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Theorizing the Point-of-Order Interpretive Canons

Chun Hin Jeffrey Tsoi
Georgetown University

THEORIZING THE POINT-OF-ORDER INTERPRETIVE CANONS

*Chun Hin Jeffrey Tsoi**

ABSTRACT

In Law Within Congress*, Jonathan Gould suggested that rulings of the House or Senate chair under the advice of their respective parliamentarians might inform statutory interpretation. This Article fleshes out the theoretical foundations of that approach. While such approach is much narrower than the broad reliance on Congress's rules by other theorists of the "process-based" school, it also comes with strong theoretical justifications and advantages that set it apart. Part I illustrates the broad appeal of "process-based" theories by showing that even textualists have strong theoretical reasons to endorse them. Part II then surveys the theoretical advantages specific to the point-of-order interpretive canons compared to broader approaches in the "process-based" school, such as notice to lawmakers and avoidance of the "rule-flouting" problem. Part III illustrates three basic point-of-order canons, as well as the various theoretical imports of chair rulings and appeals. Part IV explores how the point-of-order interpretive canons might be applied in practice using the Supreme Court case* Bankamerica Corp. v. United States*, a hypothetical analysis of Special Counsel Jack Smith's funding, and some miscellaneous examples drawn from congressional records.*

* Ph.D. Candidate, Department of Philosophy, Georgetown University; Senior Fellow at a nonprofit organization. J.D., Georgetown University Law Center. Opinions are exclusively my own and are not representative of any other person or entity. Many thanks to Josh Chafetz for his insightful guidance in the writing of this article, Jonathan Gould for his astute and encouraging comments, as well as the diligent editors of the *West Virginia Law Review* for their careful edits and thoughtful suggestions. All remaining errors are mine.

I. INTRODUCTION

Scholarship over the recent decade suggested that courts interpreting statutes should get into the weeds of the legislative process[1]—what Justice (then Professor) Amy Coney Barrett called the "process-based" school of statutory interpretation.[2] This Article proposes a particular interpretive approach under the "process-based" school, which we can call the point-of-order approach. I start that discussion by illustrating in Part I the broad appeal of "process-based" theories, showing that even textualists have strong theoretical reasons to endorse them.

A. The Inescapable Reality of Complex Congressional History

Congressional procedure is admittedly complex. While often complexity means sophistication (at least in form, if not in substance), sometimes it also brings chaos. This is especially so given the increasing use of "unorthodox" lawmaking procedures in Congress. As Abbe Gluck and others wrote, "the

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[1] *See, e.g.*, Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 905 (2013) (showing contrast between the way courts read statutes and the way Congress draft statutes through empirical evidence); Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 725 (2014) (continued); Rebecca M. Kysar, *Penalty Default Interpretive Canons*, 76 BROOK. L. REV. 953, 954 (2011) (internal quotations omitted) (exploring "penalty default interpretive canons" through which the courts assume that Congress' internal rules to cure collective-action problems function correctly) [hereinafter Kysar, *Penalty Default*]; and Rebecca M. Kysar, *Listening to Congress: Earmark Rules and Statutory Interpretation*, 94 CORNELL L. REV. 519, 523 (2009) (proposing "that judges should interpret ambiguous legislation that falls within the ambit of the earmark rules *as if Congress had followed the rules* . . .").

[2] Rebecca M. Kysar, *Interpreting by the Rules*, 99 TEX. L. REV. 1115, 1117 (2021) (quoting Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2193 (2017)) [hereinafter Kysar, *Interpreting by the Rules*].

Schoolhouse Rock! cartoon version of the conventional legislative process is dead."[3] "Unorthodox" lawmaking includes a number of alternative legislative procedures in Congress, such as:

- *omnibus legislation* where several measures are packaged together into one long bill with diverse subjects, such as the Clean Air Act ("CAA"), Affordable Care Act ("ACA"),[4] and more recently the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act");[5]
- *emergency legislation* that bypasses floor debates and sometimes even without a quorum present, such as Authorization for Use of Military Force ("AUMF") (passed three days after the September 11 attacks), Hurricane Katrina Relief legislation (passed four days after the hurricane hit land),[6] and the Families First Coronavirus Response Act[7] (passed five days after President Donald Trump made an emergency determination for COVID-19);[8] and
- *automatic lawmaking* which tasks outside boards such as Base Realignment and Closure Commissions ("BRAC") and Independent Payment Advisory Board ("IPAB") to make a recommendation which automatically takes effect unless Congress disapproves.[9]

Statistically, these alternative legislative procedures are becoming less and less *unorthodox*. For instance, in the 112th Congress, more than 90% of enacted legislation deviated from the textbook legislative process of "first passing through committees on each side, then moving to debate and vote in each chamber, followed by a conference between the chambers, and concluding with a final vote by both chambers before passage."[10] Additionally, more than 40% of enacted legislation bypassed the committee process in both Houses entirely.[11]

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3 Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1794 (2015) [hereinafter Gluck, *Unorthodox Lawmaking*].

4 *See id.* at 1804.

5 Coronavirus Aid, Relief, and Economic Security Act (CARES Act), 15 U.S.C.A. §§ 9001–9080 (West 2020) (ranging 350 pages covering subjects from unemployment insurance to education).

6 Gluck, *Unorthodox Lawmaking*, *supra* note 3, at 1808–09.

7 166 CONG. REC. S1790 (daily ed. Mar. 18, 2020) (statement of Sen. Mitch McConnell) (skipping the cloture process and going straight to voting on the bill itself).

8 Letter from President Donald J. Trump on Emergency Determination Under the Stafford Act (Mar. 13, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/letter-president-donald-j-trump-emergency-determination-stafford-act/.

9 Gluck, *Unorthodox Lawmaking*, *supra* note 3, at 1813.

10 *Id.* at 1800.

11 *See id.*

The courts might inevitably have to address this messy reality of lawmaking and its consequences.[12] One prominent example is *King v. Burwell*,[13] where the Supreme Court was confronted with the "unfortunate reality" of "inartful drafting."[14] The Court noted that "Congress wrote key parts of the Act behind closed doors . . . [and] passed much of the Act using a complicated budgetary procedure known as 'reconciliation,' which limited opportunities for debate and amendment,"[15] and Chief Justice John Roberts strived to give "fair understanding of the legislative plan"[16] even though "the Act does not reflect the type of care and deliberation that one might expect of such significant legislation."[17] In doing so, he eschewed the textual interpretive canon against surplusage as applied to the ACA.[18] Gluck described in *Imperfect Statutes, Imperfect Courts* the battle of textual interpretive canons between the *King* petitioner and the government:

> [Petitioner's] briefing focused on "plain meaning" . . . [and] other textual rules, such as the presumption that Congress uses the same statutory term consistently and that Congress does not use redundant language; and several policy-based canons of construction that presume that deductions from the tax code are clearly expressed . . . . The Government invoked numerous canons of statutory interpretation of its own, including the presumption in favor of contextual interpretation; the presumption of consistent usage; the presumption that Congress does not hide "elephants-in-mouseholes" (bury major changes in ancillary provisions); the presumption that Congress does not impose drastic consequences on states without a clear statement (federalism); and *Chevron* deference for the IRS.[19]

Fancy textual canons, even if the parties could think of hundreds of such,[20] cannot and did not conceal the unorthodox and complicated legislative history of

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12 Abbe R. Gluck, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 62 (2015) [hereinafter Gluck, *Imperfect Statutes*].

13 King v. Burwell, 576 U.S. 473 (2015).

14 *Id.* at 491.

15 *Id.* at 491–92.

16 *Id.* at 498.

17 *Id.* at 492.

18 *Id.* at 491 (quoting Lamie v. United States Trustee, 540 U.S. 526, 536 (2004)).

19 Gluck, *Imperfect Statutes*, *supra* note 12, at 71–72.

20 *See, e.g.*, William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 536 (2013) (reviewing Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts (2012)) ("Updated through 2012, my casebook coauthors and I found 187 different canons of statutory construction in the opinions of the Supreme Court under Chief Justices Rehnquist and Roberts.").

the ACA.[21] Therefore, "process-based" theorists urge that the courts rely more extensively on congressional history and procedures when interpreting statutes.

This Article takes up and fleshes out Jonathan Gould's "process-based" idea, in *Law Within Congress*, that rulings of the House or Senate chair on points of order might inform statutory interpretation[22]—the *point-of-order interpretive canons*. Part I.B shows that Gould's idea, and "process-based" theories in general have broad appeal because even textualists have strong theoretical reasons to endorse them. Part II surveys the theoretical justifications and advantages specific to the point-of-order interpretive canons compared to broader approaches in the "process-based" school. Part III illustrates three basic point-of-order canons, as well as the various theoretical imports of chair rulings and appeals. Part IV explores how the point-of-order interpretive canons might be applied in practice using the Supreme Court case *Bankamerica Corp. v. United States*,[23] a hypothetical analysis of Special Counsel Jack Smith's funding, and some miscellaneous examples drawn from congressional records.

B. Why Textualists Should Not Reject "Process-based" Interpretation

It might seem inevitable that textualists would disagree fundamentally with the "process-based" school. From their perspective, the legislative reality, however unorthodox and complicated, should not influence statutory interpretation because they "only want to know what the words mean."[24] Case in point—Justice Antonin Scalia chastised the *King* majority for "chang[ing] the usual rules of statutory interpretation for the sake of the Affordable Care Act."[25] He argued that legislative context "is a tool for understanding the terms of the law, not an excuse for rewriting them."[26] Similarly, in *A Matter of Interpretation*, Justice Scalia wrote that:

> [I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. . . . Government by unexpressed intent

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21 Gluck, *Imperfect Statutes*, *supra* note 12, at 76–79 (detailing the ACA's legislative history from the merger of committee drafts to reconciliation).

22 *See* Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946, 2022 (2020) ("Because legislators vote on bills in light of the parliamentarians' judgments and advice, one way of knowing how legislators understood a given statutory term is to see how a parliamentarian understood it. Courts can thus look to parliamentary precedent—especially rulings of the chair—to help them interpret ambiguous statutory provisions.").

23 Bankamerica Corp. v. United States, 462 U.S. 122 (1983).

24 ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (Amy Gutmann ed., 2018) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538 (1947)).

25 King v. Burwell, 576 U.S. 473, 517 (2015) (Scalia, J., dissenting).

26 *Id.* at 501 (Scalia, J., dissenting).

> [is] tyrannical. It is the law that governs, not the intent of the lawgiver.[27]

However, I argue that textualists should not reject "process-based" approaches to interpretation because, if textualism is justified by the fact that texts are products of congressional compromise, congressional procedures are equally products of compromise.

While textualists might on occasion display their pessimism of a stable legislative process, that pessimism is hardly the consistent backbone of textualism. According to scholars like Rebecca Kysar, textualism reflects assumptions of a "'dysfunctional' legislative process."[28] Kysar argues that these assumptions might be based on their perception of "the legislative process's inability to aggregate lawmakers' individual preferences into a single collective choice"[29] or their belief that legislators are constantly trying to sneak in language through legislative history to avoid the "costly endeavor to cement interest-group deals in the actual language of a statute."[30] But Justice Scalia's comments in *King* undercuts Kysar's theory: "[T]he Congress that wrote the Affordable Care Act knew how to equate two different types of Exchanges when it wanted to do so . . . What are the odds, do you think, that the same slip of the pen occurred in seven separate places?"[31] In other words, contrary to Kysar's theory of congressional dysfunction, Justice Scalia operated under the assumption of congressional deliberateness—even when, given the messy procedural history of the ACA, multiple slips of the pen would hardly be surprising.[32] So maybe an assumption of "'dysfunctional' legislative process"[33] does not neatly explain textualists' adherence to textualism.

Textualists' more fundamental argument is that only textualism is theoretically consistent with democracy.[34] This argument might be based on the premise that "[r]elying on just a few people to represent Congress as a whole is far less attractive than relying on the whole of Congress that has voted for the

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27 SCALIA, *supra* note 24, at 17.

28 Kysar, *Penalty Default*, *supra* note 1, at 957.

29 *Id.*

30 *Id.* at 956.

31 King v. Burwell, 576 U.S. 473, 504–14 (Scalia, J., dissenting).

32 *See* Gluck, *Imperfect Statutes*, *supra* note 12, at 79 ("Justice Scalia's cynicism about a seven-time 'slip of the pen' rests on the fiction that Congress drafts statutes front to back, and always has the opportunity to perfect them. . . . The ACA's procedural history — and as well the history of most other modern statutes — does not fit that narrative.").

33 Kysar, *Penalty Default*, *supra* note 1, at 957.

34 SCALIA, *supra* note 24, at 17 ("[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated . . . It is the *law* that governs, not the intent of the lawgiver.").

text of the statute."[35] If that is the sole basis, proponents of legislative intent can simply point to evidence of legislative intent that is "representative of a majority's views."[36]

However, textualists might insist that even a "majoritarian intent" would be tyrannical. Justice Neil Gorsuch wrote in *Bostock v. Clayton County*[37] that "[o]nly the written word is the law," because "only the words on the page constitute the law adopted by Congress and approved by the President."[38] Judge Frank Easterbrook argued that because "[o]nly the text survived the complex process for proposing, amending, adopting, and obtaining the President's signature . . . [t]he text of the statute, and not the private intent of the legislators, is the law."[39] John Manning similarly wrote that "the statutory text alone has survived the constitutionally prescribed process of bicameralism and presentment,"[40] and that "the final wording of a statute may reflect an otherwise unrecorded legislative compromise."[41] Accordingly, a textualist argument under these views may run as follows:

Premises

1. Individual legislators do not necessarily agree on their legislative purposes even when agreeing on a statutory text. The text is the product of deliberation and compromise among elected legislators and thus the product of democracy, but the intention is not.[42]
2. The courts should only consider products of democracy in saying what the law is.[43]

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35 Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 141 (2012) [hereinafter Nourse, *A Decision Theory*].

36 *Id.*

37 Bostock v. Clayton Cnty., 590 U.S. 644 (2020).

38 *Id. at* 653–54.

39 Cont'l Can Co. v. Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund, 916 F.2d 1154, 1157 (7th Cir. 1990).

40 John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 73 (2006).

41 *Id.* at 74.

42 *See, e.g.*, SCALIA, *supra* note 24, at 17 ("[W]e do not really look for subjective legislative intent . . . Government by unexpressed intent is [tyrannical] . . . A government of laws, not of men. *Men may intend what they will; but it is only the laws that they enact which bind us*." (emphasis added)).

43 *See, e.g.*, *id.* at 20 ("Congress can enact foolish statutes as well as wise ones, and it is not for the courts to decide which is which and rewrite the former.").

Conclusion

3. Thus, legislative intent, even those shared widely among legislators, should have no part in the interpretation of democratic decisions, and the text itself is the only product of democracy on which the courts should exclusively rely.[44]

Original Meaning Textualism

4. From 3, it follows that the courts should rely on treatises and dictionaries contemporaneous with the passage of the statutory text to interpret the statute, but not legislative history.[45]

It is not the objective of this Article to fully respond to this argument. Critics of the bicameralism-and-presentment argument noted that it proves too much: If the fact that only the statutory text is duly enacted means we must disregard everything else, then we must note that dictionaries are not themselves enacted with the statutes either.[46] "[T]he bicameralism argument reaches so far that it undermines everything but the text of the statute, including all canons and every other traditional method of statutory interpretation."[47] One might also challenge premise (1) on the grounds that the gloomy reality of legislation[48] and democratic participation[49] undercut the degree to which statutory text is

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[44] *See, e.g.*, *id.* at 17 ("It is the *law* that governs, not the intent of the lawgiver.").

[45] *See, e.g.*, Harmelin v. Michigan, 501 U.S. 957, 970–76 (1991) (citing *inter alia* T. MACAULAY, HISTORY OF ENGLAND (1899) and WEBSTER'S AMERICAN DICTIONARY (1828)).

[46] Erik Encarnacion, *Text is Not Law*, 107 IOWA L. REV. 2027, 2036 (2022).

[47] VICTORIA NOURSE, MISREADING LAW, MISREADING DEMOCRACY 166–67 (2016).

[48] *See, e.g.*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 51 (2006) ("[T]here is simply no defense for [the power wielded by small states] other than the fact that equal representation of the states was thought necessary in 1787 to create a Constitution that would be ratified by the small states."); Eric W. Orts, *Senate Democracy: Our Lockean Paradox*, 68 AM. U. L. REV. 1981, 1984 (2019) ("The United States Senate is radically unrepresentative."); Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 HARV. J. ON LEGIS. 467, 467 (2019) ("The democratic principle of majority rule does not apply in the United States Senate. Majority rule has been replaced by rule by the minority. Rule XXII of the Standing Rules of the U.S. Senate currently gives a minority of forty-one senators, who may be elected from states that contain as little as eleven percent of the nation's population, the power to prevent the Senate from debating or voting on bills, resolutions, or presidential appointments by filibustering or acquiescing in a filibuster.").

[49] *See, e.g.*, Rucho v. Common Cause, 588 U.S. 684, 722 (2019) (Kagan, J., dissenting) ("[P]artisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters' preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction."); Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of*

meaningfully a product of democracy. If so, one might propose a diversity of proposals to first fix the democratic defects, which might range from electoral reform,[50] Senate reform,[51] abolishing the filibuster,[52] to abolishing the Senate.[53]

Alternatively, one might challenge premise (2) if one questions the conception of "democracy" where ancient, obsolete statutes are applied to govern

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Redistricting Reform, 84 WASH. U. L. REV. 667, 667 (2006) ("As one North Carolina state senator admitted, when it comes to redistricting, 'We are in the business of rigging elections.' Alarmed critics naturally see redistricting today as polluted by a corrosive excess of politics."); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 CORNELL L. REV. 1445, 1448 (2016) ("[P]olitical scientists have confirmed populist suspicions and demonstrated that economic elites dominate the American political system. The wealthy participate more at every stage of the political process—from meeting candidates, to donating, to voting. Elite economic interest groups (business and industry) make up the majority of interest groups and spend the most money on lobbying. And the wealthy's preferences diverge significantly from the majority of Americans. When median-wealth Americans' preferences do make it into law, political scientists have shown that this is almost invariably a function of 'democracy by coincidence': median-wealth preferences happen to align with those of the wealthy.").

[50] *See, e.g.*, *Rucho*, 588 U.S. at 749–50 (2019) (Kagan, J., dissenting) ("If [state courts] can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn't we? We could have, and we should have. The gerrymanders here—and they are typical of many—violated the constitutional rights of many hundreds of thousands of American citizens . . . Their votes counted for far less than they should have because of their partisan affiliation. When faced with such constitutional wrongs, courts must intervene: 'It is emphatically the province and duty of the judicial department to say what the law is.' That is what the courts below did." (citations omitted)); Kang, *supra* note 49, at 699–716 (proposing direct democratic approval of statewide redistricting plans); Sitaraman, *supra* note 49, at 1506–31 (proposing four categories of institutional design approaches to reduce the influences of the rich, including "countering economic inequality, safeguarding the political process, incorporating countervailing powers into the political process, and bypassing the political process").

[51] *See, e.g.*, Orts, *supra* note 48, at 1999–2009 (proposing a Senate Reform Act, which "allocates more senators to more populous states, following the constitutional principle of equal voting rights . . . [It] recognizes the legitimacy of representation of the states as independent units within the larger federal system, but rebalances the relative weight given to citizens within these units."); Levinson, *supra* note 48, at 60 ("The Senate represents a travesty of the democratic ideal, with consequences that are harmful to most members of the American political community. It alone provides ample reason for anyone who lives in a large state to reject the current Constitution and to refer it to a new constitutional convention for redrafting.").

[52] *See, e.g.*, Bondurant, *supra* note 48, at 513 ("At one time or another, people on opposite ends of the political spectrum have agreed that the filibuster is unconstitutional. It is time for the Supreme Court to do the same.").

[53] *See, e.g.*, Elie Mystal, *The Senate Cannot Be Reformed—It Can Only Be Abolished*, THE NATION (Nov. 12, 2021), https://www.thenation.com/article/politics/abolish-us-senate/ ("The Senate needs to be abolished and replaced with a democratic institution of government. 'One person, one vote' makes sense; 'one state, two votes' never did.").

the present and argue that the courts should be allowed to correct democratic defects without relying on Congress to act.[54]

One might also challenge the inferences of the argument, e.g., whether conclusion (4) logically follows from conclusion (3). One might argue that, even conceding that courts should rely on statutory text as the product of democracy, there is still room for disagreement as to what is meant by "rely on," and that there is no logical reason why consultation of contemporaneous treatises and dictionaries must be the one and only way to "rely on" statutory text. As Judge Learned Hand wrote, "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary."[55]

This Article, with its limited space, only defends the counterargument that conclusion (3) does not follow logically from premises (1) and (2), because even if statutory text is a product of democracy, it will not be the *only* product of democracy. Congressional procedure, as the indispensable background of every statutory text, is also a result of democratic compromise: Article I, section 5 of the United States Constitution provides that "[e]ach House may determine the rules of its proceedings."[56] Congress has the Rules of the House of Representatives[57] and Standing Rules of the Senate;[58] but they can be either amended formally[59] or otherwise impacted by other procedures.[60] To the extent any statutory text is a product of democracy derived from a combination of agreement, disagreement, and acquiescence, congressional procedure at any point in time is necessarily also a product of democracy derived from a combination of agreement, disagreement, and acquiescence.[61] Thus, if textualists endorse textualism because of premises (1) and (2), a method of

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54 *See, e.g.*, GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 2 (1999) (suggesting we should grant to courts the "authority to determine whether a statute is obsolete, whether in one way or another it should be consciously reviewed").

55 Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945); *see generally* Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994) (urging caution on the Supreme Court's increasing reliance on dictionaries).

56 U.S. CONST. art. I, § 5, cl. 2.

57 *See generally* CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, H.R. DOC. NO. 116-177 (2021).

58 *See generally* S. DOC. NO. 113-18 (2013).

59 *See, e.g.,* S. DOC. NO. 113-18, at 4 (Rule V: "No motion to suspend, modify, or amend any rule, or any part thereof, shall be in order, except on one day's notice in writing, specifying precisely the rule or part proposed to be suspended, modified, or amended, and the purpose thereof."); CHARLES W. JOHNSON, JOHN V. SULLIVAN & THOMAS J. WICKHAM, JR., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE 854 (2017) ("Pursuant to its authority under article I, section 5 of the Constitution, the House may change or waive the rules governing its proceedings. This is so even with respect to rules enacted by statute." (citations omitted)).

60 *See infra* Part II.A.

61 *See, e.g.*, MARTIN B. GOLD, SENATE PROCEDURE AND PRACTICE 49–61 (4th ed. 2018) (describing the history of political calculations and struggle on Senate rule regarding the filibuster).

interpretation that is based on congressional procedure should be endorsed by them on the same theoretical basis. This Article purports to sketch out one such proposal.

Note that some textualists rely on a different type of justification for textualism, based not on the mechanisms of statutory enactment but on the perspective of ordinary people subject to the law. One might argue that the statutory text, enacted through bicameralism and presentment, is the only accessible source of legal knowledge to a congressional outsider, and reading the text exclusively would force Congress to express the law more clearly in the duly enacted statutory text for the benefit of the readers. For example, Einer Elhauge argued that "courts should force Congress to reveal Congress's preferences more accurately."[62] Rebecca Kysar advocated for interpretive canons that "punish individual lawmakers who obscurely dole out special-interest benefits by refusing to give those deals effect."[63] On the other hand, Barrett argued that the difference between textualists and process-based theorists lies in the fact that "textualists use the construct of a hypothetical *reader*, and the process-based theorists use the construct of a hypothetical *writer* of a statute."[64] That argument is likely based in the value of fair notice: "Fairness requires that laws be interpreted in accordance with their ordinary meaning, lest they be like Nero's edicts, 'post[ed] high up on the pillars, so that they could not easily be read.'"[65] These arguments, which I call "outsider" arguments for textualism, are not addressed here; I am only focused on what I call "insider textualism" arguments, concerned with giving effect to legislative compromises.[66]

II. ADVANTAGES OF THE POINT-OF-ORDER INTERPRETIVE CANONS

It is not unprecedented for the courts to mention congressional procedure in opinions. For example, the Supreme Court in *Tennessee Valley Authority v. Hill*[67] noted the House and Senate rules against "changing existing law be in order" in an appropriations bill,[68] rejecting the argument that the Endangered Species Act was impliedly repealed. Subsequently, the Third Circuit in *Roe v. Casey,*[69] noting similar rules, held that *Tennessee Valley Authority v. Hill* does

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62 Nourse, *A Decision Theory*, *supra* note 35, at 139 (citing Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2169–70 (2002)).

63 Kysar, *Penalty Default*, *supra* note 1, at 954.

64 Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2200–01 (2017).

65 *Id.* (quoting SCALIA, *supra* note 24, at 17) (emphasis added).

66 For my discussion of "outsider textualism," see Chun Hin Jeffrey Tsoi, *Congressional Outsiders and Textualist Non Sequitur*, 59 U. RICH. L. REV. (forthcoming 2025), https://papers.ssrn.com/abstract=4780855.

67 Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978).

68 *See id.* at 191 (citing "House Rule XXI(2)" and "Standing Rules of the Senate, Rule 16.4").

69 Roe v. Casey, 623 F.2d 829, 836 (3rd Cir. 1980).

not mandate the courts to take the role of enforcing the congressional rules where the House suspended its normal rules.[70] However, the scholarship developing systematic and rigorous jurisprudential accounts of how statutory interpretation can be informed by congressional processes such as Rules of the House of Representatives and Standing Rules of the Senate[71] or the Congressional Budget Office's calculations [72] gained momentum only relatively recently. As I demonstrate here in Part II, process-based theories based on written rules of the House or Senate provide some powerful insights to statutory interpretation, but are not without limitations, because the rules can be altered by other procedural history. The point-of-order approach distinguishes itself by overcoming these limitations.

A. Challenges to Broader Approaches in the "Process-based" School

The utility of a "process-based" approach is powerfully demonstrated through Victoria Nourse's analysis[73] of the Supreme Court case *Public Citizen v. U.S. Department of Justice*.[74] At issue is a dilemma of whether the American Bar Association ("ABA") was "established or utilized"[75] by the President per the Federal Advisory Committee Act ("FACA"). On the one hand, if "utilized" means "use" in accordance with its ordinary meaning, then it is hard to deny that the ABA providing judicial recommendation is utilized by the President; on the other hand, it might seem absurd that the President's productive meeting with an organization would render it "utilized" and subject to the FACA disclosure requirements.[76] Nourse suggests a simple way out of this dilemma by taking notice of the House and Senate rules regarding conference committees,[77] which prohibits the addition of new language "not committed" by either the House or

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70 *See id.* at 836 ("Indeed, cognizant of the difficulties which may arise, we are most reluctant to find that an appropriations measure has implicitly repealed substantive law. *See* [*TVA v. Hill*]. But it is not our duty to prescribe optimal methods of legislation. Rather it is simply our duty to interpret statutes in accordance with the intent of the legislature. In this case, we find the intent of the legislature to be clear. Notwithstanding rules of statutory interpretation which may counsel otherwise, the legislative history makes it evident that the Congress intended the Hyde Amendment to have substantive impact.").

71 *See infra* Part II.A.

72 *See generally* Abbe R. Gluck, *Congress, Statutory Interpretation, and the Failure of Formalism: The CBO Canon and Other Ways That Courts Can Improve on What They Are Already Trying to Do*, 84 U. CHI. L. REV. 177 (2017) (discussing how statutes could be read in accordance with Congressional Budget Office's calculation of budgetary impact).

73 *See generally* Nourse, *A Decision Theory*, *supra* note 35.

74 Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440 (1989).

75 5 U.S.C.A. app. § 3(2)(B) (West 1982); Nourse, *A Decision Theory*, *supra* note 35 at 92–93.

76 Nourse, *A Decision Theory*, *supra* note 35, at 92–93.

77 For a general description of the committee process, GOLD, *supra* note 61, at 129–36.

Senate.[78] Noting that rule, and noting the fact that "utilized" was only added to the FACA in the conference committee, Nourse inferred that "utilized" was not intended as a significant change to either the House ("establish") or Senate versions ("established or organized").[79] This would allow the Court to avoid the thorny issues related to the word "utilized," and to simply conclude that because the ABA was neither "established" nor "organized" by the President, it is not subject to the FACA.

Unfortunately, approaches such as Nourse's are not without theoretical hurdles. Gould, in *Law Within Congress*, pointed out that general reliance on congressional rules assumes that legislators "must be familiar with not only their chamber's rules and precedents but also with specific statutory provisions under consideration and, most of all, with the intersection of how those provisions' meanings are shaped by the chamber's rules and precedents."[80] This, however, rarely happens unless the procedural question arose in the form of an objection, i.e. point of order.[81] While Members of Congress most likely know that new language is not supposed to be added in conference—ironically because the rule is often flouted[82]—they may not be cognizant of the applicable rules in other cases. Gould suggested that we thus look only to the rulings of the Chair on points of order, in which case "it would be reasonable to assume that legislators in fact understood a provision's meaning in light of procedural rules and precedents."[83]

The complexity of congressional procedure also raises concerns about the reliability of Nourses' approach. Nourse argues that the Court should "[n]ever read legislative history without knowing Congress's own rules,"[84] and that *Public Citizen* is "an easy example based on an apparently hard case"[85] to demonstrate that the Court in applying the rules needs no historical exegesis beyond uncovering the time "utilized" was added. However, understanding how Congress operates can be significantly different from merely reading the written rules; conflating the two, or an overly simplified understanding of the latter, could lead to inaccurate results. As Martin Gold explained, Senate procedure consists of more than written rules, and rests on four pillars: (1) Standing Rules;

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78 Nourse, *A Decision Theory*, *supra* note 35, at 92–93.

79 *Id.* at 93–95.

80 Gould, *supra* note 22, at 2022.

81 *See id.*

82 Nourse, *A Decision Theory*, *supra* note 35, at 95 n.100 ("It is sometimes said that this rule is quite often flouted, typically in the context of appropriations bills.").

83 Gould, *supra* note 22, at 2022.

84 Nourse, *A Decision Theory*, *supra* note 35, at 92.

85 *Id.*

(2) expedited procedure laws; (3) precedents; and (4) unanimous consent orders.[86] House procedure has close parallels.[87]

1. Rules are most intuitively what "congressional procedure" means—a set of codified decrees governing each chamber per Article I, section 5 of the U.S. Constitution.[88] Standing Rules of the Senate "shall continue from one Congress to the next Congress unless they are changed,"[89] while the House adopts new rules at the beginning of each Congress.[90]
2. Expedited procedure laws like the Congressional Review Act specify certain expedited procedures to be followed for particular purposes.[91]
3. Precedents are, among other things, interpretations of the rules through rulings of the Chair or appeals thereof on points of order, made with the advice of the parliamentarians.[92] Key to the arguments below, rulings of the Chair can be appealed, and upon a majority vote[93] are either sustained or reversed as binding precedents.[94]

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[86] GOLD, *supra* note 61, at 2.

[87] JOHNSON, *supra* note 59, at 851 ("The House may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result that is sought. However, within these limitations, the House is free to adopt such rules as it sees fit."); *id.* at 375 ("Congress has enacted numerous laws reserving for itself the right of review by approval or disapproval of certain actions of the executive branch or of independent agencies. These laws take various forms, often including expedited procedures."); *id.* at 853 ("[M]uch of what is known as parliamentary law is not part of the formal written rules of the House but springs from precedent or long-standing custom."); *id.* at 907 ("A request for unanimous consent is in effect a motion to suspend the order of business temporarily. Granting the request permits some action that is not in dispute and to which no Member has any objection.").

[88] U.S. CONST. art. I, § 5, cl. 2.

[89] S. DOC. NO. 113-18, at 4 (2013) (quoting Rule IV).

[90] *See* JOHNSON, *supra* note 59, at 851 ("It is customary for the House at the beginning of each Congress to adopt the rules by which it is to be governed during its meetings.").

[91] *See* GOLD, *supra* note 61, at 4 ("An expedited procedure statute is a law that specifies procedures to be followed during the consideration of subsequent legislation arising under its provisions."); *see, e.g.*, 5 U.S.C.A. § 802(g)(1) (West 1996) ("This section is enacted by Congress as an exercise of the rule-making power of the Senate and House of Representatives, respectively, and as such it is deemed a part of the rules of each House[.]").

[92] For a general description of the role of the parliamentarians, see Gould, *supra* note 22, at 1963 ("Ambiguities in Congress's rules can give rise to disagreements within Congress about how those rules apply to particular bills . . . the House and Senate parliamentarians have been the primary officials responsible for resolving these disagreements.").

[93] *See* JOHNSON, *supra* note 59, at 65 ("The vote on an appeal may be taken by record vote. A majority vote sustains the ruling." (citations omitted)); GOLD, *supra* note 61, at 10 ("Points of order (if submitted) or appeals (if taken) are decided by a simple majority of senators present and voting.").

[94] *See* JOHNSON, *supra* note 59, at 853 ("The House adheres to settled rulings, and will not lightly disturb procedures that have been established by prior decision of the Chair."); GOLD, *supra* note 61, at 9 ("If an appeal is taken, and the decision of the Chair is sustained, that too becomes

4. Unanimous consent orders or agreements are relatively uncontroversial decisions, such as sequencing floor activity, made through the absence of objections.[95]

This brief survey should suffice to raise suspicion that the Court may get an incomplete or inaccurate understanding of congressional procedure if it only reads the Rules of the House of Representatives and Standing Rules of the Senate. To start with, Nourse cited the House and Senate rules of the 112th Congress,[96] the rules in effect when she was writing, instead of that of the 92nd Congress, the rules in effect when FACA was passed,[97] which certainly could have been different, especially when the House adopts new rules every congressional term. This is a relatively minor problem in practice because (1) the rule at issue has in fact been substantially similar,[98] and (2) the Court simply needs to find the contemporaneous rules when applying this approach to statutes. A more essential challenge to Nourse's approach lies in the interaction of the four pillars—the existence of multiple sources of congressional procedure means that the rules by themselves are not only *insufficient* but also *misleading* as interpretive tools, unless it is also known that other sources do not currently alter or invalidate the rules. Compare the written rule that conference committees are not allowed to introduce extraneous matters,[99] with the following colloquy surrounding the Federal Aviation Reauthorization Act of 1996:[100]

> Mr. KENNEDY. The rule that a conference committee cannot include extraneous matter is central to the way that the Senate

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binding on the Senate. But if an appeal is taken, and the decision of the Chair is reversed, the decision of the Senate becomes binding on the Senate.").

95 *See* GOLD, *supra* note 61, at 11 ("Among the principal objectives served by consent orders are sequencing floor activity . . . Consent orders represent a temporary waiver of the rules."); JOHNSON, *supra* note 59, at 907 ("A request for unanimous consent is in effect a motion to suspend the order of business temporarily. Granting the request permits some action that is not in dispute and to which no Member has any objection.").

96 *See* Nourse, *A Decision Theory*, *supra* note 35, at 94 n.97.

97 *See* Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770, 776 (1972).

98 *See* CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, H.R. DOC. NO. 91-439, Rule XXVIII(3) (1971) ("[T]he introduction of any language in that substitute presenting a specific additional topic, question, issue, or proposition not committed to the conference committee by either House shall not constitute a germane modification of the matter in disagreement."); SENATE MANUAL CONTAINING THE STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE U.S. SENATE, S. DOC. NO. 92-1, Rule XXVII(2) (1971) ("Conferees shall not insert in their report matter not committed to them by either House, nor shall they strike from the bill matter agreed to by both Houses.").

99 *See* 142 CONG. REC. 27,149 (1996) (statement of Sen. Larry Pressler) ("Rule 28.2 of the Standing Rules of the Senate clearly states a conference committee shall not insert in their report matter not committed to them by either House.") (internal quotations omitted).

100 *See generally* Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104-264, 110 Stat. 3213 (1996).

> conducts its business . . . [C]onference committees are already very powerful. But if conference committees are permitted to add completely extraneous matters in conference, that is, if the point of order against such conduct becomes a dead letter, conferees will acquire unprecedented power.
> . . .
> Mr. PRESSLER. I rise to ask my colleagues to overturn the ruling of the Chair in this matter. Do I do so because I believe the provision was, in fact, within the scope of the conference? No, Mr. President, I admit this section . . . was not contained in the legislation as initially passed by either the House or the Senate. I am also fully aware that Rule 28.2 of the Standing Rules of the Senate clearly states a conference committee "shall not insert in their report matter not committed to them by either House." However, Mr. President, those on the opposite side of the issue know full well that this is done with some frequency when a particular situation necessitates such action.
> . . .
> The PRESIDING OFFICER. All time having been yielded, it is the opinion of the Chair that the conference report exceeds the scope, and the point of order is sustained.
> Mr. LOTT. Mr. President, I appeal the ruling of the Chair and ask for the yeas and nays.
> . . .
> The result was announced—yeas 39, nays 56 . . . The ruling of the Chair was rejected as the judgment of the Senate.[101]

As aforementioned, an appeal stands as binding precedent of the Senate. In other words, until this precedent is again overturned, it would be wrong to assume that Senate Rule XXVIII(2) always applies. Nourse is likely suggesting the rules as a simple step for the Court to start taking Congress's operation into account. However, if the parliamentary interpretation is that Senate Rule XXVIII "bec[ame] a dead letter"[102] because the Senate has determined that practicality of the conference committees dictates, then recommending that the Court "know[] Congress' own rules"[103] is not just simple first steps but *missteps*. This is analogous to using a compass when some other device interferes with the magnetic field around them—the compass is not even an informative starting point for navigation, not until there is a clear understanding of the nature and degree of interference. Nourse may well be correct about the applicability of Senate Rule XXVIII specifically in *Public Citizen* because this colloquy

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101 142 CONG. REC. 27,148–51 (1996).

102 *Id.* at 27,148 (statement of Sen. Edward Kennedy).

103 Nourse, *A Decision Theory*, *supra* note 35, at 92.

happened in 1996,[104] while the FACA was written in 1972;[105] but the theoretical point still stands.

I see two potential responses that would be ineffective against the challenge I raised. First, one might suggest that the Court, in addition to the rules, can also look to the legislative history of the relevant statute. That does not solve the problem because precedents established from rulings of the Chair and appeals thereof can come from *any previous floor proceedings*. To completely address this problem, the Court will need to know whether a point of order and chair ruling exists *at some point in history* that particularly impacts the rule of concern, which would be extremely taxing if not a mission impossible for any institution on earth other than the parliamentarian offices.[106] Second, Nourse suggested that "whether Congress does in fact follow its rules does not undermine the principle that courts should assume that a faithful agent would follow the rules."[107] Even if true, that response also would not answer the challenge because the Senate was not merely *flouting* its rules in the colloquy surrounding the Federal Aviation Reauthorization Act of 1996—it was *invalidating* the application of its rules through an appeal.

Two points of clarification as to what the challenge of reliability *does not* suggest. First, it *does not* suggest that the problem is insurmountable for interpretive approaches of the "process-based" school relying on written rules. The uninformative nature of the rules as written could imply that parliamentarian offices ought to be more transparent[108] or that the Federal Judicial Center should start analyzing congressional floor proceedings for use in the judiciary—the feasibility and wisdom of which exceed the scope of this Article. Second, it *does not* suggest that the complexity of congressional procedure is a reason against "process-based" interpretive canons. This is *not an external critique* that complexity *per se* counsels against consideration of any congressional process, that the Courts "lack the comprehensive background knowledge of the legislative process necessary to assess the significance and weight of the sources"[109] or that it is "otiose, impractical and pretentious to try to develop [an overall theory of legislation];"[110] those critiques are beyond the scope of this Article. Instead, the challenge is an *internal* critique from the "process-based" approach, i.e., if

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104 *See* 142 CONG. REC. 27,136 (1996).

105 *See generally* Federal Advisory Committee Act, Pub. L. No. 92-463, 86 Stat. 770 (1972).

106 Gould, *supra* note 22, at 2009 ("[T]he parliamentarians' offices in both chambers keep detailed internal records of earlier parliamentary advice and recommendations, both formal and informal.").

107 Nourse, *A Decision Theory*, *supra* note 35, at 95 n.100.

108 For an argument that the obscurity of parliamentarian offices protects their autonomy, see Gould, *supra* note 22, at 2017.

109 ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 113 (2010).

110 Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 800 (1983); *see also* Nourse, *A Decision Theory*, *supra* note 35, at 135–36.

interpretation should indeed rely on congressional procedures, simply advising the Court to know the rules would ignore their complexity.

What the challenge of reliability *does* suggest, however, is that to the extent one has concerns about whether the rules as written are in fact the rules that are applied, an alternative approach within the "process-based" school has its own advantages.

B. How Point-of-Order Interpretive Canons Answer Those Challenges and More

Point-of-order interpretive canons is one such option to answer the challenges. Parts III and IV attempt to flesh out the point-of-order interpretive canons, but the idea of specifically drawing inferences from points of orders and chair rulings (and appeals thereof) should be by itself sufficient to demonstrate its numerous theoretical benefits and ability to answer the aforementioned challenges.

1. *Notice to lawmaker:* As Gould suggested,[111] unlike the written rules which could be obscure and otherwise unknown to lawmakers, points of order make rules-related issues salient to Members by giving them airtime on the floor.[112] Members are given the opportunity to understand the procedural rule at issue, how it applies to this case in accordance with precedents, and decide whether to appeal the Chair's ruling. Assumption of lawmakers' general familiarity with the rules is unnecessary under the point-of-order approach.

2. *Single view of the Chair:* Gould also noted that instead of having to discern substance from numerous lawmakers, the point-of-order canon looks only at the single view of the Chair[113] (i.e., "the parliamentarian's rulings"[114]). In the case of a successful appeal, the canon also needs only to look at the reasoning of the Member raising the point of order or appeal, if any.[115] This avoids judges "looking over a crowd and picking out [their] friends" [116] and unrepresentative members' "strategic manipulations of legislative history to secure results they were unable to

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111 *See* Gould, *supra* note 22, at 2022.

112 Members are not always on the floor—but still, it is very likely that Members would at least be told by their staffers about points of order being raised.

113 *See* Gould, *supra* note 22, at 2023.

114 *Id.* at 1965.

115 The more complicated question of interpreting those single voices is addressed at *infra* Part IV.

116 Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1989) (internal quotations omitted).

achieve through the statutory text,"[117] because the courts applying this approach look either at chair rulings to which the majority agreed/acquiesced, or appeals sanctioned by a majority.

3. *Compatibility with intent skepticism:* Contrary to the argument that "process-based" school "simply has nothing to offer to those interpretive theories that are skeptical of legislative intent,"[118] the point-of-order canon is compatible with intent skepticism. Criticisms that the "process-based" school represented by theorists such as Gluck relies upon "the subjective intent of the drafters in criticizing prior interpretive methods and justifying new ones"[119] (accurate or not) does not apply to the point-of-order canon, because the results of points of order are as much products of agreement, disagreement, and acquiescence as statutory texts are. When a Senator's speech in conjunction with a successful appeal is taken into account, the reason is not (necessarily) legislative intent, but rather that a majority of Senators voted for that to be "judgment of the Senate."[120]

4. *No "rule-flouting" problem:* To rely generally on written rules, one must face this question: "[w]hat is the significance of the rules to an interpreter when Congress routinely flouts them?"[121] Regardless of one's view of rule flouting,[122] though, rule flouting poses no problem to the point-of-order approach: either the rules are *enforced*, or they are *invalidated* through points of order.[123] The majoritarian decision to enforce or invalidate, rather than written norms that may or may not be followed, forms the basis of interpretation. Further, focusing only on points of order spares the courts the trouble of determining whether rules are even flouted in the first place under on-the-ground standards.[124] The actual

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117 Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005).

118 Kysar, *Interpreting by the Rules*, *supra* note 2, at 1123.

119 *Id.* (referencing John F. Manning, *Inside Congress's Mind*, 115 COLUM. L. REV. 1911, 1916 (2015)).

120 142 CONG. REC. 27,150 (1996).

121 Kysar, *Interpreting by the Rules*, *supra* note 2, at 1119.

122 *See, e.g.*, Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1447–48 (2018) ("In addition, and somewhat paradoxically, if one is enamored of a constitutional norm in its current form—or, at least, if one thinks that it is superior to the likely alternatives—then spectacular efforts to destroy that norm may be less troubling than subtler efforts to decompose it. The basic reason is that behaviors seen as flouting a constitutional norm will almost invariably have greater salience, both among political elites and the public at large, than incremental revisions or refinements.").

123 *See, e.g.*, *supra* note 98; 100–02 and accompanying text (ruling on point of order partially invalidating instead of flouting Senate Rule XXVIII(2)).

124 *See* Chafetz & Pozen, *supra* note 122, at 1443–44 ("[I]nterpreters and enforcers routinely change the effective meaning of legal directives even in the absence of a formal amendment, so

rules on the ground might not actually be the written ones, just like how driving slightly over the speed limit might not actually be viewed as flouting the traffic laws by law enforcement on the ground. If a Member feels like the rules are indeed flouted, it will be brought to the attention of Congress, and the rest of the Members will decide whether they agree that the rules are flouted.

5. *Contemporaneity:* Since points of order are raised by Members with knowledge of the contemporaneous rules and precedents and judged by the Chair with the same,[125] the courts utilizing the canon need not keep a comprehensive legislative history to know the rules (and other three pillars) applicable to the statute in question. Any relevant and contemporaneous rules or precedents will be brought to the attention of the Chair (and therefore the courts) and can be ignored by the courts if they are not.

6. *Parliamentarian knowledge of precedents:* Similar to contemporaneity, the courts need not keep a comprehensive legislative history to understand whether some precedent *at some point in history* might have impacted the application of a particular rule. The ruling of the Chair will embody the parliamentarian's comprehensive knowledge of the precedents for the courts' consideration.[126]

7. *Public accessibility:* Congressional Records are publicly accessible, but the parliamentarian offices' systematized record of precedents is not open to the public.[127] Information from parliamentarian advice[128] and adjudications off the floor[129] are not open to the public at all.[130] In contrast, rulings of the Chair, which embody all the information

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that, for example, a rule that says 'Speed limit 55' comes over time to mean something more like 'Do not drive recklessly and in any case don't exceed 70.'").

125 Gould, *supra* note 22, at 1980–81 ("In the parliamentary context, as in the judicial context, the easiest cases are those in which a provision of positive law speaks directly to the case at hand. The parliamentarians can then simply apply the relevant provision . . . [but] parliamentary decision-making nearly always requires looking to past decisions on similar questions.").

126 *Id.* at 2009 ("[T]he parliamentarians' offices in both chambers keep detailed internal records of earlier parliamentary advice and recommendations, both formal and informal.").

127 *Id.* ("Many precedents are not made available to legislators, legislative staff, or the public. The parliamentarians publish volumes containing cameral rules annotated with selected precedents, but these volumes include only a small share of total parliamentary precedents.").

128 For a general description of parliamentarian advice, see *id.* at 1967.

129 For a general description of adjudications off the floor, see *id.* at 1971.

130 *Id.* at 2022 n.339 ("Unlike other forms of parliamentary precedent, rulings of the chair are publicly available in the Congressional Record. As a result, courts can look to rulings of the chair in the course of interpreting statutes. The same is not true for other forms of precedent, such as the parliamentarians' advice[.]").

necessary to understand the point of order, are easily accessible by the public through *Congressional Records*.[131]

8. *Limited and "deterministic" search:* While a broader process-based approach might require comprehensive knowledge of congressional procedure and history to glean accurate inferences, the court following the point-of-order approach needs only to look at the legislative history of the particular bill at hand and search for points of order made in the debates concerning the relevant provision.[132] The approach is—to borrow loosely from computer scientists—"deterministic,"[133] in the sense that the Court has a fixed sequence of steps: find transcripts where Congress debated the statute, find in the transcripts any point of order relevant to the questions presented, and then make inferences from the Chair rulings or appeals thereof. The Court does not have to worry that hidden in the sea of congressional records might be something material that it should have known.

9. *Compatibility with unorthodox legislative procedures:* Since the point-of-order canons do not rely on the accuracy of the texts, "unorthodox legislations"[134] drafted in haste that produce "imperfect statutes"[135] will produce no obstacle to such an approach. To the contrary, points of order provide chances for drafters to clarify their language and for Congress to decide whether the drafters' understanding is accepted as that of Congress.

Admittedly, the theoretical strength of the point-of-order approach comes from its practical narrowness. Broad reliance on congressional rules is narrow enough in its application—it is not always the case that the Rules of the House of Representatives and Standing Rules of the Senate themselves, as procedural decrees, offer insight to the interpretation of statutory text; but at least they form the background of every bill passed.[136] In contrast, points of order might not even be raised in the debate of a bill, and to the extent it was raised, it could be

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131 *See, e.g.,* Cong. Rec., GOVINFO.GOV, https://www.govinfo.gov/app/collection/crec (last visited Oct. 5, 2024).

132 *See, e.g.*, Actions Overview H.R. 3539, 104th Congress (1995–1996), CONGRESS.GOV, https://www.congress.gov/bill/104th-congress/house-bill/3539/actions (Click "All Actions" to see floor debates relevant to the Federal Aviation Reauthorization Act of 1996).

133 *See* PAUL E. BLACK, DICTIONARY OF ALGORITHMS AND DATA STRUCTURES (17th ed. 2004) https://xlinux.nist.gov/dads/HTML/determinstc.html ("Permitting at most one next move at any step in a computation.").

134 Gluck, *Unorthodox Lawmaking*, *supra* note 3, at 1789.

135 Gluck, *Imperfect Statutes*, *supra* note 12, at 63.

136 Nourse, *A Decision Theory*, *supra* note 35, at 75 ("Congress makes decisions within a set of endogenous rules.").

something as trivial as "Mr. Speaker, the gentleman should not be reading a newspaper"[137] which offers no interpretive value at all. If the attempt to apply the approach in Part IV is not convincing to readers of its practical utility, then the point-of-order approach is perhaps best seen as a challenge to textualism's logical necessity and an internal critique of certain approaches in the "process-based" school.

III. BRANDISHING THE CANONS

A. Canons of Exclusion and Inclusion

Gould described his vision of a point-of-order approach as follows: "when there is an ambiguous statutory provision that survived a point of order or other challenge, courts would interpret the provision in a manner consistent with procedural rules and precedents."[138] That would be the basic framework of this Article's proposal, but a lot more nuance is needed to accurately infer meaning from points of order because points of order can come in different shapes and forms. Part III explores the interpretive difference between points of order that end up excluding text versus those that end up including text, as well as what might be viewed as permissible interpretive evidence arising from a point of order.

It should be noted at the outset that this paper only concerns itself with text-related points of order—nothing *behavioral* like "[p]oint of order . . . The gentleman called the Speaker of the House a dictator,"[139] or *purely procedural* like "I raise a point of order that the vote on cloture . . . for all nominations other than for the Supreme Court of the United States is by majority vote."[140] The most pertinent example of text-related points of order is the germaneness requirement for amendments in the House.[141] The Senate does not have a general requirement for germaneness, but germaneness and other relevant requirements are required in certain cases—postcloture germaneness,[142] appropriation bills germaneness, [143] statutory (e.g. reconciliation bill under the Budget Act)

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137 139 CONG. REC. 26,308 (1993) (statement of Rep. Thomas Barlow).

138 Gould, *supra* note 22, at 2022.

139 142 CONG. REC. 16,790 (1996) (statement of Rep. Scott McInnis).

140 159 CONG. REC. 17,825 (2013) (statement of Sen. Harry Reid).

141 JOHNSON, *supra* note 59, at 544 ("It is a fundamental rule of the House that a germane relationship must exist between an amendment and the matter sought to be amended.").

142 *See* GOLD, *supra* note 61, at 43; S. DOC. NO. 113-18, at 15–16 (2013) (Rule XXII(2) "[After cloture,] [n]o dilatory motion, or dilatory amendment, or amendment not germane shall be in order.").

143 *See* GOLD, *supra* note 61, at 10; *see also* S. DOC. NO. 113-18, at 11 (Rule XVI(4) "[N]or shall any amendment not germane or relevant to the subject matter contained in the [appropriation] bill be received.").

germaneness,[144] jurisdictional limits for committee amendments,[145] etc. Another example is that both Houses also have (in theory) restrictions against adding extraneous matters in conference committees, as we have seen in the colloquy surrounding the Federal Aviation Reauthorization Act of 1996.[146] For our purpose of theorizing the point-of-order interpretive canons, it is much more important to understand their *form*, i.e., the various ways a point of order could impact a provision and what inference attaches to each of them, than the *substance* of points of order, i.e., what "germaneness" means in a particular context.

To see why the *form* of a point of order is more important for our present purposes, here are several distinctions that can be made as to how a point of order works procedurally to impact statutory text:

- whether text is ultimately left out or let in,
- whether at issue is the original text or an amendment,
- whether the amendment at issue is to insert or to strike,[147]
- whether the amendment is agreed to or rejected on merits,
- whether the Chair rules to exclude or include, and
- whether the ruling of the Chair is sustained on appeal.

Each of these distinctions is conceivably different in their implications. As such, the remainder of this paper explores which distinctions should matter to the courts when utilizing the point-of-order approach.

The centerpiece of the approach is the distinction of text exclusion vs. inclusion—these two different possibilities provide the essential framework on the basis of which we explore other distinctions. While Gould suggested that we look only at "statutory provision that survived a point of order,"[148] the exclusion of statutory provisions might in fact allow certain inferences as well. The three point-of-order canons are:

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144 *See* GOLD, *supra* note 61, at 160; *see also* Congressional Budget Act of 1974, Title III, § 305(b)(2), 310(e)(1), Pub. L. No. 93-344, 88 Stat. 297 (1974) ("No amendment that is not germane to the provisions of such concurrent resolution shall be received . . . [the above provision] shall also apply to the consideration in the Senate of reconciliation bills.").

145 *See* GOLD, *supra* note 61, at 70; *see also* S. DOC. NO. 113-18, at 11 (Rule XV(5) "It shall not be in order to consider any proposed committee amendment which contains any significant matter not within the jurisdiction of the committee[.]").

146 *See supra* Part II.A.

147 For a brief explanation of amendment to insert vs. strike, *see* GOLD *supra* note 61, at 93. I do not here consider separately an amendment to *strike and insert*, because such an amendment can be interpreted separately as two amendments and analyzed separately on what it strikes and inserts.

148 Gould, *supra* note 22, at 2022.

1. *Procedural canon of exclusion:* Contents of the procedurally excluded text carry no presumptive disfavor in merits unless separately so voted or otherwise justified by the nature of the point of order.[149]
2. *Substantive canon of exclusion:* Substantive meaning of the point of order (e.g., the meaning of "germaneness") can be used to understand the remaining text.
3. *Substantive canon of inclusion:* Substantive meaning of the point of order (e.g., the meaning of "germaneness") can be used to understand the surviving text and the rest of the text.

Some explanations for the procedural canon of exclusion are in order. The Supreme Court sometimes considers congressional rejection of certain texts *per se* as an indication that the contents of those texts are disfavored in merits. For example, in *Youngstown Sheet & Tube Co. v. Sawyer*,[150] the majority opinion noted that "[w]hen the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency,"[151] of the kind President Harry Truman employed. The majority read this as evidence that President Truman's seizure was not only "unauthorized" but "refused" by Congress as a technique to solve labor disputes.[152] In contrast, the idea of the procedural canon of exclusion is that Congress' rejections of texts on procedural grounds are not rejections of their merits and should not be presumed as such. Without additional context, a point of order alone does not necessarily imply disapproval of the substance being excluded.

Note that two exceptions attach to the procedural canon of exclusion. First, text could be excluded both on procedural grounds and on merits. For example, consider an amendment to strike certain text, against which a procedural point of order is raised. If the amendment to strike both *survives the point of order* and is *agreed to on merits*, then the text has been excluded on both procedural grounds and on merits. In such cases, the assumption may be warranted that Congress disapproved of the substance of what is excluded. Second, certain procedural exclusions carry with it disfavor not in *policy merits* but in *propriety*. For example, text excluded on germaneness grounds also means that Congress decides that the content of such text *does not belong in this bill*, such that even if Congress otherwise favors the provision policy-wise, the courts should not read the content of the excluded text into the remaining text *of the*

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149 Note that there is no procedural canon of *inclusion*, because if the text comes before the courts, then it has necessarily survived points of order and was approved in Congress for merits. In such a case, there is no disparity between Congress' procedural and merit-based approval of the text to draw separate conclusions from the substantive canon.

150 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

151 *Id.* at 586.

152 *Id.*

bill;[153] whereas—to give an imaginary example—if Senate rule provides that any legislation shall have no spelling mistakes and a provision is excluded on that ground, the courts need not find the content of that provision disfavored.

The substantive canons are much more straightforward than the procedural canon. For example, if a certain provision survives a point of order on grounds of germaneness, then clearly the substantive meaning of the term "germaneness" helps understand the content of both the surviving provision and the rest of the text—they must be read in a way that is germane as a whole, as the concept of germaneness is understood by the chamber's rules and precedents. Similarly, if a certain provision is excluded on grounds of germaneness, then the remaining text must be read in a way that is not germane to the excluded text.[154]

In other words, the first distinction, (i) whether text is ultimately left out or let in, produces three interpretive canons. These interpretive canons can be applied without trouble to three of the five remaining distinctions listed above—(ii) whether at issue is the original text or an amendment, (iii) whether the amendment at issue is to insert or to strike, and (iv) whether the amendment is agreed to or rejected on merits; in other words, the procedural and substantive canons apply equally effectively to all of the following possibilities where text is ultimately left out:

- original text excluded by point of order[155]
- amendment to *insert* excluded by point of order
- amendment to *insert* survives point of order but rejected on merits
- amendment to *strike* survives point of order and agreed to on merits

In all these cases, the courts can directly apply the procedural canon of exclusion—the procedurally excluded text carry no presumptive disfavor in merits, unless separately so voted (the latter two) or otherwise justified by the nature of the point of order (the former two if the point of order is, for example, on germaneness). The courts can also directly apply the substantive canon of exclusion by deriving substantive meaning from the successful or unsuccessful points of order (e.g., germaneness of the remaining text). Similarly, the substantive canon of inclusion applies equally effectively to all of the following combinations where text is ultimately let in:

- original text survives point of order and agreed to on merits
- amendment to *insert* survives point of order and agreed to on merits
- amendment to *strike* excluded by point of order

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153 I emphasize "remaining text *of the bill"* because this disfavor in *propriety* might not attach if the Court is interpreting neighboring provisions in the United States Code that are inserted by *different bills*.

154 *See infra* Part IV (explaining how the substantive canons are applied in practice).

155 I do not consider the case where original text survives point of order, but the entire bill is killed on merits, because in that case there is no statute for the Court to analyze.

- amendment to *strike* survives point of order but rejected on merits

Again, the courts can directly apply the substantive canon of inclusion, by deriving substantive meaning from the successful or unsuccessful points of order (e.g., germaneness of the surviving text and the rest of the text).

The same could not be said of the two remaining distinctions, however—(v) whether the Chair rules to exclude or include, and (vi) whether the ruling of the Chair is sustained on appeal. The substantive canon of exclusion applies *differently* to each of the following possibilities where text is ultimately left out (though the procedural canon of exclusion applies equally effectively because in either case, it is an exclusion on procedural grounds):

- chair rules to exclude, and ruling survives appeal/no appeal taken
- chair rules to include, and ruling reversed on appeal

Similarly, the substantive canon of inclusion applies *differently* to the following possibilities where text is ultimately let in:

- chair rules to include, and ruling survives appeal/no appeal taken
- chair rules to exclude, and ruling reversed on appeal

Essentially, the reason is that an appeal to the ruling has itself *divergent* interpretations in substantive meaning—if the Senate appeals a ruling that certain text is germane, the successful appeal can either mean that it (1) disagrees with the Chair as to whether this case is germane and consistent with the precedents or (2) agrees that this case is germane consistent with the precedents but intends to narrow the meaning of "germaneness." In contrast, if the Chair's ruling survives appeal or if no Senator raised an appeal to the point of order,[156] then it can only mean that the Senate agrees or acquiesces that this case is germane and consistent with the precedents.

This does not imply that the courts categorically can make inferences about the latter but no inference about the former. Even if the fact of successful appeal *itself* has divergent interpretations, it is possible that the surrounding debate can aid the courts in deciding which one prevails; in contrast, even if the fact of unsuccessful appeal *itself* has only one interpretation, what "consistent with the precedents" mean can still stumble the courts. The question, then, is what information the courts can consider, other than the existence of a ruling and an appeal *per se*, to help it decide between the two interpretations or clarify the meaning of "consistent with the precedents."

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[156] Note that this discussion of point-of-order canons has yet to discuss the case where no point of order was raised at all. *See infra* Part III.B for a brief address of that issue.

B. "Permissible Evidence" for Interpretation

To understand how the courts could draw interpretive evidence from points of orders and appeals thereof, consider the 2013 invocation of "nuclear option" regarding nomination cloture:

> Mr. REID. I raise a point of order that the vote on cloture under rule XXII for all nominations other than for the Supreme Court of the United States is by majority vote.
> The PRESIDENT pro tempore. Under the rules, the point of order is not sustained.
> Mr. REID. I appeal the ruling of the Chair and ask for the yeas and nays.
> . . .
> The PRESIDENT pro tempore. The majority leader has appealed from the decision of the Chair. The question is, Shall the decision of the Chair stand as the judgment of the Senate? . . . The result was announced—yeas 48, nays 52 . . . The decision of the Chair is not sustained.[157]

While this is not an example of a text-related point of order, it is an example to demonstrate that individual Member speeches can also be evidence for interpretation, in addition to the Chair's ruling. Considering that the Chair said nothing but "[u]nder the rules, the point of order is not sustained," the parliamentarian's interpretation necessarily relies on what Senator Reid said when raising the point of order. This is evinced by the Chair's ruling *immediately* after this vote, in response to the minority leader's attempt to maintain the supermajority cloture: "Under the precedent set by the Senate today, November 21, 2013, the threshold for cloture on nominations, not including those to the Supreme Court of the United States, is now a majority. That is the ruling of the Chair."[158] Thus if the facts of ruling and appeal *per se* are ambiguous, individual Member speeches can aid the application of the point-of-order interpretive canons.

Note that looking into Senator Reid's speech here should be acceptable even to intent skeptics. First, none of the aforementioned worries about judges' "looking over a crowd and picking out [their] friends"[159] or "strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text"[160] apply here if the courts merely look at the speech of the Member who raised the point of order. Second, this does not require looking into the *intent* of Senator Reid, nor does the speech matter because it *reflects his intent*. Rather, the speech matters simply because it informs what the

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157 159 CONG. REC. 17,825–26 (2013).

158 *Id.* at 17,826.

159 Wald, *supra* note 116, at 214.

160 Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005).

product of democracy is. Instead of a statutory text, the product of democracy here is whatever precedent Senate majority has voted to set, which is in turn dependent on what Senator Reid said on appeal. So far, intent skeptics and proponents could and should agree on the application of point-of-order interpretive canons involving only speeches of the Chair and the Member raising the point of order or appeal.

Not all cases are so clear. Consider the colloquy surrounding the Federal Aviation Reauthorization Act of 1996, *supra* Part II.A. The Chair's ruling is minimalistic: "the conference report exceeds the scope, and the point of order is sustained."[161] As is the point of order and appeal by Senator Lott: "I raise a point of order that the conference report exceeds the scope of the conference committee . . . I appeal the ruling of the Chair and ask for the yeas and nays."[162] Taking into account only these two pieces of evidence, did the 104th Senate (1) disagree with the Chair as to whether the report exceeds the scope of the conference committee or (2) agree that the report exceeds the scope of the conference committee but intend to expand the power of conference committee? There is no answer because the evidence has divergent interpretations. Can the courts then take into account Senator Pressler's speech?

> Do I [believe] the provision was, in fact, within the scope of the conference? No, Mr. President, I admit this section [] was not contained in the legislation as initially passed by either the House or the Senate . . . However, Mr. President, those on the opposite side of the issue know full well that this is done with some frequency when a particular situation necessitates such action.[163]

At this point, intent skeptics and other proponents of the point-of-order approach might indeed disagree on the scope of "permissible evidence." Again, if we look into Senator Pressler's speech, it is not necessarily because it reflects his intent—the parliamentarian might also look into his speech as part of the surrounding debate to decide what precedent is created by the Senate's vote to overturn the Chair's ruling,[164] i.e., what the product of democracy is. The problems are instead practical: (1) because the precedent drawn by the parliamentarian from this colloquy is the official product of democracy under congressional procedures, but the parliamentarian's conclusion is not immediately and publicly accessible, the courts will have to *guess* what the parliamentarian thinks (if such conclusion even exists), and it may well guess wrongly what the parliamentarian makes of Senator Pressler's speech; and (2) Members of Congress who voted to appeal the Chair's ruling might in fact

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161 142 CONG. REC. 27,150 (1996).

162 *Id.* at 27,148–50 (statement of Sen. Trent Lott).

163 *Id.* at 27,149 (statement of Sen. Larry Pressler).

164 *See, e.g.*, *supra* note 155.

disagree with the parliamentarian's interpretation of their vote, which is not revealed until next time the Chair rules on a similar subject.

Given these practical problems, the proponents of legislative intent would argue that the courts should not be striving to guess what the parliamentarian thinks, but rather to interpret what Members of Congress *intended* their vote to mean; if there is quality evidence of such legislative intent,[165] such as Senator Pressler's speech, then it would be pointless to limit themselves to consider only the Chair's ruling and Senator Lott's speech.

Intent skeptics might be unconvinced and adhere to their *minimal* point-of-order approach. They might respond that Members' "unexpressed intent" does not matter to democracy,[166] and that the courts would not have to worry about getting the parliamentarian's conclusion wrong if it simply sticks to reading what the Chair and Senator Lott said. They might accept the circumscribed form of the point-of-order approach at the cost of its already limited practicality.

This Article does not intend to settle the intent debate once and for all, only to point out that the point-of-order approach can vary in its expansiveness according to the scope of what one views as "permissible evidence":

- *minimal point-of-order approach:* permissible evidence to understand a point of order comes only from the Chair's ruling and the speech by Members who raised the point of order/appeal because the courts must accurately adhere to the product of democracy, i.e., conclusions drawn by the parliamentarian from the point of order.
- *intent-based point-of-order approach:* permissible evidence to understand a point of order can include other Members' speech in response to a point of order, because the courts should be aiming to understand Members' intent in acquiescing to, affirming, or reversing the Chair's ruling.

To expand the point-of-order approach even further, one can also argue that implications could be drawn from an absence of points of order. If we can assume that at least one Member of Congress knows of a blatant rule violation and could have raised it, does the absence of a point of order not suggest acquiescence as much as an absence of an appeal does? Certainly, the more expansive point-of-order approaches will produce some theoretical advantages but not without expense to others. For example, having to explore the absence of a point of order would mean that the approach is no longer "limited and deterministic."[167] Looking into intent involves some thorny practical questions: did Members really think the text was not germane, or did they merely use it as an instrument

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165 *See, e.g.*, Kysar, *Penalty Default*, *supra* note 1, at 957–58 ("Perhaps, for instance, lawmakers voted for the statute with full knowledge that the legislative history would be used as a gap-filling device.").

166 SCALIA, *supra* note 24, at 17.

167 *See supra* Part II.B.

to kill the amendment? Intent also raises puzzling philosophical questions of what *intent* means in a *collective body*[168]—whether it is only a "pragmatic inference" from a "useful fiction," for example, as Ryan Doerfler suggests.[169] Being mindful of one's options in applying the point-of-order approach, might nonetheless prompt a thoughtful reconsideration of intent skepticism when its restrictiveness becomes apparent.

IV. PUTTING THE CANONS TO THE TEST

Regardless of how expansive one thinks the point-of-order approach should be, some basic examples of its application in Part IV should serve to demonstrate its utility. In some cases, the canons might just clarify that there is limited inference to be drawn from the point of order itself; in some others, they provide some further interpretive insights.

A. Bankamerica Corp. v. United States

The Supreme Court case *Bankamerica Corp. v. United States*[170] demonstrates how the point-of-order canons might provide a more cautious understanding of floor debates. *Bankamerica* concerns the meaning of the Clayton Act,[171] which provided in pertinent part that "[n]o person at the same time shall be a director in *any two or more corporations . . . other than banks*."[172] The issue presented is whether interlocking directorates between *banks and insurance companies* are exempted, given the "other than banks" phrase. The majority opinion concluded that the phrase exempts not only bank-bank interlock but also bank-nonbank interlock, in part relying on the legislative history where a point of order was overruled. Noting that the phrase was added in conference, and that the Chair overruled a point of order alleging the phrase exceeded the scope of conference, Chief Justice Burger concluded that the Chair accepted a

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168 *See, e.g.*, Richard H. Fallon, Jr., *Constitutionally Forbidden Legislative Intent*, 130 HARV. L. REV. 523, 527 (2016) ("Individual legislators may have intentions and purposes, but the legislature as a whole has no collective intent or purpose, the emerging wisdom maintains, and it is impossible to derive a collective psychological intent from the disparate mental states of individual legislators.").

169 Ryan D. Doerfler, *Who Cares How Congress Really Works?*, 66 DUKE L.J. 979, 981–82 (2017).

170 Bankamerica Corp. v. United States, 462 U.S. 122 (1983); *see also* Gould, *supra* note 22, at 2022 n.341 (raising *Bankamerica* as a possible case for involving point of orders in statutory interpretation).

171 Clayton Antitrust Act of 1914, Pub. L. No. 63-212, 38 Stat. 730 (codified as amended at 15 U.S.C.A. §§ 12–27).

172 *Bankamerica*, 462 U.S. at 124 (quoting the contemporaneous 15 U.S.C.A. § 19).

particular statutory interpretation endorsed by Members who opposed the point of order.[173]

The substantive canon of inclusion, under both the minimal and intent-based version, bears no support for this result. As relevant, section 8, paragraph 3 of the enacted Clayton Act provides that:

> [N]o person at the same time shall be a director in any two or more *corporations*, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000 . . . other than banks.[174]

In addition, section 8, paragraph 1 of the enacted Clayton Act provides that

> [N]o person shall at the same time be a director or other officer or employee of more than one *bank* . . . which has deposits, capital, surplus, and undivided profits aggregating more than $5,000,000.[175]

In other words, section 8, paragraph 1 clearly covers only bank-bank interlock, and the question is whether section 8, paragraph 3 catches bank-nonbank interlock or if the "other than banks" phrase exempted it as well. To discern the substantive meaning of the point of order, one should first note the actual House rule cited by Representative Mann:

> Mr. MANN. Mr. Speaker, I make the point of order against the conference report in that the conferees exceeded their jurisdiction . . . What the conferees have done is to eliminate from [section 8, paragraph 3] all banking corporations . . . [The rules state that] "[t]he managers of a conference must confine themselves to the differences committed to them and *may not include subjects not within the disagreements*, even though germane to a question in issue."[176]

In response, opponents of the point of order observed that House conferees added what became section 8, paragraph 1 to cover banks after it was stricken by the Senate, and then added the "other than banks" phrase to section 8, paragraph 3 to avoid surplusage.[177] The Chair overruled the point of order simply by noting that "The Senate struck [section 8, paragraph 1] all out. The House never agreed to the Senate amendment striking out the House language," suggesting that the

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173 *Id.* at 139 ("[T]he fact that the Speaker of the House overruled Rep. Mann's point of order suggests that he accepted Reps. Webb's and Sherley's interpretation.").

174 Clayton Antitrust Act, § 8 ¶ 3.

175 *Id.* at ¶ 1 (emphasis added).

176 51 CONG. REC. 16,269 (1914) (emphasis added).

177 *Id.* at 16,271.

language relates to disagreements between chambers.[178] Chief Justice Burger thus suggested that the Chair's ruling implies an endorsement of the views of opponents that section 8 paragraph 3, in providing for a bank exception, does not cover banks *at all*, not even interlocking directorate between banks and other corporations.[179]

Chief Justice Burger of course did not intend to apply the point-of-order canons as we call it, but he would have found no support if he did. The *substantive meaning* of the rule that matters here is that of "subjects not within the disagreements" in the rules. Representative Mann raised the issue of whether the "other than banks" phrase is a subject within disagreements; in response, the Chair noted that the Senate struck out what became section 8, paragraph 1—the interlocking directorates provision applicable to the banks—which "[t]he House *never agreed to*,"[180] and *from there* found sufficient ground to overrule the point of order. In its characteristic minimalism,[181] the implication of the Chair's ruling is simply that the "other than banks" phrase concerns the applicability of interlocking directorate limitations to banks and is therefore a "subject within the disagreements." No substantive meaning can be drawn from this determination to aid statutory interpretation, and the minimal point-of-order approach (which, recall, considers only the ruling of the Chair and speech of the Member raising the point of order) does not support the majority's conclusion.

Even under the intent-based point-of-order approach where other Members' speeches are considered, it is not immediately obvious that the responses of the opponents of the point of order constitute sufficient evidence to discern a clear and reliable view of the House. Proponents of legislative intent point out that "the anthropomorphic metaphor portraying Congress as a single person misleads" and do not believe that they must rely on a single unified congressional intent,[182] still emphasizing the difference "between reliable history and biased or manufactured history."[183] Whether the House, in acquiescence to the Chair's ruling, was also *intending* to endorse the opponents' responses might require some further deep dive into the legislative history,

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178 *Id.* at 16,273.

179 Bankamerica Corp. v. United States, 462 U.S. 122, 139 (1983) ("[T]he fact that the Speaker of the House overruled Rep. Mann's point of order suggests that he accepted Reps. Webb's and Sherley's interpretation."); *See* 51 CONG. REC. 16,271–72 (1914) (statements of Reps. Webb and Sherley).

180 51 CONG. REC. 16,271; 16,273 (1914) (emphasis added).

181 *See* Gould, *supra* note 22, at 1984 ("Another distinctive feature of parliamentary precedent is its extreme decisional minimalism . . . In ruling on points of order, the parliamentarians try to decide cases rather than to set down broad rules." (internal quotations omitted)).

182 Nourse, *A Decision Theory*, *supra* note 35, at 74; *see also* Doerfler, *supra* note 169, at 981 ("In both everyday contexts and the law, attribution of practical intentions is indispensable to understanding what people mean . . . Although necessary for the reasons above, attributions of legislative intent to Congress are also literally false. This is because, as an empirical matter, members of Congress do not share intentions." (emphasis in original)).

183 Nourse, *A Decision Theory*, *supra* note 35, at 75.

perhaps into prior floor debates of the Clayton Act in the House before it was passed.[184]

More importantly, even if their responses to the point of order were indeed endorsed by the House, it is unclear that every one of their *conclusions about the statute* must then be accepted. The opponents' speeches reflect their beliefs that, firstly, the "other than banks" phrase is not extraneous because it merely clarifies that section 8, paragraph 3 does not render section 8, paragraph 1 of the House version surplusage; if so, and if section 8, paragraph 1 *applies to banks*, then secondly, section 8, paragraph 3 *must not apply to banks at all*. However, that conclusion about the statute does not necessarily follow from their responses to the point of order.

Under the point-of-order approach, the Court would draw substantive meaning from Members' judgment about the point of order—i.e., the "other than banks" phrase is clarificatory and therefore related to the Senate-House disagreement on section 8, paragraph 1. But this is as far as the point of order itself leads. The Court can still conclude that the "other than banks" phrase does not remove the applicability of section 8, paragraph 3 to banks entirely, but only clarifies that there is no surplusage because section 8, paragraph 1 prohibits *bank-bank interlocks*, whereas section 8, paragraph 3 of the Senate version now prohibits only *bank-nonbank interlocks* and all other corporate interlocks. In fact, one might argue that the intent-based point-of-order approach *justifies* the dissent's reading. The reasoning might go like this:

1. [*Substantive canon of inclusion*] The Chair overruling Representative Mann's point of order indicates the view that the "other than banks" phrase in section 8, paragraph 3 is "subject[] . . . within the disagreements" under the rules because it was related to section 8, paragraph 1.
2. The opponents' speech indicates that section 8, paragraph 3's "other than banks" phrase is solely inserted with *intent* to avoid surplusage in section 8, paragraph 1.[185]
3. Section 8, paragraph 1 prohibits only *bank-bank interlocks*.
4. If the intent is solely to avoid surplusage in section 8, paragraph 1, then the "other than banks" phrase is inserted only to exempt what that paragraph prohibits.

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184 *See, e.g.*, 51 CONG. REC. 9,068 (1914) (initiating discussions of H.R. 15657, the bill later known as Clayton Antitrust Act).

185 *See, e.g.*, 51 CONG. REC. 16,271 (1914) (statement of Rep. Webb) ("Now, it would be idiotic to say that we included also banks and banking associations in the paragraph referring to industrial corporations; and in order to make the paragraph perfectly plain, we inserted 'other than banks and banks associations' and common carriers, which had no effect upon the meaning of that section."); *id.* at 16,271 (statement of Rep. Sherley) ("The conferees having redrafted the matter, having gotten away from the language of [section 8, paragraph 3] and [section 8, paragraph 1] in many particulars, concluded that it would leave no matter of argument touching the language of [section 8, paragraph 1], and therefore the conferees inserted in the exclusion proviso.").

5. Therefore, *bank-nonbank interlocks* are not exempted by the "other than banks" phrase in section 8, paragraph 3.

Again, I do not settle once and for all whether an intent-based jurisprudence is possible, only to point out that it might provide affirmative guidance in this case.

This is also certainly not to say that the point-of-order approaches must be logically inconsistent with the majority's conclusion in *Bankamerica* exempting bank-nonbank interlocks. Textualists and purposivists could, for their own reasons, agree that section 8, paragraph 3 exempts bank-nonbank interlocks; the point is only that *the point of order itself*, as a distinct source of interpretive evidence, does not lend support to that conclusion. As such, if one agrees with the dissent's textual analysis,[186] then one should not feel compelled by the point of order itself to reach the majority's conclusion; and even if one agrees with the majority's textual analysis, one should hasten to invoke the point of order to support the majority's conclusion.

B. Special Counsel and Indefinite Appropriations, Hypothetically

If the above analysis of *Bankamerica* seems too abstract and niche, a hypothetical analysis of Special Counsel Jack Smith's funding might provide a more concrete demonstration of the potential relevance of point of orders even in high-profile cases.

After Attorney General Merrick Garland appointed Jack Smith the Department of Justice's Special Counsel to conduct two of their ongoing investigations against then-former President Donald Trump, "[o]n June 8, 2023, a grand jury in the Southern District of Florida returned an indictment, signed by the Special Counsel, charging then-former President Trump with thirty-one counts of willful retention of national defense information in his Mar-a-Lago residence."[187] About a year later, Judge Aileen Cannon dismissed the indictment, holding principally that no statute authorizes the appointment of Special Counsel Smith by the Attorney General, and that the appropriation provision relied on by the Special Counsel's office also falls partly as a consequence of what Judge Cannon found to be the appointment defect.[188] Here, I do not weigh in on the merits of Judge Cannon's decision, but instead explore how a hypothetical point of order in Congress might have served as an additional argument against her conclusions with respect to the appropriations clause. (Nor

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[186] Bankamerica Corp. v. United States, 462 U.S. 122, 141 (White, J., dissenting) ("Consider the following analogy: a statute states that 'No person shall own two or more automobiles, other than Fords.' . . . it is [] plausible to interpret the 'other than' clause as exempting only the ownership of two Fords from the reach of the statute.").

[187] United States v. Trump, No. 23-80101-CR-CANNON, 2024 WL 3404555, at *2–*3 (S.D. Fla. July 15, 2024).

[188] *Id.* at *2.

do I take a position on whether similar arguments can be made in this case without said hypothetical point of order actually taking place.)

The hypothetical point of order I am proposing is one that could have been raised if certain attempts to eliminate Special Counsels' salary had been introduced on the House floor. For example, Representative Marjorie Taylor Greene proposed using "the Holman Rule" to defund the Special Counsel's office.[189] The Holman Rule permits the introduction of an amendment to an appropriations bill to reduce the salary of a federal official such as: "[t]he salary of Mark Gabriel, the Administrator of the Western Area Power Administration, shall be reduced to $1."[190] However, as commentators pointed out,[191] that amendment is inconsistent with the rules because Special Counsel's office is well-known to be funded not by yearly Department of Justice appropriations, but by a permanent indefinite appropriation provision established in 1988: "a permanent indefinite appropriation is established within the Department of Justice to pay all necessary expenses of investigations and prosecutions by independent counsel appointed pursuant to the provisions of 28 U.S.C. 591 et seq. or other law."[192] The Holman Rule permits "a provision or amendment that retrenches expenditures by a reduction of amounts of money *covered by the bill*,"[193] and therefore Rep. Greene's attempt to reduce Special Counsel Smith's salary in an amendment to the Department of Justice annual appropriations bill would not work. Indeed, Rep. Greene never introduced such an amendment, and later pivoted to suggesting a separate bill to eliminate the indefinite appropriations provision itself.[194]

If Rep. Greene's amendment had been introduced and a point of order raised against it, the Chair of the House, under the advice of the House parliamentarian, likely would have ruled the amendment out of order. First, there have been relevant precedents of purported "Holman Rule" amendments being excluded as nongermane because the relevant funding came from another bill[195];

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189 Press Release, Marjorie Taylor Greene, Congresswoman, House of Representatives, Congresswoman Marjorie Taylor Greene on Politically Motivated Indictment by Special Counsel Jack Smith (Aug. 1, 2023), https://greene.house.gov/news/documentsingle.aspx?DocumentID=505.

190 JAMES V. SATURNO, CONG. RSCH. SERV., R44736, THE HOLMAN RULE (House Rule XXI, Clause 2(b)) at 5 (2023), https://crsreports.congress.gov/product/pdf/R/R44736.

191 *See, e.g.*, Daniel Hillburn, *Tough Sledding for Proposal Targeting Trump Investigator*, ROLL CALL (Aug. 9, 2023), https://rollcall.com/2023/08/09/tough-sledding-for-proposal-targeting-trump-investigator/.

192 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. No. 100-202, 101 Stat. 1329 (1987).

193 H.R. Res. 5, 118th Cong., § 3(a) (2023) (enacted).

194 Rep. Marjorie Taylor Greene (@RepMTG), TWITTER/X (May 14, 2024, 11:55 AM), https://x.com/RepMTG/status/1790425834639249536.

195 *See* CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, H.R. DOC. NO. 117-161 at 927, 929 (2023) (citing 140 CONG. REC. 13,422 (1994); 112 CONG. REC. 27,425 (1966)).

second, the Government Accountability Office has (arguably) adjudicated Special Counsel to be covered by the permanent indefinite appropriation.[196] Imagine, then, Rep. Greene introducing her "Holman Rule" amendment, and is ruled out of order for being nongermane to the Department of Justice's annual appropriations bill. She appeals that ruling, arguing that Special Counsel Smith's funding must be covered by the annual appropriations bill because the permanent indefinite appropriations does not cover his office: There is no "other law" under which Special Counsel Smith was appointed, and he is not independent enough to qualify as "independent counsel," etc. The House then votes to reject her appeal, affirming her amendment as nongermane, with some members explaining the longstanding practice of independent special counsels appointed by the Attorney General. Suppose some similar procedural vote also takes place in the Senate rejecting such amendment as nongermane. In that hypothetical case, the substantive canon of exclusion would direct us to discern the meaning of "germaneness" by looking at the grounds of Rep. Greene's appeal that Congress rejected. The point of order and subsequent votes would thus be a strong piece of evidence that Congress expressly understood the permanent indefinite appropriation to cover Special Counsel Smith, and that Judge Cannon would be wrong to suggest that he is not the type of "independent counsel" covered by the provision.[197]

C. Miscellaneous Examples from Legislative History

Some final examples of points of order, where they provide other information to aid interpretation, could help further demonstrate their utility.

A point of order could clarify the purpose and scope of a statute. Consider the debates surrounding proposed amendments to the Twenty-First Amendment Enforcement Act,[198] an act that provides State attorneys general with federal injunctive relief to enforce state law regulating transportation of intoxicating liquor:

> [LOFGREN Amendment to insert the following:] This Act and the amendment made by this act shall take immediate effect with regard to any violation of a state law regulating the importation

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[196] U.S. GOV'T ACCOUNTABILITY OFF., B-302582, SPECIAL COUNSEL AND PERMANENT INDEFINITE APPROPRIATION (Sept. 30, 2004), https://www.gao.gov/assets/b-302582.pdf; U.S. GOV'T ACCOUNTABILITY OFF., FINAL REVIEW OF EXPENSES FROM THE DEPARTMENT OF JUSTICE PERMANENT INDEFINITE APPROPRIATION COVERING THE 7-MONTH PERIOD ENDING SEPTEMBER 30, 2009 (Mar. 31, 2010), https://www.gao.gov/assets/gao-10-524r.pdf.

[197] United States v. Trump, No. 23-80101-CR-CANNON, 2024 WL 3404555, at *44 (S.D. Fla. July 15, 2024).

[198] Twenty-First Amendment Enforcement Act, Pub. L. No. 106-386, 114 Stat. 1547 (2000). Partly incorporated in Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2004, 114 Stat. 1547, 1546.

> or transportation of any intoxicating liquor which results from any violation of a state's firearms laws.
> . . .
> The CHAIRMAN. One of the central tenets of the germaneness rule is that the fundamental purpose of an amendment must be germane to the fundamental purpose of the bill . . . As indicated on page 5 and 6 of the committee report, the underlying bill was "introduced in order to specifically provide States with access to Federal court to enforce their laws regulating interstate shipments of alcoholic beverages." The fundamental purpose of the amendment appears to be to single out certain violations of liquor trafficking laws on the basis of their regard for any and all firearms issues. The Chair is of the opinion that the question illustrates the principle that an amendment may relate to the same subject matter, yet still stray from adherence to a common fundamental purpose, by singling out one constituent element of the larger subject for specific and unrelated scrutiny. . . . In the opinion of the Chair, the amendment is not germane and the point of order is sustained.[199]

If the courts are called to interpret 27 U.S.C. § 122a, the Chair's understanding of the Act's purpose, to which the House agreed by acquiescence, would be a valuable source of evidence for interpretation under the substantive canon of exclusion. On the other hand, the procedural canon of exclusion would lead to the conclusion that Representative Lofgren's provision was not viewed to belong in this bill ("not germane") and thus should not be read into the remaining text of this bill. Another point of order clarified the scope of the act:

> [JACKSON-LEE Amendment to insert provision creating federal civil fine for certain transportation of liquor]
> . . .
> The CHAIRMAN pro tempore. Under clause 7 of rule XVI, one of the fundamental tenets of the germaneness test is that the amendment must have the same fundamental purpose as the bill. The fundamental purpose of the bill under consideration is the creation of Federal court jurisdiction for civil actions arising under State laws regulating the importation or the transportation of intoxicating liquor. The fundamental purpose of the amendment offered by [Rep. Jackson-Lee] is the creation of new Federal prohibitions regarding the transportation of intoxicating liquor under Federal law. Therefore, the amendment has a

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[199] 145 CONG. REC. 19,208 (1999) (the clerk read the amendment offered by Ms, Lofgren into the record); *id.* at 19,213–14 (the Chairman's response to the issue of germaneness).

> different fundamental purpose and is not germane. The point of order is sustained.[200]

Similarly, if the courts are called to interpret 27 U.S.C. § 122a, then this point of order clarifies for the substantive and procedural canons of exclusion that only injunctive relief and not damages would be available to state attorneys general.

Another example shows that a point of order could also clarify the meaning of certain terms. Consider the colloquy surrounding an insertion to the Treasury and General Government Appropriations Act, 2001[201]:

> [MORAN Amendment to insert the following:] None of the funds made available in this Act may be used to implement any sanction imposed . . . to Cuba.
>
> . . .
>
> Mr. DIAZ-BALART. Mr. Chairman, I make a point of order . . . the amendment of the gentleman from Kansas (Mr. MORAN), in my view, violates clause 2 of rule XXI of the House rules by, in effect, legislating on an appropriations bill. The amendment would add significant new responsibilities and duties to the Treasury Department[.]
>
> . . .
>
> The CHAIRMAN. The Chair finds it appropriate to construe the word "agreement," as used in the context of international sanctions, as meaning accords between or among sovereigns. The Chair similarly finds it appropriate to engage a presumption of regularity in finding that officials of the United States who are charged with the implementation of international sanctions with a specific knowledge of unilateral sanctions are likewise charged with knowledge of the bases on which they proceed, including the "corporate" knowledge of their Executive agency concerning the provenance of a particular sanction. On these premises, the Chair holds that neither the limitation nor the accompanying exception imposes new duties of discernment, occasions new burdens of investigation, or otherwise requires Executive action beyond the call of existing law. The point of order is overruled.[202]

If the courts are called to interpret this provision, then the Chair's understanding of the term "agreement," to which the House agreed by acquiescence, would

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200 145 CONG. REC. 19,216 (1999).

201 Treasury and General Government Appropriations Act of 2001, H.R. 4871, 106th Cong. (2000). The bill was ultimately not enacted into law, *see* CONGRESS.GOV, https://www.congress.gov/bill/106th-congress/house-bill/4871/actions ("Latest Action: Senate - 07/26/2000 Measure laid before Senate by motion.").

202 146 CONG. REC. 15,751–52 (2000).

similarly be interpretive evidence under the *substantive canon of inclusion* which the courts cannot ignore.

V. CONCLUSION

In sum, this Article argues that (1) "process-based" theories have broad appeal, e.g., textualists have strong theoretical reasons to accept some form of "process-based" interpretation because congressional procedure is likewise a product of democracy; (2) there are a number of theoretical justifications and advantages specific to the point-of-order interpretive canons as compared to broader approaches in the "process-based" school relying on written rules, in virtue of the canons' practical narrowness; (3) the three basic point-of-order interpretive canons are the *procedural canon of exclusion, substantive canon of exclusion* and *substantive canon of inclusion*; (4) point-of-order approaches can vary in their expansiveness of permissible evidence, such as the *minimal* and *intent-based* versions; and (5) points of order can shed light on the purpose, scope and meaning of statutory language.

While some readers may find the arguments addressed in this Article of limited practical use, others might appreciate them as an intriguing theoretical discussion. This Article's theoretical exploration of point-of-order cannons will hopefully serve as a catalyst to further facilitate and stimulate discussions on "process-based" approaches.