A COMMENT ON THE POSITIVE CANONS PROJECT

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le' ji sla chur (n.): a body with no head and 535 bellies.

I

INTRODUCTION

In another in a series of impressive papers, McCubbins, Noll, and Weingast ("McNollgast") have deployed the machinery of positive political theory ("PPT") in order to make some sense of legislative intent and to provide guidance to those who must intuit it.[1] While some have suggested that legislative intent is, in fact, senseless,[2] and while McNollgast are certainly not naive about the Arrowian incoherence of collectivities (owing to preference cycles among those 535 bellies), they nonetheless have sought to provide a positive program of systematic guidance to judges on how best to make sense of legislation.

This project on positive interpretive canons is important, and one to which we hope legal scholars and practitioners will pay some attention. It is, however, evolving, and therefore contains a number of provocative, but underelaborated, possibilities. This brief commentary will raise some issues that require attention.

In the current article, as well as in another recent contribution,[3] the authors articulate criteria according to which an interested outside observer (for example, a judge) may identify the *composition* of an enacting coalition and the *contents* of their negotiated agreement. They borrow heavily from an analogy to the theory of incomplete contracts in economics. They reason that the legislative parties to a statutory "contract" will not wish to dot every *i* or cross every *t*, since the transaction costs of doing so are excessive, and unforeseen contingencies exist. The role of courts in such circumstances, they argue, "is to fill in the gaps in legislation by interpreting the intentions of the law's enacting coalition."[4]

In the view of McNollgast, the act of interpreting is a process of inference in which the court should regard statutory language as "a statement of the

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1. McNollgast, *The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3 (Winter 1994). "McNollgast" is a fictitious author combining the names of McCubbins, Noll, and Weingast.

2. Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239-56 (1992).

3. McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992).

4. McNollgast, *supra* note 1, at 9.

preferences of a fictitious decisionmaker who embodies the compromises that solve the [enacting coalition's] collective action problem."[5] Principles of interpretation must be reliable and consistent if an enacting coalition is to be spared from frequently revisiting legislative subjects. Thus, McNollgast envision a process of social optimization in which the legislature is saved the transaction costs associated with writing extremely specific legislation; instead, legislators can rely on interpretive canons that fill gaps in legislation in a manner consistent with the preferences of the "fictitious decisionmaker" embodying the enacting coalition.

II

INCOHERENCE, COMPROMISE, AND SILENCE IN LEGISLATION

The necessity of interpretation derives from the fact that statutory language does not always contain relevant plain meaning. Language may be ambiguous. Titles of a statute may contradict one another. Circumstances may arise in which the relevance or meaning of statutory language is vague. McNollgast assume that, while all these things may plague a statute, there is, nevertheless, an appropriate interpretive course of action. In particular, they stipulate that a statute constitutes a compromise among members of the enacting coalition. The purpose of positive interpretive canons is to permit a court to determine the nature of this compromise. To do so, the court must correctly identify the composition of the enacting coalition and its intentions.

But what if there is not such a compromise? Suppose an enacting coalition consists of two factions, *I* and *II*, the union of which is sufficiently numerous and strategically well situated to constitute a winning coalition. Suppose further that *I* and *II* disagree on a number of issues at hand and, while they have compromised on many points and embodied those deals in the statute directly, there are still some issues that have not yielded to compromise. For example, faction *I* may prefer approach *A* (unqualified support for the protection and enhancement of the nation's air resources), while faction *II* prefers approach *B* (permitting some degradation of air quality in, for example, pristine areas). Despite considerable effort, the two factions have not been able to resolve this impasse. Faction *I* reports that the constituencies for which it is an agent insist on the language contained in *A*; they cannot sign off on the bill unless *A* is written into it. Likewise, faction *II* cannot compromise its principals or its principles by retreating from the language in *B*. As a result, the enacting coalition writes *both* *A* and *B* into the statute as separate titles, even though the factions fully anticipate that circumstances might arise in which *A* stands in contradiction to *B*.

Why would an enacting coalition do such a thing? Putting the question more generally, in what circumstances might an enacting coalition purposely create

5. *Id.* at 12.

confusion about statutory meaning rather than enact a compromise between contending approaches?

In order to answer these questions, it is necessary to analyze the coalition's options more systematically. In the example at hand, there are actually five drafting options for statutory language: approach *A* alone (*A*); approach *B* alone (*B*); a compromise between *A* and *B* (*A/B*); both *A* and *B* included as separate titles (*AB*); or neither *A* nor *B* included (~*A*~*B*). We know that the contending factions of the enacting coalition rank *A* and *B* in opposite fashion. Indeed, it even appears to be the case that each would prefer no bill at all to one that contained only the approach of the other faction. Assuming this to be so, the only possibilities are bills in which they compromise over the approaches, include both alternatives, or intentionally maintain silence on the issues.

To make sense of this, we must first ask what it means to include both *A* and *B* in the statute. In our view, the choice of *AB*, to the exclusion of *A/B*, is precisely parallel to choosing a lottery over its expected value.[6] In rejecting a feasible hybrid like *A/B*, the members of the enacting coalition are effectively choosing to "take their interpretive chances" in subsequent litigation lotteries, much as one might choose a 50-50 chance at winning $100 over the certainty of receiving $50. In choosing *AB*, then, the enacting coalition is rejecting feasible compromises (if any) and choosing to take its chances in subsequent implementation stages.[7]

Our central point here is that, in contrast to pure error or oversight (of which even talented wordsmiths engaged in legislative drafting are the occasional victims), or to social optimization in which these wordsmiths consciously let stand some contradictions that just are not worth fixing (as McNollgast presume), the inclusion of *AB* in a bill may reflect *purposeful* action. Policy inconsistencies within a statute should be taken at face value, indicative of the fact that the enacting coalition is not a fictitious decisionmaker. Courts should take these contrary titles as prima facie evidence of the absence of coherence among members of the enacting coalition. By incorporating a policy lottery into a statute, the enacting coalition is, in effect, taking its chances by giving the courts a free shot at policymaking. Whenever the enacting coalition, or any other winning coalition, is sufficiently unhappy with an *ex post* exercise in judicial discretion, it may revisit the policy in question.

As alluded to earlier, a second case of incoherence is also possible. If inconsistent titles in a statute invite bureaucratic and judicial discretion, then what about silence? What if, in frustration over their differences between *A* and *B*, but unhappy with both compromise (*A/B*) and the "intersection-of-incompat-

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6. This same notion has been developed in another context by Fiorina. Morris Fiorina, *Legislative Choice of Regulatory Forms: Legal Process or Administrative Process?*, 39 PUB. CHOICE 33 (1982).

7. As the parenthetical qualification "if any" indicates, this result is most likely when a compromise is unavailable in principle. The human language is highly malleable and the human imagination extraordinarily creative; but there are certainly occasions where neither linguistic manipulation nor flights of creative fancy are sufficient to craft an acceptable compromise.

ibles" solution (AB), the factions of the enacting coalition decide to remain silent on the matter? In implementing the McNollgast canons, there is a danger that such silence will be interpreted as an instance of incomplete contracting, as the kind of gap which needs to be filled. While statutory silence may be such a gap, in which case it is appropriate for courts to try to make sense of the intentions of the enacting coalition, it may also be the case that the omission is there on purpose. Should a court fill intended and unintended gaps alike? Most would find it inappropriate for a court to fill an intended gap with its version of legislative intent since, in this instance, the gap itself is the intent of the enacting coalition.

The McNollgast statutory canons are appropriate to legislative compromises (modulo further qualifications noted below). However, because omission and the intersection-of-incompatibles solution are alternatives to compromise, these canons are incomplete. While it may sometimes be true that the enacting coalition simply does not find it worth correcting inconsistencies and omissions,[8] it is entirely plausible that these outcomes are a design feature of the legislation. Thus, the inclusion in a statute of A, B, AB, A/B, or $\sim A \sim B$ reflects coalitional choice. The cases of AB and $\sim A \sim B$ display an enacting coalition at odds with itself. It is unable to resolve all disagreements but unwilling to jettison the entire enterprise.[9]

Finally, it is also important to note that because omission and the intersection-of-incompatibles solution are very real possibilities, McNollgast's fictitious decisionmaker must be discarded. A unitary decisionmaker, even a fictitious one, cannot be incoherent in this fashion.[10]

III

IDENTIFYING THE ENACTING COALITION

McNollgast argue that courts must correctly determine the composition of the enacting coalition (several of their positive canons depend on this). Indeed, they insist that the courts correctly infer who was *decisive*. In this respect, they are quite persuasive in suggesting that there are strategic principles by which the court can distinguish the expression of coalitional sentiment from "cheap talk."

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8. Indeed this may even be the case most of the time; this is clearly an empirical question.

9. The McNollgast canons actually permit a stronger statement. Their positive canons provide a process for sifting through legislative statements, separating dross from gold. The process, however, is insufficiently refined to eliminate all dross, and there is no guarantee that the restricted record of legislative history is any less confusing about intent. Thus, there is the possibility that intentional inconsistency not only is to be found in the formal statute but also remains in the canonically restricted legislative history.

10. There is another reason for discarding the fictitious decisionmaker. Even if the problem of incoherence brought on by the intersection-of-incompatibles solution does not arise, it is nevertheless dangerous to impute full coherence to nonunitary actors. A compromise may, for example, constitute a structure-induced equilibrium of the legislative process. Kenneth Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27 (1979). But it should not be treated as the ideal point of a fully coherent enacting coalition behaving as if it were a fictitious decisionmaker.

This process is not quite as simple as it sounds, though. For instance, one McNollgast principle argues for excluding from the enacting coalition those who speak against "the legislation" at key points.[11] But is the thing being spoken against the original submission, the version produced by the subcommittee or the committee, or the version that ultimately passes the chamber? Might a legislator who speaks and votes against an amendment that ultimately passes, but who supports the amended legislation in the vote on final passage, be considered part of the enacting coalition? And, if so, while her or his views on those aspects of the bill that ultimately were amended should not carry any official weight in court interpretation, what about other expressed views that may, to some degree, be tainted by a preference for a version that did not prevail?

Another McNollgast principle gives particular weight to the words of those spokespersons who serve in some official agency relationship to a legislative chamber or an enacting coalition within it.[12] McNollgast's argument derives from the fact that such persons have a continuing interest in preserving their reputation and, as a consequence, are less likely to abuse opportunities to present views. Committee chairs or party leaders, for example, will be less likely to misrepresent the understanding reached by the enacting coalition of which they are a part, because it would prove costly to their subsequent ability to exercise influence; costly lying is a necessary condition for a statement not to constitute cheap talk. But, as McNollgast note all too briefly, it is not sufficient. The temptation for a windfall opportunity may be worth, in any given circumstance, the degradation in value of the spokesperson's future dealings, especially when discounted by time, likelihood of detection, and probability of sanction. The temptation is especially great for those who intend to move on to higher office or to retirement, for example. In order to assess the reliability of particular statements, the courts must be able to weigh the relative size of windfalls versus the present value of honorably representing the enacting coalition. Can this reasonably be expected of them?

In any particular application, it may be possible to sort out some of these issues through careful scrutiny of the legislative history. We certainly do not want to be pig-headed about it, but the McNollgast positive canons are too crude to provide much precision on this score yet. Even more tricky is the possibility of strategic voting behavior. The issue is whether a legislative history will be sufficiently subtle and sophisticated to reveal this. 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 on a naive reading of legislative history.

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11. McNollgast, *supra* note 1, at 21.
12. *Id.*

IV

THE OMNIBUS PARADOX

Most statutes contain a bundle of policy effects. The art of legislating requires packaging a collection of things together in a manner that elicits the approval of those sitting at veto gates and the support of chamber majorities. Litigation, on the other hand, typically involves the appropriate application of specific titles in specific circumstances. The problem for any body of positive canons is to provide guidance in precisely these specific circumstances when there are inherent *nonseparabilities*. In some cases, the guidance suggested by McNollgast will work. In others, however, the data from which to draw appropriate inferences simply may not be available. In an omnibus bill containing n titles, rarely are separate votes taken comparing it to each of the (n-1)-titled bills determined by deleting one title at a time. So, we often do not have sufficient grounds for asserting that any particular title, which may be the object of litigation, is supported by relevant majorities. At best, we know that relevant majorities and veto players bought the whole package.

Given the tenuous nature of inferring collective preference for specific titles in an omnibus setting, it is especially treacherous to extend the meaning of a given title to novel, unanticipated contingencies. One cannot quibble with the plain meaning of some specific title of a statute. Enacting majorities, after all, have approved it as part of a package in the full knowledge that it would be implemented, whether they approved of the title separately or not. One might think of the inclusion of such a title as the price one faction was prepared to pay to secure the support of another faction for some other portion of the bill. But to extend the scope of a title is to raise that price. At some price, parts of the enacting coalition would no longer be willing to buy the whole package.

The problem which the courts must face, then, is to determine legislative intent about individual titles, subject to litigation separately, but bound up seamlessly at the time of legislative choice as part of a giant logroll. Aspects of the statute's legislative history may, when processed according to positive canons of interpretation, be sufficient to sort this out. However, in the absence of a multitude of separate votes and/or statements entailing separate comparisons, this may prove difficult.[13]

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13. This raises the issue of "severability." The enacting coalition may reveal its intention concerning individual titles by explicitly stating that it wishes an (n-1)-titled version of a statute to stand, should one of the titles be knocked down by a court. If, however, the statute is silent on this matter, should a court presume the statute is a seamless web? Or should it fill in a gap and presume the statute is a collection of independently crafted titles, stitched together for legislative convenience, and hence severable? This is a difficult challenge for any set of interpretive canons.

V

CONCLUSION

The positive canons project marries the logic of signaling to PPT to enable inferences to be made about the intentions of an enacting coalition. We are impressed by the degree to which this work facilitates the reading of legislative history, and especially with the way in which the theory of costly signaling permits an outside observer to weigh various expressions of intent. However, we remain skeptical that the chasm of incoherence that haunts coalitions, and distinguishes them from individual decisionmakers, can be completely bridged. A legislative product contains omissions and commissions of inconsistency. Both derive from costly contracting and unforeseen contingencies, as well as from ex ante error. Alternatively, however, each may be the product of purposeful design; each may constitute a means for arriving at agreement when compromise fails. Positive canons of interpretation must leave room for these possibilities, and in their current incarnation, the McNollgast canons do not.

Having expressed some reservations, in conclusion let us reaffirm our belief that the positive canons project is of considerable importance, if only to bring clarity to a host of simple inferences that judges may safely make from a given legislative history about the intentions of an enacting coalition. McNollgast nowhere claim to be providing a comprehensive set of canons. Nor do they profess that their canons will always be sufficient. Rather, they do no more than provide some guidance, namely, inferences that necessarily follow from their model of legislative institutions and their views about cheap talk. One should not be discouraged by the fact that their positive canons do not do more. If one must feel discouraged, it should be about the fact that there are judges who cannot handle even the simple situations which the McNollgast positive canons address.