Positive Canons: The Role of Legislative Bargains in Statutory Interpretation

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The expanded scope of government in this century has inevitably forced the judiciary to devote ever more effort to the problem of determining legislative intent. When courts attempt to apply statutory language to real world circumstances, the central question that arises is: What standards should govern how courts interpret legislation? Political theorists and legal scholars have proposed various standards of judicial review, the most important of which have in common an emphasis on uncovering the "original intent" of the parties to the legislation.[1] The search for original intent has led courts to pursue progressively "deeper" readings of legislation, usually involving use of the myriad legislative documents such as floor debates, conference committee reports, standing committee reports, and even committee hearing testimony.[2]

The purpose of this paper is to use positive political theory to develop a deeper insight into the concept of the original intent of legislation. Our starting point is the analogy between legislation and contracts.[3] In the case of legislation, parties to a statutory contract are the members of the legislative coalition that enacted the statute, and the contract is an agreement over public policy. In the tradition of the economic analysis of contract law, we argue that the methods employed by the courts to interpret legislation should be

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1. *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 569-828 (1988).

2. Leading critics of the "deep" reading approach argue for a narrow "textualist" reading of legislation. Another critical school uses a more passive approach, deferring to agencies in their interpretations. *See generally* Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction,* 11 HARV. J.L. & PUB. POL'Y 59 (1988); Frank H. Easterbrook, *Statutes' Domains,* 50 UNIV. CHI. L. REV. 533 (1983); William N. Eskridge, Jr., *The New Textualism,* 37 UCLA L. REV. 621 (1990).

3. This observation has been pursued, albeit along a different path, in a seminal paper by Daniel A. Farber. *See generally* Daniel A. Farber, *Legislative Deals and Statutory Bequests,* 75 MINN. L. REV. 667 (1991). We adopt Farber's argument that the spirit of interpreting statutes, like contracts and wills, should be to remain faithful to the drafters' intent. *See also* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 88-115 (1990); Gillian Hadfield, *Incomplete Contracts and Statutes: Comment on Shepsle, "Congress Is a They Not an 'It,'"* 12 INT'L REV. L. & ECON. (forthcoming June 1992).

consistent across cases, should be faithful to the bargain struck by the contracting parties, and should take into account the feedback effect of interpretive principles on the efficiency of future negotiations and agreements.

These prescriptions present the courts with three difficult problems. The first is to identify the coalition whose agreement is to be honored—the members of Congress among whom a policy bargain was struck and codified into legislation, plus (usually) the President. The second problem is to determine the compromise that enabled the members of the coalition to pass the legislation. The third problem is to develop a method for solving the first two problems that does not undermine the efficiency of the legislative process by making legislation more costly and difficult.[4]

Positive political theory provides a new foundation for the development and evaluation of interpretive canons because it provides an objective method for addressing these three problems. Indeed, we contend that canons should be developed within an explicit, positive theory of the legislative process. Thus, the principles of statutory interpretation that emerge from our approach are called *positive canons*.

Any normative theory of statutory interpretation that professes to be compatible with democratic principles of government must be grounded in an appropriate positive model of politics—that is, it must accurately reflect the politics of statutory construction. This statement may appear to be a radical departure from current legal scholarship, but the departure is not as great as it appears. Judgments about the legislative process are ubiquitous in legal and judicial analysis of statutes (e.g., in discussions about how to weigh various parts of legislative history). We contend that these judgments should be made on the basis of an explicit theory. Instead, most arguments by legal scholars and courts rely on an implicit theory of the legislative process that is rarely explicated, supported, or validated. Our approach demonstrates how the debates about statutory interpretation can be sharpened and even resolved by making explicit the theory of the legislative process from which they are derived.

Positive political theory can make a significant contribution to overcoming the difficulties encountered in filling in gaps in the legislative contract, in part by focusing attention on several important features of the legislative process. One is a sharper conceptualization of the notion of "statutory intent." According to the view taken in this paper, the intent of a statute is to codify the agreement of the enacting coalition with respect to the policy adopted, in part so that members of the enacting coalition can know more precisely the nature of their agreement and in part to convey instructions to agencies and

4. The third problem encompasses the issue of conventionalism, i.e., that the conventions of interpretation established by the courts should create the appropriate incentives for those affected by them.

courts. Statutes are most assuredly not embodiments of the objectives of any particular person, but a compromise among numerous political actors. The structure and process of legislative enactment allocate influence to the relevant actors (including the President) and sometimes accord greater weight to some over others, depending on the specific circumstances surrounding the legislation.

A positive political theory approach suggests that the major lines of compromise result from bargains among veto players in the legislative process.[5] The preferences of veto players are most influential in determining policy bargains, and, therefore, their preferences must be ascertained in order to uncover the implicit agreement underlying the explicit statutory language.

A positive political theory approach also offers guidance in sorting out meaningful or sincere evaluations of legislative language from strategic or opportunistic posturing by legislators or the President. Positive theory provides an analytical framework for sorting through statements about a bill at various stages of the bargaining process to separate statements that are likely to reveal relevant information about the agreement of the enacting coalition from more opportunistic attempts by members to gain personal advantage in the way courts will interpret statutes after the fact.

We derive two general and several specific implications from our application of positive political theory to the problem of building a normative framework for statutory interpretation. First, positive political theory leads us to look at the structure of the legislative process—as embodied in the Constitution and in House and Senate rules—to identify veto gates. Not all coalition members are equally important in determining the content of legislation; positive political theory points to the members who control the various veto gates as crucial to understanding legislative intent. Second, positive political theory shows us that not all statements made by members of Congress and the President are created equal. When talk is cheap—when members of Congress or the President cannot be held accountable for their statements about a bill by members of the coalition—its information content is not reliable.

These two general points imply several specific interpretive canons. The first is that consequential statements and actions have priority over inconsequential ones. The second canon, following from the first, is that decisions by legislators to reject language provide useful negative inferences about statutes. The third canon is that the totality of the legislative history conveys

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5. In order to become law, a bill must pass through several stages in the legislative process, some prescribed by the Constitution and some by the official rules of each congressional chamber. This creates a series of veto players. A veto player is an individual (such as a committee chair or the President) or group of individuals (such as a committee of the House of Representatives) whose consent is needed for legislation to pass. By failing to consent, that individual or group can prevent—i.e., veto—the legislation.

important information about whose preferences were most consequential in shaping the coalitional agreement. That is, in the sequence of veto points through which a statute must pass, some are likely to be much closer calls than others, and at these stages the details of the coalitional agreement are most profoundly shaped. The fourth canon is that because the President has a constitutionally granted role in the legislative process, statutory interpretation must take the President's preferences into account and must accord them considerable weight if the President possessed a credible veto threat over the statute in question.

Our argument proceeds as follows. In Part I we discuss the role of an appropriate positive theory of the legislative process, beginning by emphasizing the parallels between statutory interpretation and contract law: both rely on the use of indicia to aid courts in interpreting texts. An important difference is that contract law has developed an elaborate, explicit theory of the contracting process that limits the arbitrary use of indicia while statutory interpretation has not. Part II describes the place of methods of statutory interpretation in contemporary positive political theory, and derives several implications for evaluating methods of statutory interpretation. Part III then turns to a brief example concerning the problem of interpreting the 1970 amendments to the Clean Air Act,[6] as raised in *Sierra Club v. Ruckleshaus*.[7] We conclude with a few remarks about the promise of a set of positive canons, including a discussion of its relevance for the debate about the new textualism and the concept of agency deference.

I. THE LAW OF CONTRACTS AND STATUTORY INTERPRETATION: THE ROLE OF POSITIVE THEORY

Writing statutes shares many similarities with writing contracts. Both formalize bargains among actors with diverse and partially conflicting interests. In the legislative process, as in the marketplace, actions happen only when bargains are struck. Further, in both cases bargaining is costly.

The economic approach to the law of contracts evaluates legal regimes according to their efficiency. Legal rules that increase the costs of negotiating contracts are rejected in favor of rules that facilitate contracting by reducing transactions costs.[8] Because it is costly to negotiate contracts that

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6. 42 U.S.C. §§ 7401-7671 (1988).

7. 344 F. Supp. 253 (D.D.C. 1972).

8. *See, e.g.*, ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 212-47 (1988); A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 27-38 (2d ed. 1989); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 79-85 (3d ed. 1986); *see also* David Kreps, *Corporate Culture, in* PERSPECTIVES ON POSITIVE POLITICAL ECONOMY 90, 116-20, 124-31 (James Alt & Kenneth Shepsle eds. 1990) (exploring the inevitability of unanticipated contingencies in the contracting process and the value of developing a set of widely shared principles to resolve them).

provide for every contingency, contracts typically do not cover every potentially relevant issue, thereby leaving gaps of unresolved issues. As Mitchell Polinsky writes:

> Contract law can be viewed as filling in these "gaps" in the contract—attempting to reproduce what the parties would have agreed to if they could have costlessly planned for the event initially. Since the parties would have included contract terms that maximize their joint benefits net of their joint costs—both parties can thereby be made better off . . . .[9]

If, in resolving ambiguities or extending contracts to fill in gaps, courts use principles of interpretation that allow them to read into contracts purposes unrelated to the intent of the contracting parties, the courts diminish the value of those agreements and all future agreements. Contracting parties will discount the future value of their contracts by the probability a court will establish a meaning to the agreement that does not reflect the bargain between its drafters. Such interpretive regimes are inefficient because the possibility of court-created costs prevents some valuable agreements or forces the contracting parties to undertake the expense of constructing contract terms that anticipate and countermand anticipated court decisions.

In order to "reproduce what the parties would have agreed to if they could have costlessly planned for the event initially"[10] courts rely on a wide range of indicia, including evidence about the nature of the parties involved: their preferences, intentions, and expectations at the time of the agreement, and data about the relevant industries. Yet the use of indicia raises a new problem—the possibility of arbitrariness in the face of multiple interpretations.[11] Because many different indicia can be used, a wide range of interpretations can be rationalized. In these circumstances, what determines a court's choice among the possible interpretations?

In order to induce the appropriate expectations among contracting parties, the courts must use principles that, in general, serve the purposes of the bargainers. The courts solved this problem by developing a complex and sophisticated understanding of the contracting process based on the needs and expectations of contracting parties and on the proper boundaries between contracting and the rights of third parties. For the most part, the principles for interpreting and enforcing contacts that emerged in the common law have served to reduce uncertainties arising from ex post gap-filling decisions

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9. POLINSKY, *supra* note 8, at 27.

10. *Id.*

11. This new problem differs from the circumstance in which the court substitutes its own judgement or some well-defined social purpose for the intentions of the parties in that the latter does not necessarily arise from ambiguity of interpretation, but from the court's use of its own preferences, ideology, or social principles rather than principles associated with the problem of contracting and bargaining.

by the courts and have been based at least crudely on advancing economic efficiency. Put simply, the development of a widely accepted theory of the contracting process greatly reduced the potential for arbitrary use of indicia.[12]

The most important lesson from the history of the common law of contracts is that courts greatly reduced the potential for arbitrariness by explicitly grounding precedents in a particular approach to the contract process that encouraged efficient contracting. Exactly the same issues pertain to developing principles of statutory interpretation. Both legislation and contracts emerge from compromise among conflicting interests. In both cases, writing language to anticipate all future contingencies is infeasible because the future is uncertain and, in any case, the transaction costs of perfectly crafted statutes are prohibitive. As Richard Posner suggests:

> The basic reason why statutes are so frequently ambiguous in application is not that they are poorly drafted—though many are—and not that the legislators failed to agree on just what they wanted to accomplish in the statute—though often they do fail—but that a statute necessarily is drafted in advance of, and with imperfect appreciation for the problems that will be encountered, in its application.[13]

Viewed in the light of contract law, the purpose of canons of statutory interpretation is to facilitate legislative agreements and thereby advance the efficiency of the legislative process. However, the interpretive problem is much more difficult for legislation than for contracts. First, while contracts

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12. This important principle has long been a part of the jurisprudence underpinning contract law, as illustrated by one of the most famous 19th century cases, Hadley v. Baxendale, 156 Eng. Rep. 145 (K.B. 1854). In *Hadley*, the plaintiff sent a critical part for repair which was returned by an unnecessarily circuitous route, imposing costly delays. Since the contract did not provide for what should happen in the event of delay, the legal question of the case concerned who should be liable for the losses incurred due to the delay.

In deciding this case, the court drew on a set of general principles that were to become the great body of the common law tradition governing contracts. The court attempted to formulate a rule which could be applied with general uniformity and less ambiguity to future similar cases. The result was a liability rule focusing upon the foreseeability of harm likely to occur. The "court decided that Baxendale was not liable for Hadley's lost profits because they were the result of unusual circumstances that could not be reasonably supposed to have been contemplated by Baxendale. For Baxendale to be responsible for Hadley's lost profits, the court said, Hadley had to have communicated his particular circumstances to Baxendale at the time that the contract was made." Lucian A. Bebchuk & Steven Shavell, *Information and the Scope of Liability for Breach of Contract: The Rule of* Hadley v. Baxendale, 7 J.L. ECON. & ORGANIZATION 284, 284-85 (1991).

If the possibility of a mishap was foreseeable, it was potentially avoidable. This, in turn, implied that the party who could avoid it at least cost—in this case, Hadley—was liable. Scholars in the law and economics tradition have interpreted this case as providing for an efficient rule to govern issues not explicitly covered by an agreement. COOTER & ULEN, *supra* note 8; POLINSKY, *supra* note 8, at 25-36.

13. Richard A. Posner, *Statutory Interpretation in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 811 (1983).

typically reflect a bargain between two parties having conflicting interests, legislation usually results from bargaining among numerous parties having a wider diversity of purposes. Second, whereas contract law has a firm theoretical foundation in the principles of economic efficiency, thus far statutory interpretation has lacked a corresponding theory of the legislative process. Consequently, the courts have not been able to agree on a systematic procedure for inferring implicit legislative bargains from evidence about the legislative process. This disagreement results in uncertainty about how laws will be implemented and enforced, and so diminishes the value of legislation to those who draft statutes and, ultimately, to citizens.

To illustrate how the absence of a coherent theory of the legislative process causes arbitrariness in statutory interpretation by the courts, consider two stylized theories of the legislative process.[14] One theory adopts an idealized vision of the legislative process in which two contending parties with opposing policy objectives duel over an issue, presenting a clear choice between two alternatives. Leaders of each side present an articulate and coherent defense of their positions. At the end of the debate, the majority chooses between the two sides. This theory implies that, after the fact, courts seeking to interpret the legislation should look to utterances and expectations of the side that won, especially its leaders, in order to guide their interpretation. Unfortunately, this idealized view rarely characterizes the legislative process for controversial legislation and, therefore, fails to address the problem of arbitrariness in weighing the multiple views expressed. As Kenneth Shepsle reminds us, "Congress is a they, not an it."[15]

The second, slightly more complex theory takes a pragmatic view of the legislative process as a compromise among three groups, none of which commands a majority. First, *ardent supporters* advocate a policy change and design a legislative vehicle to implement it. Second, *ardent opponents* typically prefer the status quo over any change. The fate of legislation hinges upon the support of the third group, the *moderates,* whose interests lie between the two extremes. Legislation emerges as a compromise between ardent supporters and moderates, achieved perhaps by scaling down the budget for a program or by adding sections to the bill that expressly limit its scope. Consequently, if statutory interpretation is guided by the principle of honoring the spirit of the legislative bargain, it must not focus only on the preferences of the ardent supporters, but also *on the accommodations that were*

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14. The following discussion draws heavily on Daniel B. Rodriguez & Barry R. Weingast, Positive Canons and Statutory Interpretation: Civil Rights Legislation, 1964-1991 (1991) (unpublished manuscript, on file with *The Georgetown Law Journal*).

15. Kenneth A. Shepsle, *Congress Is a They, Not an It: Legislative Intent as Oxymoron,* 12 INT'L REV. L. & ECON. (forthcoming June 1992).

necessary to gain the support of the moderates.[16]

The differences between the idealized and pragmatic views of the legislative process are revealed in the debates over the interpretation of statutes enacted in the 1970s to expand environmental, health, and safety regulation. Two examples are the Consumer Product Safety Act (CPSA)[17] and the Occupational Safety and Health Act (OSHA).[18] In both cases, Congress created a new regulatory agency with a broad and seemingly unqualified regulatory mandate, yet Congress also provided both with cumbersome procedures that hindered each agency's ability to pursue its mandate.[19] Many authors have seen inconsistencies between the broad statement of purpose and the limitations on agency actions incorporated into these statutes. We have argued elsewhere that these perceived "inconsistencies" represent intentional limitations on policy outcomes that were part of the bargained agreement by the enacting coalition.[20]

Because most complex legislation is the result of compromise, the tension between the general mandate and the specific limitations must be resolved by the courts. Their resolution therefore depends upon the extent to which the courts rely on the portions written by the ardent supporters along with their related remarks during the debate or on the portion written for the moderates along with their related remarks during the debate. Yet how much weight should the court place on each of these positions? Without a theory of legislation, the choice may be made arbitrarily. To mitigate the problem of arbitrariness, the courts need a theory of legislative process that can be used to derive a set of positive canons for statutory interpretation.

Positive canons can have substantial practical importance. First, they will reduce the degree of ex post arbitrariness in the process of statutory interpretation—that is, the degree to which judges inadvertently substitute new prin-

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16. As Posner suggests, where the lines of compromise are discernible, the judge's duty is to follow them, to implement not the purposes of one group of legislators, but the compromise itself. Posner, *supra* note 13, at 820. Posner later qualified his views. *See, e.g.*, RICHARD A. POSNER, THE PROBLEM OF JURISPRUDENCE 277-78 (1990).

17. 15 U.S.C. §§ 2051-2083 (1988).

18. 29 U.S.C. §§ 651-678 (1988).

19. For the Consumer Product Safety Commission, the enacting legislation established an offeror process whereby the agency could not write its own proposed rules, but instead had to solicit proposed rules from outside consultants. In the case of O.S.H. Administration, the agency could not set its own agenda with respect to regulatory targets, but rather had to rely on a second agency, the National Institute for Occupational Safety and Health (NIOSH), to set its agenda. Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORGANIZATION 243, 267-68 (1987); Terry M. Moe, *The Politics of Bureaucratic Structure*, *in* CAN THE GOVERNMENT GOVERN?, 267, 296-97, 301 (John E. Chubb & Paul E. Peterson eds., 1989). For additional cases involving regulation of chemicals by the Environmental Protection Agency, see Matthew D. McCubbins & Talbot Page, *A Theory of Congressional Delegation*, *in* CONGRESS: STRUCTURE AND POLICY 409, 416-20 (Matthew D. McCubbins & Terry Sullivan eds., 1987).

20. McCubbins et al., *supra* note 19, at 414-20.

ciples for those agreed upon by the enacting coalition. Second, they will provide a clear set of expectations to legislators, giving them greater confidence that their bargains, once struck, will remain stuck. The possibility that courts will redefine bargains ex post hinders the ability of legislators to arrive at agreements. Third, positive canons shed light on the debate over other interpretative approaches such as textualism and agency deference, and thereby on the controversies surrounding the role of the courts in specific policy areas such as civil rights and environmental protection.

The following presents a theory of the legislative process and derives from it a set of normative principles of statutory interpretation—a set of positive canons. We argue that for both positive and normative reasons, a theory of statutory interpretation should take into account the effects of an interpretive method on the costs and stability of the legislative process. Interpretive methods affect legislative effectiveness through their effect on the frequency and difficulty of legislative action, and on the extent to which the legislative process is free of unproductive strategic behavior by individual political actors to influence how statutes are interpreted.

By applying the contemporary positive political theory of the U.S. government, several conclusions can be reached about the interpretive canons that are likely to emerge from the political system that, as a normative matter, courts should adopt if they seek to be faithful to the democratic theory of the U.S. Constitution. A valid theory of statutory interpretation as expressed in a set of positive canons must focus on the views, expectations, and utterances of the marginal supporters of legislation. In the simple illustration discussed above, this was the moderates. In what follows, we provide a new approach that reveals the relevant political actor in a wide variety of circumstances. While often this is a member of Congress—e.g., the median member of one of the houses, or the marginal member on a presidential veto override—sometimes it is the President. A valid theory of statutory interpretation must, therefore, take into account the preferences of the President.

II. POSITIVE THEORY AND STATUTORY INTERPRETATION

Positive political theory has been concerned with two central issues: collective action and delegation.[21] The collective action problem concerns how governing institutions, populated by representatives elected under differing electoral structures and holding differing policy objectives, make durable bargains about public policy. A continuing theme of much of the theoretical literature on collective action has been the instability of collective choice in

21. These issues are reviewed in D. RODERICK KIEWIET & MATTHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS 22-27 (1991).

majority rule institutions such as legislatures.[22] Durability of legislative agreements is made all the more difficult in American politics by a constitutional structure that requires enacting coalitions to encompass majorities in both houses of Congress and the White House; such coalitions rarely last very long. The delegation problem concerns how, once a bargain has been struck by a legislative coalition, elected officials ensure that their policy bargains are carried out by the armies of bureaucrats who make day-to-day decisions to implement policies and who presumably have their own policy agendas.

Legislation plays an important role in solutions to both problems. First, with respect to the collective action problem, statutes define and record the details of the bargain reached among majorities in the House and Senate plus, most often, the President. In this sense, legislation is the instrument of collective action. Second, because of the multiplicity of veto gates that must be overcome to enact new legislation—agreement must be reached among House and Senate committees, the majority party leadership in both chambers, and majorities in both chambers, plus the President—it is difficult to introduce changes willy-nilly to previous legislative bargains that have been enacted into law. Thus, enactment gives some measure of durability to the policy bargain reached by the members of the enacting coalition. Third, with respect to the delegation problem, statutes also are instructions to bureaucrats concerning policy.[23]

For statutes to serve the purposes desired by the enacting coalition, the language of legislation must serve as a reasonably reliable predictor of policy outcomes. Members of the enacting coalition must have confidence that, although they have different policy preferences, they generally agree on what the statute means and what policy outcomes will be derived from that meaning. Otherwise, statutes cannot serve the purpose of embodying their solution to the collective action problem.

Unfortunately, statutory language can only rarely be precise in conveying either policy bargains or instructions to agencies. Nature has a nasty habit of creating situations in which the applicability of a statute is unclear. But even

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22. *See, e.g.*, David Baron & John Ferejohn, *Bargaining in Legislatures*, 83 AM. POL. SCI. REV. 1181, 1199-1201 (1989); Shepsle, *supra* note 15; Kenneth A. Shepsle & Barry R. Weingast, *Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85, 100-102 (1987).

23. Statutes are, of course, a double-edged sword: each party to the agreement knows a priori that some aspects of the policy bargain may not work out as anticipated; they further recognize that all parties to the original bargain may not agree to rewriting the bargain to compensate for such failures. In that case, faulty bargains cannot be corrected ex post. *See generally*, Brian A. Marks, A Model of Judicial Influence on Congressional Policymaking: *Grove City College v. Bell*, (Nov. 1988) (unpublished manuscript, on file with *The Georgetown Law Journal*); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

if nature were not unkind, the meaning of statutes would still be problematic because language is inherently imprecise and because rational political actors, having many demands on their time, would never devote the effort necessary to minimize the indeterminacy of statutory language. Consequently, the principles used to interpret unclear statutory provisions play an important role in determining the course of public policy.

In writing a statute, the enacting coalition can be regarded as facing a form of constrained optimization problem. The coalition and the staff who work for its members allocate a valuable resource—their time and effort—to a variety of activities that will create a policy. One is negotiating what the policy will be, which requires compromising their differences. Another is writing statutory language for each provision in the statute, including the provisions governing the structure and process of the implementing bureaucracy and the process of judicial review of the agency's decisions. Still another activity available to them is to agree on the methods to be used in interpreting ambiguous or contradictory provisions in the statute. Finally, given the principles of interpretation that the coalition adopts, or that its members anticipate the courts will use, members of the coalition can undertake activities that will influence the interpretation that agencies and courts will adopt.

The solution to this optimization problem is unlikely to be a statute that is worded with perfect clarity, nor is it likely to be a relatively vague statute combined with a crystal clear method of interpretation. Here a parallel can be drawn between the legislative process and the negotiation of private contracts. In neither case will the parties to an agreement find it worthwhile to anticipate every conceivable eventuality in reaching a written agreement. Indeed, in both cases the principles of interpretation adopted by the courts will affect the effort devoted to details in the written agreement. If the parties to an agreement regard the interpretive methods of the court as likely to produce a result that is a reasonable compromise of their interests—a compromise that reflects the basic compromises struck in the original agreement—they need not devote as much effort to fashioning the original agreement.

Interpretive principles, then, are an integral part of the coalitional agreement about a statute, either explicitly in the statute (or in other statutes about the role of agencies and courts in carrying out the statute) or implicitly through reliance on continued application of interpretive principles propounded by the courts. Explicit and implicit understandings about interpretive principles affect the allocation of effort to other parts of the legislative process, and hence affect the total cost of a legislative agreement. Given this background, one can readily identify several aspects of interpretive methods that members of the enacting coalition will regard as important.

A. DESIRABLE PROPERTIES OF INTERPRETIVE CANONS

Much like the canons of contract law, canons of statutory interpretation should decrease rather than increase the costs bargainers face in trying to reach an agreement and should expand rather than reduce the range of issues over which agreements can be reached. If the legislative process is more efficient and if conflicting factions can reach accord on a broader range of issue, political leaders will be able to achieve their objectives more effectively. Interpretative canons, we argue, should aid the legislative process, making it less costly for policy bargains to be struck. Desirable properties of interpretive canons, then, are as follows.

1. Consistency

The enacting coalition will place greater value on a method of statutory interpretation that produces the same result when the objective circumstances are the same. Just as legislators value the stability in legislative outcomes that flows from the legislature's internal structure and procedures, legislators do not want judicial interpretation of statutes to introduce randomness and unpredictability into policy outcomes. If legislators cannot rely on the stability of the approach to interpretation adopted by the courts, their recourse is greater specificity in both the substance of legislation and statutory guidance about interpretation. Not only is greater specificity costly in its own right, but it also increases the likelihood that more substantive legislation will be required in the future when circumstances arise that were not anticipated in the original statute. Because future legislation is costly and its details unpredictable, the coalition will prefer an interpretive standard that extends a statute in a manner that is consistent with the coalition's agreement, but this is only possible if the courts' method of interpretation is consistent. Consistency also enables legislative coalitions to focus their efforts toward creating substantive policy and influencing interpretive principles on only those cases in which the coalition believes that the courts' interpretation is unacceptable.

2. Opportunistic Potential

The disintegration of legislative bargains comes from two sources. First, enacting coalitions are composed of individuals with diverse and conflicting values and objectives. To the extent that statutes can be regarded as expressing policy preferences, they embody the values and objectives arising from compromise among coalition members. Most likely, no member of the coalition has been accommodated fully by the ultimate statutory bargain. Consequently, each member of the coalition has an incentive to try to change unilaterally the coalitional agreement. Opportunism refers to individual actions to deflect the effect of the agreement to one's advantage. In crafting

legislation, each legislator may wish to behave opportunistically, but each realizes that, in general, a policy that is manipulable by opportunistic behavior is less valuable. Policy will be less predictable, and hence less valuable to the coalition as a whole, and each member will have to devote effort to behaving opportunistically, if only to prevent others from undertaking successful opportunistic actions. Thus, the enacting coalition will prefer methods of statutory interpretation that are least susceptible to opportunistic actions by individual members of the coalition.

Second, opportunistic behavior by others involved in the policy process, such as implementing agencies and the courts, can change the policy bargain struck by the enacting coalition. For example, suppose that courts, in pursuit of maximizing their own discretion in influencing policy outcomes, adopt a set of interpretive canons that are internally inconsistent and that selectively can be used to justify almost any interpretation of a statute. The effect would be to undermine the ability of the enacting coalition to make policy, so that it would be forced to pursue the complex strategy of writing more carefully specified legislation and rules for interpreting it. The result in legislation would inevitably be more costly, narrower, and would require more frequent statutes. The end result would be less desirable for both the enacting coalition and the courts. The former would be able to accomplish fewer legislative objectives, but would incur more costs of legislation, and the latter would end up with less discretion than if it adopted interpretive canons that the enacting coalition found more acceptable.

In similar fashion, the enacting coalition is not likely to want to give complete discretion to the implementing agency to interpret the scope of its mandate, for to do so creates the possibility that the agency will behave opportunistically, or that a member of the enacting coalition will be able unduly to influence the agency's interpretation. For example, the President or the chairs of congressional oversight committees might have so much more influence over the agency than other members of the coalition that the latter would want to avoid creating a broad scope of agency discretion. If courts adopt the principle that agency interpretations of statutes should be accorded great deference, the result is narrower legislation that is less durable and more costly to fashion.

Some might argue that consistency is the only necessary condition to impose on interpretive canons. Whatever canons the courts adopt, as long as they are consistently applied, will create an incentive for members of the enacting coalition to undertake activities and to generate information that would influence the statutory interpretation resulting from this canon. But, if these canons, however consistently applied, do not uphold the legislative bargain struck among members of the enacting coalition—if they bias outcomes in favor of certain coalition members, for example—then, in anticipat-

ing the application of these canons by the courts, members of the enacting coalition will reduce the number, scope, and duration of the bargains into which they will enter. Fewer public policies will be enacted and those that are enacted will be amended more frequently.

B. DEVELOPING POSITIVE CANONS

There is probably little disagreement over the desirability of the two properties for statutory interpretation just proposed. Properties similar in intent to these have been proposed previously.[24] The problem in developing canons that satisfy these properties, of course, is in determining the method for ascertaining the dimensions of the legislative bargain. Who were the key actors in the legislative process, and what was the bargain that they struck? This is precisely where positive political theory—as applied to the legislative process—can help to develop canons of statutory interpretation.

We have argued that the policy bargain among members of the enacting coalition consists of both an explicit statement of this agreement (e.g., in the text of the resulting statute) and implicit agreements over ambiguous provisions and how the explicit bargain will be applied to unforeseen circumstances. Therefore, statutory interpretation that goes beyond strict textualism and constrains the discretion of both the courts and the implementing agency requires a method of constructing the implicit bargains of the coalition. The question to be answered by an interpretive method, then, is what agreement the coalition thought it might be making that is not explicit in the language of the statute. Because the coalition's agreements represent a compromise among its members, the ascertainment of an implied agreement rests on understanding what interests were compromised—that is, who actually can be regarded as a member of the enacting coalition.

There are, then, two puzzles that we must resolve in order to create interpretive canons that satisfy the properties of consistency and upholding legislative bargains. The first is how to identify the members of the enacting coalition, among whom the bargain was struck and whose preferences most affected the dimensions of the bargain. Second, within the enacting coalition, how do we identify the preferences of those who mattered most in locating the deal that was finally struck? We address these puzzles in turn.

1. Identifying the Enacting Coalition

Though there have been some attempts recently to incorporate the President into the methods by which courts interpret statutes,[25] virtually all of the

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24. *See* ESKRIDGE & FRICKEY, *supra* note 1, at 571-639.

25. *See* Daniel B. Rodriguez, *Whose Legislation Is It Anyway? Statutory Interpretations and Political Advantage,* 12 INT'L REV. L. & ECON. (forthcoming June 1992) (discussing presidential signing statements).

evidence cited in court decisions regarding "legislative intent" focuses on congressional activities. Because of this we first discuss the role of the President in legislative bargains. Positive political theory, as a first step, leads inexorably to the conclusion that, in the U.S. federal system, the President exercises considerable influence over legislation and is, therefore, a member of most enacting coalitions.

The Constitution confers upon the President two important powers: the veto[26] and the power to propose international agreements.[27] With regard to the veto, unless a statute is supported by an overwhelming majority, the threat of veto can constitute an important check on the content of legislation. Consequently, if an interpretive method is based upon an attempt to use non-statutory information to uncover implicit agreements, then information about the preferences of the President is potentially as important as information about the preferences of the legislators who supported the bill. We have argued that statutory interpretation should be consistent and should support the legislative bargain. In this case, a statutory interpretation is invalid if the explicit statement of that interpretation would have caused the President to veto the bill without Congress being able to override the veto.

The role of the President in legislation is further enhanced by numerous statutory requirements that the President or executive agencies submit legislative proposals to Congress. For example, the President is frequently asked to study (or to appoint a blue-ribbon committee to study) an area of policy and to make legislative proposals on the basis of the study.[28] Legislation also requires the President to submit annual budget requests for virtually all executive and independent agencies.[29]

The authority to draft legislative proposals does not necessarily give the President any additional influence over the policy bargaining process. Indeed, Congress can and quite often does amend or reject presidential proposals.[30] But when presidential proposals are enacted with little change, the President's preferences are likely to have been influential. Typically, presidential legislative proposals are accompanied by reports or sometimes even presidential addresses explaining the intentions of the legislation. When the President's proposal is enacted as proposed, there is no valid basis for according the President's accompanying explanatory material less weight than is accorded to the reports of the committees that considered the bill. Indeed,

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26. U.S. CONST. art. I, § 7, cl.2.

27. U.S. CONST. art. II, § 2, cl.2. With regard to treaty powers, because treaties cannot be negotiated by Congress—though they can of course be amended or rejected by the Senate—interpretations of treaty obligations must start with the President's intent.

28. *See, e.g.*, 42 U.S.C. § 2210(1) (1988) (establishing Presidential Commission on Catastrophic Nuclear Accidents).

29. *See, e.g.*, 31 U.S.C. § 1105 (1988).

30. *See generally* KIEWIET & MCCUBBINS, *supra* note 21.

because committees can vitiate the President's explanatory text by making modest changes in the language of a bill, presidential explanatory texts should be accorded great weight when the language proposed by the President is ultimately enacted.

The upshot of this discussion is that interpretive methods that ignore the role played by the President are unacceptable on both positive and normative grounds. As a matter of positive theory, principles of statutory interpretation that ignore the veto power held by the President will lead the President to veto bills that the President might find acceptable under alternative interpretive regimes. Hence, Congress will happily introduce interpretive guidelines that accord the President weight in order not to have such statutes vetoed. As a matter of normative theory, if canons of statutory interpretation are to be evaluated on the basis of the degree to which they faithfully execute the theory of governance embodied in the Constitution, interpretations that ignore the President are unacceptable. Such canons, if pursued, would have the effect of stripping the President of both constitutional powers and statutory responsibilities enacted by Congress itself.

It is also a relatively straightforward exercise to find those who were excluded from the enacting coalition. Members of Congress who voted against the legislation in key votes, who spoke against the legislation in committee and floor debates, and who offered unsuccessful amendments to kill or gut the legislation should be regarded as being outside of the enacting coalition. Their preferences should be accorded no weight in any interpretive method.[31] Further, if the President vetoed the legislation, and both houses voted to override his veto, then the President's preferences can be accorded no weight.

Determining which members of the enacting coalition in the legislature should be accorded weight in the process of interpreting statutes is not as easy as it was for the President or for stated opponents of the legislation. A legislative compromise almost always produces a result that is more favorable to some of its supporters than to others. Positive political theory provides considerable insight into whose policy preferences are likely to have been accorded the most weight in forging the compromise. These insights can be derived from the neoinstitutionalist analysis of how the legislative process accords rights and powers to members of the enacting coalition.

The single most important feature of the legislative process is that, to succeed, a bill must survive a gauntlet of veto gates in both the House and Senate, each of which is guarded by members of the relevant chamber who were chosen by their peers to supervise that particular gate. In each house of Con-

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31. Of course, amendments rejected by the enacting coalition may yield further evidence about the dimensions of the bargain struck among the supporters of the legislation.

gress, a subcommittee and a full committee have "gatekeeping" rights in that a bill normally cannot be considered by the entire legislative body until it has been approved in committee. Then, legislation must be given a position on the legislative calendar and often must secure a special rule restricting debate or amendments (or both) from the Rules Committee, which is itself controlled by the party leadership of the majority party. Then, legislation must be approved by majorities in each branch. Differences in the legislation passed by the two houses must then be resolved. Such resolution is often accomplished through a conference committee, typically comprised of members of the committees in each house that drafted the bill. Finally, the compromise reached by a majority of the conferees from each branch must be approved without amendment by majorities in both houses and signed by the President. The most useful conceptualization of the enacting coalition is the union of all of the actors who approved the legislation at each of the veto points.

2. Identifying the Enacting Coalition Members

Positive political theory provides predictions about the relative power of each of the sequential majorities plus the President in influencing the final legislative outcome. The influence of a member of the enacting coalition depends on three things: the ability of the member to control the agenda of the legislature, the relative amount of information about proposed alternatives and the preferences of others possessed by the member, and the details of the differences in policy objectives among members. In general, two bills that follow precisely the same legislative path will not be equally influenced by each member of the enacting coalition even if their enacting coalitions are identical.

The preceding conclusion can be illustrated by example. For ease of exposition, consider the counterfactual case in which the legislature is unicameral, with a single committee and no subcommittees. To mimic the case in which a conference committee is composed of members of the originating committees in each house, assume that the committee has the power to make a legislative proposal that must be accepted or rejected without amendment by both a majority of the full legislative body and by the President.[32] (This assumption will be relaxed shortly to illustrate the importance of the power to control the alternatives considered in the full legislature.) In our examples, the policy choice will be represented as picking a point along a line. In each case, the following notation will be used:

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32. We also assume, for simplicity, that each decision is a single-shot game. For extensions of this model, see D. Roderick Kiewiet & Matthew D. McCubbins, *Presidential Influence on Congressional Appropriations Decisions*, 32 AM. J. POL. SCI. 713, 713-36 (1988).

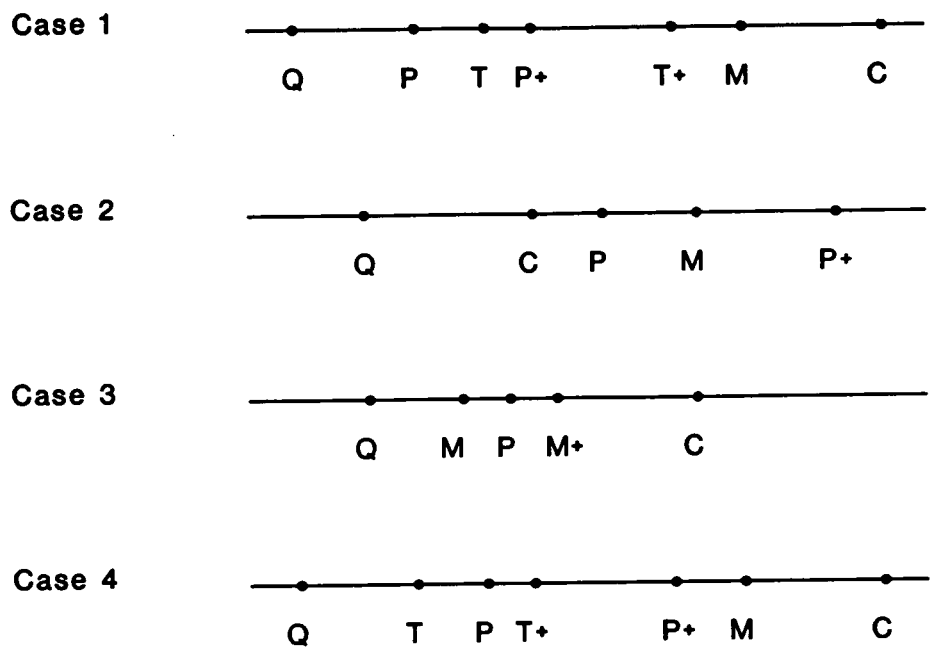
Q: the status quo policy that will remain in effect if a bill is not passed;
P: the policy preferred by the President;
P^+: the policy that the President regards as equally desirable to the status quo;
C: the policy preferred by the committee (in our examples, for ease of exposition, the committee is given as a single member);
C^+: the policy regarded by the committee as equally desirable to the status quo;
M: the most desirable policy in the view of the median voter in the legislature;
M^+: the policy the median legislator regards as equally desirable to the status quo;
T: the optimal policy for the legislator whose vote will determine whether a presidential veto is overridden;
T^+: the policy that the pivotal member on the override vote regards as equally desirable to the status quo.

The key assumption in our example is that each player's valuation of a policy choice decreases the greater the distance between that policy choice and the player's most preferred policy. It follows that no member will vote for a proposal that is further from the most preferred policy than the status quo. Hence, the President will veto a bill that is not somewhere between Q and P^+; the full legislature (represented by the median voter) will reject a proposal that is not between Q and M^+; the committee will propose only bills between Q and C^+ (or no bill at all); and the pivotal voter on an override will vote to override a veto only if the bill is between Q and T^+.

Our first examples are shown in Figure 1, where Cases 1, 2, 3, and 4 depict four different configurations of preferences. In Case 1, the President's veto threat is credible because the optimal policies from the perspectives of both the committee and the median member of the legislature are regarded by the President as less desirable than the status quo. Consequently, if the committee proposes, and the legislature adopts, any policy to the right of point T^+, the President will veto the bill and the pivotal legislator will vote to sustain the veto. Hence, the committee's best strategy is to propose a bill slightly to the left of T^+ because a presidential veto of such a bill would be overridden. Such a proposal will make all key legislators better off than if the status quo were retained and, from the perspective of the committee, is the best legislative outcome (i.e., it is the one closest to C) that can be enacted. In this case, the preferences of the President and the veto override player are crucial.

In Case 2, the median legislator, the President, and the committee all have quite similar preferences. In this case, the veto threat is not credible because the President prefers both C and M to the status quo. Consequently, the preferences of the pivotal voter on a veto override are irrelevant. The com-

FIGURE 1



mittee will simply propose its best policy, C, because C is preferred by both the median legislator and the President and so both will assent to it. In this case the determining preferences are those of the committee.

Case 3 illustrates a circumstance in which the committee is an "outlier": it prefers a policy that is much further from the status quo than either the President or the median legislator is willing to accept. In this particular case, the most difficult task facing the committee is placating the median member of the legislature, rather than the President. Hence, the committee must propose legislation slightly to the left of M^+ in order to receive majority support in the legislature and avoid a veto. In this case, the determining preferences belong to the median legislator and the committee, and the bill can be seen as a compromise between those two.

Case 4 illustrates the situation in which the threat of a veto override is the most important force influencing people. Any bill that the President is willing to veto (i.e., all policies to the right of P^+) will be sustained (as P^+ is to the right of T^+). Hence, the committee's job is to propose a bill that is the best deal it can cut with the President without causing a veto. Thus, the committee must propose a policy slightly to the left of P^+.

Now suppose that the committee cannot make a take-it-or-leave-it proposal to the legislature, but it can decide whether legislation will be considered. Once a bill is proposed, the median member of the legislature will immediately offer an amendment that represents the outcome that is as close as feasi-

ble to M. In Case 1, the rule change that allows amendment makes no difference. The best that the median member can do is to propose a bill that the President will veto but that will be enacted on override, which is still T^+. In Case 2, the rule change is consequential, for the median legislator now will amend the committee proposal, C, to M, which will then pass and be signed by the President. Likewise, in Case 3, the outcome will be M instead of M^+. But in Case 4, the presidential veto threat is again the most powerful influence, and the legislature will adopt P^+.

The purpose of these examples is to illustrate that the ultimate legislative bargain depends on the circumstances: the preferences of each member of the enacting coalition, the position of the status quo, and the rules followed by the legislature in considering a bill. Because the legislature makes its own decisions about the sequence of veto gates, amendment agendas and committee assignments, these rules must be taken into account in evaluating the influence of each actor in the legislative process. In addition, these rules do affect outcomes and accordingly play an important role in a positive theory of statutory interpretation.

In general we can derive two important implications concerning the development of interpretive canons. First, the structure and process of legislative decisionmaking determines who is to play key roles in the legislative bargain over any policy issue. Indeed, legislative structure and process are chosen to facilitate collective action by, in large part, establishing a division of labor and a system of checks and balances that defines the key decisionmaking roles on each policy issue. While vocal or ardent supporters of legislative proposals are important in motivating people to change policy, they rarely hold key veto gates in the legislative process, and thus they are rarely pivotal in the policy bargain. The division of authority chosen by members of Congress and prescribed by the Constitution, together with the preferences of the players at each stage of the legislative process, determines which players are pivotal for any decision, and it is the preferences of these pivotal players that a method of statutory interpretation must discover.

In many cases the President will be pivotal. Presidents frequently inform legislators of their preferences by sending messages to Congress. In these messages the President often indicates support for certain provisions and opposition to others, including in many instances a veto threat for aspects the President opposes. If veto threats affect congressional action, such as by causing members of Congress to modify or delete certain portions of a bill, then the President's veto threat is, in fact, influential. Consequently, statutory interpretations should accord the President's preferences greater weight when the veto threat is binding on the actions of Congress.

Under most circumstances the pivotal players in the legislative bargain will occupy veto gates in Congress. In many instances the most important

veto gates are the House and Senate committees charged with revising policy and writing legislation. The members of these committees decide the fate of most bills in Congress. And frequently, the members of committees have substantial control over the agenda under which legislation is considered by the rest of the legislature. At other times, the pivotal actors might sit on the Rules Committee, or might occupy leadership positions in the House or Senate, such as the Majority Leader in the Senate or the Speaker of the House. Party leaders often have some measure of control over the legislative agenda, as well as control of important veto gates. In still other cases (though we do not model such cases here) the pivotal decision might be made in a caucus of the majority party in either the House or Senate.

The second implication from the above analysis is that rules and procedures matter a great deal in determining the legislative bargain. When the House is considering legislation, for example, and the authors of the legislation on the House committee have been granted control over the agenda through restrictive rules (such as a closed rule in which no amendments to the committee's bill are allowed), then it is likely that the committee members were pivotal in passing the legislation. On the other hand, if the committee's proposal is considered under an open rule, which allows amendments to be offered against the committee's proposal, then it is likely to be representatives of floor majorities, perhaps the leadership of the majority party, that is pivotal in the policy bargain.

3. Actions Speak Louder Than Words: Identifying the Preferences of Pivotal Coalition Members

How is a court to proceed in implementing an interpretive standard that plausibly represents the agreement of the enacting coalition? This entails the discovery of the preferences of the pivotal members of the enacting coalition. The hazard associated with eliciting preferences, however, is that the legislative process is rife with opportunities for strategic behavior. In the first place, every stage in the legislative process is susceptible to manipulation by strategic actors. Amendments can be offered both in committee and on the floor that are designed not to change the proposed policy, but to kill it. Voting on amendments can also be strategic, intended to burden a bill with objectionable amendments so that those who originally favored the bill end up rejecting it. Additionally, extreme statements concerning the intent of the legislation will be placed in the record in order to move public opinion and to put pressure on other members to change their position.

We have emphasized the need for an interpretive regime to produce results that are consistent, predictable, and supportive of the bargains struck by members of the enacting legislative coalition. It follows that interpretations of a statute derived from proposed amendments and alternatives that were

rejected at various veto gates cannot become part of a valid statutory interpretation.

A second form of strategic behavior stems from the delegation problem as members of Congress and the President look ahead to interpretations of the statute by courts, they may act opportunistically in an attempt to influence judicial interpretation.

Despite the perils to the legislative process, we do observe that enacting coalitions form and that legislation is passed. Our positive analysis of the legislative process points out that, at every stage in legislative bargaining, members of Congress and the President have an incentive to try to twist the bargain in their own favor through strategic behavior. But individual statements, either by the President, lobbyists, or by members of Congress, either in hearings, debates, minority reports or statements into the record, do not represent the collective agreement and should be accorded no weight in the interpretation of the statute.

Positive political theory does suggest that some participants in the legislative process, at particular stages in the negotiations, will have incentives to act sincerely, rather than strategically, in either of the senses we have discussed. Both the President (at least in the first term) and members of Congress face an electoral incentive, which imposes costs for pursuing complex, strategic behaviors. Thus, for example, the President often has an incentive to convey veto threats accurately.

Further, in putting together policy bargains, the authority to strike agreements, to make logrolls, and to bring together diverse interests into a legislative compromise is delegated by majorities in the House and Senate (most often the majority parties in those chambers) to an agent. Sometimes the chosen agent is the President or an executive department or agency, but most often the agents are the committees of the House and Senate. In delegating to these agents, members of Congress know that their agents are likely to use their delegated authority to manipulate the policy bargain in their own interest. Consequently, these delegations are never unconstrained or unmanaged. The ultimate authority to make decisions is always retained by majorities in each house, and perhaps most important, strategic behavior by agents is sanctioned (policies are rejected, delegated authority is revoked, and so forth). Thus, positive political theory suggests that the findings, interpretations, and proposals of agents of the majority, as reported to the House and Senate for review, are meaningful, and statements by these agents that are not contradicted or rejected at some later stage are implicitly approved by their parent chambers when the bill itself is approved.

But when members of Congress or the President do not face disincentives to act strategically, positive political theory suggests they probably will do so. For example, presidential signing statements are not checked by members of

the legislative coalition. There is no way to overturn or amend a presidential signing statement. Even though members of Congress could reach an agreement beforehand with the President on the contents of a signing statement, because there is no way for the President to commit to carry out the agreement, the potential for unchecked opportunistic behavior by the President is great. We therefore expect Presidents to act strategically in formulating signing statements, so that no weight should be accorded to them.

Likewise, members of Congress who have not been designated as agents of the majority on a particular issue cannot easily be held accountable by the majority for their actions and statements on that issue. Their incentives to act strategically will therefore run unchecked. Again, our approach suggests that their statements should be discounted. Thus, individual and minority statements and reports should carry no weight in statutory interpretation. Positive political theory leads us to understand that talk is cheap; only when the majority is in a position to sanction such talk should it be considered relevant for statutory interpretation, and then only to the extent that it (statements, reports) is not directly contradicted by action (i.e., by voting behavior).

III. INTERPRETATIONS OF THE CLEAN AIR ACT

In this section, we apply our approach to several problems of interpretation arising from the 1970 and 1977 amendments to the Clean Air Act.[33] This topic is useful in two respects. First, it has been the subject of considerable attention by legal scholars.[34] Second, several important questions of interpretation have been brought to the courts.

We focus on three interpretations of the Clean Air Act. First, we show that some legal scholars use the same logic as our approach, namely, that the ardent supporters of the legislation must compromise their pure vision with moderates in order to ensure passage. Second, we critique those scholars who ignore the first lesson. In particular, the legislator who writes an act does not necessarily control its contents. The need to gain the support of a majority coalition implies that the author must faithfully record the bargain cementing the coalition. This, in turn, implies that the author's preferences and vision may be an inaccurate guide to the meaning of the compromise

33. 42 U.S.C. §§ 7401-7671q (1988).

34. *See generally* BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL, DIRTY AIR (1981); CHARLES O. JONES, CLEAN AIR: THE POLICIES AND POLITICS OF POLLUTION CONTROL (1975); R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT (1983); E. Donald Elliott et al., *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORGANIZATION 313 (1985).

legislation.[35] Third, we focus our attention on one aspect of the 1970 amendments, that of the prevention of significant deterioration (PSD) of air quality in "pristine" areas (i.e., regions of the country with air quality above the minimum standards set by the Act). We argue that Judge Pratt's interpretation of these amendments in *Sierra Club v. Ruckelshaus*[36] fails to satisfy our positive canons. Judge Pratt's reliance on indicia favoring the view of the ardent supporters over the moderates undid the compromise that allowed the legislation to be passed in the first place.

A. "CLEAN COAL, DIRTY AIR" REVISITED

The logic of our central theoretical conclusion—the need for ardent supporters to secure the support of pivotal legislators—has long been part of the analysis of legislation, even if it has not been as explicit or as theoretical as in our approach. An important work in this tradition is Bruce Ackerman and William Hassler's study of the 1977 amendments to the Clean Air Act, perhaps the most famous work on environmental legislation.[37] One of their central points about the politics of the 1977 amendments concerns the need of the ardent environmentalists in Congress to gain enough support so that their legislation would pass.

One of the key compromises involved the soft or "dirty" coal industry.[38] Environmentalists in Congress were willing to exchange lower levels of environmental protection than could be obtained for a given cost by compliance in exchange for sufficient support to pass the 1977 amendments. They did so by requiring that power plants burning coal install expensive scrubbers to remove sulfur in coal regardless of whether they used coal high in sulfur.[39] Imposing a performance standard instead of a technological constraint would have allowed utilities to choose the least-cost method, i.e., to choose between high-sulfur coal along with scrubbers and low-sulfur coal without scrubbers.[40] Under a performance standard, many utilities would have switched to low-sulfur coal. The technological standard, in contrast, advantaged the high-sulfur coal regions by requiring *all* utilities to install scrubbers, thus preventing utilities from using the least-cost method to meet the standards. As Ackerman and Hassler conclude, the scrubber requirement greatly increased the total costs of meeting the standard.[41] At the same time, because this provision greatly benefitted the older, unionized coal regions of

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35. An important exception to this general rule occurs when authors can be held accountable for their words, such as when an author acts as floor manager for the legislation.

36. 344 F. Supp. 253 (D.D.C. 1972).

37. ACKERMAN & HASSLER, *supra* note 34.

38. *Id.* at 35-41.

39. *Id.* at 14-15.

40. *Id.* at 17-18.

41. *Id.*

the East such as Pennsylvania and West Virginia, *The Clean Air Act Became a Multibillion-Dollar Bail-Out for High-Sulfur Coal Producers.*[42] Environmentalists in Congress were willing to support this provision because they needed the support of the eastern coal regions to pass their Act. Support from coal interests proved pivotal, forcing environmentalists to compromise their vision of a clean environment in exchange for a bill. Moreover, had the parties expected that courts would later reject the scrubber requirement in favor of a more pro-environmental performance standard, no legislation would have occurred.

This pattern of compromise is a common one and illustrates our point that the need to gain support of pivotal players typically requires that the ardent supporters compromise their goals and their pure vision of the legislation.[43]

B. COMPETITION FOR THE TITLE OF "MR. ENVIRONMENTALISM"

Conventional wisdom among legal scholars and political scientists holds that the 1970 amendments to the Clean Air Act resulted from a competition between President Nixon and Senator Muskie for the role of *the* national champion of environmental legislation.[44] This competition induced a form of "policy escalation" in which Nixon and Muskie sought to offer ever more stringent provisions in their proposed legislation in an effort to outdo the other. According to this view, this competition accounts for the contents of the Clean Air Act.

For present purposes, we stipulate that policy escalation occurred and ask how this should affect statutory interpretation.[45] To answer this question,

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42. *Id.* (subtitle).

43. Other examples of compromise in the legislative process abound. *See, e.g.*, ESKRIDGE & FRICKEY, *supra* note 1, at 22-23 (discussing compromises in the Civil Rights Act of 1964); John Ferejohn, *Logrolling in an Institutional Context: A Case Study of Food Stamp Legislation, in* CONGRESS AND POLICY CHANGES 223, 227-31 (Gerald C. Wright et al. eds., 1986) (discussing the inception of the food stamp program); Thomas Gilligan et al., *Regulation and the Theory of Legislative Choice,* 32 J.L. & ECON. 35, 50-53 (1989) (discussing the creation of the first federal regulatory agency by the 1887 Interstate Commerce Act); McCubbins et al., *supra* note 19, at 22-23 (discussing compromises in OSHA and CPSA legislation); McCubbins & Page, *supra* note 19, at 412-23 (discussing compromises in Toxic Substances Control Act); Moe, *supra* note 19, at 289-306 (discussing compromises in OSHA legislation); Rodriguez & Weingast, *supra* note 14, at 2-4 (same).

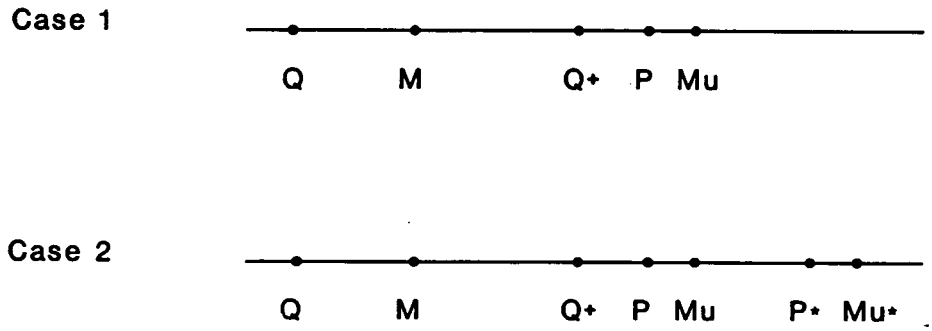
44. *E.g.*, JONES, *supra* note 34, at 175-210; Elliott et al., *supra* note 34, at 335-37.

45. An alternative explanation for the escalation is that, over the course of the legislative debate, support for environmental legislation grew among the public and in Congress. Muskie's first bill was introduced in late 1969, followed in February by the introduction of the President's version into the House. The House bill was passed in June of 1970, though the Senate did not begin its floor debate until September. The conference opened in early October, and the compromise bill passed in December. JONES, *supra* note 34, at 175-210.

The conference outcome provides a strong piece of evidence favoring this alternative explanation. The final bill looked much like the Senate version. If the House and its committee had, at the time of the conference, wanted a weaker bill such as the one they passed in June, why did they accept the Senate's version? As holder of a veto gate, nothing prevented them from holding out for conces-

we must address what policy escalation implies for the ultimate legislative bargain. The policy escalation between Nixon and Muskie over their initial proposals can be represented simply as follows. In Figure 2, Case 1, the status quo, *Q*, represents a low level of environmental protection. The median member of the Senate, *M*, has an ideal well above this and thus prefers significantly more environmental protection than *Q*. The policy alternative, Q^+, represents the maximum level of environmental protection that the median prefers to *Q*.

FIGURE 2



Nixon and Muskie are represented as relatively high in the distribution of preferences. According to this view, their competition for the title of "Mr. Environmentalism" led them to advocate levels of protection higher than the ideal levels of most voters and their representatives in Congress. President Nixon is represented at *P*, Senator Muskie at *Mu*. The policy escalation that followed from their competition is reflected in the advocacy of increasingly stronger policies. First Nixon leapfrogged Muskie from *P* to *P** (Figure 2, Case 2). Muskie then reacted by leapfrogging Nixon from *Mu* to *Mu**.

The point of this illustration is twofold. First, while this competition might have led Nixon and Muskie to advocate increasingly greater levels of protection, and while they may have been the most central figures in actually writing provisions, this does not imply that their views of the legislation were determinative. The reason is that, by virtue of their competition to be identified with a relatively extreme position, neither would prove pivotal in the decision to pass legislation. Regardless of their competition, the median voter in this example remains at *M*, and would not support a policy beyond Q^+. Put another way, policy competition by ardent supporters does not imply that the final legislation itself is any different.

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sions. The fact that they acceded suggests that, six months after passage of their own version, they wanted something stronger. Jones's view supports this interpretation: "Had air quality changed enough to produce a crisis in September [1970] that was not apparent in March? Not really. What had changed was decisionmakers' perceptions of public concern in this issue area." *Id.* at 176.

Perhaps scholars analyzing policy escalation would argue that competition has important feedback effects on leading public opinion constituents to shift their preferences toward greater levels of support for environmental protection. This, in turn, would cause M and Q^+ to shift to the right. But that is a separate argument and does not logically follow from the competition and policy escalation.[46] Because the pivotal voter—and not the ardent supporter—determines the limits of the legislation, competition does not automatically lead to a greater level of support in the final legislation.

The second point of the illustration concerns a subtle and implicit inference that sometimes enters the analysis of legislation when an ardent supporter not only is the central champion of a piece of legislation but also writes it. Under these circumstances, there is a tendency to assume that this individual's views are determinative. Yet that conclusion fails to follow from the observation that one individual wrote the legislation, for that individual alone could not ensure the legislation's passage without obtaining the support of relevant committees, majorities in both chambers, and the President. Even when a single, ardent supporter—and no one else—attends to producing the final, revised bill, the legislation must still gain the support of the pivotal player. The need to gain this support implies that the legislation is highly unlikely to embody the ideal of the ardent supporter and "author" of the legislation.

The preceding analysis has two further implications. First, an ardent supporter's statements during the debate are not a good guide for the purposes of interpretation. Because an ardent supporter is rarely pivotal, that legislator's views, goals, and visions of the legislation are rarely representative of the views, goals, and visions that will pass. This holds especially at the initial legislative stages before important compromises have been struck. At this time, the champion's expressions are likely to reflect personal preferences and ideals. As it becomes known who will support the bill, who will oppose it, and who is a potential swing or pivotal supporter, the bill evolves so as to gain the pivotal player's support. As a result, the bill typically moves away from the ardent supporter's view toward the pivotal player's view, and the expressions and statements of understanding of the legislation by its floor leaders changes to reflect the new understanding.

Second, moreover, the position of an ardent supporter is often highly ambiguous, for an ardent supporter is likely to say different things at different

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46. A range of alternative explanations for the same observations is possible. For instance, it could well have been that the groundswell in support for environmental legislation was sufficiently sudden that the preferences of the median voter in both Congress and the nation shifted rapidly toward higher degrees of protection. Plausibly, Muskie and Nixon could have been tracking this movement rather than being well out on the tail of the distribution. We put forth this argument not because we think it is true, but because the alternative argument about policy escalation provides no evidence against it or other interpretations.

points in the debate. As an example, we quote from Donald Elliott, Bruce Ackerman, and John Millian's classic account of the 1970 Clean Air Act amendments:

> Muskie wrote a "tough" pollution statute in 1970 . . . only when he was threatened with an outcome which was even worse from his perspective—the loss of his reputation with the public as a crusader to clean up the environment.[47]

In a descriptive sense, this statement appears accurate. But for the purposes of normative analysis, the case is not convincing. It is unclear that the policy competition led to changes in what the median legislator would accept, and hence to changes in the final bill. Our approach demonstrates that it is insufficient to show that an ardent supporter retained management over the writing of the act; politically sophisticated proponents still must carefully attend the limits of what will pass. There is no obvious relationship between what the ardent supporter wishes to see as legislation and what the pivotal players will support. This view thus implies that we cannot rely on an author's expressed views on the subject of legislation to understand what the coalition passing it intended.

C. *SIERRA CLUB* AND PSD

One key interpretative issue concerning the 1970 amendments was whether the Act required the prevention of significant deterioration (PSD) in pristine areas. We have set out our view at length elsewhere[48] and will only summarize the logical errors that our approach suggests were made in *Sierra Club v. Ruckelshaus*.[49]

The issue of PSD and its subsequent consideration in *Sierra Club* provide an excellent illustration of our theoretical principles. The Clean Air Act's preface provided unqualified, general support for environmental protection. It stated that the legislation's purpose was to "protect and enhance the quality of the Nation's air resources."[50] On the other hand, the Act contained numerous specific provisions that provided for control and constraints in particular cases. For the case of PSD, the Act provided for national ambient air quality standards, leaving it up to the states to decide whether to impose stricter standards.[51] While there was some discussion of significant deterioration prior to the Act and some further discussion of it in the newly created

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47. Elliott et al., *supra* note 34, at 338.

48. *See* McCubbins et al., *supra* note 23, at 445-46; *see also* MELNICK, *supra* note 34, at 71-80, 110-12 (yielding similar conclusions in analyzing the Clean Air Act).

49. 344 F. Supp. 253 (D.D.C. 1972).

50. 42 U.S.C. § 7401(b)(1) (1988).

51. MELNICK, *supra* note 34, at 71-79; McCubbins et al., *supra* note 23, at 450-59.

Environmental Protection Agency (EPA) during 1971, as Shep Melnick observes:

> In 1972, Administrator Ruckelshaus and his top advisers eliminated references to "significant deterioration" not because they were under political pressure to do so, but because the 1970 act provided the EPA with clear, specific methods for deciding what constituted "acceptable" air pollution increases. Unlike the 1967 act, the 1970 act required the EPA to set not just primary or health-based standards, but secondary air quality standards "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." *Section 116 of the act confers upon the states, not the EPA, authority to insist upon standards more stringent than these.*[52]

The Act thus contained an apparent contradiction. The preface clearly stated that the Act's purpose was to "protect and enhance" air quality while the section relating to deterioration allowed some deterioration in areas above the national standards, though any potential deterioration became subject to stringent limitations (notably, best available control technology (BACT) and the new source performance standard (NSPS)). Because of this tension, at least two potential answers can be rationalized as consistent with the statutory language as to the intent of the act. The broad, unqualified language of the preface clearly indicates that any deterioration is inconsistent with the Act. The specific provision of the Act, as noted above, indicates that limited deterioration is allowed under certain circumstances.

In deciding this issue in *Sierra Club,* Judge Pratt of the District of Columbia District Court concluded that the Act required PSD.[53] Emphasizing the language in the preface, he reasoned:

> On its face, this language would appear to declare Congress' intent to improve the quality of the nation's air and to prevent deterioration of that air quality, no matter how presently pure that quality in some sections of the country happens to be.[54]

As both our earlier analysis and that of Melnick show, Judge Pratt chose to ignore, downplay, or misinterpret the more specific provisions of the Act allowing limited deterioration. For example, one of the five items Pratt used to support his interpretation was a reference to a sentence in the 1970 report of the Senate Committee on Environment and Public Works.[55] The sentence

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52. MELNICK, *supra* note 34, at 78-79 (emphasis added).

53. *Sierra Club,* 344 F. Supp. at 256. As Melnick observes, the district court was the sole opinion for this case. The circuit court accepted the lower court's decision without writing an opinion, and the Supreme Court split four-to-four, thus "leaving the lower court's decision intact." MELNICK, *supra* note 34, at 74.

54. *Sierra Club,* 344 F. Supp. at 255.

55. *See id.* (quoting S. REP. NO. 1196, 91st Cong., 2d Sess. 4 (1970)).

said that state implementation plans should be disapproved by the EPA if, for clean areas, the plans did not "provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality."[56] As observed in our earlier work,[57] this language could be interpreted as requiring PSD. However, the report went on to state:

> Once such national goals are established, deterioration of air quality should not be permitted *except* under circumstances where there is no available alternative. Given the various alternative means of preventing and controlling air pollution—including the use of the best available control technology, industrial processes, and operating practices—and care in the selection of sites for new sources, land use planning and traffic controls—deterioration need not occur.[58]

A more reasonable interpretation of the entire passage than Judge Pratt's is that it did not intend to impose PSD. Instead, it sought a compromise between maintaining pristine areas at or above their current levels and allowing them to deteriorate without control to the lower, national standards. It did so by allowing some deterioration, but regulating the latter by imposing BACT and NSPS.[59]

As we emphasized above, legislation is typically the product of a coalition with disparate views of an issue and the role of the legislation.[60] Moreover, different provisions are often written at the behest of different members of the coalition. The ardent supporters wrote the preface of the Act, stating a broad, unqualified purpose. And yet the specific provisions, as illustrated by the controversy over PSD, were often more complex and did not unambiguously provide for the maximum amount of protection for air quality. The inconsistencies in the Act arose because other supporters, notably those representing pristine areas, wanted some flexibility in the Act so it would not inhibit economic growth in their areas. There representatives were willing to accept BACT and NSPS, but not PSD, and PSD was not required by the Act. Judge Pratt clearly changed the meaning of the Act with respect to PSD by ignoring the specific provisions and relying on the broader, unqualified preface to address the obvious contradiction. In so doing, he altered the

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56. S. REP. NO. 1196, *supra* note 55, at 11.

57. McCubbins et al., *supra* note 23, at 450-54.

58. *Id.* at 451 (emphasis added).

59. Melnick comes to the same conclusions, noting that this interpretation underlay Ruckleshaus's 1972 decision. "The EPA's lawyers advised Administrator Ruckleshaus that secondary air quality standards and NSPSs defined permissible 'deterioration,' and that the EPA had no legal authority to establish additional restrictions." MELNICK, *supra* note 34, at 79. Moreover, Judge Pratt failed to explain why, if the legislation intended this to mean PSD, it did not simply specify PSD. This is especially odd since he asserted that it implied PSD because earlier officials at the Department of Health, Education, and Welfare had proposed it. *Sierra Club*, 344 F. Supp. at 255.

60. *See supra* Part II.B.

provision from one supported by pivotal legislators to one preferred by ardent supporters. By choosing to ignore a specific qualification, he misread the intention of the coalition supporting the Act.

In this sense *Sierra Club* might be termed an "expansive judicial reading" of legislation. Such readings are always possible when courts can rationalize more than one interpretation based on different portions of the statutory text. One of the advantages of our view is that it provides a means for addressing these ambiguities rather than leaving it up to the preferences or discretion of the courts. In this case, the relevant positive canon is that, whenever the specific language of a given provision conflicts with the broad purposes of the preface or preamble of an act, ambiguities should be resolved in favor of interpretations consistent with the specific rather than the more general provisions. In terms of our approach, Judge Pratt violated the canons of our theory.

The aftermath of *Sierra Club* provided one last insight about the normative implications of statutory interpretation that endures. Melnick argues that while PSD was not the policy intended by the 1970 Act, "[b]oth the EPA and Congress later decided that the courts were *right,*" and that "[t]he 1977 amendments *ratified* the core of the judicially developed policy.[61] Although the courts obviously changed PSD policy and Congress clearly was unable to reverse this change in 1977, it does not follow that Congress decided that the courts were "right" in the sense that PSD was a better policy. As positive political theory models have shown since Brian Marks's pioneering paper, inaction does not imply acquiescence.[62] When the preferences of the politicians who possess veto power differ significantly, courts can alter interpretation toward one and away from the other with impunity. Because any such change advantages one, legislation that attempted to reestablish the original agreement would be vetoed. This circumstance is, thus, better seen as a form of ex post opportunism than as legislative acceptance. Indeed, Melnick recognizes this logic, for he argues that

> a major reason the courts won political vindication was that they shifted the balance of power between Congress and the president. On both PSD and dispersion the president and his top advisers disagreed with the courts, while the key congressional committees supported the courts' policies. The court decisions allowed the EPA to ignore the White House. They also allowed the House and Senate committees to achieve their preferred policies merely by blocking White House proposals to reverse the court decisions.[63]

As Melnick makes clear, the courts here won a political battle in the sense

61. MELNICK, *supra* note 34, at 72 (emphasis added).
62. *See generally* Marks, *supra* note 23.
63. MELNICK, *supra* note 34, at 72.

that their change advantaged one subset of coalition partners. The latter cannot be expected to give up their court-won gains by reinstating the status quo. From a normative standpoint, this form of political inaction fundamentally differs from a ratification by inaction in which actors at every veto gate prefer the court ruling to the status quo.

Our analysis thus yields another insight about statutory interpretation: the absence of an ex post reaction to a judicially imposed policy does not imply acceptance of the judicial interpretation of the original legislation. Rather, it reflects a court's ability to replace the original intent with its own preferences under political circumstances in which elected officials cannot reverse a court decision.

CONCLUSIONS

Positive political theory can make a significant contribution to the positive and normative theory of statutory interpretation. Positive theory focuses attention on several important features of the legislative process. One feature is a sharper conceptualization of the notion of "statutory intent." According to the view taken in this article, the intent of a statute is to codify the agreement of the enacting coalition with respect to the policy adopted, in part so that members of the enacting coalition can know more precisely the nature of their agreement, and in part to convey instructions to agencies and courts. Statutes are most assuredly not embodiments of the intent of any particular legislator, but a compromise among these intents. The structure and process of legislative enactment allocate influence to the relevant actors (including the President), and sometimes accord greater weight to one over another—depending on the specific circumstances surrounding the legislation. Consequently, there does not exist a set of weights to be attached to the preferences of members of the enacting coalition that applies in all cases. Nor should equal weight be placed on elements of the legislative history, regardless of how the legislation actually evolved.

Positive political theory provides a method for separating elements of the legislative process that are likely to reveal relevant information about the agreement of the enacting coalition from elements that are susceptible to opportunistic manipulation by individual coalition members to seek personal advantage in the way statutes are interpreted. The first canon of evaluating legislative history should be that consequential actions have priority over inconsequential ones. The second canon, following from the first, is that decisions by legislators to reject language provide useful negative inferences about statutes. The third canon is that the totality of the legislative history conveys important information about whose preferences were most consequential in shaping the coalitional agreement. That is, in the sequence of veto points through which a statute must pass, some are likely to be much

closer calls than others, and it is at these stages where the details of the coalitional agreement are most profoundly shaped. The fourth canon is that, because both statutes and the Constitution give a role to the President in the legislative process, statutory interpretation must take the President's preferences into account and must accord them considerable weight if the President possessed a credible veto threat over the statute in question.

Our view also has important implications for current controversies in statutory interpretation. One is the concept of deference to agencies. According to this view, agency interpretation should be accorded primary weight when legislation is ambiguous or contradictory. The problem that is created by granting deference to agencies is that it implicitly reassigns weight to preferences among members of the legislative coalition that does not necessarily reflect their influence in legislation. Specifically, day-to-day oversight of agency decisions is managed primarily by the President, and within Congress the oversight process in subcommittees is the primary means of conveying the legislators' preferences to the bureaucracy. On matters about which the President has strong views, the President's position as Chief Executive will naturally lead agencies to favor the preferences of the President. If, when legislation was developed, the President's preferences were not pivotal, the effect is to unravel the original legislative agreement. Knowing this, if the judiciary adopts a policy of deference to agencies, Congress will be less willing to pass legislation because it will not be able to rely on the courts to carry out the compromises it makes with the President. Likewise, if a matter is less important to the President, the details of legislative implementation are likely to be more heavily influenced by subcommittee oversight. Because subcommittees are often populated by ardent supporters of policies, the effect of deference in this case is to disenfranchise the moderates who, in the legislative process, were unwilling to go along with the visions of the ardent supporters.

Deference to agencies can plausibly be defended only when an agency's overseers in the White House or Congress can be regarded as the pivotal members of the enacting coalition. To ascertain that this is the case, however, requires precisely the positive political theory analysis recommended in this paper. Deference to the agency is justified only if the agency is attempting to implement the preferences of pivotal members. Hence, the concept carries no additional normative value beyond the positive political theory analysis that is necessary to sustain it.

Positive political theory also has substantial implications with respect to the debate over textualism.[64] Textualist judges view as arbitrary many readings of statutes in previous court decisions, in part because the latter rely on legislative history to support interpretations textualists consider "expansion-

64. This discussion draws from Rodriguez & Weingast, *supra* note 14.

ary." Textualist judges hope to use their new strategy as a means of rationalizing a retreat from expansive judicial readings. While many criticize textualism because of its policy consequences and its association with conservative judges, textualism is more than simply a strategy for implementing a different judicial ideology. Wholly apart from any policy motives, it is a strategy aimed at an important problem, the potential for arbitrary use of legislative history by courts.[65] As we argue above, the absence of a theory of the legislative process implies that the ability of judges to reinterpret legislation has few limits. Textualism directly addresses the problem of arbitrariness, for it denies the courts the use of the very indicia used by the previous courts to rationalize the expanded readings. For this reason textualism must be taken more seriously than it is by those who wish to dismiss it because of its present policy implications.

From our perspective, textualism is a blunt and unsatisfactory instrument for mitigating the problem of arbitrariness because it denies to the courts the use of the material needed to interpret a statutory agreement in circumstances that were not provided for in the original act. The absence of an explicit provision does not mean that the act fails to apply, for the circumstance may be a new one which affords either of two interpretations, depending upon how one reads the act. Because it denies courts a vital source of evidence and information, textualism's prohibition on the use of legislative history makes it *less* likely that the courts will choose the interpretation that would have been chosen by the act's enacting coalition. For these reasons, a set of positive canons grounded in legislative theory is a superior alternative to textualism. As in contract law, positive canons reduce the potential for arbitrariness and allow courts to play a valuable role in interpreting statutes by relying on indicia to gain evidence of a statute's meaning.

Of course, textualists might counter by criticizing our use of contract law as an inappropriate analogy. The reason is that the normative case supporting efficient contracting seems stronger than that supporting efficient legislative exchange. One reason is that the theoretical foundation for the concept of legislative efficiency—positive political theory—is less well understood by legal scholars and judges than are the basic principles of economics that underlie contract law. Consequently, the notion of efficient legislative exchange appears more nebulous. In addition, problems of interest group influence, rent-seeking,[66] and the pursuit of private gain at the public expense may be

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65. Of course, proponents of "dynamic statutory interpretation" also recognize the potential arbitrary use of indicia, though they propose a different solution. *See, e.g.*, FARBER AND FRICKEY, *supra* note 3, at 102-106; William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1533-38 (1987); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 408, 441-43 (1989).

66. The coercive power of the state can be used to alter markets for private gain, that is, to create

interpreted as causing important differences between market exchange and legislative exchange. Indeed, much of positive political theory has addressed this difference.[67] Yet, the difference is less one of kind than of quantitative magnitude, for third-party effects or economic externalities are an explicit part of the law governing market transactions. In any case, while we agree that public law must take important political failures into account, textualism appears an inadequate way to address them. If legislatures produce not only public-regarding laws, but private-regarding ones, that problem should be addressed directly via a set of canons whose purpose is to make that type of legislation less likely.[68] The problem with textualism is that it inhibits and devalues legislation indiscriminately. Not only does it inhibit legislation favoring private interests at the public expense, but it also makes public-regarding legislation less likely.

Our brief analysis of the 1970 amendments to the Clean Air Act illustrates our principles at work. It reveals how legislation is the product of a diverse group of legislators with different interests. While the views of the ardent supporters of the legislation might be the easiest and clearest for outsiders—legal scholars, political scientists, and judges—to understand ex post, their views are rarely determinative because they rarely have sufficient strength to comprise a majority. As a result, legislation usually requires a compromise between ardent advocates and more moderate supporters of the legislation. Often the form of the compromise is that some provisions are added to the bill and others subtracted, in many cases during the floor debate. Commonly legislators do not then go back to other sections of the bill to make all the wording completely consistent, in part because legislation frequently runs hundreds of pages. Consequently, the legislative bargaining process can introduce tensions into the legislation as some portions pursue the basic goal in an uncompromised fashion while others are more qualified, circumspect, or limited.

Most regulatory legislation contains conflicts between a broad, public-regarding, and unqualified mandate and implementing sections that introduce qualifications.[69] The 1970 amendments to the Clean Air Act were of this

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"rents." Rent-seeking refers both to these rents and to the nexus of activities associated with obtaining them.

67. *See* FARBER & FRICKEY, *supra* note 3, at 116-43 (exploring the relevance of public choice to statutory interpretation).

68. Indeed, a lively literature has arisen on precisely this topic. *See generally* Jonathan Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); Sunstein, *supra* note 65; Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

69. As Shapiro observes, most new health, safety, and environmental statutes in the United States:

> typically contain high aspirational general language that appears to demand the achieve-

form. Qualifications arise through the process of compromise in which the ardent supporters write the basic framework for the legislation, including the widely quoted rhetoric placed at the beginning of the act, while many of the specific provisions are written at the behest of those who insist upon qualifications in order to support the legislation. Because ardent supporters typically embrace qualifying language only when doing so is necessary to pass the legislation, the moderates supporting the qualifications are pivotal, and, hence, their preferences should be given greater weight in statutory interpretation.

Judge Pratt ruled in *Sierra Club* that the broad mandate in the preface of the 1970 Act held precedence because no one who truly supported such a purpose would have allowed deterioration of pristine areas.[70] While his internal logic holds given its explicit premise—no one who agreed with the unqualified view stated in the preface would allow deterioration—the implied premise that all who supported the legislation also supported the preface is false. Our approach to the development of positive canons emphasizes that provisions required to gain the support of pivotal members should be determinative. When their provisions conflict with the language of the nonpivotal supporters, the views of the pivots, necessary to pass the legislation, should take precedence. For the 1970 amendments, this implies taking seriously the qualification to the overall goal for clean areas stated in the preface.

Notice also that *Sierra Club* provides two examples of a point made by textualists, namely that judges sometimes use expansionary readings of legislation to make new policy. First, PSD was not intended by the members of the coalition supporting the legislation. Second, PSD was not the policy in effect at the time of the case because the EPA under William D. Ruckelshaus had decided against it. Yet, in the challenge to PSD embodied in *Sierra Club,* a textualist could not arrive at a conclusion to eliminate the requirement for PSD simply by invalidating the use of legislative indicia.[71] To reach this conclusion courts need a coherent method for deciding between conflicting parts of the text and in particular, a rationale for emphasizing the qualified provisions over the unqualified statement of purpose. Some textualist judges might be willing to rationalize such a reading solely on the basis of their preferences or ideology. But that is simply replacing one arbitrary rule

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> ment of an absolutely healthy, safe, and beautiful working and living environment with no consideration at all of costs. More deeply buried in the same statutes are vague language, exceptions and fudges of myriad sorts that allow some balancing of benefits and costs and some amelioration of impacts.

Martin Shapiro, The Court of Justice 35 (1990) (unpublished manuscript, on file with *The Georgetown Law Journal*).

70. Sierra Club v. Ruckelshaus, 344 F. Supp. 253, 256 (D.D.C. 1972).

71. Because the 1977 amendments provide for PSD explicitly in the legislative text, a textualist would uphold the policy after that date. *See* 42 U.S.C. § 7471 (1988).

with another. Our approach instead underscores the value of a theory of the legislative process, for it provides a set of objective, non-ideological criteria to help make this decision.[72]

Whereas the implications of positive political theory are substantial and not entirely obvious, the potential contribution of positive theory to the problem of statutory interpretation is far from fully realized. This paper contains some examples and illustrations; it by no means constitutes anything approaching a full-blown theory of statutory interpretation. To do so would require a far more general and realistic characterization of the legislative process than the simplified one presented here. Some of the most important unanswered questions are as follows.

First, what happens with a multidimensional issue? A single, pivotal group of moderates typically does not exist in this case. However, a coalition must form to create a majority, and it usually does so by trading support over various provisions among groups of legislators. Although we have not extended our approach to cover this case, the necessary modifications are not difficult to identify.

Second, often floor managers, even though ardent supporters of an unqualified vision, act as an honest agent of the enacting coalition and accurately express the view of the compromise version. Consequently the same individual (e.g., Senator Muskie in the case of 1970's environmental legislation) may act in different capacities at different points in the legislative process—in the initial subcommittee markup secessions, during the bill's floor consideration, and finally when the conference version comes to the floor. When a leader decides to act as an advocate, moderates may speak up to emphasize the qualifications necessary to gain their support. Additionally, members who have not succeeded in obtaining the language they seek may speak out during the floor debate to try to affect the legislative history in order to win the day when the court reviews the statute. A general theory of legislation needs to address more completely how to separate cheap talk from accurate representation of the compromise.

Third, the role of interest groups in public policy formation has not been taken into account in our analysis. In recent years, legal scholars have debated the role and legitimacy of lobbyists, notably as they relate to statutory interpretation. Several scholars have discussed the possibility that statutes representing private deals among interests should be given a more "public-regarding" interpretation.[73] This important set of issues deserves considerable attention. Because our analysis has ignored this problem, qualifications

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72. In the case we have examined, the answer appears to be one that a conservative textualist would desire, but not because the two are logically tied. In other circumstances the result would differ.

73. *See, e.g.*, ESKRIDGE & FRICKEY, *supra* note 1; FARBER & FRICKEY, *supra* note 3, at 399-419;

to our positive canons may be necessary. Presumably these qualifications would take the form of a set of canons that prescribe how to identify undesirable influence by interest groups and when legislative intent regarding these provisions should be set aside. We emphasize, however, that though this may result in qualifications to the canons presented here, it will not rationalize setting aside our program for interpretation. A necessary condition to set aside a provision on the grounds that it benefits a private interest is that legislative intent, as defined above, be determined. Only then can there be proper assurance that its meaning was to provide an illegitimate private benefit instead of another, otherwise unnoticed purpose.

More broadly, the pathologies of democracy that the U.S. governmental system is supposed to protect against include more than the instability and manipulability of legislative actions in Congress. They also include protections against the use of the coercive power of the state by one group to oppress another, and the possibility that majorities can behave irrationally in the short run owing to unusual and explosive circumstances. Expansive, durable legislation is less appealing when it arises from either circumstance. How one thinks about the tradeoffs between statutory efficiency from the perspective of the enacting coalition versus protections against these pathologies of democracy must play an important part of a normative theory of statutory interpretation.

Macey, *supra* note 68, at 132-39; Sunstien, *supra* note 65, at 446-51; Sunstein, *supra* note 68, at 1727-32.