

# Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon

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## I. INTRODUCTION

Renewed interest in statutory interpretation has generated a plethora of different suggestions about how best to discern legislative meaning through the use of interpretive rules or “canons.”<sup>1</sup> The creation and employment of canons is not a new phenomenon; courts have long relied on interpretive shortcuts to help orient the inquiry into statutory meaning and legislative intent.<sup>2</sup> However, the last half-century or so has witnessed a growth in the use of canons of statutory construction to implement substantive values and to attempt to bring about improvements in the legislative process.<sup>3</sup> Indeed, many of the more controversial canons—and, to add to this, the use of traditional canons in more controversial ways—can be explained and justified only on the grounds that courts are wise to use interpretive rules to implement desirable results under the rubric of statutory interpretation.

Karl Llewellyn reminded us a half century ago that these canons can be manipulated through careful judicial technique to reach a desired result;<sup>4</sup> and, more recently, scholars of various political stripes have defended and attacked certain canons on the grounds that they mask outcome-oriented jurisprudence.<sup>5</sup> While much of this literature zeroes in on particular interpretive rules, we ask the more general question: What are we to make of the whole enterprise of canonical statutory construction in modern American law?

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1. See, e.g., James Brudney & Corey Distlear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2004); John Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003); Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002); *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002).

2. See, e.g., *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 203 (1819); *United States v. Bright*, 24 F. Cas. 1232, 1235 (C.C.D. Pa. 1809); *Green v. Bock Laundry Machine Company*, 490 U.S. 504 (1989) (absurdity canon); *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988) (the non-retroactivity of statutes); *Chan v. Korean Air Lines*, 109 S. Ct. 1676, 1683–84 & n.5 (1989) (*expressio unius canon*).

3. See the discussion in WILLIAM N. ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* (1994). See also William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

4. See Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950).

5. See, e.g., Manning, *Absurdity*, *supra* note 1; Eben Moglen & Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203 (1990).

To determine whether such approaches are normatively appealing, we must examine directly and rigorously the logic and architecture of the canons. To the extent that canons of statutory interpretation rest ultimately on assumptions about, and theories of, the legislative process, the case for canonical construction stands or falls on the plausibility of these assumptions and theories. We support this observation by close attention to one particular interpretive canon: the canon disfavoring legislative changes through the appropriations process. This canon provides an instruction to the courts to narrowly construe legislative changes to substantive authorization statutes where such changes are made through the appropriations process.

We argue that this canon rests on an impoverished analysis of the appropriations process and is, therefore, unjustified as a matter of positive political theory. And without a grounding in a sensible theory of legislation it lacks any plausible normative foundation. More generally, this ill-advised canon sheds light on the mistakes courts commonly make in fashioning canons whose rationale and function are untethered to a compelling normative and positive theory of the legislative process.

To frame our argument, we begin with an interesting, though ultimately unremarkable, case in which the court applied this canon. In 1991, Congress passed a statute entitled the Telephone Consumer Protection Act authorizing the Federal Communications Commission (FCC) to establish a single national database of individuals who object to receiving telephone solicitations.<sup>6</sup> For reasons presumably well known to the agency and its legislative benefactors, the FCC declined to create this so-called national “do-not-call” list; instead the FCC decided to adopt its own specialized do-not-call lists.<sup>7</sup> In what must have been muzak to the ears of the prisoners, third-world sweatshops, and the telemarketing industry, the FCC declared that individuals would like to maintain their ability to choose among those telemarketers from whom they do and do not want to hear.<sup>8</sup> Under the FCC’s system, if a telemarketer calls a consumer, the consumer can request that the telemarketer remove

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6. Telephone Consumer Protection Act of 1991, Pub. L. No. 102–243, 105 Stat. 2394 (1991) (codified as amended at 47 U.S.C. § 227 (2000)).

7. See *IN THE MATTER OF RULES AND REGULATIONS IMPLEMENTING THE TELEPHONE CONSUMER PROTECTION ACT OF 1991* (Oct. 16, 1992), at 9, para. 14.

8. See *id.* at 10, para. 15. Moreover, declared the FCC, a nationwide do-not-call list was “not an efficient, effective, or economic means of avoiding unwanted telephone solicitations.” *Id.*

his or her telephone number from the telemarketer's list.

Undaunted, Congress enacted the Telemarketing and Consumer Fraud and Abuse Prevention Act (TCFAP) in 1994 and charged a different agency, the Federal Trade Commission (FTC), with the responsibility to enact "rules prohibiting . . . abusive telemarketing acts or practices."<sup>9</sup> However, the act did not apply to organizations not regulated by the FTC, which includes "certain financial institutions, common carriers, air carriers and nonprofit organizations or to insurance companies . . . regulated by state law."<sup>10</sup> Subsequently, the FTC took action as directed by Congress and created the Telemarketing Sales Rule in order to combat abusive telemarketing practices.<sup>11</sup> In January 2002, the FTC underwent the process of amending the rules in order to create a nationwide do-not-call list. By June 2003, the do-not-call list was ready for public registration. Telemarketers, of course, filed suit to block the list.

In *U.S. Security, et al v. Federal Trade Commission*,<sup>12</sup> telemarketers claimed that Congress did not give an unambiguous grant of authority to the FTC necessary to enforce the do-not-call list. The district court agreed with the telemarketers and invalidated the FTC regulation.<sup>13</sup> In supporting his decision in the Oklahoma case, U.S. District Judge Lewis West noted that Congress was silent on the precise issue of whether the FTC possesses the authority to create a national do-not-call list and, therefore, Congress did not intend to give the agency this authority. The court conceded that "Congress expressly granted the authority to the FCC under the TCPA to establish and operate" a national do-not-call list. Congress also "charged the FTC under the TCFAP with the authority" to prevent abusive and deceptive telemarketing practices.<sup>14</sup> However, Judge West concluded that "the TCFAP is *silent* as to the FTC's authority to promulgate a do-not-call registry"<sup>15</sup> (emphasis added). It was then clear to Judge West that Congress did not grant the authority to the FTC necessary to establish the do-not-call list.<sup>16</sup> Judge

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9. 15 U.S.C. §§ 6101–6108.

10. 15 U.S.C. §§ 41–45, 6105(a).

11. See the description in *U.S. Security, et al. v. Federal Trade Comm'n*, No. CIV-03-122-W (Sept. 23, 2003), at 5–8.

12. No. CIV-03-122-W (W. Dist. Ok.) (9/23/03).

13. *Id.*

14. *Id.* at 11.

15. *Id.*

16. The FTC urged that under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), "[d]eference . . . to [the] agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity [or silence] constitutes an implicit delegation from Congress to the agency to fill in the statutory

West based his logic on the precedent in the *American Bus Association* decision<sup>17</sup>, stating that "Congress' failure to grant an agency a given power is not an ambiguity as to whether that power has, in fact, been granted. . .[A] statutory silence on the granting of a power is a denial of that power to the agency."<sup>18</sup>

Whether or not one agrees with the interpretation of the sounds of congressional silence in *American Bus*, Congress could not have rung the bell more loudly. Indeed, Congress, in enacting legislation granting appropriations to the FTC to implement TCFAP, specifically authorized the agency to use, as part of its funding for the registry, money derived from "fees sufficient to implement and enforce the do-not-call provisions of the Telemarketing Sales Rule."<sup>19</sup> Lest anyone would mistake their intentions, Congress labeled this piece of legislation the "Do-Not-Call Implementation Act."<sup>20</sup>

Asked to interpret TCFAP, the district court ignored what would seem to be the interpretation of legislative will most in accord with common sense: Congress had authorized FTC in 1994 to do essentially the same thing as it had (unsuccessfully) charged the FCC to do three years earlier. Moreover, Congress *reaffirmed* this intent in 2003 when it enacted two separate appropriations laws that specifically referred to the FTC's project, then well underway, of establishing and funding a national "do-not-call" list.<sup>21</sup> Therefore, in its defense, the FTC relied upon the theory that since tax dollars were appropriated to the agency for the implementation of the do-not-call list, Congress had conferred the appropriate power to the agency.

However, Judge West invoked a canon of statutory interpretation to temper the impact of these congressional decisions. The canon, created by the Supreme Court in *Tennessee Valley Authority v. Hill*,<sup>22</sup> disfavors congressional changes in substantive legislation through the appropriations

gaps." To Judge West, the flaw with this contention rested on the fact that half of this "implicit delegation" was given to the FCC under the TCPA, not the FTC.

17. *Am. Bus. Ass'n v. Slater*, 231 F.3d 1, 8 (D.C. Cir. 2000) (Sentelle, J., concurring).

18. *Id.* at 13.

19. Consolidated Appropriations Resolution, Pub. L. No. 108-07, 117 Stat. 11 (2003) and the Do-Not-Call Implementation Act, Pub. L. No. 108-10, 117 Stat. 557 (2003).

20. Pub.L. No. 108-10 (Mar. 11, 2003).

21. *See* Consolidated Appropriations Resolution, Pub. L. No. 108-07 (Feb. 20, 2003).

22. 437 U.S. 153 (1978).

process. The presumption is that Congress did not intend, by its decision in the appropriations process, to alter the authorizing statute. Rather, as the district court says in *U.S. Security*, “the appropriation must plainly show a purpose to bestow the precise authority which is claimed.”<sup>23</sup> The *TVA* Court grounded this presumption in the logic of the hoary rule that “repeals by implication are not favored.”<sup>24</sup> This rule, said the Court, “applies with full vigor when . . . the subsequent legislation is an appropriations measure.”<sup>25</sup>

Rejecting a clear statement of congressional intent in a case where it is exactly the will of Congress that is in question is a peculiar choice to make.<sup>26</sup> However, this move is characteristic of courts struggling and straining to invent and apply increasingly opaque and convoluted canons of statutory construction to take the place of a fair, informed appraisal of legislative intent.<sup>27</sup>

Liberals and conservatives are both to blame for this mess. In recent years, judicial conservatives champion an approach to statutory interpretation labeled “textualism,” that is, fidelity to the so-called plain meaning of legislation.<sup>28</sup> Unfortunately, words enacted into law by 535 opinionated legislators, plus the president, require interpretation and the exercise of careful judgment. Where, as here, the statute does not specifically say “FTC, you may (or may not) enact a national do-not-call list,” informed judgment is called upon to discern what authority Congress intended the agency to have. Slavish devotion to the purportedly “plain meaning” of the TCFAP does not provide a ready answer. At the other end of the political spectrum, courts are told to eschew the “dead hand” of the past and instead to prefer more “progressive” approaches to interpreting

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23. See *U.S. Security*, *supra* note 11, at 14 (quoting *Ex Parte Mitsuye Endo*, 323 U.S. 283, 303 n.24 (1944)).

24. See *TVA*, 437 U.S. at 189–90.

25. *Id.*

26. In addition, Congress immediately took action by passing legislation allowing for the national do-not-call registry, effectively rendering moot federal judge’s injunction against registry which had been granted to the telemarketers in *U.S. Security v. F.T.C.* Within forty-eight hours, Congress drafted this legislation specifically authorizing the FTC to promulgate the do-not-call list. As if there was really any doubt about congressional intent, the bill passed 95-0 in the Senate and 412-8 in the House. Some lawmakers deemed it the “This Time We Really Mean It Act.” The purpose of the bill was to give the FTC power to carry forward with the do-not-call list, and especially cure any judicial misunderstanding.

27. See *supra* text accompanying note 2.

28. See, e.g., John Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

legislation over approaches that follow the real will of the legislature.<sup>29</sup>

The do-not-call registry episode illustrates the ways in which courts confound the legislative process through their fidelity to various rules of statutory interpretation. Canonical construction of the sort represented by Judge West's opinion in *U.S. Security* rests on a series of questionable assumptions about legislative behavior and performance. Too, canons such as the appropriations canon are dubious as a matter of constitutional logic as well. The fault lies, of course, not with Judge West's application of this canon in this particular case but, rather, with the development of canon by the Supreme Court, with the thin efforts of scholars to explain and justify this canon and, ultimately, with the failure of courts and commentators to ground canonical construction in a sensible and sophisticated theory of lawmaking and of American constitutionalism.

Our objective in this article is to reflect upon this failure and, more generally, upon the broad themes which animate the modern debate about statutory interpretation. We do this by focusing closely upon one canon of construction. While perhaps unremarkable in the pantheon of interpretive canons, the appropriations canon illustrates well our principal objections to the theoretically and empirically unsustainable approach to legislative interpretation reflected in cases such as *U.S. Security*.

The article proceeds as follows: In the next part, we look at the origins and logic of the appropriations canon, focusing both on the rationales advanced for its use and also by the related rationales for process-perfecting canonical construction more generally. We call into question the assumptions upon which this approach is based and, thereby, the rationale for the canon. In Part III, we offer reasons for an approach to interpreting appropriations legislation that is opposed to the traditional approach, explaining how our approach fits better with a sound theory of the performance of Congress and with the constitutional structure of lawmaking. Lastly, in Part IV, we draw from this consideration of the appropriations canon some lessons for the modern statutory interpretation debate.

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

## II. THE APPROPRIATIONS CANON

### A. *The Canon's Origins*

The appropriations canon was established by the Supreme Court in *TVA v. Hill*;<sup>30</sup> it was reaffirmed plainly fourteen years later in *Robertson v. Seattle Audubon Society*.<sup>31</sup> To understand the structure and rationale of the canon—and, indeed, to understand its flaws—it is important to be familiar with the legislative history that underlies the Court's canonical construction in these two cases. We turn first to *TVA*, often labeled the “snail darter” case.

The story of the controversial Tellico Dam and Reservoir Project began in 1967, more than a decade before the Supreme Court rendered its decision in *TVA*. Congress appropriated funds for the development of this multipurpose regional development project, a project that included a dam to be placed on the Little Tennessee River.<sup>32</sup> From the very beginning, the Tellico Dam project was ensnared in lawsuits. One major lawsuit involved a claim that the dam violated the Endangered Species Act (ESA) of 1973.<sup>33</sup> The claim, not seriously disputed by the respondents in the *TVA* litigation, was that the dam would imperil the critical habitat of the snail darter (a fish, not a mollusk), a species endangered within the clear terms of the ESA.

Among the arguments made by the respondents in this litigation was that Congress had enacted legislation after the ESA, which essentially removed the Tellico Dam project from the prohibitions of the environmental statute.<sup>34</sup> This legislation was not an amendment to the ESA per se; nor was it a specific repeal of that act. Rather, so the argument goes, the congressional decisions to continue to appropriate funds for the building of the Tellico Dam constitutes an implied repeal of the ESA *to the extent that it applies to the dam project*.<sup>35</sup>

The labyrinthine process by which Congress considered whether and how to proceed with the construction of the Tellico Dam, notwithstanding the enactment of the ESA, is described in detail by the Chief Justice Burger in his opinion for the Court in *TVA*:

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30. 437 U.S. 153 (1978).

31. 503 U.S. 429 (1992).

32. See generally *Environmental Defense Fund v. TVA*, 339 F. Supp. 806, 808 (Tenn. 1972).

33. 16 U.S.C. § 1536 *et seq.*

34. See *infra* text accompanying note 37.

35. See *infra* text accompanying note 38.



... Congress had also become involved in the fate of the snail darter. Appearing before a Subcommittee of the House Committee on Appropriations in April 1975—some seven months before the snail darter was listed as endangered—TVA representatives described the discovery of the fish and the relevance of the Endangered Species Act to the Tellico Project. (citations omitted). At that time TVA presented a position which it would advance in successive forums thereafter, namely, that the Act did not prohibit the completion of a project authorized, funded, and substantially constructed before the Act was passed. TVA also described its efforts to transplant the snail darter, but contended that the dam should be finished regardless of the experiment's success. Thereafter, the House Committee on Appropriations, in its June 20, 1975, Report, stated the following in the course of recommending that an additional \$ 29 million be appropriated for Tellico:

“The *Committee* directs that the project, for which an environmental impact statement has been completed and provided the Committee, should be completed as promptly as possible . . .” H. R. Rep. No. 94-319, p. 76 (1975). (Emphasis added.) Congress then approved the TVA general budget, which contained funds for continued construction of the Tellico Project. (TVA projects generally are authorized by the Authority itself and are funded—without the need for specific congressional authorization—from lump-sum appropriations provided in yearly budget grants. (citations omitted) In December 1975, one month after the snail darter was declared an endangered species, the President signed the bill into law. (citations omitted).

In February 1976, pursuant to § 11 (g) of the Endangered Species Act, 87 Stat. 900, 16 U. S. C. § 1540 (g) (1976 ed.), . . . respondents filed the case now under review, seeking to enjoin completion of the dam and impoundment of the reservoir on the ground that those actions would violate the Act by directly causing the extinction of the species *Percina (Imostoma) tanasi*. The District Court denied respondents' request for a preliminary injunction and set the matter for trial. Shortly thereafter the House and Senate held appropriations hearings which would include discussions of the Tellico budget.

At these hearings, TVA Chairman Wagner reiterated the agency's position that the Act did not apply to a project which was over 50% finished by the time the Act became effective and some 70% to 80% complete when the snail darter was officially listed as endangered. It also notified the Committees of the recently filed lawsuit's status and reported that TVA's efforts to transplant the snail darter had “been very encouraging” (citations omitted).

... [T]he District Court stressed that the entire project was then about 80% complete and, based on available evidence, “there [were] no alternatives to impoundment of the reservoir, short of scrapping the entire project.” . . . The court also noted that the Endangered Species Act of 1973 was passed some seven years after construction on the dam commenced and that Congress had continued appropriations for Tellico, with full awareness of the snail darter problem. . . . Where there has been an irreversible and irretrievable commitment of

resources by Congress to a project over a span of almost a decade, the Court should proceed with a great deal of circumspection.”

...To accept the plaintiffs’ position, the District Court argued, would inexorably lead to what it characterized as the absurd result of requiring “a court to halt impoundment of water behind a fully completed dam if an endangered species were discovered in the river on the day before such impoundment was scheduled to take place. We cannot conceive that Congress intended such a result.”<sup>36</sup>

The Supreme Court continued with its recounting of the history of the Tellico Dam legislation, noting that Congress expressed, in the appropriations process, its clear intent to complete the dam:

Less than a month after the District Court decision, the Senate and House Appropriations Committees recommended the full budget request of \$ 9 million for continued work on Tellico. (citations omitted). In its Report accompanying the appropriations bill, the Senate Committee stated: “During subcommittee hearings, TVA was questioned about the relationship between the Tellico project’s completion and the November 1975 listing of the snail darter (a small 3-inch fish which was discovered in 1973) as an endangered species under the Endangered Species Act. TVA informed the Committee that it was continuing its efforts to preserve the darter, while working towards the scheduled 1977 completion date. TVA repeated its view that the Endangered Species Act did not prevent the completion of the Tellico project, which has been under construction for nearly a decade. The subcommittee brought this matter, as well as the recent U.S. District Court’s decision upholding TVA’s decision to complete the project, to the attention of the full Committee. *The Committee does not view* the Endangered Species Act as prohibiting the completion of the Tellico project at its advanced stage and directs that this project be completed as promptly as possible in the public interest.” S. Rep. No. 94-960, *supra*, at 96. (Emphasis added.)

On June 29, 1976, both Houses of Congress passed TVA’s general budget, which included funds for Tellico; the President signed the bill on July 12, 1976. (citations omitted).<sup>37</sup>

In the preceding passages (and, indeed, in the following passage), the Court’s repeated emphasis on the actions of the House and Senate Appropriations Committees foreshadows the reasons underlying the Justices’ decision. The Court then summarizes the subsequent reversal by the Circuit Court of Appeals of the District Court’s decision, and describes subsequent actions prior to the Supreme Court’s writ of certiorari:

Following the issuance of the permanent injunction, members of TVA’s Board of Directors appeared before Subcommittees of the House and Senate Appropriations Committees to testify in support of continued appropriations for

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36. *TVA*, 437 U.S. at 166–67.

37. *Id.* at 167.

Tellico. The Subcommittees were apprised of all aspects of Tellico's status, including the Court of Appeals' decision. TVA reported that the dam stood "ready for the gates to be closed and the reservoir filled," (citations omitted), and requested funds for completion of certain ancillary parts of the project, such as public use areas, roads, and bridges. As to the snail darter itself, TVA commented optimistically on its transplantation efforts, expressing the opinion that the relocated fish were "doing well and [had] reproduced."

Both Appropriations Committees subsequently recommended the full amount requested for completion of the Tellico Project. In its June 2, 1977, Report, the House Appropriations Committee stated: "It is *the Committee's view* that the Endangered Species Act was not intended to halt projects such as these in their advanced stage of completion, and [the Committee] strongly recommends that these projects not be stopped because of misuse of the Act." H. R. Rep. No. 95-379, p. 104. (Emphasis added.) As a solution to the problem, the House Committee advised that TVA should cooperate with the Department of the Interior "to relocate the endangered species to another suitable habitat so as to permit the project to proceed as rapidly as possible." Toward this end, the Committee recommended a special appropriation of \$2 million to facilitate relocation of the snail darter and other endangered species which threatened to delay or stop TVA projects. Much the same occurred on the Senate side, with its Appropriations Committee recommending both the amount requested to complete Tellico and the special appropriation for transplantation of endangered species. Reporting to the Senate on these measures, the Appropriations Committee took a particularly strong stand on the snail darter issue: "This *committee has not viewed* the Endangered Species Act as preventing the completion and use of these projects which were well under way at the time the affected species were listed as endangered. If the act has such an effect, which is contrary to *the Committee's understanding* of the intent of Congress in enacting the Endangered Species Act, funds should be appropriated to allow these projects to be completed and their benefits realized in the public interest, the Endangered Species Act notwithstanding." (citations omitted). (Emphasis added.)

TVA's budget, including funds for completion of Tellico and relocation of the snail darter, passed both Houses of Congress and was signed into law on August 7, 1977 (citations omitted).<sup>38</sup>

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38. *Id.* at 170-71. A similar accounting of this episode, but with a rather different conclusion, is given by Justice Powell in his dissenting opinion in *TVA*:

In 1975, 1976, and 1977, Congress, with full knowledge of the Tellico Project's effect on the snail darter and the alleged violation of the Endangered Species Act, continued to appropriate money for the completion of the Project. In doing so, the Appropriations Committees expressly stated that the Act did not prohibit the Project's completion, a view that Congress presumably accepted in approving the appropriations each year. For example, in June 1976, the Senate Committee on Appropriations released a report noting the District Court decision and recommending approval of TVA's full budget request for the Tellico Project. The Committee observed further that it did "not view the Endangered Species Act as prohibiting the completion of the Tellico project at its advanced stage," and it

In rejecting this implication of the legislative history, The Court in *TVA* reads the ESA as plainly obliging the government to protect the critical habitat of the snail darter and thereby to shut down the Tellico Dam. This conclusion follows from the clear injunction of the ESA.<sup>39</sup> “The plain intent of Congress in enacting this statute,” declared the Court, “was to halt and reverse the trend toward species extinction, whatever the cost.”<sup>40</sup>

In his dissenting opinion, Justice Powell insists that this conclusion reads the statute as requiring an absurd result, in violation of a major

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directed “that this project be completed as promptly as possible in the public interest.” The appropriations bill was passed by Congress and approved by the President.

The Court of Appeals for the Sixth Circuit nevertheless reversed the District Court in January 1977. It held that the Act was intended to create precisely the sort of dramatic conflict presented in this case: “Where a project is on-going and substantial resources have already been expended, the conflict between national incentives to conserve living things and the pragmatic momentum to complete the project on schedule is most incisive.” 549 F.2d 1064, 1071 . . . .

In June 1977, and after being informed of the decision of the Court of Appeals, the Appropriations Committees in both Houses of Congress again recommended approval of TVA’s full budget request for the Tellico Project. Both Committees again stated unequivocally that the Endangered Species Act was not intended to halt projects at an advanced stage of completion: “[The Senate] Committee has not viewed the Endangered Species Act as preventing the completion and use of these projects which were well under way at the time the affected species were listed as endangered. If the act has such an effect, which is contrary to the Committee’s understanding of the intent of Congress in enacting the Endangered Species Act, funds should be appropriated to allow these projects to be completed and their benefits realized in the public interest, the Endangered Species Act notwithstanding.” “It is the [House] Committee’s view that the Endangered Species Act was not intended to halt projects such as these in their advanced stage of completion, and [the Committee] strongly recommends that these projects not be stopped because of misuse of the Act.”

Once again, the appropriations bill was passed by both Houses and signed into law.

39. “One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies “to *insure* that actions *authorized, funded, or carried out* by them do not *jeopardize* the continued existence” of an endangered species or “*result* in the destruction or modification of habitat of such species . . . .” 16 U.S.C. § 1536 (1976 ed.) (emphasis added). This language admits of no exception. Nonetheless, petitioner urges, as do the dissenters, that the Act cannot reasonably be interpreted as applying to a federal project which was well under way when Congress passed the Endangered Species Act of 1973. To sustain that position, however, we would be forced to ignore the ordinary meaning of plain language. It has not been shown, for example, how TVA can close the gates of the Tellico Dam without “*carrying out*” an action that has been “*authorized*” and “*funded*” by a federal agency.” *TVA*, 437 U.S. at 173.

40. *TVA*, 437 U.S. at 184.

canon of construction;<sup>41</sup> moreover, the Court's decision, insists Justice Powell, ignores another canon as well—the presumption against retroactive statutory effects.<sup>42</sup>

The most unfortunate aspect of the Court's judgment goes without mention by the dissenting justices, that is, the invocation of the new canon, that legislative changes through appropriations are disfavored. With regard to the lengthy legislative history recounted above, the Court observes:

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41. *TVA*, 437 U.S. at 196. This canon of construction, frequently referred to as the absurdity doctrine, permits judges to disregard the plain meaning of the statutory language when it would lead to absurd, or perhaps unconstitutional, results. For examples of the use of this canon, *see, e.g.*, *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 203 (1819), *United States v. Bright*, 24 F. Cas. 1232, 1235 (C.C.D. Pa. 1809) (No. 14,647), and *Green v. Bock Laundry Machine Company*, 490 U.S. 504 (1989).

42. "Today the Court, like the Court of Appeals below, adopts a reading of § 7 of the Act that gives it a retroactive effect and disregards 12 years of consistently expressed congressional intent to complete the Tellico Project. With all due respect, I view this result as an extreme example of a literalist construction, not required by the language of the Act and adopted without regard to its manifest purpose. Moreover, it ignores established canons of statutory construction: "[Frequently] words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act." *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892). The result that will follow in this case by virtue of the Court's reading of § 7 makes it unreasonable to believe that Congress intended that reading. Moreover, § 7 may be construed in a way that avoids an "absurd result" without doing violence to its language. *TVA*, 437 U.S. at 202, 204–05.

... This is a reasonable construction of the language and also is supported by the presumption against construing statutes to give them a retroactive effect. As this Court stated in *United States Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908), the "presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other." This is particularly true where a statute enacts a new regime of regulation. For example, the presumption has been recognized in cases under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, holding that the requirement of filing an environmental impact statement cannot reasonably be applied to projects substantially completed. *E.g.*, *Pizitz, Inc. v. Volpe*, 467 F.2d 208 (5th Cir. 1972); *Ragland v. Mueller*, 460 F.2d 1192 (5th Cir. 1972); *Greene County Planning Board v. FPC*, 455 F.2d 412, 424 (2d Cir.), *cert. denied*, 409 U.S. 849. *TVA*, 437 U.S. at 205–06 (Powell, J., dissenting).

On the foundations and sources of the non-retroactivity of statutory effects, *see* Eskridge and Frickey, *infra* note 150, at 457–81 (1988).

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. These appropriations, in fact, represented relatively minor components of the lump-sum amounts for the *entire* TVA budget. (The Appropriations Acts did not themselves identify the projects for which the sums had been appropriated; identification of these projects requires reference to the legislative history. See n. 14, *supra*. Thus, unless a Member scrutinized in detail the Committee proceedings concerning the appropriations, he would have no knowledge of the possible conflict between the continued funding and the Endangered Species Act.) To find a repeal of the Endangered Species Act under these circumstances would surely do violence to the “cardinal rule . . . that repeals by implication are not favored.” (*Morton v. Mancari*, 417 U.S. 535, 549 (1974), quoting *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936))

The doctrine disfavoring repeals by implication “applies with full vigor when . . . the subsequent legislation is an *appropriations* measure.” (quoting *Committee for Nuclear Responsibility v. Seaborg*, 149 U. S. App. D. C. 380, 382, 463 F.2d 783, 785 (1971) (emphasis added); *Environmental Defense Fund v. Froehlke*, 473 F.2d 346, 355 (CA8 1972). This is perhaps an understatement since it would be more accurate to say that the policy applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act. We recognize that both substantive enactments and appropriations measures are “Acts of Congress,” but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need. House Rule XXI (2), for instance, specifically provides: “No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works as are already in progress. *Nor shall any provision in any such bill or amendment thereto changing existing law be in order.*” (Emphasis added).<sup>43</sup>

The court makes several assumptions in drawing a new canon from the list of canonical strictures that the Supreme Court had previously adopted, and in contravention of several other canons (as Llewellyn could have foretold). We discuss these assumptions at greater length below. For now, notice the basic assumption underlying the Court’s treatment of the legislative history: that Congress could not possibly have meant to limit the scope of the ESA by its repeated decisions to expend money for the building of the Tellico Dam; rather, they would be read as intending to do so only where they (a) had put into the language of the ESA a stipulation that the Tellico Dam project would not be

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43. *TVA*, 437 U.S. at 189–91.

disturbed by this legislation, or (b) had specifically and unambiguously repealed the ESA to the extent that it covered critical habitats in the Tellico Dam region.

Moreover, the Supreme Court went out of its way to show its distaste for what it saw as the nondeliberative nature of the Congressional appropriations process:

Perhaps mindful of the fact that it is “swimming upstream” against a strong current of well-established precedent, TVA argues for an exception to the rule against implied repeals in a circumstance where, as here, Appropriations Committees have expressly stated their “understanding” that the earlier legislation would not prohibit the proposed expenditure. We cannot accept such a proposition. 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. First, the Appropriations Committees had no jurisdiction over the subject of endangered species, much less did they conduct the type of extensive hearings which preceded passage of the earlier Endangered Species Acts, especially the 1973 Act. We venture to suggest that the House Committee on Merchant Marine and Fisheries and the Senate Committee on Commerce would be somewhat surprised to learn that their careful work on the substantive legislation had been undone by the simple—and brief—insertion of some inconsistent language in Appropriations Committees’ Reports.

Second, there is no indication that Congress as a whole was aware of TVA’s position, although the Appropriations Committees apparently agreed with petitioner’s views. Only recently, in *SEC v. Sloan*, 436 U.S. 103 (1978), we declined to presume general congressional acquiescence in a 34-year-old practice of the Securities and Exchange Commission, despite the fact that the Senate Committee *having jurisdiction over the Commission’s activities* had long expressed approval of the practice. MR. JUSTICE REHNQUIST, speaking for the Court, observed that we should be “extremely hesitant to presume general congressional awareness of the Commission’s construction based only upon a few isolated statements in the thousands of pages of legislative documents.” *Id.*, at 121. *A fortiori*, we should not assume that petitioner’s views—and the Appropriations Committees’ acceptance of them—were any better known, especially when the TVA is not the agency with primary responsibility for administering the Endangered Species Act.<sup>44</sup>

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44. *TVA*, 437 U.S. at 191–92. The Supreme Court then questioned the actual intent of Congress, as if the committee reports were genuine reflections of this intent, arguing that the TVA misled the appropriations committees in its statements and thus the Court questioned the context of the committees’ and later Congress’s decisions:

Quite apart from the foregoing factors, we would still be unable to find that in this case “the earlier and later statutes are irreconcilable,” *Mancari*, 417 U.S., at 550; here it is entirely possible “to regard each as effective.” *Id.* at 551. The starting point in this analysis must be the legislative proceedings leading to the 1977 appropriations since the earlier funding of the dam occurred prior to the listing of

Recounting at length the Court's discussion of the facts of the Tellico Dam episode helps shed light on the question which undergirded the Court's creation of the appropriations canon. Clearly, the Court looked skeptically at Congress's decisions regarding the dam and its future within the appropriations process. The Court was dubious that Congress focused squarely on the inconsistency between the charge of the ESA and the pursuit of the Tellico Dam project; and, more broadly, they questioned the extent to which Congress as a whole grasped the impact of what the appropriations committees were recommending. In the end, the appropriations process in the House and Senate was described, if indirectly, as just so many hidden legislative machinations. And, implicitly, the process by which the ESA came about in 1973 was viewed as both ordinary and salutary.

The same considerations underlay the Court's decision in 1992 in *Robertson v. Seattle Audubon Society*.<sup>45</sup> *Robertson*, like *TVA*, involved a major environmental dispute involving the ESA. In this case, the dispute arose from the decision of the Forest Service to prohibit timber harvesting in the Pacific Northwest because such harvesting would disturb the habitat of the northern spotted owl, an endangered species under the ESA. The essential claim of the loggers was that Congress

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the snail darter as an endangered species. In all successive years, TVA confidently reported to the Appropriations Committees that efforts to transplant the snail darter appeared to be successful; this surely gave those Committees some basis for the impression that there was no direct conflict between the Tellico Project and the Endangered Species Act. Indeed, the special appropriation for 1978 of \$ 2 million for transplantation of endangered species supports the view that the Committees saw such relocation as the means whereby collision between Tellico and the Endangered Species Act could be avoided. It should also be noted that the Reports issued by the Senate and House Appropriations Committees in 1976 came within a month of the District Court's decision in this case, which hardly could have given the Members cause for concern over the possible applicability of the Act. This leaves only the 1978 appropriations, the Reports for which issued after the Court of Appeals' decision now before us. At that point very little remained to be accomplished on the project; the Committees understandably advised TVA to cooperate with the Department of the Interior "to relocate the endangered species to another suitable habitat so as to permit the project to proceed as rapidly as possible." H. R. Rep. No. 95-379, p. 11 (1977). It is true that the *Committees* repeated their earlier expressed "view" that the Act did not prevent completion of the Tellico Project. Considering these statements in context, however, it is evident that they "represent only the personal views of these legislators," and "however explicit, [they] cannot serve to change the legislative intent of Congress expressed before the Act's passage." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974).

*TVA*, 437 U.S. at 102-93.

45. 503 U.S. 429 (1992).



had enacted, through the appropriations process, legislation which authorized some timber logging in these areas, notwithstanding the ESA. This legislation, found in Section 318 of the Department of the Interior and Related Agencies Appropriations Act of 1990, created the Northwest Timber Compromise.<sup>46</sup> As its name suggests, this Act reflected Congress's judgment that the severe prohibition of logging required by a strict reading of the ESA should be tempered by the identified interest in harvesting "within a geographically and temporally limited domain."<sup>47</sup> The scope of this change was quite limited, however. The Compromise applied only to thirteen national forests in Oregon and Washington;<sup>48</sup> and it expired automatically on September 30, 1990.<sup>49</sup> Despite the limited scope of this provision, environmental groups argued that Congress had repealed key sections of the ESA by implication, insofar as these provisions protected the spotted owl habitat in the areas covered by the Timber Compromise. Apparently, Congress and its committees had not learned the lesson of *TVA*.

Although the Court reached its ultimate judgment on other grounds, it did discuss the appropriations canon announced in *TVA v. Hill*. Rejecting the lower court's judgment that the relevant subsection of the appropriations act "'could not' effect an implied modification of substantive law because it was embedded in an appropriations measure,"<sup>50</sup> the Court in *Robertson* made clear that "Congress . . . may amend substantive law in an appropriations statute, as long as it does so clearly."<sup>51</sup> Taking back with one hand what it gave with another, though, the Court reiterated that "repeals by implication are especially disfavored in the appropriations context."<sup>52</sup> Therefore, *Robertson* is rightly read as a reaffirmation of the appropriations canon invented in *TVA*. At the same time, *Robertson* is important for its holding that Congress can repeal, through explicit appropriations legislation, parts of the ESA and similarly clear substantive legislation.

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46. 103 Stat. 745.

47. *Robertson*, 503 U.S. at 433.

48. § 318(i).

49. § 318(k).

50. *Id.* at 440.

51. *Id.*

52. *Id.*

## B. *The Canon's Rationale*

From where does this idea that legislative changes through the appropriations process are disfavored derive? The Court in *TVA* based its canon not upon any overarching theory of the appropriations process, but, rather, on the longstanding interpretive rule that repeals by implication are disfavored.<sup>53</sup> Implied repeals have long been viewed by the courts as spurious.<sup>54</sup> The essential concern is that the legislature may be unaware of the impact of its current decision on existing law. Requiring explicit repeals gives the courts confidence that Congress has focused squarely on the consequences of legislative action. In an 1842 case, Justice Joseph Story for the Court argued that “[t]he more natural, if not the necessary inference . . . is that the legislature intend the new laws to be auxiliary to and in aid of the purposes of the old law, even when some of the cases provided for may equally be within the reach of each.”<sup>55</sup> Accordingly, says Justice Story, “[t]here certainly, under such circumstances, ought to be a manifest and total repugnancy in the provisions to lead to the conclusion that the latter laws abrogated, and were designed to abrogate the former.”<sup>56</sup>

Repeals by legislative action can come about in two different ways: Either Congress can specifically supplant an earlier statute, or Congress can enact legislation which repeals earlier legislation by implication. This second category include situations in which “provisions in the two acts are in irreconcilable conflict” and where “the later act covers the whole subject of the earlier one and is clearly intended as a substitute . . . .”<sup>57</sup> In any event, “the intention of the legislature to repeal must be clear and manifest; otherwise, at least as a general thing, the later act is to be construed as a continuation of, and not a substitute for, the first act and will continue to speak, so far as the two acts are the same, from the time of the first enactment.”<sup>58</sup>

The seminal modern case is *Morton v. Mancari*.<sup>59</sup> In *Morton*, the Court considered federal legislation concerning hiring preferences in the Indian service. In 1934, Congress enacted a law providing for preferences for Indians in hiring by the Bureau of Indian Affairs.<sup>60</sup> In

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53. See *TVA*, 437 U.S. at 189–90.

54. See *Morton v. Mancari*, 417 U.S. 535, 549–50 (1974).

55. *Wood v. United States*, 41 U.S. 342, 363 (1842).

56. *Id.*

57. *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936).

58. See *id.* See also *United States v. Tynen*, 11 Wall. 88, 92; *Red Rock v. Henry*, 106 U.S. 596; *United States v. Claflin*, 97 U.S. 546.

59. 417 U.S. 535 (1974).

60. Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 461 et seq.

the 1964 Civil Rights Act, Congress specifically exempted tribal employment from the coverage of Title VII.<sup>61</sup> Eight years later, Congress expanded the scope of anti-discrimination legislation to include federal employment.<sup>62</sup> The question before the Court in *Morton* was whether these statutes effectively repealed the Indian hiring preference created in 1934.

In addition to legislative history in 1964 and 1972 suggesting that the preference was intended to be kept intact,<sup>63</sup> the Court invoked the canon disfavoring repeals by implication. Somewhat curiously, the Court observed that “[a] provision aimed at furthering Indian self-government by accord[ing] an employment preference within the BIA for qualified members of the governed group can readily co-exist with a general rule prohibiting employment discrimination on the basis of race.”<sup>64</sup> Yet, the issue in *Morton* was precisely whether proscribing employment discrimination without exempting Indians was evidence that Congress intended to nonetheless exempt Indians.<sup>65</sup>

The key step in *TVA*, echoed in *Robertson*, was to equate substantive changes within the appropriations process with the disfavored repeals by implication.<sup>66</sup> As the Court says in *TVA*, this presumption applies “with full vigor” when an appropriations measure is at issue.<sup>67</sup> The connection between these two interpretive rules rests on the assumption that legislatures do not deliberate adequately when they are occupied with

61. See ROY BROOKS, ET AL., *CIVIL RIGHTS LITIGATION: CASES AND PERSPECTIVES* 397–559 (2d ed. 2000).

62. *Id.*

63. For example, when discussing the 1964 Civil Rights Act, the Senate sponsor, Senator Humphrey, stated on the floor that: “This exemption [excluding tribal employment from the coverage of Title VII] is consistent with the Federal Government’s policy of encouraging Indian employment and with the special legal position of Indians” 110 Cong. Rec. 12723 (1964). In a similar manner, Senator Mundt supported this exemption by arguing that it would allow Indians “to benefit from Indian preference programs now in operation or later to be instituted” 110 Cong. Rec. 13702 (1964).

64. 417 U.S. at 550.

65. The Supreme Court recently reaffirmed the presumption against repeals by implication and its rule that this presumption will be overcome only where: “provisions in two statutes are in ‘irreconcilable conflict,’ or where the latter act covers the whole of the earlier one and ‘is clearly intended as a substitute.’” *Branch v. Smith*, 538 U.S. 254 (2003).

66. *TVA v. Hill*, 437 U.S. 153 (1978); *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992).

67. *TVA*, 437 U.S. at 190, citing *Committee for Nuclear Responsibility v. Seaborg*, 149 U.S. App. D. C. 380, 382, 463 F.2d 783, 785 (1971).

appropriations.<sup>68</sup> Implied repeals presuppose that Congress does not focus squarely on the question whether the current and previous statute can coexist when enacting legislation. And, where Congress is passing laws within the appropriations process, it is similarly supposed that Congress is simply not paying attention<sup>69</sup> Thus, the changes to the statute made during the appropriations process are, from the *TVA* and *Robertson* Court's vantage point, implied in two senses: First, Congress does not say "this section is hereby repealed;" and, second, the appropriations-related provision does not evince clear Congressional intent to repeal the earlier legislation. In the *TVA* episode, for example, Congress did not *specifically* announce that it was repealing the ESA to the extent that it prohibited the building of the Tellico Dam. Therefore, the only basis for Congressional supplanting of the ESA was an implicit one.

Why are repeals by implication disfavored? And, in any event, why do courts deem appropriations legislation as of lesser status than authorizing legislation? More to the point, why do courts presume that legislative repeals through the appropriations process are implied repeals and, indeed, especially noxious? To understand this, we must investigate the logic of the appropriations canon.

Although nowhere explicitly stated, the arguments of the Supreme Court in crafting the appropriations canon rest on a series of controversial assumptions. Most fundamentally, the *TVA* and *Robertson* Courts object to the use of the appropriations process in making legislative changes on the grounds that the appropriations process is hurried, opaque, and, on the whole, nondeliberative. As Professors Eskridge and Ferejohn succinctly put the objection, "[a]ppropriations laws perform important public functions, but they are usually short-sighted and have little effect on the law beyond the years for which they apportion public monies."<sup>70</sup> This is both a positive and normative assertion. In its positive sense, the Court describes the process by which Congress makes substantive changes to authorizing acts through the appropriations process as fundamentally nondeliberative. Moreover, the Court insists that this manner of decisionmaking reflects a legislative failure. In objecting to congressional action on this basis, it is assumed that the Constitution prefers that Congress enact legislation through

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68. See *infra* text accompanying notes 119–33.

69. See WILLIAM ESKRIDGE, JR., ET AL, 2004 SUPPLEMENT TO CASES AND MATERIALS ON LEGISLATION 117 (3d ed. 2004) ("the *Mancari* presumption against implied repeals is one that is rarely overcome").

70. William Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

deliberative decision making processes; or, at the very least, a sensible theory of legislative decisionmaking demands a level of deliberation not met by Congress in its appropriations-related processes. Though this assumption is only implicit, it is necessary, for otherwise the Supreme Court would have no ground for favoring authorization over appropriations.

The Court in *TVA* questioned the extent to which the appropriations process meets the standard for an essentially deliberative process. For example, in criticizing the appropriations process's level of representation, the Court argued, "there is no indication that Congress as a whole was aware of TVA's position, although the Appropriations Committees apparently agreed with petitioner's views."<sup>71</sup> In discussing a series of committee reports related to TVA funding, the Court also implied that Congress's decision was not adequately reasoned: "It is true that the Committees repeated their earlier expressed 'view' that the Act did not prevent completion of the Tellico Project. Considering these statements in context, however, it is evident that they "represent only the personal views of these legislators," and "however explicit, [they] cannot serve to change the legislative intent of Congress expressed before the Act's passage."<sup>72</sup> Moreover, the Court in *TVA* objected that these substantive changes were not sufficiently transparent, writing that "we should not assume the petitioner's views—and the Appropriations Committees' acceptance of them—were any better known, especially when the TVA is not the agency with primary responsibility for administering the Endangered Species Act."<sup>73</sup> Thus, the Court concludes that appropriations acts are not the product of adequate legislative deliberation and, accordingly, we should not implement policy changes in this way.

By way of contrast, the Court insists that the enactment of legislation through the normal authorization process (by which the Endangered Species Act was passed, for instance) is more deliberative than is the appropriations process. As support for its position, the Supreme Court pointed out that both houses of Congress limit policy making within the appropriations process.<sup>74</sup> Policy change within appropriations cannot be

71. *TVA*, 437 U.S. at 192. Compare the analysis by Judge Seth for the Tenth Circuit in *Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1973): "Appropriations acts are just as effective a way to legislate as are ordinary bills relating to a particular subject." *Id.* at 22–23.

72. *TVA*, at 193 (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1972)).

73. *TVA*, 437 U.S. at 192.

74. Indeed, the Court made reference to both the House Rules and the Standing

implied, it must be explicit, because Congress must act transparently and, thereby, with deliberately. Given the nature of the appropriations process, Congress cannot meet this deliberation requirement through this device.

The logic of the appropriations canon can be stated thusly: In a conflict between two statutes, both duly and properly enacted, the Court should favor the one that was passed through a more deliberative process. Since the above conditions are generalizable, this implies that authorization lawmaking should always be favored over appropriations, unless Congress was clear in its change in authorization through appropriations.

### III. THE APPROPRIATIONS CANON REVISITED: IMPLICATIONS OF A POSITIVE POLITICAL THEORY OF LAWMAKING

The invention and deployment of the appropriations canon represents a good example of the courts' use of canons to further substantive agendas. More specifically, canons such as the one described in this article furthers policy aims by promoting particular legislative outcomes and encouraging the use of particular legislative processes. While the former goal is unabashedly substantive, the second is proceduralist in that it is designed to improve the legislative process.<sup>75</sup>

Canonical construction on these outcome-oriented bases should be distinguished from the development and use of canons that purport to mirror legislative intent.<sup>76</sup> Courts frequently use canons as surrogates for legislative intent; they also use various maxims of word choice and grammar in order to assist judges with disentangling from the complex web of statutory structure and history the most sensible construction of legislative intent and statutory meaning. Whatever are the strengths and limits of this type of canonical construction, the appropriations canon cannot be explained or justified on this basis. Instead, the appropriations canon—like the canon that repeals by implication are disfavored—is purely substantive.

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Rules of the Senate when supporting its position. It stated:

House Rule XXI (2), for instance, specifically provides:

No appropriation shall be reported in any general appropriation bill, or be in order as an amendment thereto, for any expenditure not previously authorized by law, unless in continuation of appropriations for such public works as are already in progress. Nor shall any provision in any such bill or amendment thereto changing existing law be in order. (Emphasis added.)

See also Standing Rules of the Senate, Rule 16.4 (*TVA*, 437 U.S. at 191).

75. See, e.g., Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29 (1985); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 *COLUM. L. REV.* 1689 (1984).

76. See generally WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, & ELIZABETH GARRETT, *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 818-48 (3d ed. 2001).

What are the substantive values that the canon is designed to implement? One central value is less substantive change to authorization statutes through the appropriations process. By restricting such changes, Congress must pursue their reform objectives through the ordinary legislative process, that is, through adjustments to the authorizing legislation; or, at the very least, Congress must repeal authorizing legislation explicitly, a process that we can presume to be more difficult to achieve. A second value is the improvement of the legislative process. As explained above, the appropriations process has been criticized by the Court as being hurried, opaque and, in general, insufficiently deliberative. Forcing Congress to go through the authorization process enhances deliberation by channeling legislators into an arena in which deliberation is more common than it is in the appropriations process. The notion is not so much that the legislators will become more interested in deliberation per se but, rather, they will be *in a better position* to engage in deliberative decisionmaking. We suggest that both of these assumptions are flawed.

#### *A. Appropriations and the Deliberative Ideal*

Political theorists and legal scholars have forged a complex, and rather appealing, normative argument for deliberative democracy.<sup>77</sup> Philosopher Philip Petit explains the logic of the argument:

Most of the arguments for deliberative democracy assume that the case for an inclusive democracy is palpable and focus on the benefit to a democratically organized group of having decision governed by deliberation of an inclusive, dialogical kind. Some of these arguments assert that making democracy deliberative should help to ensure that people's preferences are reflecting and informed, as distinct from remaining the brute product of adaptation to circumstance; or that it should enable people to do better in reaching beyond the chasms of difference that separate the members of certain groups, even if it does not bring them into consensus; or that it should stretch people's imagination and empathy as they are forced to take a general point of view. Without alleging any such psychological transformation, other arguments maintain that making democracy deliberative should at least have the effect of screening out self-regarding concerns in favor of more public-spirited considerations, thereby approximating or advancing an ideal of public reasoning among free and equal participants. And yet a further range of arguments urge that making democracy deliberative would promote such effects as legitimizing whatever decisions are reached, making them more likely to take account of the relatively powerless,

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77. See, e.g., JOHN DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND* (2000); JAMES FISHKIN, *DEMOCRACY AND DELIBERATION: NEW DIRECTIONS FOR DEMOCRATIC REFORMS* (1998); AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996).

increasing transparency among members of the group, or promoting just outcomes. [citations omitted].<sup>78</sup>

Responding to the powerful critique of representative democracy developed by scholars building upon the rational choice tradition,<sup>79</sup> deliberation theorists have argued for institutional arrangements and legal rules which would, if properly configured, promote deliberation within the legislature.<sup>80</sup> For these theorists, the measure of a useful institution or rule is whether it facilitates deliberation in legislative lawmaking.<sup>81</sup>

What do we mean by deliberative legislating? A deliberative legislative process has at least the following four fundamental characteristics:<sup>82</sup> First, deliberative processes are *representative* and *democratic*, both in the sense that many participate in the decision making process and, further, in the sense that diverse views are presented and given attention. Second, deliberative processes are also more *reasoned* or *closely considered*.<sup>83</sup> That is, in presenting their views, people give reasons for their positions and these reasons are the point of discussion.<sup>84</sup> Third, deliberative processes are highly *transparent* and, thereby, accessible to the public and outsiders. Finally, deliberative processes are aimed for *consensual decision making*.

A useful way to reformulate this rather abstract description of deliberation is to think about the question “what constitutes the appropriate measure of adequate legislative deliberation?” In order to determine whether and

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78. Philip Pettit, *A Dilemma for Deliberative Democrats*, in *DELIBERATION AND DECISION: ECONOMICS, CONSTITUTIONAL THEORY AND DELIBERATIVE DEMOCRACY* 91, 99–100 (Anne van Aaken, et al. eds., 2004).

79. See, e.g., NORMAN J. SCHOFIELD, *SOCIAL CHOICE AND DEMOCRACY* (1985); WILLIAM RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* (1982)

80. See, e.g., Philip Pettit, *Democracy, Electoral and Contestatory*, in *NOMOS XLII: DESIGNING DEMOCRATIC INSTITUTIONS* 105, 124–37 (Stephen Macedo & Ian Shapiro eds., 2000).

81. See, e.g., Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* (Seyla Benhabib ed., 1996).

82. These four characteristics of deliberative processes are described in John Ferejohn, *Instituting Deliberative Democracy*, in *NOMOS XLII: DESIGNING DEMOCRATIC INSTITUTIONS* (Stephen Macedo & Ian Shapiro eds., 2000).

83. See, e.g., John Dryzek, *Constitutionalism and its Alternatives*, in *DELIBERATION AND DECISION: ECONOMICS, CONSTITUTIONAL THEORY AND DELIBERATIVE DEMOCRACY* 47 (Anne van Aaken, et al. eds., 2004) (“Reasoning constitutively, an actor goes beyond the instrumental question of whether an action will help achieve some set of goals. The actor also asks whether or not the action helps constitute or undermine a desirable world or situation”).

84. See, e.g., CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993) (describing deliberative democracy as a “republic of reasons”).



to what extent Congress has adequately deliberated or, rather, whether the process it has followed can be properly characterized as deliberative, we want to know the answers to these three questions:

1. Are the various interests at stake (not only the interested groups but the interests themselves, regardless of whether these interests have particular champions) adequately represented within the process Congress uses to make its decisions?<sup>85</sup>
2. Has Congress constructed a procedure to ensure that its policies can be implemented in accordance with its will and objectives? In the vernacular of regulatory theory, we may ask: Has Congress constructed mechanisms of adequate delegation and control?<sup>86</sup>
3. Has Congress made decisions with the transparency and reasoning adequate to assure Americans generally and, in particular, the institutions responsible for implementing its policies that these legislative decisions are based upon sound theory and evidence and are reflective of consensual decisionmaking (though not necessarily, of course, consensus views)?<sup>87</sup>

The deliberative ideal is, after all, an ideal. Seldom is the case for deliberative decisionmaking made on the principle that Congress can truly achieve its ideal. Deliberation theorists are not, in the main, hopelessly naïve; legislative decisionmaking is understood to be political, messy, and frequently combative. Yet, those who embrace deliberation as an ideal insist that we ought to measure legislative decisionmaking in accordance with deliberation criteria, that is, with standards that consider how effectively does the legislature meet its “responsibilities” for

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85. The roots of the arguments for representation as an essential pre-condition for deliberation can be traced to the arguments about equality and political communication. A seminal text in this regard is JURGEN HABERMAS, *A THEORY OF COMMUNICATIVE ACTION*, VOLUMES 1 & 2 (1984, 1989). See also *DELIBERATIVE DEMOCRACY* (Jon Elster ed. 1998); Joshua Cohen, *Deliberation and Democracy Legitimacy*, in *THE GOOD POLITY* (Alan Hamlin & Philip Pettit eds., 1989).

86. See, e.g., JOHN D. HUBER & CHARLES R. SHIPAN, *DELIBERATE DISCRETION? THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY* (2002) (developing theory of discretion and delegation with emphasis on transparency and policy responsiveness).

87. See, e.g., Christian Kirchner, *Final Remarks: Deliberation and Decision—Perspectives and Limitations*, in *NOMIS XLII*, at 261, 262 (“Deliberation is supposed to be a social process in which the participants are searching for the common interest, i.e. the common interest of a given society”).

representativeness, optimal delegation and control, and adequate transparency and reasoning.

As previously mentioned, we put “responsibilities” in quotation marks because we question whether this deliberative ideal is a worthy aspiration for legislative decisionmaking in the U.S. system. One of us has questioned whether American political behavior can be deliberative in the sense described by contemporary deliberation theorists, given the nature of individual choice under conditions of scarcity and otherwise.<sup>88</sup> Though a full discussion of deliberation in Congress is well beyond the scope of this article, we note that the ideal of deliberation presupposes that legislators are capable of the sustained behavior—particularly the effort at consensual decisionmaking and sound “reasoning”—that deliberation theorists suppose to be essential to representative lawmaking.

Moreover, contemporary public law scholars who argue for a more conspicuously deliberative legislative process frequently insist that deliberative decisionmaking is mandated by the Constitution. Bruce Ackerman,<sup>89</sup> David Estlund,<sup>90</sup> Frank Michelman,<sup>91</sup> Cass Sunstein,<sup>92</sup> and others have made the broad point that the Constitution, particularly after the enactment of the 14th amendment, is designed to promote the civic republican ideals of deliberation and dialogic self-government. A thorough consideration of these sophisticated debates is beyond the scope of this article. However, the process-perfecting<sup>93</sup> rationale for the deployment of certain substantive canons such as the appropriations canon is not tethered persuasively to the constitutional structure of lawmaking in Article I, Section 7. The success of the effort to establish the deliberative ideal as a compelling principle for American lawmaking requires a more coherent effort to explain why the constitutional structure of lawmaking is designed to promote deliberation. Or, to put the point another way, what is the basis to believe that the Constitution favors a more deliberative over a less deliberative method of lawmaking?

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88. See ARTHUR LUPIA & MATHEW MCCUBBINS, *THE DEMOCRATIC DILEMMA* 226–27 (1998).

89. See, e.g., Bruce Ackerman, *Discovering the Constitution*, 93 *YALE L.J.* 1013 (1984).

90. See, e.g., David Estlund, *Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence*, 71 *TEXAS L. REV.* 1437 (1993).

91. See, e.g., Frank Michelman, *Foreword: Traces of Self Government*, 100 *HARV. L. REV.* 4 (1986).

92. See, e.g., Cass Sunstein, *Interest Groups*, *supra* note 75, at 29.

93. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

*B. The Appropriations Process and Legislative Policymaking*

*1. Representation*

Courts and commentators take issue with the lack of representation during the appropriations process.<sup>94</sup> This criticism misses the mark.

First, because the appropriations process is inherently about money and resource allocation, there are vastly more stakeholders in the appropriations process. The plethora of interests implicated by the resource allocations made in the appropriations process demand attention by key legislators and majority party officials to the expressed preferences of legislators. While a particular authorization statute may implicate a broad swath of interests within Congress, the impact of appropriations decisions is uniquely wide-ranging and ubiquitous. Everything we know about the structure of incentives in the modern Congress indicates that the influence by legislators will be brought to bear on appropriations committee members, on party leaders, and on others whose participation in appropriations are direct and significant.<sup>95</sup>

Second, within Congress, the Appropriations Committee is the largest, most representative committee. Between 1971 and 1974, during which the ESA and Tellico Dam issues were both considered in the House, 55 representatives (more than 1/8th of the entire body) served on the appropriations committee and in the Senate 24 members served on appropriations in the 92nd (1971-72) Congress and 26 in the 93rd Congress. In the House between 1971 and 1974, the majority Democrats took 33 of the 55 seats, which is approximately proportional to their membership in the overall House. In the Senate, Democrats took 13 of the 24 seats in the 92nd Congress and 15 of the 26 seats in the 93rd Congress, a distribution that is also equivalent to their membership in the overall Senate.<sup>96</sup> Currently, the House Appropriations Committee has 65 members and the respective Senate committee has 29 members.<sup>97</sup>

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94. See Eskridge & Ferejohn, *supra* note 70.

95. See D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN* 56-133 (1991).

96. For party and committee membership in the 92nd Congress see Official Congressional Directory, 92nd Congress, US Government Printing Office, Washington: 1971 and for the 93rd Congress see Official Congressional Directory, 93rd Congress, US Government Printing Office, Washington 1973.

97. For information on the current House Appropriations Committee see <http://appropriations.house.gov> and for information about the current Senate Appropriations see: <http://appropriations.senate.gov>.

Although the Budget committees did not yet exist in the 92nd and 93rd Congresses, the 2004 House Budget Committee has 43 members and the Senate Budget Committee has 23 members.<sup>98</sup> Members normally do not serve on both the Budget and Appropriations committees simultaneously, a situation which ensures that there is widespread representation of the House membership during the budget and appropriations process.

The members chosen to serve on the House Appropriations Committees are also ideologically similar to the party they represent, and in the aggregate are quite close to the entire House membership. Between the 80th and 100th Congress, the Democratic and Republican contingents on the Appropriations Committee were statistically different than their respective party's caucuses in only three instances.<sup>99</sup> Additionally, the distribution of each party's contingent on appropriations is rarely different than the distribution of the party caucus.<sup>100</sup> In fact, the distribution of Democrats on appropriations was never different than their party caucus; moreover, Republicans on appropriations differed from their caucus only twice between the 80th and 100th Congress.<sup>101</sup> As Professors Kiewiet and McCubbins note: "As long as the Republicans are given proportional representation on the committee (which they are) and as long as they are concentrated to the right of the Democrats (which they are), the distribution of Democrats on the committee would have to be extremely nonuniform for them *not* to do a better job of matching the entire chamber median than of matching their own caucus median."<sup>102</sup> Taken together, this evidence suggests that the Appropriations and Budget committees are quite representative of each party and also of the entire membership of the House.

Third and finally, the bills reported from the Appropriations Committees are among the most frequently amended of all legislation. To measure the floor amendment activity for each committee's bills, political scientist Steven Smith constructs an index using number of amendments, number of amendments per measure, proportion of amendments subject to at least one amendment, the number of successful amendments and the number of contested amendment. Based on this index, bills reported from the Appropriations Committee in both the House and

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98. For membership information on the U.S. House Budget Committee see: <http://www.house.gov/budget>. For information about the US Senate Budget Committee see: <http://www.senate.gov/~budget>.

99. See GARY COX & MATHEW MCCUBBINS, *THE LOGIC OF DELEGATION*, ch. 8 (1993) (using NOMINATE scores to measure ideology).

100. *Id.*

101. *Id.*

102. See KIEWIET & MCCUBBINS, *LEVIATHAN*, *supra* note 95, at 102–03.

Senate are among the top three most amended in the five Congresses studied between 1955 and 1985.<sup>103</sup> Data from the 83rd to 106th Congress demonstrate that 31% of all amendments are to appropriations legislation.<sup>104</sup> This is not to imply that all politicians are represented during appropriations or that all contrary views receive equal time for consideration. However, it does suggest that a variety of interests are represented during the appropriations process. Stakeholders are engaged, active, and participate in the process by which Congress expends money during the regular appropriations process. There is precious little reason to believe that this involvement wanes when the issue turns to modifying authorizing legislation through the appropriations process.

## 2. *Delegation and Control*

In *TVA*, the Court is worried that too much discretion is left to House and Senate committees,<sup>105</sup> the implication being that majoritarianism is thereby undermined. The result, therefore, is a product that does not reflect adequate representation within Congress. What this observation misses is that the key committees, acting as agents of the majority party within the legislature exert control over the development and implementation of legislative policy. Hence, the concern about inadequate deliberation is simply belied by the architecture of the legislative process and, in particular, the structure of legislative control over policymaking.

The institutional design of Congress reflects a 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. To that end, Congress has structured the appropriations committee system to assure, to the best of legislators' ability, that appropriations decisions reflect the will of the legislative majority.<sup>106</sup>

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103. See STEVEN S. SMITH, *CALL TO ORDER* 176–83 (1989).

104. See DAVID W. ROHDE, *ROLL CALL VOTING DATA FOR THE UNITED STATES HOUSE OF REPRESENTATIVES 1953-2000*. Compiled by the Political Institutions and Public Choice Program, Michigan State University, East Lansing, MI, 2003. This percentage was computed by dividing the number of straight amendments on issues classified as appropriations by the total number of straight amendments.

105. *TVA*, 437 U.S. at 193.

106. See KIEWIET & McCUBBINS, *LEVIATHAN*, *supra* note 95, at 102–03; COX & McCUBBINS, *DELEGATION*, *supra* note 99, at 188–229. Cox and McCubbins find that, using interest group and NOMINATE measures of ideology, there is rarely a difference between the median Democrat or Republican on appropriations and the median of her respective party. Additionally, they find that there is also rarely a difference between the

Appropriations is one of three control committees in the U.S. House (the other two are Rules and Ways and Means),<sup>107</sup> and the majority party takes special care to ensure that appointees to these committees are loyal to the majority party.<sup>108</sup>

To legislate successfully, politicians need to control the agenda.<sup>109</sup> The principal technique that the majority party employs to control the policymaking process is to delegate to a central authority and implement checks and balances to control individual politicians.<sup>110</sup> The checks and balances include rules regarding how bills get to the floor, the jurisdiction of committees, and expectation regarding the behavior of committee chairs.

To see how this works with the appropriations process, consider the following: The Budget process begins well before the fiscal year that starts each October. Approximately a year-and-a-half before the fiscal year actually begins, agencies begin to work with the President and the Office of Management and Budget (OMB) to develop agency budget requests.<sup>111</sup> About one year before the fiscal year commences the President and the OMB makes decisions regarding agency budget requests in a process called “passback.”<sup>112</sup> This process provides opportunities for the agencies to appeal the OMB and President’s decisions. Congress typically starts work on its version of the budget 10 ½ months before each fiscal year. In the February before the start of the fiscal year, the President submits a budget to Congress. This is a public document.<sup>113</sup> At

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distribution of each party’s contingent on appropriations and the overall party caucus.

107. Control committees monitor the flow of legislation for the majority party, supervise other committees’ legislative products, and, therefore, enable the majority party to control the legislative agenda. For example, all committees must go through the Rules Committee to get their bills to the floor, and the Appropriations Committee ensures that all committees adhere to a single budget. GARY W. COX & MATHEW D. MCCUBBINS, *LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE* 20, 61 (1993). Gary W. Cox & Mathew D. McCubbins, *Setting the Agenda: Responsible Party Government in the U.S. House of Representatives*, at <http://www.settingtheagenda.com>.

108. See COX & MCCUBBINS, *DELEGATION*, *supra* note 99, at 164–82 (discussing the role loyalty plays in assignments to control committees).

109. See Gary W. Cox & Mathew D. McCubbins, *Agency Power in the U.S. House of Representatives, 1877-1986*, in *PARTY PROCESS, AND POLITICAL CHANGE IN CONGRESS: NEW PERSPECTIVES ON THE HISTORY OF CONGRESS* 107 (D. Brady & M. McCubbins eds., 2002). See also Cox & McCubbins, *Setting the Agenda* 6–28 (2005), at <http://www.settingtheagenda.com>.

110. *Id.* See also KIEWIET & MCCUBBINS, *LEVIATHAN*, *supra* note 95, at 22–55; Cox & McCubbins, *Setting the Agenda*, *supra* note 109, at 30–61.

111. Bill Heniff Jr. “Overview of the Executive Budget Process” CRS Report for Congress, at <http://www.senate.gov/reference/resources/pdf/RS20175.pdf> (July 28, 2003).

112. *Id.*

113. See BUDGET AND ACCOUNTING ACT OF 1921, 42 STAT. 20 (JUNE 10, 1921).

about this time, the Congressional Budget Office (CBO) submits a report on the economic and budget outlook to House and Senate Budget Committees. Each substantive committee in Congress then has an opportunity to report their views and estimates to the respective Budget committee. At this point, the House and Senate must pass a budget resolution. From the budget resolution, which creates overall spending targets for the defined policy areas, the Appropriations committees undertake the process of determining spending priorities. Eventually, the House and Senate bills are reconciled and signed by the President before they take effect.<sup>114</sup> Throughout this process documents produced by agencies, President, Congress, OMB and CBO are public documents, available to anyone who asks, and certainly available to Congresspersons. As discussed in other sections, and made even more clear here, the length and public nature of the budget process provide significant opportunity for legislators, experts, agency officials, and other members of the public to comment on the proposed legislation.

Courts and commentators appear to believe and dislike that the appropriations committee is heavy-handed.<sup>115</sup> For example, in *TVA*, the majority wrote: “We venture to suggest that the House Committee on Merchant Marine and Fisheries and the Senate Committee on Commerce would be somewhat surprised to learn that their careful work on the substantive legislation had been undone by the simple—and brief—insertion of some inconsistent language in Appropriations Committees’ Reports.”<sup>116</sup> However, the Court misunderstands the legislative process. By way of summary, the following figure demonstrates many of the points regarding control of the agenda, procedure, and checks on delegated authority. Figure 1 is a graphic representation of the legislative process in the US House of Representatives, demonstrating the path that any piece of legislation must travel in order to become law. It is important to note the numerous places where a proposal may be revised, amended, or halted altogether—negative agenda control. By unraveling who influences the decision at each of these points (control of agenda and procedure)—whether an individual, a faction, or a party—it is possible to assess the degree to which interests are balanced in a nation’s legislative process.

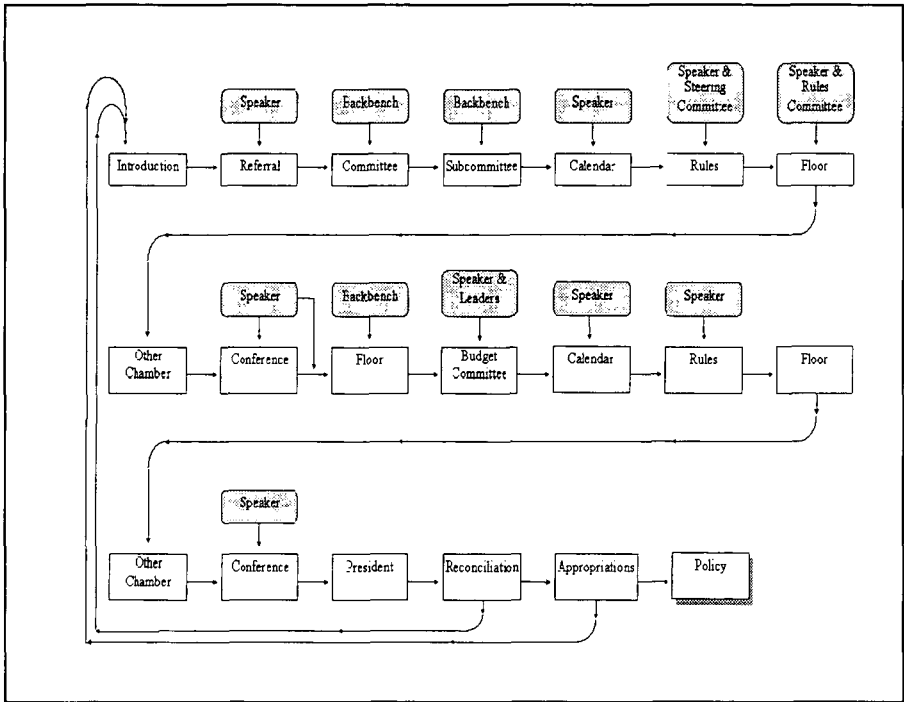
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114. See Robert Keith, “A Brief Introduction to the Federal Budget Process”, CRS Report for Congress (Nov. 13, 1996), at <http://www.house.gov/rules/96-912.htm>.

115. See *supra* text accompanying note 71–73.

116. *TVA*, 437 U.S. 153 at 191.

FIGURE 1: HOW A PROPOSAL BECOMES A POLICY IN THE US HOUSE OF REPRESENTATIVES, HIGHLIGHTING ASPECTS OF PARTY CONTROL



In the initial stages of the U.S. policymaking process, the substantive committees in each chamber possess significant agenda control within their jurisdiction. Given members' attraction to committees that are substantively salient to their constituents, legislators who are most concerned with the policy at hand have asymmetric influence at this early stage. As a proposal approaches the floor, however, the party's influence may be felt more and more. Majority party members delegate to their leadership the power to represent their interests on a broad variety of matters.<sup>117</sup> The Rules Committee and the Speaker—as well as the Appropriations Committee, if any funding is required to implement the proposal—check committee members' ability to exploit their agenda

117. See COX & MCCUBBINS, DELEGATION, *supra* note 99, at 83–135; Cox & McCubbins, *Setting the Agenda*, *supra* note 109, at 30–61 (discussing the way in which the majority party delegates to central leadership in order to solve the collective action problems associated with the legislative process).



control, for these two central coordinating bodies control access to plenary time. If a substantive committee's proposal is unrepresentative of the party's collective interests, and it is an issue of importance to the party, then either the Speaker or the Rules Committee are likely to kill the proposal. The shortage of plenary time itself creates incentives for the substantive committees to compete against each other, in something of a tournament, where the reward for satisfying the party's interest is time for floor consideration.<sup>118</sup> Before the proposal leaves the chamber, there may be floor amendments; and, of course, the legislature votes on the final bill. There are thus many opportunities for legislators to form coalitions to influence and potentially kill a bill. At all of these stages, procedure and who controls it is critically important. Lastly, albeit not explicitly captured by this figure, is the matter of what happens if policy is not made. All policy is made, unmade, amended, and/or disregarded with this reversionary policy. Certain policies, which happen to command majority support, may be difficult to pass if the reversionary policy is preferred by members who occupy veto gates—negative agenda control. In sum, the three elements discussed—agenda, status quo, and procedural control—repeatedly overlap one another throughout the policymaking process to structure the policymaking, provide checks and balances between the various interests, and define the boundaries of which interests will be represented.

There is little reason to believe that authorizing legislation is not similarly structured and, therefore, similarly subject to control by the devices described above. As discussed earlier, the appropriations process is clearly no less representative than the authorization process—indeed, we believe that more people's views are likely represented during the appropriations process than during the normal process of authorization. And, given the stakes at issue, the incentives for the majority party to supervise assiduously the process by which money is allocated are strong. Hence, the intra-Congressional structure of policymaking delegation and control works as effectively in the appropriations process as in the authorization process.

### *3. Transparency and Consensual Decisionmaking*

The Court objects to the appropriations process on grounds that the appropriations process is insufficiently transparent. This criticism, too,

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118. See COX & McCUBBINS, DELEGATION, *supra* note 99, at 245–47 (discussing the role the Speaker plays in allocating plenary time).

is flawed. The creation of the budget is at least as transparent as any other legislation, and probably more so. As described earlier, the process begins more than a year and a half before appropriations legislation is crafted with reports by the General Accounting Office and estimates from executive agencies.<sup>119</sup> Then, 12 months before the legislation hits the floor, the Office of Management and Budget produces its budget review. All of these documents are public and easily accessible to those who want to be informed during the process. This is unlike regular legislation where there is no public release requirement for staff and committee reports until 48 hours before the vote. Committee reports are required by congressional rules as a way to inform other members about the committee's findings. Importantly, these committee reports can be trusted because their authors meet the conditions for trust,<sup>120</sup> due either to sharing similar interests with other members of Congress, or more importantly, because the majority party requires committee chairs to meet certain standards to gain and retain their positions.<sup>121</sup> The quantity of information available to the public, media, political opponents and interested bystanders is far greater during the appropriations process than the authorization process, which gives appropriations an advantage regarding transparency.

The deliberation argument for the appropriations canon rests, as well, on the view that the appropriations process does not lend itself to consensual policymaking.<sup>122</sup> This, too, reflects a misunderstanding about the contemporary Congress. The appropriations process is at least as consensual as other legislative processes for two major reasons: First, the significant degree of representation and high level of transparency during the appropriations process increases the opportunities for consensus to develop. The bargaining game between the president and Congress during appropriations also provides opportunity for inter-branch consensus to develop.<sup>123</sup> Second, appropriations bills typically

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119. For a general discussion, see Robert Keith, "A Brief Introduction to the Federal Budget Process," CRS Report for Congress (Nov. 13, 1996), at <http://www.house.gov/rules/96-912.htm>; Bill Heniff, Jr., "Overview of the Executive Budget Process," CRS Report for Congress (July 28, 2003), at <http://www.senate.gov/reference/resources/pdf/RS20175.pdf>.

120. See LUPIA & MCCUBBINS, *DEMOCRATIC DILEMMA*, *supra* note 88, at 39–67, 210–15 (discussing the conditions for trust).

121. See Cox & McCubbins, *Setting the Agenda*, *supra* note 109, ch. 8 (discussing how the majority party controls committee chairs).

122. See *supra* text accompanying notes 71–73.

123. See, e.g., D. Roderick Kiewiet & Mathew D. McCubbins, *Appropriations Decisions as a Bilateral Bargaining Game between President and Congress*, 10(2) LEGIS. STUD. Q. 183 (1985).

pass with a considerable majority of the vote.<sup>124</sup> Indeed, the Appropriations Committee has the lowest average dissent rate of House committees.<sup>125</sup> As Andrew Taylor noted, “[i]n a House increasingly riven by open warfare, the Appropriations Committee has tried to be an oasis of bipartisanship. When a committee is charged with enacting 13 bills each year that are necessary to keep the government operating, good relationships are a big help.”<sup>126</sup> This is the best evidence that there is widespread consensus in the legislative process during the appropriations process. Apropos of the representation objection discussed above, this broad support reflects the variety of avenues for prior participation in the process.

To be sure, the appropriations process involves difficult struggles. The stakes, after all, are high, with decisions involving fundamental issues of resource allocation and policy control. To expect appropriations lawmaking to be unanimous ignores the reality of policymaking, in which a majority party must be able to pass legislation to fund and direct the government’s functions. To deny this role for appropriations would be to reject majority rule decision making in the U.S. Congress.

The Court in *TVA* further argues that the appropriations process is not as reasoned as the authorization process. By this, the Court presumably means that legislators spend inadequate time and attention on the key issues underlying their substantive decisions to change the authorizing legislation. This conclusion is hard to sustain in the face of an understanding of the legislative process. The appropriations process is, under the requirements of the federal budgetary process, the mechanism by which the legislature makes fundamental and retail decisions about the allocation of discretionary federal money in a fiscal year.<sup>127</sup> Richard Fenno writes that “the Committee on Appropriations, far from being merely one among many units in a complicated legislative-executive system, is *the* most important, most responsible unit in the whole

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124. Final passage votes on adoption of a bill or a conference report for appropriations legislation pass with the support of an average of 80% of votes cast. Data from David W. Rohde, *Roll Call Voting Data for the United States House of Representatives, 1953-2000*. Compiled by the Political Institutions and Public Choice Program, Michigan State University, East Lansing, MI, 2003.

125. See Cox & McCubbins, *Setting the Agenda*, *supra* note 109, at 286.

126. Andrew Taylor, *House Appropriators Show Past is not Prologue*, CONG. Q. WKLY. 1732 (July 17, 2004).

127. See generally ALLEN SCHICK, *CONGRESS AND MONEY: BUDGETING, SPENDING, AND TAXING* (1980).

appropriations process.”<sup>128</sup> Much of the federal budget is tied up with automatic appropriations and so-called entitlement spending.<sup>129</sup> Nonetheless, there remains enough money left over to generate room for vigorous conflict and competition.<sup>130</sup> In any fiscal year, the choices concerning appropriations are perhaps the most difficult and contested choices the Congress faces in its carrying out of governmental responsibilities. As demonstrated earlier, the appropriations process is a lengthy process that allows significant time for the airing of all manner of arguments for and against different types of spending. Although appropriations bills are often brought up late in the session and may receive little plenary time, this is because of the time spent on the bill before it ever reaches the floor (including actions starting over a year and a half before final passage). Consequently, a considerable amount of the work is done before the bill reaches the floor. Equating plenary time with total time spent on the legislation misconstrues the nature of the legislative process.

The authorization process also has a considerable advantage in providing opportunities for reasoned legislation, because policy goals can be weighed against each other using spending and cost-benefit analysis as a metric and a tool, respectively. There are two dimensions of legislating through appropriations which suggest that Congress may be in a good position to assess the utility of legislative change within this process. The first is what we will call the *horizontal dimension of legislative decision making*. Within the appropriations process, legislators may evaluate the wisdom of statutory adjustments in light of other policy priorities. For instance, the view of the fiscal consequences of a specific policy may be affected greatly by the tradeoffs immanent in the current overall policy domain. What may be sensible in terms of appropriations in one fiscal year may be nonsensical in another, given the resource tradeoffs and policy consequences at issue.

The *Seattle Audubon* situation provides a good example of how these tradeoffs are considered. Congress had enacted a series of far-reaching environmental laws in the early and mid-1970’s.<sup>131</sup> These laws, including

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128. Richard F. Fenno, Jr. *The House Appropriations Committee as a Political System: The Problem of Integration*, 56 AM. POL. SCI. REV. 310–24 (June 1962).

129. In 2004 discretionary spending accounted for 35.9% of the U.S. federal budget and in 1965 discretionary spending accounted for 61.5% of spending. However, the 2004 discretionary spending amounted to over \$800 billion. See WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 46 (2004).

130. See, e.g., Kenneth A. Shepsle, *The Congressional Budget Process: Diagnosis, Prescription, Prognosis*, in CONGRESSIONAL BUDGETING: POLITICS, PROCESS, AND POWER 190 (W. Wander eds., 1984).

131. Environmental legislation passed during this time period includes: National

the ESA, restricted significantly harvesting and sale of timber from old-growth forests. Needless to say, these restrictions were controversial at the time of the enactment of these statutes. And, as the economy of the Pacific Northwest stagnated in the period of the late 1970's onward, the impact of these laws on the timber industry and, thus, on the economy of the region exacerbated this controversy. Attentive to these competing concerns, Congress mapped out a compromise—labeled, appropriately, the Northwest Timber Compromise—which endeavored to balance environmental and economic interests. As described just above, this compromise was forged within the appropriations process. By virtue of the annual appropriations process, members of Congress could assess, with the benefit of 17-years worth of experience with the ESA and its impacts, the circumstances involved in this controversy. Through the constitutionally prescribed lawmaking process, Congress could make an educated judgment concerning the question of whether or not the twin values of environmental protection and economic well-being are best protected through a resolute, unyielding application of the ESA and its concomitant regulations or whether there are sound reasons to limit, at least for a time, the impact of the spotted owl regulations on the Northwest timber industry. We take no position on the underlying resolution; these tradeoffs are difficult to assess. Our point, rather, is that Congress is in an excellent position to assess the efficacy of its policy architecture when it considers annual appropriations, indeed, a better position than it is when it makes initial, broad authorization judgments. Reconfiguring this architecture in the focused crucible of resource allocation decision making is a superior way of making difficult policy choices. Such choices, after all, usually involve difficult tradeoffs. And it is a fundamental precept of such decision making that more information is better than less when these choices are made.

Viewed in one light, Congress may always consider these policy tradeoffs with regard to the contemporary structure of federal legislation. Yet, the appropriations process *demand*s such examination of tradeoffs; indeed, this is part and parcel of what is the appropriations process, that is, the consideration of the overall scope of federal public policy. We might, therefore, pay special heed to what Congress decides with regard

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Environmental Policy Act, Clean Air Act, Clean Water Act, Endangered Species Act, Federal Insecticide, Fungicide and Rodenticide Act, Occupational Safety and Health Act, Resource Conservation and Recovery Act, Safe Drinking Water Act and the Toxic Substance Act.

to such tradeoffs in the appropriations process.

The other dimension of policymaking is what we call the *temporal dimension of legislative decision making*. The idea here is that the legislature considers, within the structure of the appropriations process, policies within the shadow of what has transpired before. That is, Congress considers, in deciding at what level to fund a particular governmental program, the past successes and failures of the program. It has a vantage point resulting from the time that has passed. Legislation is, after all, frequently an experiment. The legislature endeavors to tackle a public program through the enactment of legislation, while reserving the discretion to change course at a later point in time. Legislative changes subsequent to the original enactment are to be encouraged; they represent legislative appreciation of the role of changed circumstances (or, in some instances, changed politics). Legislative changes through the appropriations process may well ease these changes; they enable Congress to limit the scope and reach of a legislative policy without dismantling the policy altogether; they permit a greater range of discretion by providing a more finely tuned instrument of revision and change. Congress may ultimately turn to substantive and substantial legislative modifications or perhaps even rescission of the statutory policy; yet, changes via appropriations may reveal a more carefully considered policy choice by Congress. Discouraging such tempering strategies through a restrictive approach to appropriations limits this fine tuning, and thereby leaves Congress with a more limited range of policymaking tools.

By contrast, the authorization process does not provide the same effective method for legislators to weigh various policy options against each other. Authorizing legislation comes up *seriatim*, and Congress is seldom attentive to the ways in which a particular statute impacts upon fundamental resource allocation decisions wrought by earlier statutes and by statutes whose consideration lies in the future. To be sure, Congress *can* take into account the holistic fiscal consequences of their actions when they consider any legislative proposal. Our point is that neither the incentives nor the structure of Congress gives reason to believe that legislators will in fact do so.

The lack of tradeoffs can be seen in major authorizing legislation. A recent example of the non-reasoned nature of authorizing legislation comes from the Sarbanes-Oxley Act, in which Congress introduced new corporate governance procedures.<sup>132</sup> This legislation was rushed

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132. Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, NYU Law and Economics Research Paper 04-032 (Sept. 25, 2004) (on file with author).

through Congress in response to high-profile corporate fraud at Enron and Worldcom, and during the legislative process little time was given to the policy positions of competing interest groups. In fact, Roberta Romano writes: "Simply put, the corporate governance provisions were not a focus of deliberation by Congress."<sup>133</sup> There are theoretical and practical reasons to doubt that the authorization process has a comparative advantage on the appropriations process with regards to its reasoned nature.

### *C. Summary*

The preceding sections have shown that there is little substance to the Court's objections to the appropriations process on deliberation grounds. Much of what the Court concludes is based on a misunderstanding of both the authorization and appropriations process. The conventional view of the legislative appropriations process is a peculiar brand of tunnel vision, where one sees only the end of a long tunnel, the point at which appropriations are brought to the floor. The Court's view is that legislators gather together their political tactics and construct policy agendas through a weakly deliberative process of fiscal wheeling and dealing. This depiction is set in contrast to the processes of legislating in ordinary, non-appropriations contexts.

The notion that the legislature deliberates effectively through the ordinary legislative process and then scrupulously departs from such optimal deliberation when it turns to appropriations is inaccurate. Ordinary legislating consists of a mixture of strategies, agenda manipulation, and good-faith policy formation. The constraints of time, as well as ubiquitous constituent pressures, exist in any context in which the legislature acts, whether deemed "ordinary" or "extraordinary." The concept of deliberation is a notoriously slippery one; yet, however we may conceptualize deliberation, the fact of legislating in traditional settings is a complex, interdependent, and particularistic one.

Viewed through the lens of congressional structure and practice, the deliberative ideal is better fulfilled through active legislating through the appropriations process. As we suggested above, the deliberative ideal is a controversial one, for not only is this ideal contestable as a normative matter,<sup>134</sup> but it is questionable as a matter of constitutional theory and

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133. *Id.*

134. *See supra* text accompanying notes 88.

law.<sup>135</sup> However, insofar as deliberative policy processes are favored as the best way to make decisions, we have offered some reasons to reject the appropriations canon and, moreover, some reasons why there might be reasons to favor an opposite canon, that is, one in which statutory repeals or revisions through the appropriations process ought to be looked at especially charitably. Indeed, Article 1, Section 9 specifically mentions appropriations as a key responsibility of Congress.

The fact that the courts in *TVA*, *Robertson*, and other cases have misconceived the legislative process and, as a consequence, have gotten their process-perfecting canon backwards suggests a broader lesson about the perils of canonical construction. We consider these lessons in the concluding section of this article.

#### IV. LESSONS FOR CANONICAL CONSTRUCTION OF STATUTES

##### *A. Canonical Construction Should be Based Upon a Normative Compelling View of Law and the Legislative Process*

Substantive canons are designed to implement substantive values.<sup>136</sup> Therefore, the measure of a successful canon is whether it improves the state of the world through its use. This is not, we hasten to add, the sole criterion of legitimacy; as we discuss below, the enterprise of canonical construction rests on a disputed view of the role of the courts in statutory interpretation. Yet, if we stipulate that the overall objective of substantive canonical construction is adequately justified, we must still press the point of whether and to what extent particular canons improve the lawmaking process.<sup>137</sup>

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135. See *supra* text accompanying notes 99.

136. See generally William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989).

137. Moreover, insofar as these judgments are grounded in assumptions about the legislative process, it is imperative that the canons and their deployment be based upon *reasonable* assumptions. In the case of the appropriations canon, we explained why these assumptions were unreasonable; indeed, a more accurate perspective on the legislative process may lead on to the adoption of the opposite canon, that is, that legislative changes through the appropriations process are to be especially favored. Yet, we can see this same flaw in the courts' contemporary approach to other interpretive canons as well.

Consider, for example, the courts' use of the canon which undergirds the appropriations rule, namely, the canon that repeals by implication are disfavored, see *TVA*, 437 U.S. at 153. The assumption underlying this canon is that Congress manifests its intentions only directly, through explicit instructions. Thus, when it purports to change a statutory provision it does not clearly; where it is not clear, so the argument goes, we can assume that Congress intended to leave well enough alone. This is the essential logic of the canon that repeals by implication are disfavored. However, we know that Congress acts



The measure of process improvement is viewed as the expansion of deliberation in legislative decisionmaking. The restrictive approach to legislative change through the appropriations canon is justified on the grounds that such an approach facilitates legislative deliberation. Thus justified, this canon, for reasons we describe above, rests on a quite controversial normative view about the nature of legislative deliberation. This view, elegantly articulated by leading political theorists and legal scholars, is that legislatures should aspire to be much more deliberative.<sup>138</sup> This aspiration, they argue, reflects the larger ambitions of the founders and of contemporary political theory, generally, to foment intra-legislative deliberation.<sup>139</sup> Deliberative democracy in representative government is attractive both for the better ends that are reached through this process and for its intrinsic value under a “proceduralist” conception of democratic decision making.<sup>140</sup> Though the question of whether this is an attractive point of view is mostly beyond the scope of this article, we do note that the tether between the appropriations canon and this deliberative conception of congressional lawmaking rests on a quite controversial series of normative assumptions. What does deliberation mean in the modern Congress? Are 535 legislators capable of the sort of deliberative

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implicitly with regard to legislative actions in many contexts. And the courts not only concede this, but in fact base other interpretive canons on this logic. For instance, the cases in which the courts imply a private right of action in a statute reflect the courts’ judgment that Congress *intended* to provide a private right of action in a regulatory statute and that this intention will be respected in the absence of a clear statement. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Cort v. Ash*, 422 U.S. 66 (1975); *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964).

By contrast, the logic of the “repeals by implication” canon supposes that Congress never *repeals* a statute by implication; rather, it only *enacts* a statute thereby. In addition to the faulty logic underlying this view, the canon rests on a misguided assumption about the nature of the legislative process. It conceives of Congress as an institution that is insistent in its protection of the status quo and its privileging of extant legislation; however, we know from careful observation and also from the positive political theory of the legislative process that Congress commonly retreats from previous policy decisions and that it does so through a variety of tried-and-true devices, including administrative agency oversight, official repeal of regulations, restrictions on regulatory funding, scrutiny of agency officials in confirmation hearings, and, yes, substantive changes through the appropriations process. In light of these ubiquitous instruments of policy control, it is naïve to suppose that Congress would not intend to repeal a statute by implication. This is, therefore, an illustration of the courts’ flawed canonical construction, an approach which builds on flimsy assumptions about the legislative process.

138. *See supra* text accompanying notes 89–92.

139. *See* sources cited in *supra* note 77.

140. *See id.*

democracy that deliberation theorists celebrate? Does the U.S. Constitution contemplate, expect, or even permit the deliberative ideal that these scholars commend? How do we reconcile the values of deliberation with other critical values which are ascribed to Congress in practice and in theory, for example, checks and balances, constituent representation, majority rule, party influence, and agenda control. These and other questions are properly put to scholars and courts who insist that the measure of certain process-perfecting canons is the success that canonical construction enjoys in promoting deliberation within Congress.

The more general point is that arguments for a particular method of canonical construction must be grounded squarely in persuasive prescriptive analysis. It is not sufficient to insist that substantive canons promote one or more substantive values; we must be persuaded that these values are worthy of promotion.<sup>141</sup> In the case of deliberation-promoting strategies, we insist that this case is insufficiently supported. And whether and to what extent this particular canon furthers other substantive aims is nowhere apparent in the courts' analysis of the canon, its underpinnings, and its effects. Much the same can be said about the other so-called substantive canons of statutory construction. The prescriptive arguments for canonical construction in the modern statutory interpretation debate are weak; too often, they simply assume that there are values associated with promoting one or another substantive aim through a judicial thumb on the interpretive scale. These assumptions must be defended with analysis; and this analysis must support clearly and rigorously the difficult case for replacing legislative will and statutory text with a preferred policy or a salutary lawmaking process.

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141. Lest one think that this flaw in the courts' approach to canonical construction is of recent origin, we recall the earliest canons, those associated with William Blackstone and the approach of the English common law courts. These canons, too, rested on controversial and frequently undefended normative assumptions. Perhaps the earliest major canon was Blackstone's injunction that "statutes in derogation of the common law be narrowly construed." See ESKRIDGE, ET AL, *LEGISLATION*, *supra* note 76, at 898; *Shaw v. Railroad Co.*, 101 U.S. (11 Otto) 557, 565 (1879). Of course, this canon rested on the Blackstonian view that the common law ought to be favored as a method of lawmaking and that legislation should be interstitial and rare. This canon rested on a shaky normative foundation at the time; after all, Bentham and his contemporaries fueled the move in England in, more methodically, on the continent, toward statute-making by elected legislators. See generally DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED* 16–20, 52–72 (1989). Not coincidentally, Blackstone propounded the "derogation" canon just as the expansion of statutes made the assumption that legislative lawmaking was of modest consequence and scope anachronistic.

*B. Canonical Construction Must be Attentive to the Equilibrium  
Effects of Legal Rules and Judicial Decisions*

One of the cardinal contributions of positive political theory has been the observation, based upon both rigorous theory and evidence, that decisions reached by courts, legislatures, and agencies—indeed, *all* relevant political actors—impact the strategic decisions of other actors in the political process.<sup>142</sup> In the vernacular of standard noncooperative game theory, political actors make decisions in light of anticipated actions of other decisionmakers equipped with (this is the simplifying assumption) full information.<sup>143</sup> As Brian Marks and many others have explained, statutory decisions are not final; Congress can and does adapt to these decisions through various techniques, most notably, its constitutional power under Article I, Section 7 to overturn statutory interpretations through legislation.<sup>144</sup> Moreover, there are a variety of devices Congress, and also the President, can and do use to influence judicial decisions.<sup>145</sup>

There are, as scholars in this tradition have explained, multiple equilibria possible within the Congress/courts/agency process.<sup>146</sup> Whether one or another equilibrium obtains, and the durability of that equilibrium in light of the dynamics of the inter-institutional process, is both a theoretical and an empirical question; yet, we can extrapolate from the configuration of political interests, ideological commitments, economic circumstances (i.e. transaction costs, scarcity, resource endowments, etc.), and, importantly, the nature, scope and limits of human cognition, what courts and Congress may do in one or another decision making situation.<sup>147</sup>

142. For an overview of the vast literature on this point, see KENNETH A. SHEPSLE & MARK S. BONCHEK, *ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS* (1997).

143. See generally DAVID AUSTEN-SMITH & JEFFREY S. BANKS, *POSITIVE POLITICAL THEORY II* (2005).

144. See Brian Marks, *A Model of Judicial Influence of Congressional Policy Making: Grove City College v. Bell* (Hoover Institution Working Paper, 1988). See also Eskridge & Ferejohn, *supra* note 70; Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Decisions with Applications to the State Farm and Grove City Cases*, 6 J.L. ECON. & ORG. 263 (1990).

145. For a general discussion, see WALTER F. MURPHY, *CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS* (1962); C. HERMAN PRITCHETT, *CONGRESS VERSUS THE SUPREME COURT, 1957-1960* (1961); ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* (1960).

146. See generally KENNETH A. SHEPSLE & MARK S. BONCHEK, *ANALYZING POLITICS* 422–28 (1997).

147. See LUPIA & MCCUBBINS, *DEMOCRATIC DILEMMA*, *supra* note 88, at 205–27.

Canonical construction, by its very design, aims to shift onto Congress the burden and costs of making a particular legislative decision.<sup>148</sup> So, in the case of the appropriations canon, Congress may repeal a previous statute, but, to do so, it must be explicit about what it is doing—indeed, not only explicit, but *explicit to the satisfaction of the court*. By all accounts, this requirement is designed to make it more difficult for Congress to legislate through the appropriations process. However, the assumption that Congress will, when faced with these costs, abandon its efforts to effect a particular policy change, is naïve and unsupportable. More reasonable is the view that Congress will review the policymaking options available to it and revise its strategies in light of the burdens imposed by the court through this canon.

To be sure, Congress may find itself without reasonable options. The court, through the deployment of a canon, may truly curtail congressional action, in which case the substantive result favored by the court is set more or less in stone (at least until the court changes *its* mind). More often, we believe, Congress can reengineer its policy approach to pursue its objectives through other means. For example, if a court enforces rigidly the appropriations canon, making it rather difficult to effect a change to an earlier statute, Congress may expand its control over agencies and agency budgets in order to get to the same result. As an instrument of Congress, agencies can be steered in deliberate directions; agency action at the behest of Congress may, after all, create conflict between, say, Congress and the President, conflict that makes this strategy problematic and costly. However, Congress's willingness/ eagerness to exercise this option will likely be impacted by the availability of other strategies. Thus, the use of a particular canon may shift the equilibrium from a place in which Congress acts through the appropriations process to effect legislative changes to an equilibrium in which the legislature's preferred result is reached more indirectly through, for example, command and control of agencies and agency implementation process.

To take a more concrete example, consider how Congress responded to the Supreme Court's ruling that legislative vetoes are unconstitutional.<sup>149</sup> In the 1970's, the legislative veto (i.e. a statutory mechanism that makes the administrative process subject to further legislative review or control) became a popular way for Congress to gain greater oversight of agency decisions and actions.<sup>150</sup> Legislative veto provisions were attached to

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148. See the discussion in Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and its Consequences*, 45 VAND. L. REV. 743 (1992).

149. *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

150. See, e.g., LOUIS FISHER, *THE POLITICS OF SHARED POWER* 92–103 (1981); WILLIAM N. ESKRIDGE & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION*:

many pieces of federal legislation (defense and foreign policy laws, in particular).<sup>151</sup> When, in 1983, the Supreme Court ruled that legislative vetoes are unconstitutional, many claimed that Congressional power to oversee agencies would be greatly reduced. However, far from reducing Congress' power, the Court's ruling had two important effects: First, Congress and agencies simply ignored the Court's ruling and continued to issue and abide by legislative vetoes.<sup>152</sup> Second, Congress began to rely on other oversight mechanisms. Indeed, as Kaiser<sup>153</sup> and Leahy<sup>154</sup> note, even absent the legislative veto, Congress has many oversight mechanisms available to it, including 1) passing legislation to override an agency's proposed action; 2) amending an agency's jurisdiction or directly limiting its discretion; 3) requiring an agency to receive notice before it takes any action; 4) imposing restrictions on the use of appropriated funds; and 5) passing joint resolutions of disapproval. Given the wide array of other mechanisms available to Congress, it is no wonder that William Leahy concluded that "*Chadha* invalidates the use of the [legislative] veto, but does nothing to impair these other, clearly constitutional, means of exerting congressional influence."<sup>155</sup>

Ought we to care about which equilibrium obtains? We answer yes. Appropriations, as we discussed in the Part III above, is a process which must go through the Article I, Section 7 lawmaking process. Though the contrast is drawn in *TVA, Robertson*, and elsewhere with "ordinary" lawmaking, appropriations is, in constitutional terms, as ordinary as any other lawmaking in that it complies with all the requirements of Article I, Section 7. Insofar as legislative lawmaking ought, to the extent possible, proceed consistently with what the Constitution decrees to be the standard lawmaking process, the appropriations process fits this bill. Moreover, Article I, Section 9 of the Constitution explicitly authorizes Congress to pass appropriations bills, and these bills are one of only two types of bills that the Constitution specifically mentions (the other is revenue bills). We hasten to add that our point here is not merely the

STATUTES AND THE CREATION OF PUBLIC POLICY 496 (1988).

151. See ESKRIDGE & FRICKEY, *LEGISLATION*, *supra* note 150, at 496.

152. See generally FISHER, *SHARED POWER*, *supra* note 150.

153. See Kaiser, *Congressional Control of Executive Actions in the Aftermath of the Chadha Decision*, 36 AD L. REV. 239 (1984).

154. Leahy, William F., *Recent Developments in Administrative Law: Congressional Supervision of Agency Action: The Fate Of the Legislative Veto After Chadha*, 53 GEO. WASH. L. REV. 168 (1984).

155. *Id.* at 190.

formulaic one that appropriations is good because it is grounded in the words and structure of Article I. To be clear about our normative views: We believe that the constitutional structure of lawmaking rests on the consent that citizens give to the government to develop public policy. Though American political institutions obviously make policy through a vast, complex web of techniques and tactics, we should not forget that the core mechanism for the making of federal policy through representative, transparent, and ultimately democratic techniques is legislative lawmaking per Article I, Section 7 of the U.S. Constitution.

By contrast, pushing Congress toward policy changes through control over agencies pushes policymaking out of the democratic arena of Article I, Section 7 to the comparatively less democratic processes of agency decisionmaking. All things being equal, this shift from one to another equilibrium ought to give pause to those who believe that canonical construction is process perfecting and that courts can have their way by interpretive fiat.

We have drawn our conclusion from a discussion of the appropriations canon. Yet, the observation about the equilibrium effects of canonical construction is a more general one. Whenever courts apply an interpretive rule directed at Congress, Congress can and will adapt to meet the new circumstances created by the courts. Hence, in assessing the benefits and costs of an interpretive rule, we must have a more sophisticated sense of the equilibrium effects wrought by the courts approach. The discussion of the particular canon on which we focus suggests that the consequences of canonical construction may be unanticipated; and the cure may be worse than the disease.

## V. CONCLUSION

The appropriations canon rests on a deeply flawed description of the federal lawmaking process. While the Supreme Court has viewed with skepticism the appropriations process on the grounds that it is hectic, opaque, and nondeliberative, we believe that this perception is misguided. Indeed, the Court may have it backwards; the structure of the appropriations process and the incentives faced by legislators making the contentious, controversial budgetary decisions within this process points toward a conclusion at odds with the appropriations canon.

Our analysis of this particular canon sheds light on the larger enterprise of canonical construction. When courts create substantive canons, they are promoting policy outcomes in the shadow of assessments about how legislators behave and how statutes are enacted. This assessment must be based upon a plausible theory of the legislative process; and the canon must be evaluated in light of its impact on the legislative

decisionmaking, and not merely on the basis of the substantive outcomes reached in particular cases.

The growing interest in canons of statutory construction reflects, we suggest, the tendency in the modern normative literature on statutory interpretation to justify statutory revisionism. Whatever the case to be made for this approach to interpreting statutes—an approach we argue elsewhere is flawed—the retail approach to reconfiguring the legislative process through tactical use of canons has its own liabilities. These liabilities are well illustrated by the careless use of the appropriations canon.