might be consulted to determine Congress's meanings in cases of apparent absurdity. Since neither scholars nor lawyers dispute that, as a matter of fact, legislative history is used, the question is how it is best used.

More than occasionally, law professors reveal a stunning lack of knowledge about Congress's rules. This reflects the failure of the standard law school curriculum, with its courses on civil procedure, criminal procedure, and administrative procedure, but none on legislative procedure.<sup>3</sup> Perhaps not

1. Legislative history, whether followed or not, has featured in some of the more prominent controversies of the day, from the constitutionality of the Patient Protection and Affordable Care Act, *see* *Liberty Univ. v. Geithner*, 671 F.3d 391, 425 (4th Cir. 2011), *abrogated by* Nat'l Fed'n of Indep. Bus. v. *Sebelius*, 132 S. Ct. 2566 (2012), *cert. denied*, No. 11-438, 2012 WL 2470099 (U.S. June 29, 2012), to the National Football League player lockout, *see* *Brady v. Nat'l Football League*, 644 F.3d 661, 678-80 (8th Cir. 2011). A Westlaw search conducted on September 16, 2011 in the "U.S. Courts of Appeals Cases" database for the term "legislative history" at least five times in a single case resulted in over 5,000 appellate cases; at least four times yielded over 7,000 cases; and at least three times yielded over 10,000 cases (in a database retrieving cases since 1891). It would thus be quite premature and unwise for lawyers not to learn, cite, or be prepared to rebut claims drawn from legislative history. For recent examples of courts invoking legislative history, *see* *DePierre v. United States*, 131 S. Ct. 2225, 2234-35 (2011); *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081-82 (2011); *Los Angeles County v. Humphries*, 131 S. Ct. 447, 451-52 (2010); *Bilski v. Kappos*, 130 S. Ct. 3218 (2010); *Recovery Group, Inc. v. Commissioner*, 652 F.3d 122, 127-28 (1st Cir. 2011); and *Cohen v. United States*, 650 F.3d 717, 729-30 (D.C. Cir. 2011).
2. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring in the judgment) ("I think it entirely appropriate to consult all public materials, including . . . the legislative history of [Rule 609(a)(1)'s] adoption, to verify that what seems to us an unthinkable disposition . . . was indeed unthought of . . . ."); James J. Brudney, *Confirmatory Legislative History*, 76 BROOK. L. REV. 901 (2011) (discussing the Roberts Court's current confirmatory use of legislative history); James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117 (2008) (identifying an overall decline in legislative history but providing empirical data showing that the Court continues to use legislative history).
3. As Judge Posner long ago complained: "[T]he creation and interpretation of statutes are now paramount concerns of the legal profession. . . . But about the nature of the legislative process . . . the typical law school curriculum is practically silent." Richard A. Posner, Book Review, 74 VA. L. REV. 1567, 1567 (1988) (reviewing WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (1988)) (emphasis added). While theories of statutory interpretation have flourished since this statement, it remains the case that focus on congressional process is rare if not nonexistent in the legal academy.

surprisingly then, the average lawyer learns to read the congressional record in ways he or she would never read a judicial opinion or trial record. No lawyer would confuse a dissent with a majority opinion, or pleadings with jury instructions, and yet the equivalent occurs regularly in standard judicial and scholarly legislative histories. Scholars and law students dismantle congressional reports and debates as if early reports (at the pleading stage) were interchangeable with much-altered bills (jury instructions) and as if statements of those who lost the debate (dissenting opinions) amount to authoritative statements of meaning (majority opinions). Such readings invite legislative history's critics to shout "activism." But, as we will see, there is a better and more objective way to understand legislative history: by the rules.

In this Article, I offer a decision theory<sup>4</sup> of statutory interpretation that aims to make the reading of legislative history empirically sound, normatively appealing, and far easier, because it defers to *Congress's own rules*.<sup>5</sup> Legislative history by the rules is likely to appear as common sense to those who have actually worked in a legislature, but few persons on the bench or in the legal

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4. The terms "decision theory" and "rule-based decision theory" are used interchangeably in this Article. It is important to note, particularly for political scientists, that the term "decision theory" has been used in other contexts far different from the way it is used here. For example, this Article does not offer a welfarist, cost-benefit analysis of decisionmaking. See Thomas W. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, 14 LEWIS & CLARK L. REV. 1565, 1574 (2010) (characterizing Adrian Vermeule's theory as an "institutional choice" welfarist approach); Caleb Nelson, *Statutory Interpretation and Decision Theory*, 74 U. CHI. L. REV. 329 (2007) (reviewing ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* (2006)) (describing Vermeule's cost-benefit approach as a "decision theory"). Nor is this Article's approach associated with the heuristics movement or behavioral decision theory. See Samuel Issacharoff, *Behavioral Decision Theory in the Court of Public Law*, 87 CORNELL L. REV. 671 (2002). Rule-based decision theory is a positive political theory in the sense that it reflects empirical realities about how Congress works. For a more careful distinction between rule-based decision theory and other forms of positive political theory, see *infra* Part IV.
  5. You will find related ideas occasionally strewn about the professional literature but never theorized as such. See, e.g., Larry M. Eig & Yule Kim, *Statutory Interpretation: General Principles and Recent Trends*, in STATUTORY CONSTRUCTION AND INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS; STATUTORY STRUCTURE AND LEGISLATIVE DRAFTING CONVENTIONS; DRAFTING FEDERAL GRANTS STATUTES; AND TRACKING CURRENT FEDERAL LEGISLATION AND REGULATIONS 1, 45 (TheCapitol.Net ed., 2010) (suggesting that temporal proximity and relevance rules can trump the standard hierarchy of legislative history). A welcome exception to ignorance of congressional procedure is Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573 (2008), which assesses the influence of congressional resolutions that do not have the status of law. This Article deals with a far greater range of congressional actions, including those having the status of law.

academy have such experience.<sup>6</sup> As political scientists generally believe, legislative rules help Congress achieve stability and equilibrium in an otherwise chaotic atmosphere.<sup>7</sup> As even those skeptical of legislative history have explained, these rules are “second nature” in our political culture”; in effect, they are Congress’s constitution.<sup>8</sup> As legislative scholars have long known, “without a positive theory,” any normative theory of statutory interpretation may be misguided and even futile.<sup>9</sup>

Those who scoff at legislative “intent” should read on. Let us agree that the anthropomorphic metaphor portraying Congress as a single person misleads. When it comes to the judiciary, lawyers understand this: they do not charge the multimember Supreme Court with having no “intent” and, from this premise, dismiss judicial opinions as if the Court had made no decision. First-year law students easily recognize the difference between majority and

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6. Both scholars and judges have noted their concern that lawyers lack sufficient experience or knowledge of congressional practice to fully understand legislative history. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 113 (2006) (questioning whether parties and judges “lack the comprehensive background knowledge of the legislative process necessary to assess the significance and weight of the sources”); Robert A. Katzmann, *Statutes*, 87 N.Y.U. L. REV. 637, 645 (2012) (“[T]here has been scant consideration given to what I think is critical as courts discharge their interpretative task—an appreciation of how Congress actually functions.”); see also Dakota S. Rudesill, *Closing the Legislative Experience Gap: How a Legislative Law Clerk Program Will Benefit the Legal Profession and Congress*, 87 WASH. U. L. REV. 699, 706-08 (2010) (providing an empirical study showing a “virtual non-existence of legislative work experience” among judges and top legal faculty members). There are of course well-known exceptions to the rule of judicial inexperience in legislatures, such as Justice Stephen Breyer, Judge Robert A. Katzmann, and former Judge Abner Mikva.
  7. KENNETH A. SHEPSLE, *ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS* 374 (2d ed. 2010) (arguing that “[p]rocedures are required to cut through all this instability,” given that “there is no equilibrium to majority voting”); see Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27, 27 (1979) (offering a model of legislative behavior that results in “equilibrium”); Kenneth A. Shepsle & Barry R. Weingast, *Positive Theories of Congressional Institutions*, in *POSITIVE THEORIES OF CONGRESSIONAL INSTITUTIONS* 5, 7 (Kenneth A. Shepsle & Barry R. Weingast eds., 1995). Although the statutory interpretation literature often emphasizes Arrow’s Theorem, see *infra* note 72, which predicts that Congress, when faced with multiple alternatives, cannot reach a coherent policy choice, few political scientists accept this theory as consistent with empirical reality. Legislative rules and institutions permit coherent policy choices. Second-generation textualism has moved away from this line of attack, as Professor Manning has argued. See John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1315 (2010) (“Second-generation textualism seems to embrace the legislative process, with all its foibles.”).
  8. JEREMY WALDRON, *LAW AND DISAGREEMENT* 77 (1999).
  9. Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 152 (1989).

dissenting opinions. Yet the simple distinction between winners and losers appears to have sporadic influence on standard judicial use of legislative history.<sup>10</sup> Untutored in basic legislative distinctions, judges and scholars cannot differentiate between reliable history and biased or manufactured history, precisely the abuse textualists decry.

Congress makes decisions within a set of endogenous rules.<sup>11</sup> These rules can be used to cull the wheat from the chaff of legislative history; in fact, they can even be used to support claims about the centrality of *key texts*. This should be good news for lawyers and judges because this approach may simplify the process of analyzing and identifying relevant legislative history. For textualists, a decision theory may help identify central texts in cases where texts conflict, and, for purposivists, it may strengthen and objectify their legislative history arguments. It should also be good news for positive political theorists who have claimed, for over a decade, that existing theories of statutory interpretation—including textualism—lack an approach that appreciates “how legislation is actually created and how elected officials” operate.<sup>12</sup>

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10. See *infra* Section II.D (arguing that reliance on losers’ history—statements of those who opposed a bill—is equivalent to confusing a dissenting for a majority opinion). To be sure, there are statements by courts that “[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation.” *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394 (1950). And yet this advice, as we will see later, is often acknowledged but rejected. For example, there are courts that, noting this injunction, nevertheless draw meaning from losers’ history explicitly. See, e.g., *Am. Fed’n of Gov’t Emps. v. Gates*, 486 F.3d 1316, 1325-26 (D.C. Cir. 2007) (citing losers’ statements for the proposition that a last-minute conference committee change was a “statutory elephant (in the sense of having a huge impact)”); see also text accompanying notes 152-154 (discussing this phenomenon in *United Steelworkers v. Weber*); *infra* note 219 and accompanying text (discussing this phenomenon in *Griggs v. Duke Power Co.*); *infra* note 218 (listing other cases).
  11. The House and Senate rules can be easily found online. Karen L. Haas, *Rules of the House of Representatives, One Hundred Twelfth Congress*, OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES (Jan. 5, 2011), <http://clerk.house.gov/legislative/house-rules.pdf>; *Rules of the Senate*, COMMITTEE ON RULES & ADMIN., U.S. SENATE, <http://www.rules.senate.gov/public/index.cfm?p=RulesOfSenateHome> (last visited Mar. 27, 2012). It is important to note that the term “rules” as used in this Article refers to the standing rules of the House and Senate cited above, not to specific “rules” created for the debate of particular legislation.
  12. McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 5 (1994) [hereinafter McNollgast, *Intent*]; see McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 741 (1992) [hereinafter McNollgast, *Positive Canons*]; Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 NW. U. L. REV. 1207, 1219-22 (2007) [hereinafter Rodriguez & Weingast, *Paradox*]; Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964*

Part I of this Article argues that we must move beyond the great debates about abstract questions of legislative intent, and turn to Congress's own rules. The realist critique of legislative intent as a fiction has been a diversion. No one looks for the nine-Justice Supreme Court's intent in determining the meaning of a judicial decision, and no one need look for the fictional intent of Congress in searching for the meaning of its decisions. The term "legislative intent" is obscuring, even for those of us who consider ourselves "originalists" in matters of statutory interpretation. Intent is simply a constitutional heuristic used to remind judges that, in the end, it is not their decision, but Congress's.<sup>13</sup> Legislative intent, then, is not an accurate description of Congress, but a message for *judges* about *judging*. This Part concludes by explaining how rule-based decision theory is far more realistic and empirically grounded than either textualism or purposivism as a method of statutory interpretation.

Part II offers five rule-based decision theory Principles,<sup>14</sup> akin to canons, for judges and lawyers to make readings of legislative history more objective. The First Principle is a caution against congressional illiteracy: one should never read legislative history without knowing Congress's rules. To illustrate, I use *Public Citizen v. U.S. Department of Justice*<sup>15</sup> to show how the rules of conference committees could have simplified this important Supreme Court case, eliminating the difficulties preoccupying the Justices about the absurdity doctrine or the Appointments Clause.

The Second Principle is a rule of reverse sequential consideration: legislative history should focus on the last relevant legislative decision. To illustrate, I invoke two canonical cases, *United Steelworkers v. Weber*<sup>16</sup> and *Green v. Bock Laundry Machine Co.*,<sup>17</sup> and I argue that both liberal and conservative

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*Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1442-48 (2003) [hereinafter Rodriguez & Weingast, *New Perspectives*].

13. See JAMES WILLARD HURST, DEALING WITH STATUTES 32-33 (1982).

14. These Principles are intended to be just that—canons for judicial or agency interpretation—not attempts to enforce Congress's rules as such. Courts have no competence to look behind Congress's texts to impose "rule-based" objections to Congress's lawmaking procedures. The point of these Principles is to use them to resolve textual ambiguities in a way that a member of Congress, following the rules, would resolve those ambiguities. In this sense, they are similar to the canons asserted by positive political theorists. See, e.g., McNollgast, *Positive Canons*, *supra* note 12. Because two of these Principles are in fact "meta-canons" (see the First Principle and Fifth Principle), I have chosen to use the term "principle," which encompasses both the more general and the more specific recommendations.

15. 491 U.S. 440 (1989).

16. 443 U.S. 193 (1979).

17. 490 U.S. 504 (1989).

Justices have made serious errors in reading legislative history precisely because they have failed to understand congressional procedure.

The Third Principle is one of proximity and specificity: proximity to text and specificity to the interpretive issue are central to the most reliable history. This rule of relevance can make manageable even some of the largest decisionmaking records, including the vast legislative history of the Civil Rights Act of 1964. Here, I use as illustration the three-page legislative history of the Tower amendment to the 1964 Civil Rights Act, at issue in the controversial disparate impact decision *Griggs v. Duke Power Co.*<sup>18</sup>

The Fourth Principle is that one should never cite losers' history as an authoritative source of textual meaning. No judge would ever confuse a dissenting opinion with a majority opinion, yet this is precisely what happens when a judge uses losers' history as Congress's meaning. One of the greatest difficulties with the "intent" metaphor is that it obscures the differences between majorities' decisions and filibustering minorities' opposition. Here, I employ the legislative history in the canonical case of *Church of the Holy Trinity v. United States*<sup>19</sup> to illustrate how scholars have relied, to their detriment, on losers' history.

The Fifth Principle follows from the First: courts and Congress regularly misunderstand each other precisely because courts fail to understand that Congress plays by its own rules, not judicial ones. For example, behavior that follows Congress's own rules may appear to courts as if it produces ambiguity and no resolution where a conscientious legislator would find no ambiguity and a clear decision (based on bills already passed). Similarly, cases that appear as if they could be solved by a simple textual fix may involve significant and difficult structural conflicts within the legislature. Here, the infamous snail darter case, *Tennessee Valley Authority v. Hill*,<sup>20</sup> is used as illustration, along with *Bock Laundry* and *Public Citizen*.

Part III compares rule-based decision theory with other legal scholars' proposed solutions to the legislative history question, arguing that rule-based decision theory is superior to a ban on legislative history,<sup>21</sup> a set of "federal rules of statutory interpretation,"<sup>22</sup> or democracy-forcing reforms.<sup>23</sup> This Part

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18. 401 U.S. 424 (1971).

19. 143 U.S. 457 (1892).

20. 437 U.S. 153 (1978).

21. ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (Amy Gutmann ed., 1997) (arguing that courts should never use legislative history).

22. Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2089 (2002) (arguing that Congress should pass a set of federal rules of statutory interpretation).



counters four potential objections to the use of legislative history by arguing that, relative to existing practice, decision theory reduces complexity, lowers costs, respects democratic decisions, and encourages Congress to discipline itself. This Part argues that decision theory offers a particularly powerful self-enforcing method of statutory construction that may even reduce total interpretive costs relative to a complete ban on legislative history.<sup>24</sup>

If nothing else, as a matter of legislative supremacy, if courts must respect Congress's decisions, then judges—and administrators, where it may matter more<sup>25</sup>—must begin the process of understanding Congress's methods. Congress has independent incentives to know and follow its own rules apart from any particular statutory interpretation case or any theory of statutory interpretation. Indeed, given that it requires no knowledge whatsoever of judicial practice,<sup>26</sup> including canons of construction, decision theory will be far easier for congressional staffers to understand and use than theories that appear to require that they have knowledge of canons or judicial decisions, knowledge that empirical work shows to be scarce in Congress.<sup>27</sup> Finally, to the

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23. See Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002) [hereinafter Elhauge, *Preference-Eliciting*]; Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002) [hereinafter Elhauge, *Preference-Estimating*].
  24. On the distinction between interpretation and construction, see ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 3-4 (2011).
  25. I agree with Professors Mashaw and Vermeule that far more statutory interpretation is done in the administrative sphere than elsewhere. See VERMEULE, *supra* note 6, at 225-26; Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 502-03 (2005) (“[A]gencies are, by necessity, the primary official interpreters of federal statutes . . .”). It may even be that administrators are more expert in Congress's rules than are judges. This is an empirical question that deserves investigation and may support application of these rules in the administrative sphere. Because my focus is on courts in this Article, I leave to another day the question of administrative interpretation, without any intention to suggest that it is any less important or pervasive. It should be noted that debates about administrative interpretation are often carried on in the shadow of the standard debates about judicial interpretation. See, e.g., Glen Staszewski, *Introduction to Symposium on Administrative Statutory Interpretation*, 2009 MICH. ST. L. REV. 1, 3-4 (describing Michael Herz as arguing for a purposivist view and Staszewski as arguing for a textualist view in the context of administrative agency interpretation).
  26. See VERMEULE, *supra* note 6, at 118-29 (criticizing interpretive theories that require a significant amount of coordination among judges).
  27. Katzmann, *supra* note 6, at 688 (noting Judge Katzmann's experience as part of a Judicial Conference committee finding that congressional “committee staff did not know” about judicial opinions on technical aspects of statutes); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 575 (2002) (suggesting, based on an empirical study, that “although drafters are generally

extent courts follow this approach and Congress understands them to do so, it reduces Congress's own incentives to manipulate the process. If, for example, members know that losers' history does not count, then losers have no incentive to try to manipulate the record; and if Congress's rules do matter, then members will have an even greater incentive than they already do to conform to the rules.

In Part IV, I address theoretical questions raised by calling this a "positive" political theory, distinguishing rule-based decision theory from existing anticipation-response and signaling models. The problem with existing positive political theory (PPT) is its failure to foreground that which its adherents know,<sup>28</sup> but do not emphasize: the congressional "rules of the game." In fact, PPT and decision theory share a theoretical ambition that "[w]ith a proper theory of statute making . . . , we can effectively ground the interpretation of legislative history."<sup>29</sup> Rule-based decision theory, however, is likely to be far more attractive to judges and legal scholars in general because it is both rule based and text based, focusing the analyst on pivotal points in a decisionmaking process and using that process as an internal preference aggregation mechanism, rather than relying on other external measures (such as voting coalitions).<sup>30</sup> More importantly, relative to the enormously information-demanding early forms of PPT, this approach allows one to limit the legislative record, in some cases quite dramatically, by reversing the sequential process.<sup>31</sup>

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familiar with judicial rules of construction, these rules are not systematically integrated into the drafting process").

28. Rodriguez & Weingast, *New Perspectives*, *supra* note 12, at 1473 (emphasizing the importance of a pre-cloture substitute); *see id.* at 1518-20 (relying on the importance of the pre-cloture substitute to analyze a particular text); *id.* at 1500-01 (rejecting reliance on certain legislative history precisely because it occurred before the pre-cloture substitute).
29. *Id.* at 1524.
30. This may come as a surprise to some decision theorists, but they should consider that rules may be a form of preference aggregation preferable to voting or ideological scores. Recent work in philosophy and PPT suggests that coherent preference aggregation can be achieved by other means, such as "a premise-based or sequential priority procedure." CHRISTIAN LIST & PHILIP PETTIT, *GROUP AGENCY* 58 (2011). For criticisms of standard voting-based models, see JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 99 (1997), which criticizes some positive political theorists' approach as "enormously information demanding" and offering "a tool that [judges] cannot use."
31. Fans of PPT should refer to Part IV for a more detailed analysis. My basic point is twofold. First, the anticipation-response version of PPT (typically referred to as game theory and associated with William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 *GEO. L.J.* 523 (1992)) needs to contend with the fact that members may have no incentive to respond to the institution down the line because electoral incentives dominate their decision

## I. RETHINKING LEGISLATIVE “INTENT” AS CONSTITUTIONAL HEURISTIC

In 1930, Max Radin wrote one of the most famous law review articles on statutory interpretation. In it, he made a classic “realist” claim that there was no such thing as “legislative intent.”<sup>32</sup> In the 1950s, legal process scholars aimed to rehabilitate statutory interpretation by renaming specific intent as a more general “purpose,” a move that intensified, rather than diminished, the fictional character of the inquiry by suggesting to their readers (if only for purposes of discussion) a wholly unrealistic view of the legislature as akin to judicial actors, as “reasonable persons pursuing reasonable purposes reasonably.”<sup>33</sup> Fifty years later, textualists resurrected Professor Radin’s critique, denouncing legislative history on the theory that text should prevail over any “imaginary” congressional intent.<sup>34</sup>

Textualists’ powerful critique of legislative intent has spread beyond statutory interpretation specialists. Just as legal academics and judges have split on this issue, so too have political scientists. As Kenneth Shepsle famously put it: Congress is a “they,” not an “it.”<sup>35</sup> Other positive political theorists disagree: Daniel Rodriguez and Barry Weingast urge that legislative history be given its due.<sup>36</sup> A similar battle repeats itself in serious jurisprudential debates. Literary

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(no one was ever elected because they wrote statutes clear enough to survive appellate review). Second, as far as signaling theory goes, actual points of rule-based compromise may serve to aggregate preferences more accurately than do ideological scores or voting records. In the latter case, I agree with Miriam Jorgensen and Kenneth Shepsle about the difficulty of determining *ex post* the members of the enacting coalition. See Miriam R. Jorgensen & Kenneth A. Shepsle, *A Comment on the Positive Canons Project*, 57 *LAW & CONTEMP. PROBS.* 43, 46-47 (1994). As even those who are enthusiastic about rational choice models have argued, these models posit simple assumptions that may be wildly inconsistent with empirical reality and need new ideas as well as data to keep them alive. Terry M. Moe, *The Revolution in Presidential Studies*, 39 *PRESIDENTIAL STUD. Q.* 701, 710 (2009) (“[T]he players in these formal models are optimizers whose assumed capacities for calculation and information processing are typically light years beyond those of real people.”); *id.* at 713 (arguing that good ideas are likely to test and push rational choice theories in the future).

32. Max Radin, *Statutory Interpretation*, 43 *HARV. L. REV.* 863, 872 (1930).

33. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., The Foundation Press 1994) (1958).

34. See, e.g., SCALIA, *supra* note 21, at 31 (“I object to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of the law.”); William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 *MICH. L. REV.* 1509 (1998) (reviewing ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)).

35. Kenneth A. Shepsle, Commentary, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 *INT’L REV. L. & ECON.* 239, 239 (1992).

36. Rodriguez & Weingast, *Paradox*, *supra* note 12, at 1226-33.

theorist Stanley Fish claims that it is impossible to interpret text without assigning intent, that statements are inherently intentional acts;<sup>37</sup> meanwhile, legal philosopher Jeremy Waldron argues that Congress's multiplicity renders legislative "intent" impossible to know.<sup>38</sup> Even more recent work in political theory from Christian List and Philip Pettit argues that group agency is indeed possible and can be rational.<sup>39</sup>

*A. Intent as an Injunction About Judging to Judges*

The problem with this debate is the debate itself. The notion of congressional intent is built upon a metaphor,<sup>40</sup> and precisely because it is a metaphor, it is true in some senses, but false in others. As Aristotle said of metaphor, it "is the application of a strange term either transferred from the genus and applied to the species or from the species and applied to the genus, or from one species to another or else by analogy."<sup>41</sup> Congressional intent hinges on an obvious error of composition: reducing a multiperson institution to a single person. The "strange term," to use Aristotle's phrase, is the individual. As Jeremy Waldron has argued so cogently, the very essence of Congress is its plurality, its multiplicity, its 535-ness.<sup>42</sup> In this sense, the "Congress-is-a-person" analogy is misleading: Congress has no brain, no desire, no hopes or dreams. Taken to its metaphorical extreme, congressional intent suggests the rather implausible proposition that one is looking inside members' minds when looking at legislative history, or that legislators, unlike

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37. STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 99-100 (1989); Stanley Fish, *Play of Surfaces: Theory and the Law*, in *LEGAL HERMENEUTICS: HISTORY, THEORY & PRACTICE* 297, 300-01 (Gregory Leyh ed., 1992).

38. WALDRON, *supra* note 8, at 119-46.

39. LIST & PETTIT, *supra* note 30, at 59 ("We have argued that it is possible, at least in principle, for a group to aggregate the intentional attitudes of its members into a single system of such attitudes held by the group as a whole.").

40. One might also argue that the term "decision" is a metaphor. My defense is that this is a better metaphor than others since it reduces distracting debates over matters such as whether we should be looking for legislators' states of mind or whether legislative history is subjective as opposed to objective.

41. 23 ARISTOTLE, *The Poetics*, in ARISTOTLE IN 23 VOLUMES § 1457b (W.H. Fyfe trans., Harvard Univ. Press 1932), <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0056%3Asection%3D1457b>.

42. WALDRON, *supra* note 8, at 10 ("Statutes . . . are *essentially*—not just accidentally—the product of large and polyphonous assemblies.").

corporate officers or any other principal, would actually have to read an agent's document to be bound by it.<sup>43</sup> That is the work of the false side of the metaphor.

There is, however, a truer side to the metaphor. We talk about collective entities all the time: Harvard thinks this, Yale does that.<sup>44</sup> Positive political theorists are right on this score: the idea that we do not talk about collective entities flies in the face of general linguistic usage and common law practice.<sup>45</sup> No one would conclude that a corporation is not bound by a contract because it was drafted by its lawyers and therefore does not reflect the intent of the corporation.<sup>46</sup> Just as corporations are bound by the statements of their agents, Congress may be bound by the statements of its agents.<sup>47</sup> Even if one does not accept the recent philosophical work supporting group agency, one should at least accept that, however fictional, the concept of group agency exists in the law. And if such a rule is good enough for corporations and other legal entities, query why it should not be good enough for Congress.

Over the course of the past twenty years, the debate about congressional intent has vacillated between the two sides of the metaphor—from the “it” to the “they” and back—when both are in part true. That is the very nature of a

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43. Positive political theorists have made the point that, although it is often complained that legislators do not read legislative history, *e.g.*, *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring in the judgment), lawyers do not hold corporate officers to the same standard. A document is not ignored because the head of the corporation has not read it. See McNollgast, *Intent*, *supra* note 12, at 19-20.

44. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 864-65 (1992) (arguing that members' motives or purposes need not be unanimous to ascribe a purpose or intent to the group).

45. See Rodriguez & Weingast, *Paradox*, *supra* note 12, at 1227-28.

46. See JAMES D. COX & THOMAS LEE HAZEN, *CORPORATIONS* 129 (2d ed. 2003) (“A corporation cannot see or know anything except by the eyes or intelligence of its officers.” (quoting *Factors' & Traders' Ins. Co. v. Marine Dry Dock & Shipyard Co.*, 31 La. Ann. 149, 151 (1879))).

47. “It is well settled that if an officer or agent of a corporation acquires or possesses knowledge in the course of her employment as to matters that are within the scope of her authority, this knowledge is imputed to the corporation.” *Id.* at 358 (citing *Volkswagen of Am., Inc. v. Robertson*, 713 F.2d 1151, 1163 (5th Cir. 1983); *In re Pubs, Inc.*, 618 F.2d 432, 438 (7th Cir. 1980)). “Courts generally base the doctrine that a principal is chargeable with knowledge of facts known to an agent on the agent's duty to communicate his knowledge to the principal and the presumption that this duty has been performed; the presumption is usually treated as conclusive.” *Id.* at 360-61; see also *RESTATEMENT (THIRD) OF AGENCY* § 5.03 (2006) (“Imputation of Notice of Fact to Principal”); WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* 133 (3d ed. 2001) (citing *Anderson v. Walthal*, 468 So. 2d 291, 294 (Fla. Dist. Ct. App. 1985); *Ouachita Equip. Rental Co. v. Trainer*, 408 So. 2d 930, 935 (La. Ct. App. 1981)) (“The general rule is that the knowledge of an agent is to be imputed to the principal.”).

metaphor. There is no question, for example, that Congress is a body of multiple players, none of whom might actually intend the ultimate text resulting from institutional deliberation. As Jeremy Waldron has urged, Congress might choose a machine to aggregate its votes,<sup>48</sup> but even a machine has a written protocol (rules) for aggregating votes.<sup>49</sup> Congress's texts are the product of rules creating stability and facilitating decisionmaking; these rules are in effect means for aggregating individual preferences.<sup>50</sup> They may favor some and not others; they may even be violated, but the point is that there are rules. Accepting such rules does not commit one to thinking the interpreter is looking for a single unified intent, or even multiple intents, but only that there is a bill whose text has been created in part by these rules and procedures.<sup>51</sup>

To see how the concept of "intention" has distorted the legal debate, engage in an intellectual experiment. Strike the term "intent" and replace it with the term "meaning" (as Holmes suggests<sup>52</sup>) or "decision" (as I recommend). It makes fine sense to say that a particular text was the result of a congressional decision; one need not describe the decision as a matter of intent to understand that a choice has been made. Once we strike the term "intent," the tendency to think that we are looking in minds or for subjective desires dwindles because the term "intent" is doing so much of the debate's intellectual work.<sup>53</sup> If we switch to the term "decision," the implication that there is

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48. WALDRON, *supra* note 8, at 126. Waldron's example is borrowed from the philosopher Richard Wollheim.

49. The literature on originalism in constitutional interpretation tends to reject Waldron's position that there can be no collective intent. See, e.g., BENNETT & SOLUM, *supra* note 24, at 162-63.

50. LIST & PETTIT, *supra* note 30, at 56 (arguing that "sequential priority procedures," where procedures are ordered on an agenda, can produce coherent majority voting because attitudes on the "new proposition [are] constrained by attitudes on earlier propositions"); see *id.* at 58 (concluding that to achieve collective rationality, "[a]n aggregation function such as a premise-based or sequential priority procedure enables a group not only to form rational intentional attitudes but also to do so in a way that collectivizes reason").

51. See MICHAEL E. BRATMAN, *FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY* 111 (1999) ("To understand shared intention, then, we should not appeal to an attitude in the mind of some superagent; nor should we assume that shared intentions are always grounded in prior promises.").

52. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899) ("We do not inquire what the legislature meant; we ask only what the statute means.").

53. Of course, it makes good sense to argue, as Professor Manning has, that we should not reduce Congress to the statements of a single proponent or committee. John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 675 (1997). Congress could not constitutionally give its de jure power to legislate to a committee or to a single senator or House member. But this does not mean that courts may ignore Congress's decisions about

something necessarily subjective or individualistic lessens quite dramatically. This intellectual experiment suggests that the great objectivity/subjectivity debates about legislative intent are heavily influenced by semantics, in the sense that the overarching debate depends upon the contingent meaning of a particular word (intent). By suggesting this, I do not mean to denigrate in any way the extraordinary work of those who have struggled with the collective “intent” argument in productive ways, from Justice Scalia to Jeremy Waldron to Kent Greenawalt.<sup>54</sup> My claim is only that these accounts, however important at a philosophical or jurisprudential level, remain untethered from one important congressional reality: the rules.

A “decision,” as I define it here, is capable of capturing the idea that there may be no final or complete collective intent, while at the same time acknowledging that intentions may stop at a moment of decision. Decision theory differs from intentionalism in important theoretical and philosophical respects. It does not deny that persons or groups may have something we describe as an intention,<sup>55</sup> but, following the work of action philosophers, such as Michael Bratman, it contends that intentions are events that reach at least temporary closure at a moment of decision. Those decisions can be overridden, after a series of other intentional events, but there are identifiable stopping points where no further intentions are relevant. These stopping points, as I argue, are moments in the legislative process marked by rules, which close off debate, whether in committee, on the floor, or in conference committee.<sup>56</sup>

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its own texts, when the alternative is to impose the judiciary’s own meaning. The answer to that question requires a constitutional theory. See Victoria Nourse, *Misunderstanding Congress* (Sept. 12, 2012) (unpublished book manuscript) (on file with author).

54. KENT GREENAWALT, *LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS* (1999); SCALIA, *supra* note 21, at 16-23; WALDRON, *supra* note 8, at 109-29.
55. In acknowledging that decisions may be intentional, I am not asking that judges imagine or reconstruct intentions as states of mind. A judge with a gap in a statute has to construct an answer to the problem. As today’s originalists have made clear, construction is the legal effect of a term and may differ from its original meaning. So, too, in statutory interpretation, the judge must seek the legal effect of Congress’s decisions in the case of ambiguity. This does not require judges to project themselves into the political situation by imaginative effort, but to know the rules of the game and when those rules will help them make a judgment about the legal effect of a statute.
56. Michael E. Bratman, *Shared Cooperative Activity*, 101 *PHIL. REV.* 327, 340 (1992) (“A joint activity can be cooperative down to a certain level and yet competitive beyond that. . . . [In playing chess,] [y]ou and I do not intend that our subplans mesh all the way down. But you and I do intend that our subplans mesh down to the level of the relevant rules and practices. Our chess playing . . . is jointly intentional, and it involves shared cooperation down to the cited level.”). I thank Larry Solum and Greg Klass for pointing this work out to me.

Ultimately, the great legal historian Willard Hurst was correct when, in replying to Max Radin, he urged that “legislative intent” is a fiction, but a fiction with a purpose: to help judges better serve the separation of powers. Long ago, Hurst argued that the concept of “legislative intent” reminds judges that it is not *their* decisions, but the *people’s* decisions, that count in a democracy.<sup>57</sup> Recent empirical work has shown that viewing “intent” as a check on judges (rather than a search for subjective meaning) may be an important restraint on judicial bias. In a study conducted by Ward Farnsworth, Dustin Guzior, and Anup Malani, when readers searched for ordinary meaning (the meaning of someone else), they resisted their own policy preferences relative to a search for ambiguity.<sup>58</sup> In James Brudney and Corey Ditslear’s study, legislative history constrained liberal Justices to reach conservative outcomes.<sup>59</sup> This work is particularly important given Michael Abramowicz and Emerson Tiller’s findings that citation of legislative history does have an ideological tilt.<sup>60</sup> Hurst was correct when he urged that the point of “legislative intent” was not to supplant text, nor to search for one’s friends, but to constrain judges’ ideological and cognitive biases.<sup>61</sup> In its best sense, “legislative intent” is a message for *judges* about *judging*, not an accurate or even necessary description of Congress.

*B. The Poverty of Current Theory on Congressional Procedure*

In part, the failure to move beyond standard debates about intentionalism reflects ignorance of how Congress works: neither law professors nor judges have typically worked in a legislature.<sup>62</sup> The great debates about legislative history and intent have settled in slovenly fashion in that old sludge of a controversy about subjectivity and objectivity. “Can we read the minds of the

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57. HURST, *supra* note 13, at 32-33.

58. Ward Farnsworth, Dustin F. Guzior & Anup Malani, *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257, 272 (2010).

59. Brudney & Ditslear, *supra* note 2, at 148-49 (arguing that liberal Justices are constrained in their liberalism to take conservative pro-employer positions by reference to legislative history).

60. Michael Abramowicz & Emerson H. Tiller, *Citation to Legislative History: Empirical Evidence on Positive Political and Contextual Theories of Judicial Decision Making*, 38 J. LEGAL STUD. 419, 436-38 (2009) (finding both that Democratic appointees generally place more weight than Republican appointees on legislative history, and that judges of both parties on three-judge panels are more likely to cite legislative history when more Democratic appointees are on the panel).

61. HURST, *supra* note 13, at 32-34.

62. Rudesill, *supra* note 6, at 706-08.



legislators?” the objectivists ask. “But can there be a law without some will?” say the subjectivists. This kind of debate occurs all over the law and produces many disputes, but it never manages to describe the law, which tends to adopt both objective and subjective approaches simultaneously.<sup>63</sup> The problem is neither subjectivity nor objectivity. If lawyers find no difficulty in understanding the complexities of other collective entities, such as corporations or administrative agencies, one wonders why it is too difficult to understand Congress.

Consider the poverty of current theories on the matter of congressional procedure. Textualism imagines Congress as a failed court, paying no attention whatsoever to congressional procedure on the theory that it is too chaotic or incoherent.<sup>64</sup> Textual theorists are mightily concerned with their own institution, the judiciary, and its legitimacy. They pay great attention to the canons of interpretation and procedural rules of courts, such as deference to administrative interpretation. And yet they pay scant attention to the rules of Congress. This is particularly ironic given the fact that judicial emphasis on text sometimes appears less motivated by a focus on language (which often yields to common law or canons) than by the notion of a “rule-bound” jurisprudence.<sup>65</sup> The rules that appear to matter to textualists are judicial, not congressional, rules. But there is nothing necessary about this; indeed, there are good reasons to believe that the focus on canons, common law, and judicial precedent runs directly contrary to how Congress in fact drafts statutes.<sup>66</sup> Textualists can gain enormous power from decision theory

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63. Victoria Nourse, *After the Reasonable Man: Getting over the Objectivity/Subjectivity Question*, 11 NEW CRIM. L. REV. 33, 36 (2008). For a more incisive analysis, see the rejection of this debate in Caleb Nelson, *What Is Textualism?*, 91 VA. L. REV. 347 (2005). I expect that a good deal of this debate may emanate from contract scholarship. See STEVEN J. BURTON, ELEMENTS OF CONTRACT INTERPRETATION § 1.3.2-1.3.3, at 21-34 (2009) (comparing objective and subjective interpretive regimes in contract interpretation). The contract analogy in statutory interpretation is at best incomplete: there are rules governing the parties “contracting” for statutes, which have no precise analogue in standard contract law. However, this is not to say that, for some purposes, the analogy may not be apt.

64. See Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1138-42 (2011).

65. See Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 26 (2006) (“[I]f textualism’s description of interpretation had much in common with legal realism, its aspirations for the judiciary had much in common with legal formalism.”); Nelson, *supra* note 63, at 349 (“My central argument is that . . . different attitudes toward what academics call ‘rules’ and ‘standards’ could still generate the very same divide that we currently observe [between textualists and intentionalists].”).

66. Nourse & Schacter, *supra* note 27 (arguing, based on a qualitative study, that canons and precedent may have little weight in drafting by congressional staffers).

by emphasizing rules likely to clarify the central texts, as I show throughout this Article.<sup>67</sup>

Purposivists are as oblivious of congressional rules as are textualists,<sup>68</sup> although purposivists have no aversion to legislative history. To the extent purposivists rely upon generalized statements of legislative history drawn from random sources, they generate fodder for the new textualist critique: if purposivists make no distinction between winners and losers, or between committee reports and conference committee reports, they may make very serious errors (as we will see). It is just as easy for purposivists to come up with an interpretation vindicating losers' history as for textualists to come up with such an interpretation by, for example, focusing on a bit of text that is contradicted by other text.<sup>69</sup> On the other hand, if purposivists were to follow the rules, they might have more powerful legislative history to rebut textualists' challenges, adding rigor and simplicity to their analyses. In fact, precisely because these rules help inform the choice of relevant texts, purposivists have new and important grounds to defend their recourse to legislative history.

### C. Positive Political Theory

The most significant academic competitor to textualism or purposivism frequently flies under the banner of "positive political theory." Although approaches carrying this name differ,<sup>70</sup> a number of political scientists have

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67. See *infra* Subsection II.B.2 (discussing *Weber*).

68. See Nourse, *supra* note 64, at 1148-49 (critiquing purposivism for its lack of realism about Congress).

69. See *infra* Section II.A (*Public Citizen*) and Subsection II.B.1 (*Bock Laundry*); see also *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989) (relying on one part of a statute without fully accounting for the contradictions between that part of the statute and other parts left out of the opinion). Sinclair's textual choices are explained in WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 996 (4th ed. 2007), which discusses the statute in *Sinclair* and reports that "according to prevalent rumors in one segment of the bankruptcy bar, at the behest of lending interests a Senate staff member put § 302 into the bill, contrary to the apparent wishes of the sponsors and supporters of the 1986 statute."

70. There are obviously many versions of positive political theory and its application to law. See, e.g., Emerson H. Tiller, *Resource-Based Strategies in Law and Positive Political Theory: Cost-Benefit Analysis and the Like*, 150 U. PA. L. REV. 1453 (2002) (focusing on decision resources as a prominent aspect of positive political theory). I emphasize the two approaches appearing later in this paragraph because these are the most prominent among legal scholars of statutory interpretation.

offered sophisticated theories of statute-making.<sup>71</sup> They are called “positive” theories because they aim to provide an empirically grounded view of Congress. In seminal pieces beginning in the late 1970s, Kenneth Shepsle and Barry Weingast argued that Congress is not as chaotic as some political theories predict, but that stable or equilibrium policy choices are reached through institutional means. They emphasized the power of the rules and agenda-setting mechanisms to avoid policy cycling, as predicted by Arrow’s Theorem.<sup>72</sup> Later, these scholars aimed to apply their approach to find a “method[.]” of statutory interpretation “compatible with how legislation is actually created.”<sup>73</sup> Two prominent versions of that method have emerged in the law review literature. In one version, the “anticipation-response” approach, John Ferejohn and William Eskridge have argued that Congress will generally anticipate what courts will do in interpreting a statute.<sup>74</sup> In another version, the “signaling” version, Daniel Rodriguez and Barry Weingast have argued that it is possible to rhetorically analyze whether legislators are engaging in cheap talk or costly signals, and that one can do this best by looking for statements made to persuade pivotal compromise voters.<sup>75</sup>

In this Article, I offer a version of positive political theory that differs substantially from existing theories. I call this “rule-based decision theory” because, unlike existing positive political theory, it foregrounds Congress’s own rules. It is a positive theory because it depends upon an empirical vision of how Congress works. However, rule-based decision theory diverges from some

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71. John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT’L. REV. L. & ECON. 263, 265 (1992); McNollgast, *Intent*, *supra* note 12; McNollgast, *Positive Canons*, *supra* note 12; Rodriguez & Weingast, *New Perspectives*, *supra* note 12; Rodriguez & Weingast, *Paradox*, *supra* note 12.

72. Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27, 27 (1979) (offering a model of legislative behavior that results in “equilibrium”); Shepsle & Weingast, *supra* note 7, at 6-7. For a succinct description of Arrow’s Theorem, see DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* 7-8 (1994).

73. McNollgast, *Intent*, *supra* note 12, at 5; *see also* McNollgast, *Positive Canons*, *supra* note 12, at 706 (emphasizing the need for an “explicit theory” of legislative history).

74. Eskridge & Ferejohn, *supra* note 31 (positing policy outcomes based on the interaction of Congress and courts based on game theory); *see* Ferejohn & Weingast, *supra* note 71, at 265 (advancing a theory of statutory interpretation based on the interaction of courts and Congress).

75. Rodriguez & Weingast, *New Perspectives*, *supra* note 12; Rodriguez & Weingast, *Paradox*, *supra* note 12; *see also* McNollgast, *Intent*, *supra* note 12, at 7 (“[A]scertaining legislative intent requires separating the meaningless actions (or signals) of participants in the legislative process from the consequential signals that are likely to reveal information about the coalition’s intentions.”).

standard assumptions suggested by the term “decision theory.” Positive political theorists tend to use the term “decision theory” to mean a procedure by which political preferences are aggregated. Typically, political scientists use legislative votes or ideological scores (liberal or conservative) to assess members’ preferences. By contrast, the theory I propose here—rule-based decision theory—posits that Congress’s rules dominate members’ preferences.<sup>76</sup> Indeed, the rules help to form preferences: if in the game of chess, moving a piece in a particular direction violates the rules, one’s preference cannot be to move pieces in that direction. Similarly, in Congress, the rules form and limit members’ preferences. If a member knows that she needs sixty votes to obtain bill passage, she will temper her ideal preferences and may even diverge from her own party’s preferences or ideology, if the bill is important to her electoral future. This is true as well of models that assume anticipation across institutions: one can fairly well predict that one’s chess opponent will not move a piece in a way that violates the rules.<sup>77</sup> If I am correct that rules may dominate and form preferences, then rules must be taken into account in any theory that aims to reflect how Congress really works.

*D. Rule-Based Decision Theory*

Rule-based decision theory is a distinctive theory of statutory interpretation because, unlike purposivism, textualism, or positive political theory, it rejects standard forms of intentionalism.<sup>78</sup> The theory searches for Congress’s decisions based on Congress’s rules. It starts with the text, as all statutory theories do, but unlike textualism, it posits that interpreters may not find the proper text without looking at legislative history (a position likely to seem oxymoronic to most textualists, as they define themselves as rejecting

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76. See LIST & PETTIT, *supra* note 30, at 58 (arguing that “a premise-based or sequential priority procedure enables a group not only to form rational intentional attitudes but also to do so in a way that collectivizes reason”). Note that the Principles I emphasize in the Article are sequential and that the legislation as introduced is the starting point of the sequential process.

77. In this sense, rule-based decision theory diverges from the “positive canons” grounded in contract law. See McNollgast, *Positive Canons*, *supra* note 12, at 708-09. It also rejects the positive canons project’s willingness to adhere to the language of intent, based on the contract analogy, and insists instead upon the notion of an institutional decision.

78. In rejecting intentionalism, I am not rejecting the philosophical arguments that a collective intent may, in theory, be established sequentially. See, e.g., LIST & PETTIT, *supra* note 30. Nor am I saying that intentionalism does not have a heuristic purpose; it does—as a judicial restraint. I am saying that I believe the use of the term “intention” muddies the waters and is best avoided when considering how texts are in fact created within the legislature.

legislative history). Rule-based theory looks to legislative history, then, in cases where textualists would not, but for reasons textualists should accept: to determine text. Similarly, this theory both diverges and converges with some aspects of purposivism. Like purposivism and some forms of positive political theory, it has no hesitancy in researching legislative history as information helpful to find Congress's meaning. However, unlike purposivism, it does not posit a unified collective intent, or look to legislative history to find vague purposes, but looks for Congress's textual decisions in the actual rule-based history of the statute.

Today, we are all textualists and we are all purposivists. Purposivists begin with text, and textualists look to text to find purpose. The only difference lies in how one conceives of legislative history. Decision theory makes its most important contribution in that arena by rejecting the distracting influence of intentionalism on both purposivism and textualism. Decision theory will not solve every statutory interpretation case, but it can make the use of legislative history more objective and easier, and free it from the intellectual diversions of intentionalism. In Part II, I aim to show how rule-based theory transforms basic scholarly understandings about central cases taught to law students across the country.<sup>79</sup> I offer five Principles that exemplify the advantages of a rule-based theory as it applies to legislative history. These Principles illustrate the basic distinction between rule-based theory and current approaches. In Part III, I consider objections to the Principles I have offered in Part II. In Part IV, I offer a more complete explanation of rule-based decision theory writ large, by distinguishing it from other forms of positive political theory.

## II. SIMPLE PRINCIPLES FOR READING LEGISLATIVE HISTORY

Courts and scholars make sweeping statements about legislative history: it is far too complex and heterogeneous to be understood; always manipulated or produced by non-legislators; generated by a "chaotic" or "tortuous" institution.<sup>80</sup> As Adrian Vermeule has insisted, these are empirical claims.<sup>81</sup> In theory, they may be falsified. My argument will not resolve the empirical questions at a high level of generality. To do that would require a much larger

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79. In other work, I will have to defend the larger empirical proposition that decision theory can in fact simplify the use of legislative history by appellate courts at a systemic level.

80. John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 423, 431-32 (2005).

81. VERMEULE, *supra* note 6, at 149 ("[E]mpirical questions about legal interpretation are inescapable . . ."); see also *id.* at 109 (positing that "legislative history is distinctively voluminous and heterogeneous in comparison with other interpretive sources").

study.<sup>82</sup> But my argument does suggest that such claims may be falsified in individual high-profile cases regularly taught and debated by legal scholars and, if so, that we must question at the very least what we are teaching students and what we as scholars are arguing about. We cannot know that legislative history is impossibly complex unless we look at the hard case for the critics – when legislative history is easy and at its best.

Legislative history is at its best when understood within Congress’s own rules. Just as no one would try to understand the meaning of a trial transcript without understanding the rules of evidence or civil procedure, no one should try to understand legislative history without understanding Congress’s own rules. This does not resolve, as we will see, the ultimate empirical question, but neither does it posit some vague normative ideal, borrowed from political theory or constitutional thought, to answer central interpretive questions.<sup>83</sup> Of course, some will charge that my examples are anecdotal or particularly friendly to the argument. If so, they are no worse than the standard fare, as claims both for and against legislative history rely upon precisely the same “friends” I invoke here.<sup>84</sup> At its most minimal, my claim is for one simple, but

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82. The question is not simply whether a larger study could be done but whether the cases cited in this Article have any claim to being representative of the use of legislative history, aside from the fact that they are representative of the cases taught to law students; they are indeed representative of the cases taught in the top casebooks and law review articles. *See infra* note 84. Moreover, as a matter of rule relevance, there is evidence to suggest that the cases I discuss are not unrepresentative. Barbara Sinclair reports that, from the 1960s to the 1990s, over three-quarters of all major legislation went to conference committee, *see* BARBARA SINCLAIR, *UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS* 91 (4th ed. 2012), which suggests the importance of rules governing conference committees. As Sinclair also notes, it is unclear whether this trend will continue in the near term because of the rise of the use of the filibuster to block conferences. *Id.* at 101-02. But filibusters themselves, which are part of the rule-based analysis, are moments of important compromise, and are now applicable to all legislation. GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE* 10 (2006) (“The Senate’s rules that protect unlimited debate . . . effectively require supermajorities for the passage of legislation . . .”); *see* 157 CONG. REC. S311 (daily ed. Jan. 27, 2011) (statement of Sen. Tom Harkin) (noting that in the 110th and 111th Congresses, there were “275 filibusters in just over 4 years. It has spun out of control. This is not just a cold statistic of 275 filibusters. It means the filibuster, instead of a rare tool to slow things down, has become an everyday weapon of obstruction, of veto.”).
83. VERMEULE, *supra* note 6, at 31 (arguing that “formal constitutional premises . . . mandate neither formalist interpretive methods nor nonformalist interpretive methods,” and so the resolution of that dispute depends upon institutional and empirical issues).
84. The principal cases I discuss in this Article—*Public Citizen v. U.S. Department of Justice*, *Green v. Bock Laundry*, *TVA v. Hill*, *Church of the Holy Trinity v. United States*, *United Steelworkers v. Weber*, and *Griggs v. Duke Power*—are precisely the ones typically referred to by those who argue for or against legislative history, particularly in the scholarly literature

powerful, canon of construction: just as Congress is presumed to know and follow the “surrounding body of law,”<sup>85</sup> there should be an even stronger presumption that Congress knows and follows its *own* rules.<sup>86</sup>

*A. First Principle: Never Read Legislative History Without Knowing Congress’s Own Rules*

Consider an easy example based on an apparently hard case. *Public Citizen v. U.S. Department of Justice*<sup>87</sup> involved the American Bar Association’s recommendations to the President on judicial nominations. The question raised was whether the ABA had to satisfy the Federal Advisory Committee Act (FACA), which requires certain governmental entities “established or

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and in casebooks. See WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 44-47 (1994) (discussing *Bock Laundry*); *id.* at 74-80 (discussing *Griggs*); *id.* at 208-10 (discussing *Holy Trinity*); *id.* at 219-25 (discussing *TVA v. Hill*); SCALIA, *supra* note 21, at 21-22 (discussing *Holy Trinity*); VERMEULE, *supra* note 6, at 87-117 (discussing *Holy Trinity*); *id.* at 28-29 (discussing *TVA*); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2479-80 (2003) [hereinafter Manning, *Absurdity Doctrine*] (discussing *Bock Laundry*); John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 415-17 (2010) (discussing *Public Citizen*); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2011-13 (2009) [hereinafter Manning, *Federalism*] (discussing *Holy Trinity*); Rodriguez & Weingast, *New Perspectives*, *supra* note 12, at 1501-10 (discussing *Griggs*); *id.* at 1517-21 (discussing *Weber*). They also appear prominently in major casebooks in the field. See, e.g., ESKRIDGE ET AL., *supra* note 69, at 42-47 (*Griggs*); *id.* at 88-100 (*Weber*); *id.* at 743-44 (*Public Citizen*); *id.* at 752-55 (*TVA*); *id.* at 766-75 (*Bock Laundry*); JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 4-17 (2010) (*TVA*); *id.* at 38-43 (*Holy Trinity*); *id.* at 89-96 (*Public Citizen*).

85. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring) (offering a reading of a statute based on “ordinary usage” and “most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind”).

86. One might object that Congress does not in fact follow its own rules. In the case I have described, however, it does not follow that the original rule evasion is not incorporated into the final majoritarian decision. If a conference committee adds material to identical bills, that would violate the House and Senate rules. A member voting on such a bill with altered language would assume, per the rules, that the addition was immaterial. This approach follows the rules that a member would follow in making his or her vote. The rule-based decision approach thus incorporates knowledge of rule evasion within the proper majoritarian response to that evasion.

87. 491 U.S. 440 (1989).

utilized”<sup>88</sup> by the President to open their meetings, balance their membership, and release public reports.<sup>89</sup>

Today, *Public Citizen* is taught as a controversial case. For textualists, the majority opinion commits judicial surgery, cutting the word “utilized” from the statute. As Justice Kennedy wrote in his concurrence, it is hard not to believe that the ABA was in fact being “used” by the President.<sup>90</sup> Any conclusion to the contrary depended on how the absurdity canon was applied. The majority argued that if “utilize” meant “use,” in the ordinary sense, then it would yield absurd results, covering a meeting of the President with the NAACP or his own political party.<sup>91</sup> Ultimately, the majority decided to read the relevant statutory term—“utilize”—in a technical rather than “ordinary meaning” sense, as something of a repetition of the statutory term “establish,” a result that seems odd as a linguistic matter, but avoided apparent absurdity.<sup>92</sup> Among textualists, the majority opinion raises eyebrows not only for its apparent judicial surgery, but also for its use of the much-debated absurdity canon and constitutional avoidance.<sup>93</sup>

There was an easier way to resolve *Public Citizen*, although this road was taken neither by the majority opinion (which performed the apparent surgery) nor by the concurrence (which concluded the statute could not be constitutionally applied to the President). The answer lies in understanding when Congress added the term “utilize” to the statute. No lengthy legislative history is necessary to find the answer. The term “utilize” first appears in the conference committee report resolving House and Senate differences on FACA. Conference reports are moments when Congress must resolve disagreements between texts; more specifically, between the House and Senate versions of a

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88. 5 U.S.C. app. § 3(2)(B) (2006).

89. For the sake of full disclosure, as an appellate litigator at the Department of Justice, I was involved in briefing FACA cases in the courts of appeals at the time. Later, I was interviewed by the ABA, accorded a “well qualified” rating, and recommended by the Justice Department to sit on the Seventh Circuit Court of Appeals.

90. *Public Citizen*, 491 U.S. at 477-78 (Kennedy, J., concurring in the judgment).

91. *Id.* at 453 (majority opinion).

92. *See id.* at 462-63.

93. *Id.* at 452-53 (noting that how “utilized” is interpreted could create absurd results); *id.* at 465-67 (addressing the issue of constitutional avoidance). *But see id.* at 482 (Kennedy, J., concurring in the judgment) (concluding that the application of FACA to the ABA would be a “plain violation of the Appointments Clause of the Constitution”). On the absurdity canon, see Linda D. Jellum, *But That Is Absurd!: Why Specific Absurdity Undermines Textualism*, 76 BROOK. L. REV. 917 (2011); and Manning, *Absurdity Doctrine*, *supra* note 84.



bill.<sup>94</sup> This was certainly true in *Public Citizen*. The Senate bill going to conference covered committees “established or organized” by the President;<sup>95</sup> the House bill used the term “establish.”<sup>96</sup> In other words, the votes in both the House and the Senate prior to the conference were for “establish” and at the most “established or organized.” The term “utilize” was nowhere in sight. Indeed, “utilize” was added in the conference committee, contrary to the bills passed in both House and Senate.

That “utilize” first appears in the conference report should raise a red flag for anyone knowledgeable about Congress’s rules. *Conference committees cannot—repeat, cannot—change the text of a bill where both houses have agreed to the same language.*<sup>97</sup> Both House and Senate rules bar such changes.<sup>98</sup> These rules

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94. See CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 780-83 (1989) (noting that a bill goes to conference when the bodies have reached a “stage of disagreement” and both chambers adopt motions to request a conference and appoint conferees).
95. *Public Citizen*, 491 U.S. at 461 (“[T]he Senate bill that grew into FACA defined ‘advisory committee’ as one ‘established or organized’ by statute, the President, or an Executive agency.” (quoting S. 3529, 92d Cong. §§ 3(1), (2) (2d Sess. 1972))).
96. *Id.* at 459 (“The House bill which in its amended form became FACA applied exclusively to advisory committees ‘established’ by statute or by the Executive, whether by a federal agency or by the President himself.” (quoting H.R. 4383, 92d Cong. § 3(2) (2d Sess. 1972))). H.R. 4383 was passed by the House in May of 1972 and sent to the Senate, which struck the entirety of the bill after the enacting clause and substituted the text of S. 3529. It went to conference in September, the Senate agreed to the conference report on September 19, and the House agreed to the conference report on September 20.
97. RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 111-157, R. XXII (9), at 37 (2011) [hereinafter HOUSE RULES, 112th Cong.] (“The introduction of any language presenting specific additional matter not committed to the conference committee by either House does not constitute a germane modification of the matter in disagreement.”); STANDING RULES OF THE SENATE, S. DOC. NO. 112-1, R. XXVIII (2a), at 52 (2011) [hereinafter SENATE RULES, 112th Cong.] (“Conferees shall not insert in their report matter not committed to them by either House, nor shall they strike from the bill matter agreed to by both Houses”); TIEFER, *supra* note 94, at 801 (“Conferees can only approve the conference committee’s conclusions . . . as a whole, not just the parts they prefer. There is no provision for additional, separate, or dissenting views for conference reports . . .”). For a fairly recent example where the conferees were so insistent upon this that they specifically revoked their signatures on a conference report, see *infra* note 287 and accompanying text.
98. Senate Rule XXVIII “prohibits new components of legislation from being inserted into a conference report.” DAVID M. PRIMO, RULES AND RESTRAINT: GOVERNMENT SPENDING AND THE DESIGN OF INSTITUTIONS 7 (2007). “Congress limits [the conferees’] authority to the differences between the House and Senate versions of the bill . . . by allowing points of order on both the House and Senate floors against conference reports that exceed that scope.” TIEFER, *supra* note 94, at 811; *id.* at 812-13 (“Conferees cannot remove language both chambers agree on, or insert new provisions not in either chamber’s version.”).

limit opportunism by conference committees' members and ex post control by drafting committees, since drafters are typically appointed as conferees and thus get another shot at legislation they themselves drafted. Even if these rules are flouted at times, members have an incentive to follow them lest the bill be stalled by a point of order<sup>99</sup>—a formal objection to proceeding with the bill as violating the rules—precisely at the point when the maximum effort has been expended toward passage.<sup>100</sup>

In *Public Citizen*, the conference report was simple, strong, and proximate legislative history. It was the last act on the precise statutory term at issue—“utilize.” Viewed within the Principles outlined above, a court should defer to the meaning demanded by Congress's own rules. According to congressional rules, the conferees had no power to change the text in any significant way and therefore a judge should interpret “utilize” precisely as a member of Congress would interpret it—as making no significant change to “established or organized.” Ironically, this is precisely the result the Court reached, albeit in ways that seem highly strained and controversial.<sup>101</sup>

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99. SENATE RULES, 112th Cong., *supra* note 97, R. XXVIII 2(b), at 37-38 (“If matter which was agreed to by both Houses is stricken from the bill a point of order may be made against the report, and if the point of order is sustained, the report is rejected or shall be recommitted to the committee of conference if the House of Representatives has not already acted thereon.”); *id.* R. XXVIII 2(c), at 38 (“If new matter is inserted in the report, a point of order may be made against the conference report and it shall be disposed of as provided under paragraph 4.”); HOUSE RULES, 112th Cong., *supra* note 97, R. XXII (10), at 37 (“A Member, Delegate, or Resident Commissioner may raise a point of order against nongermane matter, as specified in subparagraph (2), before the commencement of debate on . . . a conference report.”).

100. It is sometimes said that this rule is quite often flouted, typically in the context of appropriations bills. See SINCLAIR, *supra* note 82, at 117-20 (discussing earmarks and misconceptions about earmarks). The bill may be lit up like a Christmas tree with earmarks, see Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 534-36 (2009), and there will be little incentive for members to object because each has his or her own individual earmark and thus his or her own violation of the rule. As I have already noted, see *supra* note 86, whether Congress does in fact follow its rules does not undermine the principle that courts should assume that a faithful agent would follow the rules. Certainly, if we assume members know the surrounding body of law, we can assume that they know their own rules.

101. I propose this as a principle to resolve ambiguity, not to supplant the statute's text. Critics will claim that congressional procedures, like all legislative history, violate the Bicameralism Clause. Congress's rules, of course, are promulgated pursuant to constitutional authority to regulate their own institution. U.S. CONST. art. I, § 5, cl. 2. This does not mean that they are law in the sense of the Bicameralism Clause, since each house passes its own rules and they are never submitted to the President. Like all canons, the principles proposed here are based on presumptions about congressional behavior, but these canons are far more likely to be realistic and effective since they depend upon already-endogenous rules.

The point of my proposed canon is not to undermine text. One might argue that, since no Senator or House member objected to the term “utilize,” it should be given a full and independent meaning. But this, again, violates the rules and the custom of the trade; at the stage where members are voting for a conference report, this is not a new bill and no amendment may be offered. A faithful member of Congress would assume that, when both houses pass the same language, any added language must be read as making no substantive change in the bill. It is in this sense that a court applying this Principle is not itself violating the rules of Congress: it is not ignoring the text as passed but rather interpreting it in light of what the congressional rules say about how a faithful congressional agent would interpret any last-minute conference additions. A faithful textualist should apply this interpretation as well, given that the Constitution requires deference to Congress’s rules.<sup>102</sup>

This is particularly important in cases of demonstrable ambiguity or potential absurdity, which was the case in *Public Citizen*. When a statute is capable of two meanings (here “utilize” can be read in a prototypical ordinary-meaning sense or in a technical meaning-for-this-statute sense), a court may look to legislative history to resolve the ambiguity. If the ambiguity is created in conference committee,<sup>103</sup> as it was here, then the court may resolve the ambiguity by conforming to Congress’s own rules. Those rules tell the congressperson to assume that the conference has not changed in any significant way the meaning of any text passed by both houses. Under the conference committee rules, a member looking at the term “utilize” would either object (in which case the language would be subject to debate and potential change) or assume that utilize did not, per the rules, change the meaning of “establish” in any significant way.<sup>104</sup> That is how the judge should interpret the meaning of “utilize” as well. If courts must respect Congress, as

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102. U.S. CONST. art. I, § 5, cl. 2.

103. My claim is not that Congress must follow its rules or that courts should make Congress follow its own rules. My claim is that, when faced with a difficult case of ambiguity, courts using the First Principle may give language the legal effect demanded by the congressional rules, in some cases obviating difficult interpretive decisions. By assuming that a member of Congress reading the conference report was entitled to assume that “utilize” did not substantially change “establish,” the court defers to Congress without the need to engage in complex analyses. Decision theory does not require, for example, that a member actually raise a point of order under the rules.

104. *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 462 (1989) (“The phrase ‘or utilized’ . . . appears to have been added simply to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations such as the National Academy of Sciences ‘for’ public agencies as well as ‘by’ such agencies themselves.”).

all statutory interpreters agree, then judges should interpret the meaning of “utilize” in the same way that Congress would.

This analysis requires no lengthy exegesis of the law’s full legislative history, focusing instead on statutory history (which, as the history of the statute’s text, has always had a better pedigree than legislative history).<sup>105</sup> All this analysis requires is looking at the bills passed by the House and the Senate and finding that the *key statutory term* was added at conference. Even if one were to invoke the entire conference report, it is a mere thirteen pages long, eight pages of which are statutory text.<sup>106</sup> This is hardly the excessive “volume” or “heterogeneity”<sup>107</sup> that has been asserted by legislative history’s critics. More importantly, if this analysis is correct, it avoids all sorts of rather controversial questions: it turns a case that is quite difficult on questions of absurdity,<sup>108</sup> constitutional avoidance, and the President’s power to nominate into a far more straightforward case. Relying on the rules of the conference allows a judge to defer to Congress’s decisions and, at the same time, restrains judges from picking out friends or enemies in the legislative history or even the text.<sup>109</sup>

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<sup>105</sup>. Statutory history is the history of the statute’s text as opposed to any committee report or floor statement commenting on the text.

<sup>106</sup>. H.R. REP. NO. 92-1403 (1972) (Conf. Rep.). As the Supreme Court noted, the rather short conference report supports the notion that the conferees could not have meant “utilize” in the legalist sense since the conferees explicitly exempted contractors. *Id.* at 10, *quoted in Public Citizen*, 491 U.S. at 462 (“The Act does not apply to persons or organizations which have contractual relationships with Federal agencies nor to advisory committees not directly established by or for such agencies.”). There are also indications that the Conference may have added “utilize” to cover presidential transitions. This would, in fact, reconcile the majority and this proposed principle’s reading with an interpretation of “utilize” that gives it a meaning (transitions are covered) but rejects the extensive meaning of “use.”

<sup>107</sup>. VERMEULE, *supra* note 6, at 115.

<sup>108</sup>. *Public Citizen*, 491 U.S. at 471 (Kennedy, J., concurring in the judgment) (“I believe the Court’s loose invocation of the ‘absurd result’ canon of statutory construction creates too great a risk that the Court is exercising its own ‘WILL instead of JUDGMENT,’ with the consequence of ‘substitut[ing] [its own] pleasure to that of the legislative body.’” (quoting THE FEDERALIST NO. 78 (Alexander Hamilton))).

<sup>109</sup>. Although a systematic study must await another article, there is at least anecdotal evidence that courts misunderstand (or are unaware of) the rules governing conference reports, which generally do not allow significant changes to legislation agreed upon in House and Senate bills prior to conference. *See, e.g., Small v. United States*, 544 U.S. 385, 406-07 (2005) (Thomas, J., dissenting) (indicating that the conference committee change was significant enough to cover foreign convictions even though the language passed by the House and the Senate stated “federal” and “state” offenses); *Am. Fed’n of Gov’t Emps. v. Gates*, 486 F.3d 1316, 1325 (D.C. Cir. 2007) (interpreting a last-minute conference change as a “statutory elephant (in the sense of having a huge impact)”). At the very least, some courts appear to

*B. Second Principle: Later Textual Decisions Trump Earlier Ones*

Historians worry about using the present to interpret the past. Precisely the opposite presumption should apply in reading legislative debates. The very notion of legislative “history” should be treated as a misnomer. In legislative debates, *sequence is important. Later textual decisions trump earlier ones.* Put in the simplest terms, legislative history should be read in reverse. The last act may occur in a debate on a post-cloture amendment or in a conference report or in committee, but one should always start by looking for the last textual decisionmaking point. The aim should not be to imagine that one is actually writing a history, but to look for the last textual decision on the interpretive question.

This Principle of reverse sequential consideration explains the value of conference committee reports. It is the conventional and correct wisdom that, of all legislative history “apart from the statute itself, [conference committee reports are] the most reliable evidence of congressional” decisions.<sup>110</sup> This is not necessarily because of deliberative quality: at the end of a bill, particularly a long-debated bill, much may be assumed and rushed.<sup>111</sup> This is the moment when the rules narrow the decisions available to the negotiators. However, conference reports are not the only key moments of decision; often, the cloture process in the Senate makes the pre-filibuster compromise text a very important point of textual decision.<sup>112</sup>

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ignore Congress’s rules when interpreting language added in conference (as in *Public Citizen*). See, e.g., *Chem. Mfrs. Ass’n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116 (1985) (interpreting a new provision added in conference without regard to conference rules); *Sec’y of the Interior v. California*, 464 U.S. 312, 322 (1984) (interpreting language added in conference without regard to conference rules).

110. *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 977 (9th Cir. 1999); accord *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 835 (9th Cir. 1996) (“[A] congressional conference report is recognized as the most reliable evidence of congressional intent because it ‘represents the final statement of the terms agreed to by both houses.’” (quoting *Dep’t of Health & Welfare v. Block*, 784 F.2d 895, 901 (9th Cir. 1986))).

111. See SINCLAIR, *supra* note 82, at 96 (noting the effect of time constraints on Senate conferees); *id.* at 98 (“By the time legislation gets to conference, many people, and especially many of the conferees . . . have a considerable stake in the legislation’s enactment.”).

112. Senate Rule XXII provides for the closing of debate after a cloture motion:

[A]t any time a motion signed by sixteen Senators, to bring to a close the debate upon any . . . matter pending before the Senate . . . is presented to the Senate, the Presiding Officer, or clerk at the direction of the Presiding Officer, shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and direct that the clerk call the roll, and upon the ascertainment that a quorum is

To illustrate this Principle, I will consider two statutory interpretation “classics.” First, let us turn to an opinion by a legislative history advocate: Justice Stevens’s opinion in *Green v. Bock Laundry Machine Co.*,<sup>113</sup> which provoked an important textualist concurrence by Justice Scalia. Next, we will turn to a far less enthusiastic advocate of legislative history, Justice Rehnquist, writing in dissent in *United Steelworkers v. Weber*,<sup>114</sup> a canonical case involving race discrimination.<sup>115</sup> My claim here is not about results, but methodology; as a personal matter, I tend to disagree with the interpretive result in *Bock Laundry* and in *Weber*, but that is irrelevant to my claim. My point is simpler: both Justice Stevens and Justice Rehnquist made the legislative history question much too difficult; both opinions invite the “picking and choosing” critique. In each case, the relevant legislative history was a fraction of that which the Court considered. Moreover, in each, knowledge of sequential textual decisionmaking would have helped judges to focus not only on relevant legislative history but also on the central *text or texts* in the case.<sup>116</sup>

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present, the Presiding Officer shall, without debate, submit to the Senate by a yea-and-nay vote the question: “Is it the sense of the Senate that the debate shall be brought to a close?” And if that question shall be decided in the affirmative by three-fifths of the Senators duly chosen and sworn—except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting—then said measure, motion, or other matter pending before the Senate, or the unfinished business, shall be the unfinished business to the exclusion of all other business until disposed of.

SENATE RULES, 112th Cong., *supra* note 97, R. XXII, at 20-21.

113. 490 U.S. 504 (1989).

114. 443 U.S. 193 (1979).

115. *ESKRIDGE ET AL.*, *supra* note 69, at 88-100.

116. In *Weber*, the relevant text was section 703(j) of the Civil Rights Act of 1964, added after the original statute and thus clarifying the limits of sections 703(a) and (d). 443 U.S. at 205-08. In *Public Citizen*, the relevant text was “established,” the term “utilize” having been added at conference. *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 462 (1988). Similarly, in *Bock Laundry*, the central text was “the credibility of a witness,” passed by both houses, with the term “defendant” being added in conference. 490 U.S. at 520. The same is true of *Holy Trinity*. See *infra* Section II.D (explaining that the major opponent of the bill made a concession by explaining that the statutory exemption for “lecturers” applied to lecturers on morals and religion and exempted them from the Act).

1. Green v. Bock Laundry Machine Co.

*Bock Laundry* involved Rule 609 of the Federal Rules of Evidence.<sup>117</sup> The civil plaintiff brought a products liability action against the maker of a machine used in a car wash. The defendant company sought to impeach the civil plaintiff based on the plaintiff's prior felony conviction. The question was whether Rule 609 covered *civil* plaintiffs: the rule's opening clauses covered all witnesses, but its balancing test covered only "defendants."<sup>118</sup>

Justice Stevens's majority opinion is an excellent example of how *not* to read legislative history.<sup>119</sup> The opinion begins with the common law, Wigmore, and other legal treatises and goes on to reference "a seminal article"<sup>120</sup> by Dean Ladd and the 1942 American Law Institute proposal, the ABA proposal, the D.C. Code, and important caselaw principles, such as the "*Luck* doctrine."<sup>121</sup> Congress is nowhere to be found in this putative treatise.<sup>122</sup> It seems quite unlikely, as Justice Scalia noted, that the average

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117. FED. R. EVID. 609.

118. 490 U.S. at 509-10.

119. I do not mean to single out Justice Stevens; Justice Rehnquist appears in the next example. It is fairly easy to find opinions that make simple mistakes about congressional procedure, for example, failing to distinguish conference committee reports as the text of the bill as opposed to the joint explanation to the conference committee, which is the legislative history of the conferees' agreed-upon text. See, for example, *CSX Transportation, Inc. v. Alabama Department of Revenue*, 131 S. Ct. 1101, 1108 (2011), which cites joint explanation materials as material from the "Conference Report," indicated as S. Conf. Rep. No. 94-595 at 165-66, when the report is the text, not the joint explanation. So, too, some opinions, contrary to the conventional wisdom, suggest, in the absence of a conference report, the equivalence of floor statements with a conference report. See, e.g., *Begier v. IRS*, 496 U.S. 53, 64 n.5 (1990) (citing a representative's views that remarks of a floor manager of the Act have "the effect of being a conference report"); *Simpson v. United States*, 435 U.S. 6, 17-18 (1978) (Rehnquist, J., dissenting) (criticizing the majority for giving equal weight to the author's statement and to the conference report).

120. 490 U.S. at 512 n.11.

121. *Id.* at 511-16; see also *id.* at 527-28 (Scalia, J., concurring) ("Approximately four-fifths of [the majority's] substantive analysis is devoted to examining the evolution of Federal Rule of Evidence 609, from the 1942 Model Code of Evidence, to the 1953 Uniform Rules of Evidence, to the 1965 *Luck* case and the 1970 statute overruling it, to the Subcommittee, Committee, and Conference Committee Reports, and to the so-called floor debates on Rule 609 . . .").

122. For another case in which the Court relied upon non-legislative materials, see *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 569-70 (2005), which rejected a committee report for the views of the Federal Courts Study Committee. See also *id.* at 575 (Stevens, J., dissenting) (referring to the House report as a "virtual billboard of congressional intent").

member of Congress had any clue about this history,<sup>123</sup> which is better suited to an academic than an elected official. If one thinks it dangerous and potentially self-interested to “look out for one’s friends” in legislative history,<sup>124</sup> how much more dangerous is it to search for one’s friends among law reviews and treatises? Ultimately, Justice Stevens, like the rest of the Justices, must perform judicial surgery by inserting words into the text. The majority concluded that Rule 609 did not apply to a civil plaintiff, based on a gestalt reading of a lengthy history in which the common law rule prevailed.<sup>125</sup> But this immediately seems odd for two important reasons: (1) the Senate passed the common law rule and the conference rejected that rule; and (2) every bill that preceded the conference report applied to civil cases, with precisely the same language. In fact, at least one member of the House believed that the ultimate language violated the conference committee rules barring changes of agreed-upon language by going outside the terms passed by both houses.<sup>126</sup>

The important point is that a one-and-a-half page segment of the conference report’s joint explanation is the relevant legislative history.<sup>127</sup> One need not wade knee-deep in the thirteen-year<sup>128</sup> history of the Federal Rules of Evidence. The central focus should have been on Congress’s decision, not Dean Wigmore’s or Ladd’s treatises or the ALI or ABA rules. More

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123. See 490 U.S. at 528 (Scalia, J., concurring).

124. The reference here is to the Judge Harold Leventhal quip that those who look to legislative history tend to look for their friends. See Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (“[C]iting legislative history is still . . . akin to ‘looking over a crowd and picking out your friends.’” (quoting a conversation with Judge Leventhal)).

125. 490 U.S. at 523.

126. 120 CONG. REC. 40,480 (1974) (statement of Rep. Elizabeth Holtzman).

127. H.R. REP. NO. 93-1597, at 2 (1974) (Conf. Rep.) (showing the textual amendment added by the conference committee); *id.* at 9-10 (joint explanatory statement of one-and-a-half pages on Rule 609). Note that if one seeks this conference report in the ProQuest Congressional database, it may only provide the report and not the “joint explanation” that accompanies the report. In the text, I am referring to the one-and-a-half page part of the “joint explanation” to the conference report. Bringing up this document in Westlaw’s legislative history database provides the full document. The bill was passed by the House as H.R. 5463 and retained that number when it was debated and amended in the Senate. Rule 609 was part of a much larger bill on the Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (1975). For the specific language of the House-passed and Senate-passed bills, see *infra* note 129.

128. See H.R. REP. NO. 93-650, at 2 (1973) (“H.R. 5463 is the culmination of almost thirteen years of study by distinguished judges, Members of Congress, lawyers and others interested in and affected by the administration of justice in the Federal courts.”).



importantly, the analysis should not depend on various pieces of legislative history in the House debate or the Senate debate, because *neither bill passed involved the key textual language at issue*, which, as in *Public Citizen*, first appears in the conference report and its accompanying joint explanation. One should start in reverse order, with the texts passed by both houses and the conference report, as the last acts before the text is fixed.<sup>129</sup> However one wants to resolve that issue,<sup>130</sup> the focus should have been on the conference report and the

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129. H.R. REP. NO. 93-1597, at 9-10 (1974) (Conf. Rep.) (joint explanation of changes to Rule 609). Both the Senate and House bills applied to civil cases; indeed, they used the same language applying to “the credibility” of a “witness.” The House-passed bill provided: “(a) General Rule—For the purpose of attacking *the credibility of the witness*,” evidence that he has been convicted of a crime is admissible only if the crime involved dishonesty or false statement. H.R. 5463, 93rd Cong. (as passed by the House, Feb. 6, 1974) (emphasis added); see 120 CONG. REC. 2374, 2394 (1974) (reporting the House bill as it was debated on the floor of the House). The Senate-passed bill provided the following:

(a) General Rule. For the purposes of attacking *the credibility of a witness*, evidence that he has been convicted of a crime is admissible but only if the crime, (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (2) involved dishonesty or false statement regardless of the punishment.

H.R. 5463, 93rd Cong. (debated on the Senate floor as H.R. 5463, as amended by Senate, Nov. 22, 1974) (emphasis added). The Senate bill amended the House bill in Senate floor debate, so the text of the Senate bill, proposed by Senator McClellan, appears in the Congressional Record as a floor amendment, 120 CONG. REC. 37,076 (Nov. 22, 1974), which passes at 120 CONG. REC. 37,084 (Nov. 22, 1974). Even the Senate Committee version, however, covered all witnesses, and would have applied to all witnesses in a civil case:

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime may be elicited . . . but only if the crime (1) involved dishonesty or false statement; or (2) in the case of witnesses other than the accused, was punishable by death or imprisonment in excess of one year . . . but only if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect.

See S. REP. NO. 93-1277, at 3 (Oct. 11, 1974) (reporting an amendment to the language passed by the House); *id.* at 14-15 (explaining the textual changes to Rule 609 made by the Senate committee). Senator McClellan read the proposed Senate committee amendment during the Senate debate, 120 CONG. REC. 37,076 (Nov. 22, 1974), when he sought to amend it. Even Senator McClellan’s amendment returning to the common law began by referencing the “credibility of a witness.” *Id.* (reporting the amendment, which passes at 120 CONG. REC. 37,083 (Nov. 22, 1974)).

130. There is some evidence that the drafters were particularly concerned with providing an asymmetrical rule in criminal cases, which is to say that the defendant could not be impeached (if he or she survived the balancing rule), although the government’s witnesses (i.e., confidential informants) could be impeached. To decide *Bock Laundry*, which was a civil case, however, one did not need to resolve that question: focusing on civil cases alone is a far more parsimonious and restrained approach than the one chosen by the Justices, each of whom

conference report alone.<sup>131</sup> If this is right, one can hardly say that the most relevant legislative history is too heterogeneous or voluminous: after culling the fourteen-page conference report and joint explanation, the sections on Rule 609 amount to less than two pages.<sup>132</sup>

Perhaps most importantly, emphasizing the statutory history focuses the interpreter on the proper texts. In *Bock Laundry*, none of the Justices paid much attention to the fact that both houses passed text applying to civil cases, with each house beginning its proposed Rule 609 with precisely the same language: “[f]or the purposes of attacking the credibility of a witness.” As in *Public Citizen*, a member who reads the conference text is entitled to believe, under Congress’s own rules,<sup>133</sup> that any language added in conference does not

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implicitly or explicitly tried to resolve the rule’s application not only to Green’s particular “civil plaintiff” situation but also in a variety of criminal cases (i.e., prosecution witnesses).

131. For a different case in which the majority ignores the procedural sequence of events, see *Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995). Justice Ginsburg explains this in her dissent, noting that although the “House Report No. 85 affords support for the reading advanced by the Court, it predates the Conference Report.” *Id.* at 600 n.4 (Ginsburg, J., dissenting). For the rules governing conference reports in the current Congress, see SENATE RULES, 112th Cong., *supra* note 97, R. XXVII (2a), at 52; and HOUSE RULES, 112th Cong., *supra* note 97, R. 22(9), at 37.
132. H.R. REP. NO. 93-1597, at 9-10 (1974) (Conf. Rep.) (joint explanation of changes to Rule 609). Although the conference report refers to the term “defendant,” there are far more references to witnesses and parties. *See id.* at 9 (“The House bill provides that the credibility of a witness . . . . The Senate amendment providing that a witness’ credibility . . . .”); *id.* (“The Conference Amendment provides that the credibility of a witness, whether a defendant or someone else . . . .”); *id.* (“prejudice to a witness other than the defendant”); *id.* (“the danger of prejudice to a nondefendant witness”). In subsection (b), which covered the age of convictions, the joint explanation focuses on parties. *Id.* at 10 (“The Conference adopts the Senate amendment with an amendment requiring notice by a party . . . in order to give the adversary a fair opportunity . . . .”); *id.* (stating that failure to give notice may “impair the ability of a party-opponent”). None of these references are limited to criminal defendants. At one point in the joint explanation, it is clear that the authors are using the term “accused” to stand in for the much larger category of witness or party. No one doubted that the rule would permit impeachment of all witnesses and parties if the crime was one of false statement (*crimen falsi*), and yet this rule was described in the joint explanation as covering any crime “bearing on the accused’s propensity to testify truthfully.” *Id.* at 9.
133. For the rules, see *supra* notes 97-99. If the drafters were following the rules, they could not change the first part of the statute regarding “the credibility of a witness,” since that language had been passed by both houses of Congress. *See supra* text accompanying notes 97-104 (arguing that Congress violated its own rules in *Public Citizen* if it added significantly new material at the conference stage). The conferees may have tried to provide a special rule for criminal defendants. The conference report “legislative history” (the “joint explanation”) does not resolve the question but does show that conferees were not terribly precise. They used the term “defendant” as a proxy for “all witnesses” and “all parties,” as well as used the

substantially change agreed-upon terms. This puts the emphasis on agreed-upon texts—here, “credibility of a witness.”<sup>134</sup> None of the opinions put much emphasis on that text, however, focusing instead on the term “defendant.”<sup>135</sup> However one wants to resolve that conflict, and there is a clear conflict in *Bock Laundry* absent from *Public Citizen*, one should be aware that a conscientious member reading the conference text and recognizing a conflict was entitled to read it and resolve doubts in favor of what both houses passed—a bill that covered all witnesses.<sup>136</sup>

## 2. *United Steelworkers v. Weber*

The failure to follow the Principle of “reverse sequential consideration” mars some of the most significant statutory interpretation cases ever decided. Roaming around in legislative history with no appreciation for congressional procedure is an entirely bipartisan affair, affecting liberal and conservative judges alike, as well as those inclined toward various theories of statutory interpretation, including purposivism and textualism. The case need not involve conference reports or the rules governing them, but a simple recognition of the basics of congressional procedure. These rules may not only aid those judges who rely upon legislative history but also help textualists seeking the key text.

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narrower term “accused.” See H.R. REP. NO. 93-1597, at 9-10 (1974) (Conf. Rep.); *supra* note 132 (quoting from the joint explanation).

134. See *supra* note 129 for the text of bills as passed by the House and Senate.

135. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509-10, 520-21 (1989) (majority opinion by Stevens, J.); *id.* at 528-29 (Scalia, J., concurring); *id.* at 533-34 (Blackmun, J., dissenting) (all focusing on the term “defendant”).

136. As William Eskridge has pointed out to me, the conferees might have compromised in many ways, including a resolution that kept the common law rule (no balancing for felony impeachment) for everyone but criminal defendants. That argument suffers from two objections from the perspective of a faithful member of Congress. First, it is politically implausible: Why would a member of Congress give a benefit to the least desirable citizens (criminal defendants) that he or she would not give to civil plaintiffs and defendants? Second, it is rule-inconsistent: faithful members of the conference had to begin with the language both houses passed (which covers all witnesses). The real problem here was a salience effect: the political fight was over criminal defendants. Once the conferees compromised on that, they either forgot the question of civil case coverage, or they had no time to iron out any potential ambiguities with the first part of the statute (i.e., “the credibility of a witness” passed by both houses). A faithful member of Congress, under the rules, was entitled to read the new language (“defendant”) as consistently as possible with the language passed by both houses (“witness”), which would suggest a reading that would harmonize the two, rather than one that focused solely on the term “defendant.”

Consider the opinion in *United Steelworkers v. Weber*, an exceedingly significant discrimination case. The question was whether a private company and its union could use a voluntary affirmative action plan to rectify a “conspicuous racial imbalance” in the workforce.<sup>137</sup> Until 1974, the company had only hired white persons for skilled craft positions. As a result, less than two percent of the skilled craft workers in the plant were African American.<sup>138</sup> The affirmative action agreement reserved for African Americans fifty percent of the openings in newly created craft training programs.<sup>139</sup> Brian Weber, who was white, brought suit claiming racial discrimination under Title VII of the Civil Rights Act of 1964.<sup>140</sup>

The majority opinion, written by Justice Brennan, acknowledged that Title VII barred discrimination “because of” race under sections 703(a) and (d),<sup>141</sup> and that the law prohibited discrimination against “whites as well as blacks.”<sup>142</sup> Nevertheless, the majority rejected this language as based on too “literal” an interpretation, reasoning that the purpose of the Act was primarily concerned with voluntary efforts at racial integration of blacks into America’s workforce.<sup>143</sup> A number of scholars have considered Justice Brennan’s opinion seriously flawed.<sup>144</sup> As Philip Frickey once explained: “With all due respect for

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137. *United Steelworkers v. Weber*, 443 U.S. 193, 209 (1979).

138. *Id.* at 198.

139. *Id.* at 197.

140. *Id.* at 199-200.

141. Section 703(a) provided that it was an “unlawful employment practice for an employer” to “discriminate against any individual with respect to his . . . employment, because of such individual’s race.” 42 U.S.C. § 2000e-2(a) (1976). Section 703(d) provided that it was an “unlawful employment practice for any employer, labor organization, or joint labor-management committee . . . to discriminate against any individual because of his race . . . in admission to . . . any program established to provide apprenticeship or other training.” 42 U.S.C. § 2000e-2 (1976).

142. *Weber*, 443 U.S. at 201.

143. *Id.* at 202.

144. ESKRIDGE ET AL., *supra* note 69, at 101 (“But many of the commentators agree with Justice Rehnquist that the Court [Justice Brennan’s opinion] ‘changed’ the meaning of the statute by judicial fiat, and ‘[t]hat change goes to the roots of the bargain struck by the 88th Congress, and the roots of our color-blind aspiration.” (quoting Bernard Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. CHI. L. REV. 423, 456 (1980))); *see also* Philip P. Frickey, *Wisdom on Weber*, 74 TUL. L. REV. 1169, 1181 (2000) (characterizing Justice Brennan’s “apparent admission” that the statute was “unambiguous in Weber’s favor,” as requiring “the judicial Heimlich maneuver of the *Holy Trinity* move to dislodge text supposedly choking the spirit out of the statute” (internal citations omitted)); George Schatzki, *United Steelworkers of America v. Weber: An Exercise*

Justice Brennan, . . . the opinion is a failure: it so lacks persuasive methodological power as to raise questions . . . about the Court's candor . . . ."<sup>145</sup> In dissent, Justice Rehnquist engaged in an extraordinarily lengthy legislative history of the 1964 Civil Rights Act<sup>146</sup> in an opinion that has been praised by scholars such as Professor Frickey who nevertheless disagree with Justice Rehnquist's result.<sup>147</sup>

In fact, under the Principles I propose, Professor Frickey's methodological critique misses the mark. Justice Rehnquist's opinion, like Justice Stevens's opinion in *Bock Laundry*, demonstrates how *not* to read legislative history. Justice Rehnquist cites legislative history that is the equivalent of confusing pleadings for jury instructions. For example, the opinion begins its analysis of the legislative history by emphasizing that sections 703(a) and (d) were included in the early House bills.<sup>148</sup> As a matter of congressional procedure, this is entirely irrelevant if later amendments changed the bill in ways limiting or clarifying these provisions. That is the core problem in the case: section 703(j),<sup>149</sup> the most relevant provision, was added in the Senate prior to cloture<sup>150</sup> and specifically aimed to counter concerns that companies would be required to impose racial quotas in hiring. Section 703(j) says that nothing in the bill was to "require" preferential hiring.<sup>151</sup>

From this rather inauspicious beginning, Justice Rehnquist's treatment of the legislative history continues on its otherwise irrelevant course. The opinion

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*in Understandable Indecision*, 56 WASH. L. REV. 51, 67 (1980) (criticizing Justice Brennan's opinion for overstating "enormously the meaning of the legislative history").

145. Frickey, *supra* note 144, at 1177.

146. *Weber*, 443 U.S. at 231-54 (Rehnquist, J., dissenting).

147. Frickey, *supra* note 144, at 1183 ("[T]here was force to Justice Rehnquist's heated assertions that the majority opinion was an example of Orwellian doublespeak . . . ."); *id.* at 1195 (arguing that "Justice Rehnquist had the better of those arguments," in reference to arguments based on "statutory text and legislative intent").

148. *Weber*, 443 U.S. at 231.

149. Section 703(j) provided that nothing contained within Title VII required an employer or union to "grant preferential treatment to any individual or to any group because of . . . race . . . in comparison with the total number or percentage of persons of such race . . . in any community, State, section, or other area." 42 U.S.C. § 2000e-2(j) (2006).

150. Cloture was voted on June 10, 1964, *see* 110 CONG. REC. 13,327 (1964); section 703(j) is reprinted in the precloture bill at 110 CONG. REC. 13,315 (1964). STANDING RULES OF THE SENATE, S. DOC. NO. 88-1, R. XXII, at 24 (1963) (providing for the closing of debate upon a vote of (then) two-thirds of the Senate present and voting).

151. 110 CONG. REC. 13,315 (1964) (reporting substitute bill including section 703(j)). The original bill was H.R. 7152, 88th Cong. (1963).

cites a separate “Minority Report” put forth in the House.<sup>152</sup> Again, relying upon committee reports penned long before a bill has been debated and, more significantly, amended can be perilous; this House report appeared many months prior to the addition of section 703(j).<sup>153</sup> Moreover, Justice Rehnquist’s reliance on “minority views” is particularly weak. One cannot find a congressional decision if one looks only at statements from those who *opposed* the bill. (As we will see, under the Fourth Principle, losers’ history cannot be taken as “authoritative” lest a court enshrine a filibustering minority’s will into law.)<sup>154</sup> This error is compounded by long discussions of the House debate.<sup>155</sup> Even the House sponsors of the bill knew it would be significantly changed in the Senate.<sup>156</sup> Because of the importance of the filibuster, the Senate debate trumps the House on matters of text added in the Senate. Put bluntly, House members could not possibly have debated section 703(j) because it had not yet entered the bill.

Justice Rehnquist’s treatment of the Senate debate is better than that of the House, but suffers again from lack of attention to congressional procedure. He begins by explaining: “The Senate debate was broken into three phases: the debate on sending the bill to Committee, the general debate on the bill prior to invocation of cloture, and the debate following cloture.”<sup>157</sup> This is true, but unhelpful. The debate on recommittal is irrelevant: the motion was defeated<sup>158</sup>

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152. 443 U.S. at 231 (Rehnquist, J., dissenting).

153. H.R. REP. NO. 88-914, pt. 1, at 1 (Nov. 20, 1963).

154. In the text, I have criticized a well-known conservative Chief Justice. There is no reason to believe, however, that this practice is a partisan affair. Losers’ history can be found in the opinions of well-known liberal judges as well. Compare *Mont. Wilderness Ass’n v. U.S. Forest Serv.*, No. 80-3374 (9th Cir. May 14, 1981) (rejecting the statement of the Senate author of a bill’s nationwide application for a House member who opposed that interpretation), *withdrawn*, 655 F.2d 951 (9th Cir. 1981), *as reprinted in* ESKRIDGE ET AL., *supra* note 69, at 1027, *with* *Mont. Wilderness Ass’n v. U.S. Forest Serv.*, 655 F.2d 951 (the same judge reversing the original decision based on a conference report on a different bill). For a fuller list of such cases, see *infra* note 218.

155. See 443 U.S. at 232-34 (Rehnquist, J., dissenting).

156. See ESKRIDGE ET AL., *supra* note 69, at 7 (noting how Representative Bill McCulloch only agreed to support the 1964 Civil Rights Act based in part on a promise that the Kennedy Administration would not “water down the bill” in the Senate). This kind of anticipation does not undermine my argument that, as a general rule, when electoral incentives (constituents) demand it, the electoral effect may dominate the anticipation effect. See *infra* Part IV. In this case, the electoral payoffs for members of the House were aligned with their anticipation of the actions of other institutions.

157. *Weber*, 443 U.S. at 235 (Rehnquist, J., dissenting).

158. Senator Morse moved to refer the bill to the Judiciary Committee, 110 CONG. REC. 6454-55 (1964), but the motion was tabled, *id.* at 6455. See *id.* at 6442 (statement of Senator Long

and those supporting the motion *opposed* the bill, attempting to use the procedural move of sending it back to committee to delay its passage. The general debate prior to cloture, including various memos written by the supporters of the Act and the Justice Department, is better than the motion to recommit, but is hardly the “last act.” It precedes the central act of any Senate drama: cloture. Cloture is almost always preceded by a “substitute” bill whose provisions are different from the bill as introduced; provisions must be added to assuage opponents and produce a supermajority coalition. In this case, the pre-cloture debate did not include the central provision at issue: section 703(j), which speaks directly to the question of quotas, was added in the substitute bill, trumping prior text.

Justice Rehnquist’s treatment of the Senate is at its most persuasive when he cites *post-cloture*<sup>159</sup> statements from the Act’s proponents, who made statements against quotas and repeatedly asserted that the bill would not *permit* discrimination.<sup>160</sup> In particular, a post-cloture statement by Senator Muskie addressing section 703(j) specifically supported Justice Rehnquist’s point that section 703(j) clarified and should trump sections 703(a) and (d).<sup>161</sup> This discussion is marred, however, by the repeated invocation of legislative statements of those who opposed the bill. In short, Justice Rehnquist’s opinion would have been much stronger had it been a good deal shorter, focused on the text of section 703(j), and followed the rules of congressional procedure. Focusing only on the most relevant legislative history may well have reduced his account to a few pages.

Meanwhile, Justice Brennan, much criticized for his opinion’s failure to attend to text, managed to stumble onto the key statutory provision, section 703(j).<sup>162</sup> Unfortunately, he could have made more of this provision by arguing that section 703(j) trumped the earlier provisions in the bill, sections 703(a)

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explaining that those who sought to send the bill back to committee were only seeking delay).

159. There is also a good bit of damning evidence in the pre-cloture debate that supports Justice Rehnquist, but, as even he notes, this debate quieted down substantially after the insertion of section 703(j). This suggests that section 703(j) resolved the problem. Of course, the “problem” itself may remain contested; Justice Brennan would argue that the problem was the federal government *requiring* a racially balanced workforce, and Justice Rehnquist would argue that it was any racially balanced workforce, “voluntary” or not.

160. The problem of textual interpretation finds itself repeated in these statements: some supporters are using the term “discriminate” to refer to any difference in treatment and others are using it to refer to differences in treatment caused by prejudice against minorities. See Frickey, *supra* note 144, at 1179-80 (discussing this essential ambiguity in the term).

161. 443 U.S. at 247-48 (Rehnquist, J., dissenting).

162. *Id.* at 204-07 & nn.5-7 (majority opinion).

and (d). Not only is section 703(j) more specific on the question of quotas, but it is also the “last act”<sup>163</sup> necessary to yield a supermajority consensus. Section 703(j) says nothing about “voluntary” affirmative action, focusing instead on the precise objection made by opponents: that the bill would not “require” employers to racially balance their workforces. Whatever one thinks about the majority’s result, at least for purposes of recognizing the key text, Justice Brennan’s opinion fares far better than the much-admired Rehnquistian wanderings through the legislative forest, which differ very little in this sense from Justice Stevens’s wanderings in *Bock Laundry*.

My point is to assess methodology and, on that score, it seems fairly clear that the conventional academic wisdom about the *Weber* opinions is overstated. Justice Rehnquist’s opinion should not be held up as a model even if one likes his result, and Justice Brennan’s opinion is not as much of a failure as many have supposed even if one does not like his result. As we have seen above with *Bock Laundry*, reading the legislative history in reverse goes a long way toward *limiting* the history relevant to a provision. More importantly, this analysis suggests that an understanding of congressional procedure is important not only for those who seek the *purpose* of a bill (for example, Justice Brennan), but also for those who focus on the most relevant *text*.

*C. Third Principle: The Best Legislative History Is Not Identified by Type, but by Specificity to the Interpretive Question and Proximity to the Textual Decision*

It is often asserted that some kinds of legislative history are inherently better than others: committee reports are better than author statements, and author statements are better than the statements of hearing witnesses.<sup>164</sup> Some scholars have asserted a de facto hierarchy of reliability when it comes to legislative history.<sup>165</sup> In fact, as Professor Vermeule has written, this hierarchy is “poorly theorized.”<sup>166</sup> The standard hierarchy is not only under-theorized, it

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163. The “last act” was the Mansfield-Dirksen substitute introduced first in May, and later amended on June 10, 1964, the date cloture was invoked. That substitute included section 703(j). See 110 CONG. REC. 13,315 (1964). The Senate bill was later accepted by the House; there was no conference.

164. See generally George A. Costello, *Average Voting Members and Other “Benign Fictions”: The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 41-42 (recounting the standard hierarchy).

165. ESKRIDGE, *supra* note 84, at 222 (presenting proposed hierarchy based on the 1982 Supreme Court).

166. Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1880 (1998).



is wrong as far as its judgments about reliability.<sup>167</sup> The best legislative history should not be defined by essentialist category, such as the category of all committee reports or all floor statements. Instead, the best legislative history is the last, most specific decision related to the interpretive question prior to the textual decision.<sup>168</sup> Note that this Principle is not simply a repetition of the Second Principle, which privileges later decisions over earlier legislative history, all other things being equal. Specificity and proximity need not be conjoined; for example, there may be cases where the most *specific* legislative history on the issue appears earlier rather than later in the process, as, for example, when a committee report speaks directly to the question being litigated.

That the best legislative history is the history most proximate to text, rather than a particular type of report or statement, might seem banal.<sup>169</sup> Others have noted this phenomenon, for example, in canonical cases such as *Church of the Holy Trinity v. United States*.<sup>170</sup> Justice Scalia has made this case famous for his claim that text, not legislative history, must govern.<sup>171</sup> The question was whether alien-labor legislation governing “labor or service of any kind” applied to a rector from England.<sup>172</sup> Reviewing the legislative history, Professor Vermeule is clearly right in concluding that an early report cannot be “authoritative history.”<sup>173</sup> Professor Vermeule is clearly right in concluding that such a report cannot be “authoritative” history because no decision was in fact made. The committee report on which Justice Brewer relied was simply too far

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167. For example, in the standard hierarchy, committee reports are given great weight, *see* Costello, *supra* note 164, at 43, but decision theory suggests that this may be untrue if the text has been significantly modified after the report.

168. Professor Vermeule, *supra* note 166, at 1874, suggests that courts may overvalue “legislative history documents that are not themselves legally operative.” *Id.* In fact, I think the opposite is likely to happen since courts tend, today, to look for “purposes,” and so they tend to gravitate toward general statements. It is possible that some specific sources should be rejected because they violate the rules set out here—either by violating the Third Principle (proximity) or the Fourth Principle (losers’ history)—but if one is looking for a decision, rather than an intention or a purpose more generally, specificity should count in favor of, not against, legislative history.

169. Positive political theorists have applied rules of temporality and relevance in their analyses of specific legislation. *See, e.g.*, Rodriguez & Weingast, *New Perspectives*, *supra* note 12, at 1500-01 (arguing that the Clark-Case memorandum “cannot be considered a definitive illumination of the intent of the framers” of Title VII because it was “prepared before the introduction of the Mansfield-Dirksen substitute” (emphasis omitted)).

170. *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

171. SCALIA, *supra* note 21, at 17.

172. *Church of the Holy Trinity*, 143 U.S. at 458.

173. Vermeule, *supra* note 166, at 1843-44.

in advance of the ultimate debate.<sup>174</sup> Bills change dramatically over time, and in fact the Alien Contract Labor Act was amended after that report was issued.<sup>175</sup> One should always be cautious in asserting that committee reports are necessarily better than author statements or amendment debate. Of course, if the committee report refers to a decision on the particular matter, and is roughly contemporaneous in time, then that may be the relatively best legislative history available.<sup>176</sup>

A proximity and specificity rule not only helps to ensure reliability, but it may also whittle down vast amounts of legislative history. For example, return to *Green v. Bock Laundry*.<sup>177</sup> Does one really need to know the *Luck* doctrine, the ABA drafts, or even the prior House and Senate floor debates to resolve the case—after one looks at the competing statutes and recognizes that a one-and-a-half page conference report governs? Return to *Public Citizen*.<sup>178</sup> The prior history of an executive order and various reports may be enlightening on subtle issues, but these reports are irrelevant where there is a proximate conference report. Even if one were to come out entirely differently in these cases, the legislative history was a good deal simpler than portrayed by the Court. Conference reports, because of temporal sequence, trump prior legislative history if they speak to the issue and, in each of these cases, the disputed language was added at conference.

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174. *Id.* at 1845.

175. VERMEULE, *supra* note 6, at 96-97 (describing how the committee report was attached to a bill that died in the first session of the 48th Congress and that in the second session of that Congress “other amendments” were made to “critical sections” of the bill).

176. *See, e.g.*, *Blanchard v. Bergeron*, 489 U.S. 87 (1989). In *Blanchard*, the question was whether a contingent fee agreement would cap attorneys’ fees under 42 U.S.C. § 1988. The Court relied upon a Senate committee report proximate to the floor debate, which spoke to the question of contingent fee agreements, at least to the extent of citing district court cases on that topic. *Id.* at 91-92. The Senate report, S. REP. NO. 94-1011 (1976), dated June 29, 1976, was the most specific committee report on the issue, *see id.* at 6, but not the last report, *see* H. REP. NO. 94-1558 (1976), which was dated September 15, 1976. Nor was the committee report the “last act” on the bill, as there was a debate in the Senate, a filibuster, 122 CONG. REC. 31,471, 31,487 (Sept. 21, 1976) (filing a cloture motion), more debate from September 21, 1976 through September 27, 1976, 122 CONG. REC. 32,383, 32,388, 32,394, 32,405 (Sept. 27, 1976), followed by House acceptance of the Senate bill after debate, 122 CONG. REC. 35,578 (Oct. 1, 1976). To determine whether the committee report should control, one would have to review this evidence.

177. 490 U.S. 504 (1989).

178. 491 U.S. 440, 452-54 (1989).

Reading legislative history in reverse, coupled with a specificity rule, may<sup>179</sup> make even the longest debates<sup>180</sup> manageable if, for example, the change was made in an amendment on the floor, either in the House or Senate. We have already seen this in *Weber*, but other cases reveal just how proximity may affect both legislative history and the relevant text.

Suppose that one is looking for the legislative history of the intelligence-testing provisions of the 1964 Civil Rights Act, in particular how those testing provisions should affect the decision in *Griggs v. Duke Power Co.*<sup>181</sup> *Griggs* is conventionally known as a “disparate impact” case, although that term did not exist at the time it was decided.<sup>182</sup> The issue in *Griggs* was, in part, whether coal handlers (among others) were to be subject to various intelligence tests.<sup>183</sup> The company, Duke Power, argued that its testing was protected by the Tower amendment, which authorized any professionally designed ability test “that is not ‘designed, intended, or used to discriminate because of race.’”<sup>184</sup> The EEOC had issued regulations providing that any test had to be “job-related.”<sup>185</sup> One might think, if one were reading the legislative record from start to finish, that it would be nearly impossible to find the history of such provisions; so many reports, so much testimony, so much filibuster.

A computer-generated summary of the legislative history of the Civil Rights Act is divided into four parts and covers eighty-eight screen pages.<sup>186</sup> In

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179. My claim here is not that such a reading always makes this task easier but only that the interpreter should first check whether the conference report speaks to the issue in the case. If not, then one will have to go to the debate on the conference report, then if that is not relevant, to the debate to determine whether there was an amendment, and to any committee reports, to find where the precise language entered the relevant bill.

180. See, for example, the debate about the Civil Rights Act of 1964. CHARLES & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* (1985).

181. *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1239-40 (4th Cir. 1970), *rev'd in part*, 401 U.S. 424 (1971).

182. As can be seen from my analysis, one need not reach a conclusion on so-called disparate impact based on my interpretation of this particular case. Section 703(j), which is the subject of the later, and much more controversial *Weber* case, is effectively trumped in “testing” situations by the more specific language of section 703(h), since section 703(j) was in fact included in the substitute negotiations, prior to the insertion of the Tower amendment’s refashioning of section 703(h).

183. 401 U.S. at 427-28.

184. *Id.* at 433.

185. *Id.*

186. See WESTLAW, <http://www.westlaw.com> (follow “Directory” hyperlink; then follow “U.S. Federal Materials” hyperlink; then follow “Legislative History” hyperlink; then follow “US GAO Legislative Histories” hyperlink; then enter “88-352” in the “Public Law No.” search

fact, if one hones in on the text at issue, the relevant legislative history reduces to about two to three pages in the Congressional Record.<sup>187</sup> To know how to narrow the field, one must know the rules governing legislative procedure. If one knows the bill has been filibustered,<sup>188</sup> then one looks in the Congressional Record for the cloture petition. Typically, the cloture vote will be immediately preceded by the introduction of a “substitute package” incorporating the provisions necessary to yield a supermajority coalition, and substituting new, compromised language for any prior bill.<sup>189</sup> If the amendment was debated after cloture, then, by definition, it is unlikely to have been important enough to obtain a sixty- (or, then, a sixty-seven-) vote coalition; it may have been trivial to the deal, of interest only to a distinct geographic or other minority, or, in effect, a relitigation of issues already addressed in the substitute. Those who filibuster a bill have an incentive, under the rules, to revisit the issues they lost in the “substitute” negotiations: bill opponents do not care about wasting time, have every incentive to test whether negotiators have represented the views of the entire body, and may suggest redundancy or ambiguity by adding new language, allowing further litigation in the judicial system.<sup>190</sup>

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box) (last visited Aug. 20, 2012). The number eighty-eight is the sum of Part 1 (twenty-seven screens), Part 2 (twenty-six screens), Part 3 (nineteen screens), and Part 4 (sixteen screens).

187. 110 CONG. REC. 13,503-05, 13,724 (1964).

188. One may wonder why I have placed so much emphasis on the Senate when we have a bicameral system; the answer is that the Senate’s procedures, including its supermajoritarian filibuster, are ordinarily far more onerous a burden than the House rules. “[F]ilibuster threats are an everyday fact of life, affecting all aspects of the legislative process.” BARBARA SINCLAIR, UNORTHODOX LAWMAKING 5 (4th ed. 2012). As Professor Sinclair writes: “The Senate is not a majority-rule chamber like the House. In the House the majority can always prevail; in the Senate minorities can often block majorities.” *Id.* at 50.

189. WAWRO & SCHICKLER, *supra* note 82, at 10 (2006) (“The Senate’s rules that protect unlimited debate . . . effectively require supermajorities for the passage of legislation . . .”).

190. This does not undercut my later claim, in Part IV, about game theory and Congress’s general lack of attention to judicial precedent. In this case, electoral and anticipatory interests are aligned; if you oppose a bill, you have electoral reasons to do so; those electoral reasons give you an incentive to create ambiguity that may allow your preferred outcome to be reached in the courts.

In the case of the 1964 Civil Rights Act, the major compromise text<sup>191</sup> agreed to prior to cloture was the Mansfield-Dirksen “substitute.”<sup>192</sup> Senator Tower, an avowed opponent of the bill,<sup>193</sup> introduced his testing amendment after cloture was invoked. Like most post-cloture amendments, the debate is short (as the parties are exhausted by a rather lengthy debate, and their positions are likely to be known on issues being “revisited”): it occupies two to three pages of the Congressional Record (excluding the material that Senator Tower inserted into the record from the Illinois employment board *Motorola* decision<sup>194</sup>). The original amendment,<sup>195</sup> which added a new section to the law,

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191. WHALEN & WHALEN, *supra* note 180, at 175 (“[T]here would be no final agreement with Dirksen [on amendments] until a quid pro quo—the minority leader’s agreement to work actively for cloture—had been obtained.”). Dirksen introduced a substitute with his amendment in May, *id.* at 185; these amendments were debated and a final pre-cloture package introduced on June 10, prior to the cloture vote, *id.* at 197-98. The substitute’s provisions on Title VII, the employment title, appear at 110 CONG. REC. 13,314-18 (1964); the provisions at issue in *Griggs* appear at 110 CONG. REC. 13,314 (1964).

192. On the importance of the substitute in the 1964 Civil Rights Act, see Rodriguez & Weingast, *New Perspectives*, *supra* note 12, at 1473.

193. 110 CONG. REC. 13,320-22 (1964) (statement of Sen. Tower objecting to cloture).

194. In *Motorola*, a hearing examiner in Illinois ruled that a general ability test in considering applicants for assembly-line jobs was discriminatory on the theory that the test was unfair to “culturally deprived and . . . disadvantaged groups.” *Myart v. Motorola, Inc.*, No. 63C-127 (Ill. Fair Emp’t Practices Comm’n Feb. 27, 1964), *reprinted in* 110 CONG. REC. 5662, 5664 (1964) (reprinting the text of *Motorola* and a letter from the executive director of the Illinois Fair Employment Practices Commission).

195. The first Tower amendment was offered post-cloture on June 11, 1964. 110 CONG. REC. 13,492 (1964) (Amend. No. 605). It provided as follows:

On page 35, after line 20, insert the following new subsection:

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to give *any professionally developed* ability test to any individual seeking employment or being considered for promotion or transfer, or to act in reliance upon the results of any such test given to such individual, if—

(1) in the case of any individual who is seeking employment with such employer, such test is designed to determine or predict whether such individual is *suitable or trainable* with respect to his employment in the particular business or enterprise involved, and such test is given to all individuals seeking similar employment with such employer without regard to the individual’s race, color, religion, sex, or national origin, or

(2) in the case of any individual who is an employee of such employer, such test is designed to determine or predict whether such individual is *suitable or trainable* with respect to his promotion or transfer within such business or enterprise, and such test is given to all such employees being considered for similar promotion or transfer by such employer without regard to the employee’s race, color, religion, sex, or national origin.

was rejected, and later Senator Tower offered a revised amendment agreed to by voice vote.<sup>196</sup> Having failed once, Tower and Humphrey compromised on the language ultimately adopted; the final amendment did not add a new section, but was inserted into existing compromise language covering bona fide merit systems.<sup>197</sup>

If one wants to look for the legislative history, even in the longest of debates, one can do it fairly easily if one focuses on the text at issue, knowing the sequential process by which bills are considered. And yet, all of the judges who participated in this case reached out to a variety of provisions, including the general purposes of the bill, various memoranda prepared before the last Mansfield-Dirksen substitute, and other materials.<sup>198</sup> In doing this, they actually missed what should have been a “smoking gun,” a crystal clear signal that the Tower amendment was revisiting an issue that had already been the subject of pre-cloture negotiations in the Mansfield-Dirksen substitute.

Red flags should immediately go up when one notices that the author of the amendment, Senator Tower, representing the state of Texas, was a determined opponent of the bill.<sup>199</sup> Why does a Texan care about an Illinois employment board decision that in no way binds Texas? In fact, *Motorola* had become a rallying cry long before the Tower amendment was proposed because Senator Dirksen, the leader of the moderate opposition, represented the State of Illinois.<sup>200</sup> Of course, this raises the possibility that the filibustering opponent, Senator Tower, was simply trying to win something more than what Senator Dirksen and his forces had gained in the cloture negotiations.

The *Motorola* issue was not new. Senator Humphrey, lead sponsor of the bill, explained this rather colorfully in the brief floor debate: *Motorola* had been “discussed, discussed, and *cussed*.”<sup>201</sup> Senator Miller, a conservative

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*Id.* (emphasis added).

196. *Id.* at 13,724 (statement of Sen. Tower concerning Amend. No. 952).

197. Humphrey’s concession here risked ambiguity, but he reduced this risk at the very least by inserting the language in the relevant section rather than, as in the first amendment, adding a separate, freestanding amendment. Note that the first amendment, a completely new section to be inserted into the bill, was to find a home at page 35 of the post-cloture bill. See 110 CONG. REC. 13,492 (1964). The ultimate amendment appeared at page 44. See *id.* at 13,724.

198. The Clark-Case memorandum was prepared in April; the final substitute was introduced in June. For the legislative history relied upon by the judges considering *Griggs*, see *infra* note 209.

199. 110 CONG. REC. 13,320-22 (1964) (statement of Sen. Tower objecting to cloture).

200. I am in complete agreement with the analysis of Rodriguez and Weingast, *New Perspectives*, *supra* note 12, at 1474-88, that Senator Dirksen was pivotal to the compromise.

201. 110 CONG. REC. 13,504 (1964) (emphasis added).

Midwestern Republican who came late to vote for cloture (and thus is a fairly reliable source),<sup>202</sup> asked Senator Humphrey whether another part of the bill had been inserted to bar a *Motorola*-type ruling. Humphrey responded, "That is correct," meaning that the bona fide merit system language had been inserted to respond to the *Motorola* objection.<sup>203</sup> In other words, Senator Miller was trying to test whether the cloture negotiators had accurately compromised on the *Motorola* issue. This is why the proponents' first objection was not that the amendment encouraged intentional discrimination by creating a safe harbor for all professionally developed tests, but that the amendment was unnecessary<sup>204</sup>:

MR. MILLER. Is it the position of the managers . . . that the opportunity and the right to give tests . . . would be authorized under subparagraph (h) on page 44? The reason I ask the question is that I know something about the amendment and its reference. I believe that during the development of the amendment, the question of its not being an unfair labor practice for an employer to provide for the furnishing of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings was discussed. Would not a test such as is covered by the amendment have to be included in the concept of such a system as I have mentioned?

MR. HUMPHREY. That is correct. That amendment was one that was added after the original substitute package had been tentatively agreed upon. We reviewed the entire *Motorola* case, and then added that particular section.<sup>205</sup>

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202. WHALEN & WHALEN, *supra* note 180, at 190-91 ("Jack Miller, the conservative Iowa Republican, announced his support for the cloture motion [the Thursday before cloture was invoked]. Miller had been the target of intense church lobbying . . . [T]he most decisive influence of all was the Archbishop of Dubuque . . . who urged Miller, a Catholic and former Notre Dame University law professor, to support cloture and the bill."). Senator Miller is a reliable source because he was not an eager enthusiast of the bill, but one who hung back with the bill's filibustering opponents until a compromise had been reached moderating the bill to obtain cloture. As opposed to winners or losers, moderates have a relatively greater interest in explaining the bill's essential compromises.

203. 110 CONG. REC. 13,504 (1964).

204. *Id.* at 13,503-04 (statement of Sen. Clifford P. Case) ("I object to the amendment suggested by the Senator from Texas because . . . it is unnecessary. Discrimination could actually exist under guise of compliance with the statute.").

205. *Id.* at 13,504.

One page of debate thus narrows the possible decisions Congress made on testing. Consider two possible extremes: Congress decided that all testing was permissible, or Congress decided that no testing was permissible (*Motorola*). The first position (all testing) was rejected by the vote on the first Tower amendment; the second position (no testing) was rejected by all Senators in the debate on the first Tower amendment.<sup>206</sup> This leaves us with an intermediate category of testing that was not intentional discrimination but was “used” to discriminate, per the text of the final Tower amendment.<sup>207</sup> “Used” obtains a reasonable meaning from its context and significant placement in the section with the *bona fide* merit language (which was a Tower concession in the second amendment, since the first amendment was a free-standing addition to the bill). Even Senator Tower was willing to accept “suitability and trainability” in his first amendment, which suggests a broad recognition in the Senate that merit tests would only be permissible if they bore some relation to the job at issue.<sup>208</sup> The EEOC could reasonably have relied upon “job-relatedness” as a position agreed upon by both proponents

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206. *Id.* at 13,503 (statement of Sen. Clifford P. Case) (“I feel certain that no member of the Senate disagrees with the views of the Senator from Texas concerning the Motorola case . . .”).

207. The second Tower amendment was modified as follows before passage:

On page 44, line 15, insert the following after the word “origin”; nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin.

110 CONG. REC. 13,724 (1964). The resulting statute reads:

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions.

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a *bona fide seniority or merit system*, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are *not the result of an intention to discriminate* because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results *is not designed, intended or used to discriminate* because of race, color, religion, sex or national origin.

42 U.S.C. § 2000e-2(h) (2006) (emphases added).

208. See 110 CONG. REC. 13,492-93 (1964); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 n.12 (1971) (“This language indicates that Senator Tower’s aim was simply to make certain that job-related tests would be permitted.”).



and opponents. Of course, this says nothing about disparate impact as such, for it simply addresses the narrow question whether an agency, like the EEOC, had congressional authority to issue such regulations, not whether the regulations were the best or only interpretation of the statute.

Even if one disagrees with this interpretation, notice that the analysis takes no grand tour through the legislative history of the Civil Rights Act. It does not invoke statements of purpose, the Clark-Case memorandum, or other snippets of history relied upon by proponents or opponents in the Fourth Circuit and the Supreme Court.<sup>209</sup> It simply reads the most proximate and specific legislative history in light of the cloture rules and the cloture-rule-based incentives of filibustering minorities. How can two to three pages possibly be any more complex or difficult than the kinds of administrative records routinely reviewed by courts today?

*D. Fourth Principle: Never Cite Legislative History Without Knowing Who Won and Who Lost the Textual Debate*

In Congress, winning and losing matter.<sup>210</sup> Yet scholars and judges feel free to rifle through the debates, picking and choosing quotations supporting their interpretive positions. There is nothing partisan in this: so-called liberal and conservative judges rely on losers' history and both are wrong in doing so despite rather ancient and well-known pronouncements against the use of such history.<sup>211</sup> This point has become far more important recently, however, because of the ubiquity of the filibuster. The point of statutory interpretation cannot be to look for the position of a filibustering minority. There has been an enormous hue and cry against judicial activism in the use of legislative history, but one of the more significant problems is using it improperly. It should be far clearer that it is "activist" to use losers' history. Positive political theorists are correct that losers are likely to exaggerate the limits of a bill, just as winners

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209. *Griggs*, 401 U.S. at 434-36 (citing the Clark-Case memorandum, statements of Senators disagreeing with *Motorola*, and statements of Senators Case and Humphrey); *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1234-35 (4th Cir. 1970) (relying on Senator Tower's statements with respect to the first failed Tower amendment, the Clark-Case memorandum drafted two months prior to the amendment, and Senator Humphrey's statement on the second amendment passed on June 13, 1964), *rev'd in part*, 401 U.S. 424 (1971); *id.* at 1242-43 (Sobeloff, J., concurring in part and dissenting in part) (citing the Clark-Case memorandum and Senator Tower's statements on the first failed Tower amendment).

210. See, e.g., SHEPSLE, *supra* note 7, at 127 ("We think of pure majority-rule legislative choice as an 'election writ small.'").

211. See *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951).

are likely to exaggerate the advantages of the bill.<sup>212</sup> But losers' history should generate far more caution: surely the job of judges is not to aid legislative obstructionists. At the very least, students of the legislative process must be taught to distinguish between winners' and losers' history.

Positive political theorists have urged that winners' history cannot be enough and that compromise positions must be taken into account.<sup>213</sup> This is surely true, but it is also true that one cannot find such compromises without looking at the legislative history and the rules governing it: chunks of text do not come with an attached footnote saying, "this was a compromise."<sup>214</sup> Perhaps more importantly, Congress's own rules are the only way to identify significant decisionmaking points when compromise is essential. The rules tell us, for example, that conference committees and cloture motions are places where important compromises must be made for a bill to move forward. Positive political theorists know these rules and apply them;<sup>215</sup> they have simply forgotten that the average lawyer and judge do *not* know the rules.

Taking the term "history" literally perhaps, lawyers have a tendency to treat all legislative statements as having equivalent value. As positive political theorists recognize, statutes are electoral battles. At the end of the battle, someone wins and someone loses. Although positive political theorists emphasize the dangers of winners' history (and there are dangers), a similar if not greater risk lies in losers' history. A court perceived as persistently narrowing statutes to allow minority objectors to win that which they lost in Congress is just as likely to be met with congressional backlash as a court perceived as expanding statutes' meanings.<sup>216</sup> But there is a more serious

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212. See, e.g., Rodriguez & Weingast, *Paradox*, *supra* note 12, at 1220 (distinguishing between cheap talk and costly signaling and explaining that all legislators are subject to these rhetorical incentives).

213. E.g., Rodriguez & Weingast, *New Perspectives*, *supra* note 12, at 1423 (arguing that turning to the authors of legislation "can be misleading, as the bill's authors are typically ardent supporters who have strategic incentives to expand the meaning of the act").

214. Thus, "second generation" textualists now emphasize that texts are the product of "complex bargains" but, in my view, they should not assume that any particular piece of text is a compromise or a complex bargain. See Manning, *supra* note 7, at 1290 (arguing that "courts risk upsetting a complex bargain among legislative stakeholders if judges rewrite a clear but messy statute").

215. See, e.g., Rodriguez & Weingast, *Paradox*, *supra* note 12, at 1215 ("The bargaining process within Congress is structured by a complex set of rules, norms, procedures, and institutions.").

216. Compare Rodriguez & Weingast, *Paradox*, *supra* note 12, at 1209 (implicitly indicting purposivism by urging that expansionist reading "of existing statutes by judges inhibits congressional passage of new progressive legislation"), with William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 348 (1991).

normative objection to losers' history. No lawyer would try to pass off a judicial dissent for a majority opinion; surely this is a more fundamental problem in statutory construction, or at least one that is a good deal easier to correct, than the failure to appreciate moderating influences on congressional bargains.

Unfortunately, despite declarations to the contrary,<sup>217</sup> losers' history is fairly easy to find in judicial opinions.<sup>218</sup> We see it in the Fourth Circuit's *Griggs* opinion: Senator Tower's statement about the *Motorola* case during the debate on the first and *losing* Tower amendment is used to support the very proposition that Congress rejected in that amendment.<sup>219</sup> We can see it in the Supreme Court's *Bock Laundry* opinion: Justice Stevens relies on statements by Senator McClellan, even though McClellan's position lost in conference.<sup>220</sup>

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(implicitly indicting textualism by arguing that Congress is more likely to overrule textualist Supreme Court decisions).

217. See Rodriguez & Weingast, *Paradox*, *supra* note 12, at 1213 n.23 (citing cases rejecting opponents' history).
218. See, e.g., *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 525 (1985) (Powell, J., dissenting) (chiding the majority for relying upon statements of bill opponents); *Bowsher v. Merck & Co.*, 460 U.S. 824, 851 (1983) (White, J., concurring in part and dissenting in part) (relying upon statements of an opponent of the bill to construe extent of act); *NLRB. v. Fruit & Vegetable Packers*, 377 U.S. 58, 85-88 (1964) (Harlan, J., dissenting) (relying on opponents of the bill for the conclusion about whether a statute barred secondary boycotting); *Davis v. Washington*, 512 F.2d 956, 964 n.59 (D.C. Cir. 1975) (citing a party's citation of language from a bill opponent's (Senator Tower) failed amendment), *rev'd on other grounds*, *Washington v. Davis*, 426 U.S. 229 (1976); *Voutsis v. Union Carbide Corp.*, 452 F.2d 889, 891 n.1 (2d Cir. 1971) (citing Senators Russell and Tower, opponents of the Civil Rights Act of 1964, on the Senate's concern that states play a role in enforcing the Act); see also *United States v. Turkette*, 452 U.S. 576, 586-87 (1981) (relying upon the statements of Representatives Eckhardt and Mikva, whom the court acknowledged opposed RICO, to support the extent of the statute); Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 632 (1987) (describing how he voiced his opposition to RICO in "hyperbolic terms" and that those "remarks have been used ever since as legislative history to prove the broad scope of RICO"). Obviously, a more careful empirical analysis would be required to reveal the extent to which this is done on a regular basis.
219. The Fourth Circuit majority opinion relied upon Senator Tower's statement for the proposition that all professionally developed tests were appropriate, but the amendment was voted down and necessitated a compromise that placed the actual amendment in the bona fide merit system section of the law. *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1234-35 (4th Cir. 1970), *rev'd in part*, 401 U.S. 424 (1971).
220. *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 516-17 (1989). Senator McClellan had persistently pushed for the "all felony impeachment" rule for witnesses, which is precisely what the conference rejected, imposing a balancing test. *Id.* at 517-18.

Curiously, Justice Stevens would later claim that the “legislative history” in this case “altered [his] opinion.”<sup>221</sup>

Perhaps more disturbingly, we see losers’ history in great scholars’ interpretation of seminal cases. Take, for the example, the debate about the canonical *Holy Trinity* case. The law reviews have offered two widely different interpretations of the legislative history in that case, one by Adrian Vermeule<sup>222</sup> and the other by Carol Chomsky,<sup>223</sup> neither of whom makes much of a distinction between losers and winners. Professor Vermeule has argued that the legislative history of the Alien Contract Labor Act supports Justice Scalia’s plain meaning interpretation<sup>224</sup>: the Labor Act says “labor or service of any kind” and obviously covered a British rector brought to preach in New York.<sup>225</sup> Professor Chomsky disagrees, arguing that the legislative history is far more complex, focusing on corporate en masse importation of slave labor or what was called at the time “cooly practices.”<sup>226</sup> Chomsky emphasizes the parallel interpretation of the Chinese Exclusion Act as meaning “manual labor” when the Act used the term “labor.” Since the Supreme Court had already

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221. *Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 278 (1996) (“That the [legislative] history *could* have altered my opinion is evidenced by the fact that there are significant cases, such as *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989), in which the study of history *did* alter my original analysis.”). In my view, Justice Stevens misread the conference committee joint explanation when he emphasized that Rule 609 did not cover nonparty witnesses. The joint explanation makes quite clear that the rule covers witnesses; it is just that the joint explanation indicated what was not in the statute: that prejudice to the witness’s own reputation in the community (such as a confidential informant might claim), as opposed to prejudice to the party offering the witness, was not to be considered.

222. Vermeule, *supra* note 166.

223. Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901 (2000).

224. SCALIA, *supra* note 21, at 20-21; Vermeule, *supra* note 166, at 1854-57.

225. SCALIA, *supra* note 21, at 19-20. Justice Scalia’s argument is not the only textual argument in the case. As we have seen for all of our other cases, there are typically two conflicting terms, rather than a single one, in difficult statutory interpretation cases. The issue in the case was about not only the meaning of “labor” but also the meaning of the “lecturer” exemption. Careful readers of the statute have so argued. See Laurence H. Tribe, *Comment*, in SCALIA, *supra* note 21, at 92 (emphasizing the lecturer exemption as part of a constitutional argument). It is ironic but true that the legislative history helps us see that there are two texts (“labor” and “lecturer”) and that Professor Tribe’s preferred text has a very plausible claim to being the way the law was read by the 1885 Congress. As one of the bill’s major opponents conceded, “People who can instruct us in morals and religion and in every species of elevation by lectures . . . are not prohibited.” 16 CONG. REC. 1633 (1885) (statement of Sen. Morgan).

226. Chomsky, *supra* note 223, at 929-30 (quoting Senator Blair).

interpreted similar legislation in a way that would exclude the rector, Congress did not intend to cover the rector.<sup>227</sup>

There is much in the legislative history repeating this battle, with the supporters of the bill insisting that it would apply only to slave-labor-type importations and the opponents insisting it covered a wide variety of workers. Indeed, one can see this quite clearly in the following exchange between Representative John O'Neill of Missouri, labor's ally, and his interlocutor, Representative John Adams of New York, cited by both Professors Chomsky and Vermeule (at least in part). A former store clerk who had gone on to be a lawyer,<sup>228</sup> Adams was curious about how someone like himself might fare under the bill. He asked O'Neill whether a clerk such as his former self would be barred from coming to the United States.<sup>229</sup> O'Neill said "yes," if the clerk would be brought to the United States under the kind of circumstances covered by the bill's core prohibition, en masse slave-labor-type conditions.<sup>230</sup>

Notice that Representative O'Neill is speaking to his political constituents (the "electoral connection"), and is noticeably annoyed by his opponents' tendency to focus on "hair-splitting technicalities."<sup>231</sup> Representative O'Neill clearly cared more about the political victory than the precise terms of the bill, but no doubt so did his constituents. One can understand this colloquy a bit better if one recognizes that the bill's opponents suggested that it was unconstitutional under a theory – "class legislation" – now largely forgotten<sup>232</sup>:

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227. *Id.* at 927 ("It is difficult to read page after page of this House debate without concluding that the bill was meant to address the 'contract labor system,' the practice by industrialists of importing large numbers of workers from abroad to take the place of American laborers at reduced wages, and that this was understood by all legislators considering the bill.").

228. *Adams, John Joseph, (1848-1919)*, BIOGRAPHICAL DICTIONARY OF THE U.S., <http://bioguide.congress.gov/scripts/biodisplay.pl?index=A000040> (last visited Nov. 22, 2011). Adams was a graduate of Columbia University and a Democrat.

229. 15 CONG. REC. 5358 (1884). The House voted overwhelmingly to pass the bill, 102-17, but there is no recorded vote so it is impossible to tell whether Mr. Adams actually voted for the bill. *Id.* at 5371.

230. *Id.* at 5358 (statements of Rep. Adams and Rep. O'Neill); see Vermeule, *supra* note 166, at 1847 (citing part of this exchange).

231. 15 CONG. REC. 5358 (1884) (statement of Rep. O'Neill).

232. These objections suggested that drafters were damned if they did and damned if they didn't. If they amended the bill to narrow it to a particular "class" of workers, it might invite constitutional litigation just as it would if they were to expand the exemptions, since exemptions were the classic trigger for "class legislation" claims. V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 972, 987 (2009) (analyzing the origins of "class legislation" arguments).

MR. O'NEILL, OF MISSOURI. It is not intended by this bill to keep away skilled mechanics or laborers from coming to the country who come here voluntarily. It is for the purpose of preventing pauper laborers from being brought here from abroad for the purpose of breaking down the efforts of the workingmen of this country to secure their just rights.

MR. ADAMS, OF NEW YORK. Why do not you insert "day laborers?"

MR. O'NEILL, OF MISSOURI. Because they are not day laborers; they are liable to work by the week or the month.

Now there is one thing I will refer back to, because I want to bring it to the ears of this House, that if you mean to protect American labor here is where you can show your sympathy in the best way.

Never mind about these hair-splitting technicalities with reference to the bill; but remedy any defects that you believe to exist in it. *If we all had to run as constitutional lawyers, few of us would get elected [laughter]*, and remember that what the workingmen ask you to do for them is simply that this Congress shall give, so far as it can, protection to them against this infamous contract system.<sup>233</sup>

The question remains whether, as Professor Vermeule suggests, the legislative history resolved itself in favor of Justice Scalia's interpretation, or did not, as Professor Chomsky writes.<sup>234</sup> In favor of his view, Vermeule cites the following exchange: Senator Morgan protested that the bill was "class legislation" and "vicious" in that "it discriminate[d] in favor of professional actors, lecturers, or singers."<sup>235</sup> We no longer remember the constitutional doctrine of "class legislation," but the argument is that the bill's exemption treats "high class workers" differently from "low class workers," a common argument used against labor legislation at the time.<sup>236</sup>

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233. 15 CONG. REC. 5358 (1884) (emphasis added).

234. Vermeule, *supra* note 166, at 1850 ("[T]he Senate had essentially settled the question of the bill's scope in favor of coverage of both brain toilers and manual laborers."). *But see* Chomsky, *supra* note 223, at 927-28 (arguing that the legislative history shows that the bill was meant to address only the importation of low-wage laborers).

235. 16 CONG. REC. 1632 (1885) (statement of Sen. Morgan).

236. Nourse & Maguire, *supra* note 232, at 966 n.43, 967 n.44. At one time, for example, it was thought that the best argument against the restrictions on working hours at issue in *Lochner*

Senator Morgan argued that if the alien “happens to be a lawyer, an artist, a painter, an engraver, a sculptor, a great author, or what not, and he comes under employment to write for a newspaper, or to write books, or to paint pictures . . . he comes under the general provisions of the bill.”<sup>237</sup> He continued later:

Now, I shall propose when we get to it to put an amendment in there. I want to associate with the lecturers and singers and actors, painters, sculptors, engravers, or other artists, farmers, farm laborers, gardeners, orchardists, herders, farriers, druggists and druggists’ clerks, shopkeepers, clerks, book-keepers, or any person having special skill in any business, art, trade or profession.<sup>238</sup>

Senator Blair responded, encouraging his counterpart to observe “that it is only the importation of such people under contract to labor that is prohibited . . . . If that class of people are liable to become the subject-matter of such importation, then the bill applies to them. Perhaps the bill ought to be further amended.”<sup>239</sup>

From this exchange, Professor Vermeule explains: “[T]he Senate had essentially settled the question of the bill’s scope in favor of coverage of both brain toilers and manual laborers.”<sup>240</sup> Professor Chomsky disagrees, arguing that Professor Vermeule reads the debate selectively since the core agreement was to ban en masse slave labor.<sup>241</sup> Professor Vermeule pauses to note that Senator Morgan, a Democrat from Alabama, opposed the bill but nevertheless relies on Morgan’s statements.<sup>242</sup> In fact, had he wanted to, Professor Vermeule

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*v. New York* would be “class legislation,” that the bill affected only one class of workers, namely bakers. 198 U.S. 45 (1905). This view was based on a number of state cases that had used similar arguments. *Lochner* is known, in fact, for rejecting the “class legislation” argument in favor of one based on “right.” See *id.* at 974-75; see also Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751 (2009) (rejecting claims made by other historians that *Lochner* was a “class legislation” decision).

237. 16 CONG. REC. 1633 (1885).

238. *Id.*

239. *Id.* (statement of Sen. Blair); see also Vermeule, *supra* note 166, at 1849-50.

240. Vermeule, *supra* note 166, at 1850.

241. Chomsky, *supra* note 223, at 905-08, 927-28.

242. Vermeule, *supra* note 166, at 1849 (citing Senator Morgan’s comments as the meaning of the bill, one accepted by the statute’s authors). It is one thing if the statute’s authors actually did accept that meaning, but as can be seen from the actual response, the supporters of the bill made a standard evasive move when met with this objection from bill opponents: if “that class of people are liable” to be imported as slave labor, then “the bill applies to them.” *Id.* at

could have cited a great deal more evidence that proponents knew their *opponents* were reading “labor” in its extensive, legalist sense (all work) rather than in its contextual, prototypical sense (any labor imported en masse).<sup>243</sup> If we stick to the notion offered by a vast array of proponents (even the reluctant ones),<sup>244</sup> the rector in *Holy Trinity* was exempt because he did not fit the prototypical “contract labor” situation (he was not imported in conditions of the prototypical slave labor contract). As Senator Sherman explained, just after the exchange quoted above between Senators Morgan and Blair: “What I intend to vote for when I vote for the bill is to prevent this organized corporate importation, not of laboring men, but of bought men, to come here and compete with our laboring men, with our mechanics and miners.”<sup>245</sup> Indeed, even Senator Morgan, the bill’s most ardent opponent, agreed that under the “lecturer” exemption, a lecturer on religion or morals was not covered.<sup>246</sup>

If Professor Vermeule does not distinguish statements opposed to the Act from those supporting it, neither does Professor Chomsky, who is far more reliant on the legislative history for her argument. Chomsky concludes that

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1850 (citing Senator Blair’s response). The point implicit in this exchange is that bill supporters thought their opponents were raising “technicalities,” eventualities that would never happen (store clerks imported en masse in the hold of a ship). Supporters wanted the bill drafted broadly to cover skilled labor (part of the strong impetus for the legislation), but they were afraid that the narrower the definition, the more likely it would be subject to a constitutional challenge, just as the opponent Morgan suggested, as “vicious” and “class legislation.” 16 CONG. REC. 1632 (1885) (statement of Sen. Morgan). Remember that, as Vermeule himself suggests, it was the bill’s opponents who were urging that the bill covered all labor and so needed to be amended in ways that its supporters feared. Vermeule, *supra* note 166, at 1847 (quoting the Senate committee report for the claim that there was an “unfriendly” opposition to the bill built upon the notion it was overbroad and needed to be narrowed to cover only “manual” labor). Even the bill’s opponents, however, were not consistent in this effort: in urging that the bill was “class legislation,” Morgan argued that the bill was intended to cover “the ruder sorts of work about the manufacturing establishments” of the land. 16 CONG. REC. 1632 (1885) (statement of Sen. Morgan).

243. For the distinction between legalist and prototypical meanings, see Victoria F. Nourse, *Two Kinds of Plain Meaning*, 76 BROOK. L. REV. 997 (2011).

244. See, e.g., Chomsky, *supra* note 223, at 927 (noting that Representative Kelley objected to the language but nevertheless supported the “spirit of the bill,” because it protected labor from “importation of cheap labor in the persons of the worst classes of the least enlightened states of Europe” (quoting 15 CONG. REC. 5354 (1884) (statement of Rep. Kelley))). For a typical statement of a proponent, see, for example, *id.* at 930, which quotes a statement of the manager of the bill, Senator Blair, claiming that the bill was to “prevent substantially the cooly practices which have been initiated and carried on to a considerable extent between America and Europe.” *Id.* (quoting 16 CONG. REC. 1624 (1885)).

245. 16 CONG. REC. 1635 (1885).

246. *Id.* at 1633 (statement of Sen. Morgan).



it is difficult to read page after page of this House debate without concluding that the bill was meant to address the “contract labor system,” the practice by industrialists of importing large numbers of workers from abroad to take the place of American laborers at reduced wages, and that this was understood by all the legislators considering the bill.<sup>247</sup>

In reaching this conclusion, however, she cites opponents and proponents, making no distinction between the two. We are treated to statements by Senators Morgan and Hawley (who voted against the bill) just as readily as by Senators Blair and Platt (who voted for the bill).<sup>248</sup> Her argument would have been substantially strengthened had she emphasized that those who persistently complained about the breadth of the Act were in fact *opponents* of the bill.<sup>249</sup> She might have even dented the armor of those naturally hostile to legislative history by noting that her favored interpretation *narrows the statute’s domain*.

Though neither likely intended it, both Professor Chomsky and Professor Vermeule appear to give equal weight to congressional statements of losers and winners. This causes concern about both of their analyses, but it is most disturbing when we realize that it is possible that scholars are relying for their interpretations on losers’ history. Certainly, we should not read the legislative history to adopt the view of one of the bill’s most urgent opponents, Senator Morgan, that the law was “vicious” and “class legislation.”<sup>250</sup> Then why should his views on the bill’s scope be authoritative? It is not a court’s job to search out and enforce the position of determined congressional minorities. It is one thing to suggest that Senator Blair made an important concession when he stated that perhaps the bill should be amended (although this is rather unclear in its import since it does not indicate precisely in which way the bill should be

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247. Chomsky, *supra* note 223, at 927.

248. *Id.* at 930-31 (quoting Senator Morgan); *id.* at 930 (quoting Senator Hawley); *id.* at 929-30 (quoting Senator Blair); *id.* at 933 (quoting Senators Platt); *see* 16 CONG. REC. 1839 (1885) (showing that Senators Butler, Groome, Hampton, Hawley, Maxey, Morgan, Saulsbury, Vance, and Williams voted against the bill).

249. *See, e.g.*, 16 CONG. REC. 1795 (1885) (statement of Sen. Morgan) (“I think it is one of the duties of the Senate to make laws that are so plain in their meaning that they can not be misunderstood.”); *id.* at 1787-88 (statement of Sen. Saulsbury) (characterizing the bill as “very sweeping” and “too sweeping”); *id.* at 1789 (statement of Sen. Maxey) (“[A]ccording to the first section it applies to every character of labor . . . .”); *id.* at 1834 (statement of Sen. Butler) (agreeing with Senator Morgan that the bill was overbroad and would cover individual contracts).

250. *Id.* at 1632 (statement of Sen. Morgan); Vermeule, *supra* note 166, at 1849.

amended).<sup>251</sup> Without greater support, we cannot say that the majority gave up its interpretation that the bill covered en masse imported labor (whether the workers imported en masse were skilled, unskilled, or store clerks), even if the text of the statute is not so limited. After all, Senator Morgan’s view that the bill should not have been passed because of its crude drafting did not carry the day: the Senate vote was a rather lopsided fifty to nine.<sup>252</sup>

To say that those opposed to the bill should be cited with great caution is not to say that their statements are irrelevant. Costly concessions, as the political scientists say, are important: after all, it was the great opponent of the bill, Senator Morgan, who argued that “lecturers” on religious topics were excluded from the Act. It is to say that there is a great risk in picking out losers’ history as authoritative history without determining whether it is simply a reflection of a superminority’s opposition. In *Holy Trinity*, it means that those who reject the Court’s outcome based on Senator Morgan’s statements about the broad scope of the bill risk becoming judicial activists in favor of a congressional minority. No lawyer would last long at a law firm if he or she cited the Supreme Court’s dissenting opinions as if they were majority opinions, but this is precisely the risk when lawyers and scholars cite legislative history without regard to legislative winners and losers. Both intentionalism and purposivism tend to exacerbate this problem because they appear to assume that there will be a unanimous intention when, as Congress’s procedures make clear, the majority (or in most cases today, a supermajority) prevails. Indeed, the worst-case scenario—reliance on those who relentlessly opposed a bill, as in the Fourth Circuit’s *Griggs* opinion<sup>253</sup>—raises the risk that a court may embrace a superminority interpretation held by those who have filibustered a bill.

An important caveat to this Principle remains: to say that losers’ history should not be outcome-determinative or authoritative is not to say that it should be ignored. Minorities’ views may be essential to understanding changes in textual meaning to provide context in legislative changes,<sup>254</sup> or when their arguments in effect “win.” Indeed, Senator Morgan makes a “costly concession” (one supported by a textual exception that does win) when he acknowledges that “lecturers” (exempted in the text) include lecturers on

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251. See 16 CONG. REC. 1633 (1885) (statement of Sen. Blair).

252. *Id.* at 1839-40 (1885).

253. *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1234 (4th Cir. 1970), *rev’d in part*, 401 U.S. 424 (1971); Nourse, *supra* note 64, at 1156-62 (explaining the dynamics of the Tower amendment).

254. See, e.g., *Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910, 917 (7th Cir. 2012) (using Senator Tower’s attempt to limit the reach of the civil rights bill as an element of context).

religious topics; this is an admission against interest, contrary to his general claim that the bill covered all workers, even high-class ones.<sup>255</sup> Having said that, the common lawyerly and scholarly practice of picking statements from the record without regard to winners and losers should play no part in the best practices of statutory interpretation, by either soft textualists<sup>256</sup> or purposivists.

*E. Fifth Principle: Structure-Induced Misunderstandings: Congress's Rules May Create Ambiguity for Courts but Not for Congress*

We have come to a far more nuanced appreciation of the ways in which Congress's rules may defy lawyerly expectations. Let me call these "structure-induced misunderstandings": cases in which faithful legislators following the rules may operate under rule-based expectations that contradict what a court might expect if it looked solely to the text and not the structural context of Congress's decision.<sup>257</sup>

Return to the *Public Citizen* example and the conference report. When conferees come to conference, they know that they cannot change text on which both houses have already agreed. Time is often short,<sup>258</sup> and so conference reports tend to have minimal explanations.<sup>259</sup> For example, on matters for which both bills have the same text, the conferees will have an incentive, given time constraints, to say nothing about this agreement. Lawyers reading the reports, however, may read the resulting silence in various ways inconsistent with this notion of textual agreement. Even though members will realize silence is likely to mean textual agreement, judges and lawyers tend to read all sorts of positive meanings into that silence—that it means the conference did not consider the matter, or that the conference committee

255. "People who can instruct us in morals and religion and in every species of elevation by lectures . . . are not prohibited." 16 CONG. REC. 1633 (1885) (statement of Sen. Morgan).

256. By "soft" textualism, I mean those textualists who seek in legislative history a confirmation of plain meaning. See James J. Brudney, *Confirmatory Legislative History*, 76 BROOK. L. REV. 901 (2011).

257. Elsewhere I have described a related, but distinct, phenomenon: structure-induced ambiguity, a form of ambiguity that is different from and in addition to ambiguity created by the lack of foresight or by the vagaries of language. Nourse, *supra* note 64, at 1128-34.

258. Katzmann, *supra* note 6, at 655 ("In conference committee, the pressure to come to closure and produce a law can compromise technical precision."); see also *id.* at 686 (quoting Judge James Buckley of the D.C. Circuit, a former Senator, as saying, "[W]ith time often the enemy, mistakes . . . are made in the drafting of statutes . . .").

259. SINCLAIR, *supra* note 82, at 98 ("By the time the legislation gets to conference, many people, and especially many of the conferees who may well have worked on the bill for months, have a considerable stake in the legislation's enactment.").

report is ambiguous or unhelpful. The lawyerly readings occur because lawyers read the legislative history without regard to the relevant context (the bills passed by both houses).<sup>260</sup>

We can see this in *Bock Laundry's* brief conference report joint explanation. Full of typographical errors, the explanation was obviously hurried. From a litigator's perspective, the legislative history is more ambiguous than the statute—sometimes the conference report refers to Rule 609 as covering witnesses, sometimes parties, sometimes the accused, sometimes the defendant, and even “someone else.”<sup>261</sup> At times it appears to distinguish witnesses as constituting a class other than defendants, and at other times, it refers to any person testifying, including a defendant, as a witness. To be sure, the conferees could have been more precise, but the point for our purposes is that the rules of a conference make legislators assume that they *cannot change* the language at the beginning of the statute referring to all witnesses. This explains the frequent reference to “witnesses” throughout the conference report.<sup>262</sup>

The purpose of a conference report's joint explanation is not to communicate to the two houses items agreed upon, but those items *disagreed upon*. It is not surprising, then, that the report focused at times on issues involving criminal cases since this is where controversy lay. Such a focus may have a distorting effect. For example, the conference report used the term “accused” to refer to a provision that everyone conceded applied to all parties and witnesses: the impeachment-by-false-statement rule.<sup>263</sup> That the conferees did not write about civil cases or change the “all witness” language at the beginning of the Rule 609's text is explained by the conference committee rules. Conferees have every incentive to be silent on that which is agreed upon and to focus on that which is in dispute—here, criminal cases. This may, however, create a misplaced “salience” effect for judges who will see that the report focuses on criminal cases and think that must be the statute's domain.

“Structure-induced” misunderstandings do not arise only around conference reports. For example, reconsider our *Griggs* example, the case

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260. See, e.g., *Cont'l Can Co. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union*, 916 F.2d 1154, 1156 (7th Cir. 1990) (noting that the conference report included no reference to the interpretive question as if this indicates significance or absence of information); *id.* (“Section 4203(d)(2), language common to the two versions, was not mentioned in the Conference Committee's report.”). To know what the Conference Report's silence means (if anything), one must look to the bills passed by the House and the Senate.

261. H.R. REP. NO. 93-1597, at 9 (1974) (Conf. Rep.).

262. *Id.* at 7-12.

263. *Id.* at 9.

interpreting a single amendment by Senator Tower concerning job testing.<sup>264</sup> The cloture rules give an incentive for bill opponents to revisit issues agreed to in the substitute. Today, Senate Rule XXII actually encourages this by requiring that post-cloture amendments be introduced prior to cloture.<sup>265</sup> Given the incentives produced by the rules, proponents of the underlying bill will always suspect that amendments offered in opposition are efforts to obtain benefits lost in the major substitute negotiations. Nevertheless, proponents will want to see the already-filibustered bill move forward, which will give them an incentive to agree to redundant language. Redundant language raises no immediate electoral costs to the proponents or opponents, but may be the subject of very serious inquiry by judges who apply canons of construction, particularly the canon against surplusage. In such a case, the rules of the Senate create incentives to create surplusage likely to offend judges' canonically induced preference for parsimony.

Consider, finally, another type of rule likely to create "structure-induced misunderstandings"—those governing appropriations bills. The canonical case is *Tennessee Valley Authority v. Hill*.<sup>266</sup> The question was whether the construction on the Tellico Dam could be halted because it would endanger the snail darter, an endangered species. The Burger Court held for the tiny fish against the huge dam on the theory that the Endangered Species Act was broadly worded and that there could be no "repeal by implication" based on Congress's repeated general appropriations for the Tellico Dam.<sup>267</sup> This judicial rule of construction is likely to run contrary to the structure-induced behavior of House and Senate members. Members operate under "rules [that] prohibit the inclusion of legislative language in appropriations measures."<sup>268</sup>

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264. See *infra* text accompanying notes 181-197.

265. SENATE RULES, 112th Cong., *supra* note 97, R. XXII(2), at 21 ("Except by unanimous consent, no amendment shall be proposed after the vote to bring the debate to a close, unless it had been submitted in writing to the Journal Clerk by 1 o'clock p.m. on the day following the filing of the cloture motion if an amendment in the first degree, and unless it had been so submitted at least one hour prior to the beginning of the cloture vote if an amendment in the second degree.").

266. 437 U.S. 153 (1978).

267. *Id.* at 190 (quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1974)); *id.* at 192-93.

268. Bill Heniff, Jr., *Overview of the Authorization-Appropriations Process*, in CONGRESSIONAL AUTHORIZATIONS AND APPROPRIATIONS: HOW CONGRESS EXERCISES THE POWER OF THE PURSE THROUGH AUTHORIZING LEGISLATION, APPROPRIATIONS, EARMARKS, AND ENFORCING THE AUTHORIZATION-APPROPRIATIONS PROCESS 1, 4 (The Capitol.Net ed., 2010). For exceptions to the practice, see Robert Keith, *Examples of Legislative Provisions in Annual Appropriations Acts*, in CONGRESSIONAL AUTHORIZATIONS AND APPROPRIATIONS, *supra*, at 43. Although in 1995, by ruling of the Chair, the Senate appeared to allow certain legislative

The congressional bar against legislating on appropriations “is derived from House and Senate rules.”<sup>269</sup> The basic principle of the rule keeps textual authorizing language out of appropriations bills, which may be a list of numbers. Authorizing committees are separate from appropriating committees. Authorize all you want, but the ultimate monetary decision will be made by the appropriating committees. This rule is followed every day in the Senate and the House, as authorizing committees pursue their part of the division of labor while appropriating committees pursue theirs. The division of labor between the committees is preserved against encroachment by committee structure and sequential referral, but violations are subject to a point of order or floor objection to the completed bill. However well known are Congress’s attempts to violate this rule, it remains embedded in the structure of Congress’s committees and the rules governing floor debate on appropriations bills.

No authorizing Chairperson believes that his or her program will be funded if the appropriators disagree. As a practical matter, appropriations chairs are the most powerful members of their respective houses. The authorizer may try to amend the appropriations bill—but any textual language put into the bill violates the rule against “legislating” on appropriations and will subject the bill to a point of order. If, for example, an authorizing committee wanted to spend money on a war in Afghanistan, Congress could pass a bill to that effect, and the appropriating committee could completely undo the effect of that bill by introducing an appropriations measure with no money for such a war. At that point, the authorizing committee could *not* seek to amend the appropriations bill with contravening language, for that would violate the rules against legislating on appropriations. The sequence of these procedures from authorization to appropriations means that, as a general rule, appropriations trump authorizations.

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provisions on appropriations (known as the Hutchison precedent), this was overruled in 1999 by the Senate as a whole. S. Res. 160, 106th Cong. (1999).

269. Heniff, *supra* note 268, at 1; see HOUSE RULES, 112th Cong., *supra* note 97, R. XXI(2)(b), at 845 (“A provision changing existing law may not be reported in a general appropriation bill . . . .”); *id.* R. XXI(2)(c), at 845 (“An amendment to a general appropriation bill shall not be in order if changing existing law . . . .”); SENATE RULES, 112th Cong., *supra* note 97, R. XVI(2), at 14 (“The Committee on Appropriations shall not report an appropriation bill containing amendments to such bill proposing new or general legislation . . . .”); *id.* R. XVI(4), at 15 (“On a point of order made by any Senator, no amendment . . . which proposes general legislation shall be received to any general appropriation bill . . . and any such amendment or restriction to a general appropriation bill may be laid on the table without prejudice to the bill.”); *id.* R. XVI(6), at 15 (“When a point of order is made against any restriction on the expenditure of funds appropriated in a general appropriation bill on the ground that the restriction violates this rule, the rule shall be construed strictly and, in case of doubt, in favor of the point of order.”).

The Supreme Court's opinion in *TVA v. Hill* fails to appreciate both the structure and rules governing appropriations and authorizations.<sup>270</sup> The Court applied a judicial canon against "repeal by implication,"<sup>271</sup> which effectively reversed members' presumption that appropriations trump legislation. Elsewhere, the canon against repeal by implication may be both wise and important,<sup>272</sup> but, in this particular case, it reversed the assumptions of those within the legislative process. As Daniel Rodriguez and political scientist Mathew McCubbins have argued, the Supreme Court's assumptions about Congress were more than "[s]trange"; they defied positive political theorists' well-honed understandings of the appropriations process.<sup>273</sup> What judges see as ambiguity and lack of deliberation in appropriations matters<sup>274</sup> is quite the opposite for those within Congress. Experts believe that members have every incentive to and do actively participate in the appropriations process and that these bills are among the most important and actively deliberated of all bills Congress passes.<sup>275</sup>

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270. 437 U.S. 153 (1978).

271. STEVAN A. TOMANELLI, APPROPRIATIONS LAW: PRINCIPLES AND PRACTICE 30-31 (2003). Echoing Karl Llewellyn's view that for every canon there is a counter-canon, see Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Considered*, 3 VAND. L. REV. 395, 401 (1950), there is a counter-canon to this one: the doctrine of "ratification by appropriation," by which Congress ratifies by appropriation "an agency action that may have been questionable" at the time made. TOMANELLI, *supra*, at 31. The mere appropriation can signal ratification. *Id.* at 27-29.

272. There may be good reason for the use of this canon to control executive abuses of power—when, for example, the executive branch claims authority based on appropriations that, in fact, contravene other laws. Special thanks to Dakota Rudesill for pointing out the difficulties with executive-branch use of the ratification canon.

273. Mathew D. McCubbins & Daniel B. Rodriguez, *Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon*, 14 J. CONTEMP. LEGAL ISSUES 669, 671 (2005) (remarking upon the appropriations canon's "impoverished analysis of the appropriations process," and concluding that it is "unjustified as a matter of positive political theory").

274. According to Professors McCubbins and Rodriguez, the Supreme Court in *TVA* mistakenly believed that "legislatures do not deliberate adequately when they are occupied with appropriations," *id.* at 687-88, and therefore appropriations should not be accorded the respect of "legislation." *Id.* at 688-89. This violates what most political scientists believe about appropriations: not only are such bills legislation, but also very powerful legislation. See *id.* at 689-90, 695-708 (arguing that the Supreme Court in *TVA* misunderstood and devalued the appropriations process based on controversial normative and positive assumptions about Congress).

275. *Id.* at 697 (arguing that the stakeholders—members, voters, and interest groups—"are engaged, active, and participate in the process by which Congress expends money during the regular appropriations process"); *id.* ("The institutional design of Congress reflects a

In the end, there was no way for the appropriators or authorizers *alone* to provide the textual clarity the Supreme Court sought. The Supreme Court wrote, “There is nothing in the appropriations measures, as passed, which states that the Tellico Project was to be completed irrespective of the requirements of the Endangered Species Act.”<sup>276</sup> But under House Rule XXI(2) and Senate Rule XVI(4) (rules that the Court itself cites), neither the Committee nor the full House could have added legislative text to the appropriations bill, for that would have been legislating on appropriations, subjecting the bill to a point of order.<sup>277</sup> An appropriations committee cannot change authorizing legislation—it cannot call up the Endangered Species Act and amend it, for that is outside the appropriations committee’s jurisdiction; it would have to go to the authorizing committee to do that. The Court ruled that the appropriations “Committee[] Report[]” language discussing the dam was insufficient,<sup>278</sup> even though there was nowhere else where the appropriating committees could express their understanding (short of passing an entirely new bill outside their jurisdiction).<sup>279</sup>

The Supreme Court seemed to think that making a clear exception in the text was simple, but under Congress’s rules, it may not have been easy at all. The appropriators could not put legislating text in their appropriations bill, and they could not amend the authorizing legislation. The same was true of the authorizing committee: it could not amend the appropriations bill with legislation, and it had no jurisdiction over the appropriations bill. Functionally

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strong interest on the part of all legislators, and particularly the majority party who sets the congressional agenda, to manage and monitor the critical appropriations process.”).

276. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 189 (1978).

277. *See id.* at 190-91.

278. *Id.* (“Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress, particularly not in the circumstances presented by this case.”).

279. *See Heniff, supra* note 268, at 2 (“The separation between the two steps of the authorization-appropriations process is enforced through points of order provided by rules of the House and Senate. First, the rules prohibit appropriations for unauthorized agencies and programs . . . . Second, the rules prohibit the inclusion of legislative language in appropriations measures. Third, the House, but not the Senate, prohibits appropriations in authorizing legislation.”); Sandy Streeter, *The Congressional Appropriations Process: An Introduction*, in CONGRESSIONAL AUTHORIZATIONS AND APPROPRIATIONS, *supra* note 268, at 29 (noting that authorization bills and appropriations “perform different functions and are to be considered in sequence. First the authorization is enacted and then appropriations provides the funding.”); *id.* (“The House and Senate prohibit, in varying degrees, language in appropriations bills providing unauthorized appropriations or legislation on an appropriations bill. . . . *Legislation* refers to language in appropriations measures that change existing law, such as establishing new law, or amending or repealing current law.”).



speaking, it is as if the Supreme Court was asking Nebraska to pass a law for Louisiana or vice versa. One might simply say that the Court was forcing the House committees to compromise, but it was also risking the possibility that, even if the House committees cooperated, no final legislation would be passed because of the ever-present risk of a Senate filibuster. Resolving the situation in *TVA* was not a matter of a small textual fix but required complex congressional negotiations because of a structural conflict between two committees' plans.

### III. DECISION THEORY RELATIVE TO THE ALTERNATIVES

In Part II, I showed how Congress's rules should change how we read statutory text and history. In a sense this should be obvious. Procedural context matters to courts—so why should it be irrelevant to congressional debate or text? If we force students to imbibe rules of evidence, civil procedure, and securities regulation, why not the rules that amount to their representatives' internal "constitution"? In this Part, I respond to the major practical and theoretical objections to this approach and place decision theory within the context of a positive, empirically based theory of legislation.

#### A. *The "It's Too Complex" Argument*

Some legal scholars or judges are quick to say that legislative procedures are simply too complex for lawyers or judges.<sup>280</sup> As Judge Posner once remarked, most theories of statutory interpretation are not guided by an "overall theory of legislation."<sup>281</sup> Lawyers and judges would find it "otiose, impractical and pretentious to try to develop one."<sup>282</sup> Charitably interpreted, this claim assumes that lawyers do not, and cannot, know anything about legislative processes. My quarrel is with that assumption. Query whether House and Senate rules are any more complex than the Federal Rules of Civil Procedure or the Federal Rules of Evidence. Lawyers have no problem tackling the massive Code of Federal Regulations or the General Agreement on Trade and Tariffs but pale when faced with a document like the Senate rules that is substantially smaller. I have invoked fewer than a dozen congressional

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<sup>280.</sup> See, e.g., VERMEULE, *supra* note 6, at 113.

<sup>281.</sup> Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 800 (1983).

<sup>282.</sup> *Id.*

rules in this Article. Is it really “too complex” or difficult for judges and academics to learn a dozen congressional rules?<sup>283</sup>

Others might argue that there really are no rules because Congress’s rules are not entrenched.<sup>284</sup> Congress’s rules may be evaded by unanimous consent in the Senate or a “special rule” in the House. But these are the exceptions that prove the existence of the rules. No one claims that the Federal Rules of Civil Procedure or the Federal Rules of Evidence are not really rules because Congress does in fact amend them. Standing rules of the House and Senate do in fact regularize the processes affecting members’ run-of-the-mill behavior.<sup>285</sup> Just because we have all heard stories about conference committees including extraneous material<sup>286</sup> does not mean that members do not go to extreme lengths to enforce the rules of conference committees. For example, on a weekend shortly before Christmas in 2005, Senators Carl Levin and John Warner temporarily revoked their signatures on a conference report because House members sought to add extraneous material.<sup>287</sup> This anecdote demonstrates what positive political theorists embrace: “[L]egislators value the stability in legislative outcomes that flows from the legislature’s internal structure and procedures . . . .”<sup>288</sup>

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**283.** Professor Vermeule has made a sophisticated argument to the contrary suggesting that institutional features of the interaction between courts and Congress may, in fact, increase the level of complexity. Given the limits of space, I do not treat this argument in full, but simply aim to suggest its limits here. See Vermeule, *supra* note 166, at 1833.

**284.** It is generally agreed that, under the Rules of Proceedings clause, U.S. CONST. art. I, § 5, cl. 2, Congress may set its own rules and as a result may abrogate those rules, although under the rules, doing so would require a two-thirds majority in the Senate. On the entrenchment question and the Rules of Proceedings clause, see Aaron-Andrew P. Bruhl, *Using Statutes To Set Legislative Rules: Entrenchment, Separation of Powers, and the Rules of Proceedings Clause*, 19 J.L. & POL. 345 (2003). Bruhl’s piece also shows how Congress has in fact “added” to its rules through what he calls “statutized rules,” whereby statutes provide various procedures, such as fast-track procedures for trade agreements. *Id.* at 346-47.

**285.** See, e.g., McNollgast, *Positive Canons*, *supra* note 12, at 716.

**286.** One of the classic “folk tales” of conference committees is that members routinely “air drop” in language that is unavailable to other members. This folk account comes, I suspect, from the practice involving appropriations bills, which are must-pass legislation and which, under the Budget Act, are not subject to normal procedures. Even, however, if this were true, it would provide no reason for a court not to hold Congress to its rules, as one of the salutary side benefits of such an approach might well be that there would be less contravention of the rules.

**287.** 151 CONG. REC. 30,744 (2005) (statement of Sen. Levin) (“Senator Warner and I strongly objected to a procedure so totally destructive of bedrock legislative process.”).

**288.** McNollgast, *Positive Canons*, *supra* note 12, at 716.

In fact, most of the rules essential to understanding legislative institutions stem from a simple structurally fixed premise: plurality. How can 535 people write a brief together without a division of labor (committees devoted to particular issues), rules for resolving disputes (sequential referral), and ultimate compromises made (conference committees)? For example, consider the unwritten rule that “legislative precedent” matters. In voting on bills or drafting bills, members often look to prior bills so that their policy positions are consistent over time and, in the case of drafting, so that it is easier to pass the bill—the author can argue that the bill presents no great change in law, and it has already passed the relevant legislative body. Just as no written constitutional rule binds the judiciary to precedent, no written rule binds the Congress to its prior textual precedents. And yet, textual precedent has a powerful effect in Congress. Relying on precedent reduces information costs; it makes decisions easier. This is true of individual judges and individual representatives as well. Let us say that Representative *X* has voted for bill *Y* for three sessions of Congress. The likelihood is very high that he will vote for it again; the likelihood is also very high that his staff will want precisely the same language voted on earlier to avoid the costs of considering new and unexpected outcomes. Relative to the current uncoordinated system, one based on Congress’s rules is likely to decrease complexity and increase simplicity.

*B. The “Legislative History Costs Too Much” Argument*

One of the more significant arguments against legislative history, akin to the complexity argument, is that even if legislative history is no more complex than other areas of law, relative to a focus on the text itself, it increases litigation costs.<sup>289</sup> Some have even suggested that the costs of investigating legislative history “may . . . tend to skew judicial evaluation in favor of claims . . . advanced by affluent parties” with greater resources to mine the

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289. I reject, however, Justice Scalia's view that all judicial use of legislative history is per se unconstitutional. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 388 (2012) (“[U]se of legislative history is not just wrong; it violates constitutional requirements of nondelegability, bicameralism, presidential participation, and the supremacy of judicial interpretation . . .”). *But see* VERMEULE, *supra* note 6, at 76 (“Our sketchy Constitution, I have argued, cannot plausibly be read, on any interpretive approach, to dictate rules of statutory interpretation . . .”); *id.* at 76-77 (arguing that any appeal to formalism must rest upon system capabilities and empirical questions). For a response to Professor Manning’s constitutional arguments, see Nourse, *supra* note 53.

legislative record.<sup>290</sup> The question remains whether such concerns demand an exclusionary rule—a rule excluding all legislative history from consideration.<sup>291</sup> An exclusionary rule (no legislative history) stance does not necessarily reduce interpretive costs below those that might be saved by a rule-based decision theory. As Professor Vermeule has made clear, there is no unified judicial view on any particular statutory interpretation approach, including a legislative history exclusionary rule.<sup>292</sup> The vast majority of courts still use legislative history to some extent. Relative to the present practice in which there is no central agreement upon what counts as reliable legislative history, rule-based decision theory’s focus on the last decision may render the legislative history quite manageable. It may well be impossible, as Professor Vermeule has noted, to assess whether courts make more errors with legislative history than without it.<sup>293</sup> However, relative to a rule of uncoordinated picking and choosing of legislative history, one that simplifies and objectifies legislative history reduces costs. It reduces costs by decreasing the amount of relevant legislative history and increasing the coordination of those courts looking to legislative history.

In theory, rule-based decision theory could even reduce the total interpretive costs below the level imposed by a strong exclusionary rule, meaning a rule allowing the interpreter to consider text only. Just as legislative history is subject to “picking and choosing,” so too is text. As we have seen above, rule-based decision theory has the effect of focusing on the texts central to Congress’s decision. Perhaps more importantly, the costs of an exclusionary rule cannot simply be calculated by what is left out. If a court does not use legislative history, it uses something else to resolve ambiguity, whether canons of interpretation, prior precedent, or other statutes, all of which impose interpretive costs. Such costs can be quite large, as, for example, when a court canvasses the whole code looking to vast numbers of other statutes.<sup>294</sup> In *Public Citizen v. U.S. Department of Justice*, we saw how decision theory made it

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290. VERMEULE, *supra* note 6, at 112.

291. SCALIA, *supra* note 21; Manning, *supra* note 7.

292. VERMEULE, *supra* note 6, at 119 (“[T]he judiciary, like Congress, is a ‘they,’ not an ‘it.’ That mistake produces the critical and erroneous assumption that coordinated judicial adoption of some particular approach to legal interpretation is feasible and desirable.” (citation omitted)).

293. Vermeule, *supra* note 166, at 1863-65.

294. See, e.g., *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 88-89 & 89 n.4 (1991) (resolving whether “attorney’s fees” under 42 U.S.C. § 1988 include expert fees by comparing § 1988 with a host of other fee statutes, the assemblage of which certainly requires time and expense).

unnecessary to either invoke the absurdity doctrine or answer a constitutional question.<sup>295</sup>

The exclusionary view also risks a different kind of cost: entrenching the views of superminorities. Because no text comes with a sign indicating it was inserted by the majority or the minority, only by looking to the legislative history can one be certain that one is not embracing a result sought by a filibustering minority. The best available empirical evidence shows that textualist decisions tend to be overridden by Congress at greater rates than non-textual decisions.<sup>296</sup> This shows not only that textualism may increase the cost of legislating but also that textualist decisions could easily reflect the views of a superminority. This result has an inevitable entrenching effect. Given congressional inertia and the need for a supermajority to overcome the inevitable Senate filibuster, losing parties are likely to find it quite difficult to elicit congressional reversals of erroneous textualist interpretations in cases of low political salience or where minorities' interests are at stake. If a rule-based approach reduces that risk, it may well be less costly than the exclusionary view, where cost is defined not purely in terms of information costs or judicial resources, but in the larger normative sense of legitimacy in a democratic order. As we have seen, although textualism claims to be a majoritarian approach, there is nothing preventing such an approach from entrenching the will of the few at the expense of the many. The same is unfortunately true of purposivism, but here the risk is smaller since purposivists are at least willing to look at legislative history.

### C. The "Let's Discipline Congress" Argument

A number of scholars have suggested that the problems of ambiguity would be solved if Congress were simply "punished" when it created

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295. See *supra* Section II.A.

296. Eskridge, *supra* note 216, at 348 (finding that the Congress is "much more likely to override 'plain meaning' decisions than any other type of Supreme Court statutory decision"). Despite this finding, textualists defend their position by arguing that text is a matter of finely wrought compromise, see, e.g., Manning, *supra* note 7, at 1304, but there is no reason to believe, absent some review of the legislative history, that any particular statutory term is the subject of a compromise. Indeed, assuming that any particular piece of text is the reflection of such a compromise appears to be a way to suggest that courts apply the narrowest possible plain meaning, even if there is no reason to believe that meaning conforms to Congress's rules or its decisions. Note, as well, that the narrowest possible meaning of a repealing statute could in fact increase the quantity of law relative to Congress's decision, thus there is no inherent libertarian effect to such a claim.

ambiguity.<sup>297</sup> As Einer Elhauge has written in one of the most sophisticated forms of this approach, courts should force Congress to reveal Congress's preferences more accurately.<sup>298</sup> In fact, such judicially imposed default rules are likely to be unsuccessful. As Professor Vermeule has argued, for such rules to be effective, judges must agree upon them, and there is no evidence that judges can or will reach such a consistent agreement.<sup>299</sup> More importantly, even if judges were to agree upon them, they would have to communicate their rulings consistently to Congress, and Congress would consistently have to "hear" those rules.<sup>300</sup> Outside decisions of wide public notice or application to a powerful interest group, the empirical evidence suggests that Congress pays little attention to the internal minutiae of appellate decisions.<sup>301</sup> This reflects the obvious fact that no one ever lost an election by failing to pay attention to appellate case law. As Judge Robert Katzmann of the Second Circuit, a former professor and Senate aide, has recently written, it is an "illusion[]" that even a uniform judicial practice, such as one decrying ambiguity, "will change legislative behavior."<sup>302</sup>

Others have proposed that Congress pass its own federal rules of statutory interpretation, as Nicholas Quinn Rosenkranz has argued.<sup>303</sup> If we have rules of evidence, why don't we have rules of statutory interpretation? This is an excellent question, but it is unlikely to incite legislative action by Congress, particularly given that Congress may view itself as already having such rules. Congress simply has no incentive to pass new rules in a world otherwise

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297. Elsewhere, I have argued that there is an irreducible structure-induced ambiguity that makes such proposals implausible. Nourse, *supra* note 64, at 1129-34. Only if one were to change the structure of the body could one reduce this form of ambiguity.

298. Elhauge, *Preference-Eliciting*, *supra* note 23, at 2169-70.

299. VERMEULE, *supra* note 6.

300. Nourse & Schacter, *supra* note 27, at 619-23 (describing an empirical study suggesting that Congress does not pay attention to judicial rulings in any consistent way).

301. See, e.g., Katzmann, *supra* note 6 (detailing the history of projects to try to keep Congress informed of appellate decisions and noting that initial efforts revealed that "committee staff did not know about judicial opinions concerning technical aspects of the statutes under the committee's jurisdiction," although they knew about broad policy decisions that had been brought to their attention by a "losing party with influence" in Congress). Judge Katzmann explained efforts since that observation was made and various proposals for change, see *id.* at 682-94, but offered little positive evidence of results, despite widespread approval by members of the Congress and the judiciary. Judge Katzmann argues courts should continue to actively seek "a better understanding of the legislative process and . . . [its] internal hierarchy of communications." *Id.* at 682.

302. *Id.* at 680-81.

303. Rosenkranz, *supra* note 22.

crowded with immediate political needs, like jobs or health care. Congress is a very busy place,<sup>304</sup> and statutory interpretation, however important in the abstract, is likely to garner little attention by representatives waging war, balancing budgets, and reforming entitlements. Moreover, even if a statutory rules bill did capture the imagination of a member or senator, it would not be easily passed because theoretical disputes would soon be associated with larger, politically salient issues, making it difficult to reach consensus. For example, rules about textualism and purposivism would be debated in public terms, as rules of judicial restraint or activism, and this would tend to yield predictable and large political divisions akin to those we see in Supreme Court nomination battles. Finally, even if a bill were passed, Congress would soon begin the process of undoing any compromise, just as it has felt free to “contract around” the sentencing commission guidelines and pass its own rules of evidence.<sup>305</sup>

Legislative history by the rules offers significant advantages because it is a *self-enforcing* rule of statutory interpretation. Using Congress’s own rules allows judges to apply the interpretive presumptions of a faithful congressional decisionmaker, hurdling the barriers of coordination and communication associated with competing proposals.<sup>306</sup> It might also have the salutary side benefit, if it were to communicate anything to Congress,<sup>307</sup> of reducing incentives for legislative manipulation. If losers’ history does not count, there is

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304. SINCLAIR, *supra* note 82, at 53-54 (explaining the time pressure in the Senate).

305. I call this the “Coasian” principle of legislative instability: when there is an electoral dominance effect, Congress will circumvent even the most carefully wrought and complex administrative structures. A simple example of this is the passage of mandatory minimum sentences after the creation of the complex Sentencing Commission scheme. Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 STAN. L. REV. 1017, 1044-48 (2004) (criticizing the mandatory minimum laws passed by Congress as “redundant” of the Sentencing Guidelines).

306. See, e.g., VERMEULE, *supra* note 6, at 118-20 (critiquing democracy-forcing interpretive proposals because they assume coordination among judges).

307. My position here is not inconsistent with the general claim that there is a large barrier to communication between Congress and the courts; as a general rule, senators and representatives have no incentive to pay attention to courts unless their rulings are politically salient. This is not to say that a repetitive pattern of rulings (or at least a perception of a repetitive pattern) that has become politically salient cannot have an effect upon congressional action. See Rodriguez & Weingast, *Paradox*, *supra* note 12 (arguing that expansionary progressive readings by courts may inhibit passage of progressive legislation by Congress). For example, textualism as a theory has been discussed at various points on the floor of the Senate when it was to a senator’s advantage. See, e.g., ESKRIDGE ET AL., *supra* note 69, at 988 (reporting the statement by Senator Armstrong that “we should discipline ourselves to the task of expressing congressional intent in the statute”). So too, if decision theory were to become commonplace and well-known, it might surface within Congress and have the salutary side effects mentioned above.

less incentive for losers to relitigate the issue on the floor of the House or Senate; if extraneous conference committee report language does not count, there is less incentive to use committee reports to trump the text passed by both houses. No one knows how often these things happen, but enforcing these kinds of rules surely would not increase rule abuse, and might have the salutary side benefit of strengthening counterincentives to prevent Congress from violating its own rules.

*D. The Democracy Argument*

Others may suggest that any recourse to legislative history suffers from a democracy deficit. Relying on just a few people to represent Congress as a whole is far less attractive than relying on the whole of Congress that has voted for the text of the statute. Curiously, no one makes similar arguments in other venues; no one argues that because we rely upon corporate agents, the rules of corporate law do not respect markets or the corporate form. But, even if we were to take the democracy objection at face value, decision theory can accept and correct for the objection. Take, for example, the case involving conference reports: assuming a gap in a statute, a reference to the bills that were passed by the House and Senate is a reference to a more democratic, larger body than the conference committees that, in *Public Citizen*, added in the term “utilize,” or, in *Bock Laundry*, added in the term “defendant.” Even when a court is relying upon a smaller body, the drafters of a committee report or an individual statement of a sponsor, it is not relying on them because of their individual character, but because it believes that these documents or statements are representative of a majority’s views. If they are not, then they should not be relied upon. Finally, in cases where there is an irreducible gap in the statute, one cannot say that there is in fact a truly democratic alternative to legislative history—in the case of unforeseen events or even deliberate ambiguity, no majority ever formed on the interpretive text in question. In such cases, the courts’ job is to give legal effect to the statute in such a way that is the most respectful of democracy—and that is to follow democracy’s own rules.

If nothing else, decision theory is more normatively appealing than any available theory because it is more respectful of legislative supremacy. If Article I of our Constitution means anything, it signals legislative primacy of place, which no student of the Constitution or statutory interpretation, textualist or purposivist, disavows. “Congress is the Constitution’s first branch, with enumerated, sweeping powers . . . .”<sup>308</sup> It is not only the most “potentially

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308. Rudesill, *supra* note 6, at 700.



powerful” legal institution in the country, it is also the institution theoretically “most accountable to the people.”<sup>309</sup> “[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”<sup>310</sup> Unfortunately, academic contempt for Congress has deprived lawyers and judges of the knowledge that would make them not only more effective citizens but also better informed and disciplined consumers of Congress’s statutes. As Judge Katzmann explained, it was James Madison’s vision that a good government not only yields “fidelity to the object of government, which is the happiness of the people,” but also “a means by which the object can be best attained.”<sup>311</sup>

#### IV. RULE-BASED DECISION THEORY VERSUS OTHER POSITIVE POLITICAL THEORY APPROACHES

The legislative history question remains the central question dividing the legal academy’s two principal schools of statutory interpretation: textualism and purposivism. Although textualists today claim that they are happy to look at purpose based on the text of the statute,<sup>312</sup> and purposivists claim that they are happy to look at text,<sup>313</sup> the one place these schools of thought diverge is legislative history. Textualists will not look at legislative history; purposivists will. Most judges are in fact “neither wholly textualists nor purposivists.”<sup>314</sup> The theory propounded here—decision theory—is neither wholly textualist nor purposivist. It argues for the theoretically contrarian position that textualists must look to legislative history to avoid “picking and choosing” texts and that purposivists must give up intentionalism to avoid “picking and choosing” purposes. In other words, textualists must look at legislative history even when the text appears clear,<sup>315</sup> and purposivists must pay more attention to textual

309. *Id.*

310. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

311. Katzmann, *supra* note 6, at 694-95 (quoting THE FEDERALIST NO. 62, 445 (James Madison) (Cynthia Brantley Johnson ed., 2004)).

312. SCALIA, *supra* note 21, at 23 (“To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed . . . to serve . . .”).

313. See Molot, *supra* note 65, at 36 (“[W]e have all become textualists.”).

314. Katzmann, *supra* note 6, at 667.

315. Saliency effects (where the parties focus on one term because it is available) may produce the appearance that one text is central or plain when there is other text or another meaning of the text that only appears relevant when looking at the legislative history. On saliency bias, see Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS

choices as opposed to reading legislative minds. Both textualists and purposivists have to understand how Congress really works. Decision theory tells them both how to understand Congress in the way that lawyers understand trials, as a series of procedures leading to a final decision.

Some critics may urge that this theory, however attractive, should fail because it does not reflect “how Congress actually functions.”<sup>316</sup> If this theory is to claim the title of “positivist,” it must convince not only judges and lawyers but also those who study Congress that it is a better version of theories already propounded as “positive” political theories. Some scholars, such as Professors Eskridge and Ferejohn, have argued that lawyers should look at Congress as a strategic game-player anticipating and responding to other actors’ behavior.<sup>317</sup> Other scholars, such as Professors Rodriguez and Weingast, have urged that Congress produces outcomes as a set of fractured, self-interested individuals racing to secure the support of the median voter in order to achieve compromise.<sup>318</sup> Decision theory claims to more accurately reflect the internal workings of Congress, and to do so in a way that is easily translatable to the actual practice of judging, by focusing on the institutional rules governing Congress’s decisions.

#### *A. Anticipation-Response Theory*

Anticipation-response theory views Congress primarily in relation to other actors in the overall governmental system: Congress versus the President versus the judiciary. In an exceedingly important article relying on game theory, Professors Eskridge and Ferejohn argued that statutory analysis must consider the anticipated interplay of legislators, judges, and the President. They contended that “all the parties to the deal operate under assumptions about how the courts will interpret their bargain. They anticipate the judicial

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AND BIASES 138-39 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982), which notes that “whenever some aspect of the environment is made disproportionately salient or ‘available’ to the perceiver . . . that aspect is given more weight in causal attribution”; and *id.* at 140-41, which describes one form of salience bias as the “false consensus” theory that one’s own “choices and judgments” are common. See *supra* notes 116 and 225 (discussing ways in which cases debated as questions concerning one term turn out to involve more than one term).

<sup>316</sup> Katzmann, *supra* note 6, at 645.

<sup>317</sup> Eskridge & Ferejohn, *supra* note 31, at 523 (describing *The Article I, Section 7 Game*).

<sup>318</sup> Rodriguez & Weingast, *New Perspectives*, *supra* note 12 (describing a positive political theory of legislative history).

response as they draft and produce committee reports and floor debates.”<sup>319</sup> At a high level of generality, this model is both important and correct. It predicts whether the Congress will shift to the political right or the left based on anticipation about the actions of the President and the judiciary. The problem is that it does not tell us much of anything about Congress’s internal processes. Just as a theory of the planets may tell us little about any specific country on Earth, this theory highlights important interactive effects pitched at a high level of generality, without giving us much guidance about how specific texts are created.

At the level of specific text, the theory offered here—decision theory—disputes a basic assumption upon which the Eskridge-Ferejohn approach proceeds: that Congress pays a good deal of attention to appellate courts at the level of particularity necessary to textual interpretation. Although gravity is surely true, very few people actually pay attention to it as they walk; so, too, just as it is true that Professors Eskridge and Ferejohn’s institutional anticipation is a real phenomenon at a high level of generality, there is little evidence that such anticipation operates in real life at a high level of particularity. After all, if it did, there would be no need for appellate interpretation. Full congressional anticipation of judicial interpretations would mean fully clear statutes. As Professor Eskridge concedes, the assumption of full information about other players’ actions or preferences (in this case courts’ actions) is “unrealistic” and “simpli[stic].”<sup>320</sup> Full information suggests a picture of congressional omniscience, which is unlikely. It also suggests an equally unrealistic and cynical picture of strategic behavior: Congress writes ambiguous statutes knowing that the institution down the line—the courts, or, more likely, agencies—will bail it out. I would be the first to acknowledge “structure-induced” ambiguity—that Congress’s internal processes often force those who would prefer clarity to write ambiguous statutes.<sup>321</sup> But it does not follow from this, as game theory sometimes suggests, that all text-writing in legislatures is a cynical attempt to manipulate other institutions.

There are good empirical reasons to believe that members of Congress are *indifferent* to the vast majority of ordinary statutory interpretation cases in appellate courts.<sup>322</sup> One of the most resilient empirical findings of the political

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319. ESKRIDGE ET AL., *supra* note 69, at 75 (summarizing the argument of Eskridge and Ferejohn’s *The Article I, Section 7 Game*).

320. *Id.* at 76.

321. See Nourse, *supra* note 64, at 1133 (explaining “[s]tructure-induced ambiguity”).

322. Nourse & Schacter, *supra* note 27 (empirical study suggesting that Congress does not pay attention to judicial rulings in any consistent way); see also Katzmman, *supra* note 6.

science literature is the “electoral connection”: members do things to get reelected.<sup>323</sup> No one ever lost or won a seat in Congress because voters campaigned for the man or woman with the most textual bailouts or the greatest textual clarity.<sup>324</sup> If that is right, and the electoral payoff of textual clarity or bailout ambiguity is small, then the basic empirical assumption of anticipation-response theory—that there is anticipation at the retail level—may be too strong.<sup>325</sup> As other positive political theorists have argued, “[R]ational political actors, having many demands on their time, would never devote the effort necessary to minimize the indeterminacy of statutory language.”<sup>326</sup> This may be true even if I am wrong about my claim that members do not care terribly much about most retail appellate interpretations; even in cases where members do care in theory, there is often a significant “lag effect” between anticipation (legislative passage) and response (judicial ruling) likely to diminish the force of the effect of the judicial player at the end of the line.<sup>327</sup>

It is certainly possible to model such effects, for as game theorists themselves have acknowledged, there can be significant “audience costs” to making particular policy proposals. As Tim Groseclose, Nolan McCarty, and James Fearon have shown, the need to signal to third parties can dominate in some cases, operating as a far stronger influence than the need to anticipate the

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323. The seminal works are RICHARD F. FENNO, JR., *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* (1978); and DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974). See also MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* (1977); LEWIS A. FROMAN, JR., *CONGRESSMEN AND THEIR CONSTITUENCIES* (1963); JOHN W. KINGDON, *CONGRESSMEN'S VOTING DECISIONS* (3d ed. 1989); KEITH KREHBIEL, *PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING* 219-24 (1998); DONALD R. MATTHEWS, *U.S. SENATORS AND THEIR WORLD* (1960). The electoral connection is also a staple of PPT analysis. See, e.g., SHEPSLE, *supra* note 7, at 113 (“As a first approximation . . . [p]oliticians are conceived of as single-minded seekers of election.”).

324. See Nourse, *supra* note 64, at 1141 (“Can one really imagine citizens protesting on the steps of the Capitol with signs reading, ‘Vote “No” on Lack of Precision’ . . . ?”).

325. As PPT analysts acknowledge, “When the stakes are low, uncertainty is high, and individual choices are of little consequence to the chooser, then inconsistencies are likely to be common.” SHEPSLE, *supra* note 7, at 28. To be fair, Professor Eskridge and his coauthors acknowledge that “[t]he structure of institutions makes a difference in the way people interact.” ESKRIDGE ET AL., *supra* note 69, at 76. The question remains whether the Article I, Section 7 model, *see id.* at 77-80, accurately reflects the proper institutional rules as they apply to legislative history. Of course, Professors Eskridge and Ferejohn might argue that they are not seeking to provide a theory of legislative history. *But see* Ferejohn & Weingast, *supra* note 71 (offering a positive theory of statutory interpretation).

326. McNollgast, *Positive Canons*, *supra* note 12, at 715.

327. Nourse, *supra* note 64, at 1163.

institution down the line.<sup>328</sup> For example, as a general rule, Congress will not go to the trouble of passing bills that it knows the President will veto, a general positive prediction gleaned from the Eskridge-Ferejohn approach. But in some cases Congress does: for example, in 1992, Congress passed the Family and Medical Leave Act, even though it was well known that President Bush was going to veto it.<sup>329</sup> Proponents wanted to make the bill an issue in an election year: that is, the electoral connection dominated and explained the institutional behavior. Similarly, the electoral connection may explain congressional indifference to the “bailout effect”: because of the lag between congressional enactment and judicial enforcement, electoral cycles may make judicial enforcement irrelevant to the individual legislator.<sup>330</sup> No one was ever ousted from a seat because his or her electoral opponent claimed he or she wrote an unclear bill, particularly one that had never reached a court or agency.

Some would say that anticipation is neutral as to whether the player down the line reacts negatively or positively—that even a failure to act based on anticipation (for instance, the veto of a popular bill) involves anticipation. But even if one describes inaction as action, there remains a third possibility at odds with any claim of positive or negative “anticipation”: indifference. We know Congress acts in ways apparently indifferent to judicial or executive action: it passes bills that will be vetoed,<sup>331</sup> bills that are deliberately ambiguous,<sup>332</sup> bills for symbolic purposes.<sup>333</sup> We know that the House passes bills it knows (or at

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328. See Tim Groseclose & Nolan McCarty, *The Politics of Blame: Bargaining Before an Audience*, 45 AM. J. POL. SCI. 100, 101 (2001) (“Almost all models of bargaining ignore the possibility that the two primary negotiators want to send signals to a third party.”); see also James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 AM. POL. SCI. REV. 577 (1994) (discussing vertical and horizontal considerations of democratic states conducting foreign policy).

329. Groseclose & McCarty, *supra* note 328, at 100.

330. See Nourse, *supra* note 64, at 1163 (noting this lag effect).

331. See, e.g., Groseclose & McCarty, *supra* note 328, at 100 (discussing the Family and Medical Leave Act).

332. See Nourse, *supra* note 64, at 1133 (explaining “structure-induced ambiguity”). For an analogous but different view of “purposeful” ambiguity, see Jorgensen & Shepsle, *supra* note 31, at 45.

333. See SINCLAIR, *supra* note 82, at 77 (“To expedite the legislative process on the Senate floor, a floor manager will often agree to accept many pending amendments, either as is or with some negotiated changes, and roll them into a big ‘manager’s amendment’ that the floor manager then offers. After a number of grueling days on the floor, the manager may be willing to accept ‘just about anything,’ staff report (only half-jokingly). Some of these amendments, everyone knows, will be dropped in conference. Even so, senators are able to claim credit for an amendment passing the Senate.”).

least should know) will fail in the Senate.<sup>334</sup> All of this suggests that if one wants to refine the concept of anticipation and predict variations in negative anticipation and/or indifference, one must consider the possibility of an “electoral dominance”<sup>335</sup> effect (the electoral connection produces negative or indifferent anticipation). If the electoral dominance<sup>336</sup> effect is true, then one can predict variation in institutional anticipation based on electoral payoff: members will not care about most retail statutory interpretation decisions for which there is no electoral payoff, but will care most where wholesale trends or particular legislation is most salient to the electorate.

The game theorist may well claim that he or she is not offering a theory for interpreting legislative history, simply a prediction of policy outcomes. Indeed, on the latter score, the Ferejohn-Eskridge thesis is quite persuasive at a wholesale level. At a retail, textual level, however, one wonders whether it provides the fine-grained tools offered by a rule-based decision theory or whether it can be employed by judges in ways consistent with their constitutional mission, which rejects policymaking in favor of close textual analysis.

### *B. Signaling Theory*

Signaling theory offers a more fine-grained analysis and greater ability to address textual choice. In a series of path-breaking articles, Professors Rodriguez and Weingast have argued for an approach that urges judges to distinguish between reliable and unreliable legislative history. Reliable history

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334. See SINCLAIR, *supra* note 82, at 160-61 (discussing the Contract with America, which any moderately informed observer of the Congress would probably have known could not have been passed in the Senate because of a potential filibuster).

335. A “dominant” effect in game theory is an alternative that beats out all available alternatives. PETER C. ORDESHOOK, *GAME THEORY AND POLITICAL THEORY: AN INTRODUCTION* 115-16 (2003).

336. One caveat to this “electoral dominance” hypothesis should be noted: to say that the electoral payoff dominates anticipation at the “retail level,” on individual pieces of legislation, is not a claim intended to impugn game theory at a more general or “wholesale level.” Occasionally, members may give speeches on “legislative interpretation,” but the electoral dominance thesis predicts that they are likely to react only to trends in legislative interpretation when they are translated into public perceptions of judicial interpretation, or when the trend matters to a particular political outcome. If, for example, the people believe that courts are too “liberal,” or “conservative,” in general, this may translate into a dominant anticipation effect upon the legislative process at the wholesale level, but only, as the electoral dominance thesis predicts, because this is a popular conception likely to yield electoral payoff. See Rodriguez & Weingast, *Paradox*, *supra* note 12, at 1209 (arguing that a general trend may translate into anticipation).

is history necessary to persuade a “moderate coalition” to adopt particular language. A moderate voting coalition is the critical voting bloc necessary to support a statute. Moderates are to be distinguished from majority advocates who are likely to be overly enthusiastic about the law’s purposes, and minority objectors who are likely to be overly pessimistic. The conscientious judge, under signaling theory, looks for “costly signals”—statements by the majority necessary to “signal” the real meaning of the law to the moderate coalition—and avoids “cheap talk,” statements that are likely to be exaggerated because the speaker pays no cost in persuading the moderate coalition.<sup>337</sup>

Decision theory<sup>338</sup> does not dispute the existence of voting blocs or the importance of compromise in legislating, but urges that the temporal point of compromise in the overall institutional process is more important than the identity of those who compromised.<sup>339</sup> Signaling theorists have, from the beginning, acknowledged the power of the rules in analyzing legislative history.<sup>340</sup> They have missed an opportunity, however, in failing to emphasize their comparative advantage vis-à-vis lawyers—knowledge of the rules. For example, positive political theorists focused on signaling do not stress the rules as much as they might. Although they acknowledge that the legislative process is sequential, they do not emphasize the obvious implication of that theory—reverse sequentialism: that later textual decisions trump earlier ones.<sup>341</sup>

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337. McNollgast, *Positive Canons*, *supra* note 12, at 706-07.

338. In technical terms, decision theory shifts from a welfarist preference-aggregation model to one that assumes that institutional rules and sequential priority procedures perform important preference-aggregation functions. See LIST & PETTIT, *supra* note 30, at 58 (arguing that “[a]n aggregation function such as a premise-based or sequential priority procedure enables a group not only to form rational intentional attitudes but also to do so in a way that collectivizes reason”); see also *id.* at 72 (arguing that a “sequential priority procedure” with “distributed premised-based procedures” can yield “robust group rationality”); *id.* at 71 (defining “distributed premised-based procedure” as “the attitudes of some subgroup—the relevant specialists” that determine the “group attitude on that premise”). Decision theory further assumes that because congressional sequential rules and subgroup delegations are internal to the congressional process, they are more reliable aggregators than are external measures such as generalized measures of voting behavior or ideological scores (typically used in PPT).

339. For examples of focus on the identity of the compromisers, see Rodriguez & Weingast, *New Perspectives*, *supra* note 12, at 1461-62, which uses Americans for Democratic Action scores; and *id.* at 1507, where the authors use the votes on an amendment to hypothesize a key coalition.

340. McNollgast, *Intent*, *supra* note 12, at 10.

341. See, e.g., McNollgast, *Positive Canons*, *supra* note 12, at 721 (stating that the moderate coalition is a “union of . . . actors” at all points in the process and thus not distinguishing between key institutional moments of compromise (cloture and conference committee) and implying that all points in the process have the same value).

Most importantly, signaling theory has failed to use the rules to focus on textual decisions rather than voting coalitions. Firsthand empirical accounts of the legislative process acknowledge the ad hoc nature of the motivating factors explaining any member's vote, however pivotal. For example, during the debate on the Civil Rights Act of 1964, there was an earthquake in Alaska, and President Johnson loaned the Alaska senators Air Force Two so that they could return to the state, helping to ensure the Alaska senators' votes for cloture.<sup>342</sup> Similarly, one of the last votes to obtain cloture on the 1964 Act was gained by a call to a moderate senator from the Archbishop of Dubuque, Iowa—the senator was a former Notre Dame law professor.<sup>343</sup>

Knowing the “real” moderate coalition *ex post* is likely to be impossible given that deals involve not only life's vagaries, but cross-statute compromises (“I will give you the Violence Against Women Act if you cut the federal workforce”)—none of which will ever appear on the legislative record because they take place in hideaways and cloakrooms. If this is the deal that judges must find, it cannot be found in the congressional record, and it cannot be found by positive political theorists.<sup>344</sup> Far more importantly, the airplane and the phone call tell us little about the meaning of section 703(j) or any of the provisions of the Civil Rights Act text about which judges care.

The good news is that even if this is true of the real deal, the Constitution and the rules force deals into text—Congress must pass one law to send to the President.<sup>345</sup> Once Senators exit the cloakroom, they must write their compromise in language, and they must do it according to the rules. As Keith Krehbiel has made clear, the cloture rule is central to understanding pivotal politics.<sup>346</sup> Not surprisingly, the substitute bill prior to cloture reveals significant textual compromises. So, too, conference committees are explicitly constructed to resolve conflicts between the House and the Senate and to make compromises necessary to achieve one text. In the end, it is the rules creating these institutions of compromise (as opposed to the compromising members

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342. ESKRIDGE ET AL., *supra* note 69, at 20.

343. WHALEN & WHALEN, *supra* note 180, at 190-91.

344. See, e.g., McNollgast, *Intent*, *supra* note 12 (defending and using the notion of intent).

345. U.S. CONST. art. I, § 7, cl. 2.

346. The reason the cloture rule is pivotal (and more pivotal than, say, the rules produced by the Rules Committee in the House) is that the Bicameralism Clause requires the House and Senate to agree and that, with tougher rules allowing a minority to block legislation, the Senate gains power relative to the House, which it is unlikely to give up. KREHBIEL, *supra* note 323, at 233 (arguing that the filibuster is pivotal and a more powerful explanation than rules granting parliamentary advantages); SINCLAIR, *supra* note 82, at 50 (“[I]n the House the majority can always prevail; in the Senate minorities can often block majorities.”).



or their idiosyncratic motives) that are crucial in understanding where to find textual compromises. A pivotal decision on a *text* is different from a pivotal *member* on any vote.<sup>347</sup> The rules show us points of decision where compromises are almost surely to be made about *text*, without having to identify particular moderate *coalitions* or *members*.<sup>348</sup>

As Miriam Jorgensen and Kenneth Shepsle long ago worried, identifying the moderate coalition may be quite difficult.<sup>349</sup> In fact, the rules may matter a good deal in making such a determination. A moderate member on a committee is not a necessarily a moderate member on cloture, and a moderate member on cloture is not necessarily a moderate member in conference committee.<sup>350</sup> As Shepsle argued in the context of committees, the “best deal” that can be cut “depends upon the procedural rules for amendments.”<sup>351</sup> For example, if one did not know the rules and incentives, one might assume that anyone offering a post-cloture amendment is a legitimate “moderate” seeking true compromise rather than an opponent opportunistically seeking to undo

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347. Even before a bill is brought up, a senator may inform his or her party leader of an intention to object, known as a “hold.” “Especially when floor time is short—before a recess or near the end of the session,” the power of the hold increases and “[a]s time becomes scarcer, a hold increasingly becomes a veto.” SINCLAIR, *supra* note 82, at 62. “Holds are frequent, and placing them has become standard operating procedure in the Senate.” *Id.* at 61. They are not part of Senate rules, but an informal custom: “What gives holds their bite is the implicit or explicit threat to filibuster the motion to proceed.” *Id.*

348. By contrast, see the complex analysis of McNollgast, *Positive Canons*, *supra* note 12, at 721–22. See also *id.* at 721 (“The influence of a member of the enacting coalition depends on three things: the ability of the member to control the agenda of the legislature, the relative amount of information about proposed alternatives and the preferences of others possessed by the member, and the details of the differences in policy objectives among members.”).

349. Jorgensen & Shepsle, *supra* note 31, at 47 (wondering whether “a legislator who speaks and votes against an amendment that ultimately passes, but who supports the amended legislation in the vote on final passage,” should “be considered part of the enacting coalition”); see also *id.* (“For example, a vote for an amendment, intended to kill a bill but failing to do so even though the amendment passes, may mistakenly qualify an individual as part of the enacting coalition . . .”); *id.* at 49 (“[W]e remain skeptical that the chasm of incoherence that haunts coalitions, and distinguishes them from individual decisionmakers, can be completely bridged.”). Decision theory avoids this “identify the coalition” problem by focusing on text.

350. SHEPSLE, *supra* note 7, at 99 (“*Who* the median is . . . depends upon who the participants in the group are.”); see *id.* at 124 (“Just as majority preferences in the entire legislature are identical to the preferences of the committee’s median voter, majority preferences inside a committee are a copy of the preferences of the committee’s median member.”).

351. *Id.* at 137.

the substitute's compromise.<sup>352</sup> The important point is to look at the particular text, not to assume an inevitable empirical truth based on a member's voting record or ideological scores.

It is in the text that one can find the best evidence as to whether the amendment is a real or false compromise. Does it repeat a prior amendment? Does it address an issue previously addressed in the substitute text introduced to induce cloture? With any textual change, it will be far more difficult to ascertain the moderate coalition than it will be to tell whether the text changed from proposal *A* to proposal *B*, and for lawyers, it is the *text* that counts. As Jerry Mashaw has argued, the early game theory literature asserted judges' role in heroic terms that could never be implemented.<sup>353</sup> Positive political theorists, unlike lawyers or legal academics, know Congress's rules and depend on them in conducting their analyses; they should step back a moment and consider that educating lawyers about the rules would, in fact, represent a significant contribution to lawyerly practice by simplifying their model for use in the real world of appellate judging. The rules themselves have limits; they will not solve every case, and when one is left with raw legislative debate, signaling theory is right to try to sift the wheat from the chaff by searching for "costly actions" rather than "cheap talk."<sup>354</sup>

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352. On opportunistic incentives and behavior, see McNollgast, *Positive Canons*, *supra* note 12, at 717.

353. MASHAW, *supra* note 30, at 99 ("If McNollgast means to suggest that legislative history is reliable only when it can be deployed in this sophisticated fashion . . . , they may have offered judges and administrators a tool that they cannot use."). McNollgast originally claimed, as a theoretical matter, that Bayesian analysis proved why simple status quo textualism could not be a rational result: rejecting more information (in the form of legislative history) to prefer the status quo was likely to be irrational. See McNollgast, *Intent*, *supra* note 12, at 23-35. This theoretical argument against textualism was not intended, in my view, to be an injunction to judges to use various forms of Bayesian analysis. To the extent that judges are being asked to find moderate coalitions, they are being asked to engage either in a fraud (statutes do not come with signs that any particular text is a "moderating" text) or in an analysis of voting patterns for which they are ill equipped.

354. In this piece, I do not attempt to offer a positive theory of a "costly" action, but rather suggest that any such theory must view a costly action as one in the context of the rules and, as existing signaling theory in part suggests, in terms of whether one is advocating for or against the bill. So, for example, admissions against interest—statements against an advocate's or opponent's own position—are more reliable than statements supporting one's own position.

**CONCLUSION**

Ever since Henry Hart and Albert Sacks offered their theory of legal process, scholars have been trying to either reject or improve upon it. Hart and Sacks caused a revolution by pushing scholars away from the common law and courts by introducing elements of legal analysis in considering legislation and administration. Unfortunately, that movement suffered from a tendency to imagine legislators and administrators in the image of judges. The judiciary does not exist at the center of the constitutional universe. If nothing else, a generation of work in political science has provided theories supported by empirical data showing that this is a rather narrow and unrealistic view. It is time that we have a *minor* Copernican revolution. It is time to reconsider the view that courts are the center of the constitutional universe. We must instead consider a new model of our “constitution entire” that is as knowledgeable about Congress’s processes as those of courts or other legal institutions.