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Statutory Meanings: Deriving Interpretive Principles from a Theory of Communication and Lawmaking

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Statutory Meanings

DERIVING INTERPRETIVE PRINCIPLES FROM A THEORY OF COMMUNICATION AND LAWMAKING

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Statutes are best understood as a form of communication. Communicating messages requires a sender and receiver. The sender encodes her message in the form of communication, and the receiver's task is to decode this message so that she can understand what it means. In all forms of communication that include commands, the challenge is to make sure that the commands can be effectively decoded and thus implemented as appropriate.[1] In short, we view statutory interpretation's essential purpose as producing "a constitutionally legitimate decoding of [ambiguous] statutory commands."[2] Although legislation is admittedly a very stylized rendering of a multifaceted, complex structure of law, politics, and institutional performance, we see value in reducing the far-flung objective of interpreting legislation to a core purpose. With this core purpose in mind, we can proceed to the critical task of evaluating competing approaches to discerning statutory meaning.

The focus of this essay is to advance the conversation. Part I recapitulates the basic elements of communication theory and positive political theory, and their potent applications to statutory interpretation. Part II explains how a nuanced understanding of the lawmaking structure in

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[1] *See* Cheryl Boudreau et al., *What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957 (2007) [hereinafter Boudreau et al., *What Statutes Mean*]; Cheryl Boudreau et al., *Statutory Interpretation and the Intentional(ist) Stance*, 38 LOY. L.A. L. REV. 2131 (2005) [hereinafter Boudreau et al., *The Intentional(ist) Stance*].

[2] Boudreau et al., *What Statutes Mean*, *supra* note 1, at 959.

Congress has valuable implications for understanding statutory meaning. Finally, in Part III, we sketch some thoughts about how the bridge between communication theory and positive political theory can illuminate debates about the use and misuse of extrinsic aids in interpretation, especially the so-called canons of statutory interpretation.

While the normative question at the heart of the enduring statutory-interpretation debate is whether and to what extent legislative communications should be authoritative,[3] we give that question a rest in this essay. Rather, we are interested here in developing a model of statutory meaning and looking hard at whether this model can yield useful techniques for decoding statutes. Nor does this essay focus on the central matter of statutory authority and the dynamic relationship between legislatures and courts. Although this issue has been prominent in other work we have done separately and collaboratively,[4] we assume here that statutes are constitutionally pedigreed commands and that the objective of interpreting a statute is to recover its meaning using a theory of both communication and lawmaking.

I. THE SCIENCE OF COMMUNICATION

While much of communication theory is motivated by algorithms derived for compressing and then expanding messages from one computer to another, the theory is quite general and has been applied to viruses, bacteria, and other infectious agents, as well as to speech and writing.[5] The act of writing a statute, when reduced to its essentials, begins with an idea about what should be policy. Second, this idea about policy information is compressed into a written document. While great pains may be taken to accurately compress ideas into language, this process is not always perfect. Interpretive difficulties frequently arise; indeed, they are perhaps inevitable given cognitive deficiencies, as well as

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[3] *See generally* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION (3d ed. 2006).

[4] *See* sources cited *supra* note 1; *see also* Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 NW. U. L. REV. 1207 (2007); Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417 (2003).

[5] *See generally* DAVID J.C. MACKAY, INFORMATION THEORY, INFERENCE, AND LEARNING ALGORITHMS 3-5 (2003); J. R. PIERCE, SYMBOLS, SIGNALS AND NOISE: THE NATURE AND PROCESS OF COMMUNICATION 8-9 (James R. Newman ed., 1961).

the limits of language and the difficulty of constructing institutions capable of successful compression.

Moreover, compression is done with an eye toward the transmission, reception, and, ultimately, the expansion of the document into meaning by the receiver. This is perhaps the key takeaway point of communication theory: those who do the compressing are necessarily aware of the need for the message to be later expanded. Of course, it is well known that error and biases can be introduced into the transmission and expansion, causing the meaning to be distorted. These problems may or may not be intentional; in any event, they are ubiquitous problems and hence increase difficulties for communicators in compressing the communication and for recipients in expanding it. Third, the ideas about policy are transmitted over a channel or channels. Fourth, the messages are received, and the ideas that were compressed into written language are expanded into meaning. This is the key: in perfectly operating communication, not only is the transmission lossless (i.e., there is no error) but the expansion is the inverse (or mirror image) of the compression. The authors of messages often send other messages in conjunction with the original (such as parity bits in electronic communication) in order to reduce transmission and expansion errors.

At an abstract level, our argument is based upon overlapping common-sense views about the nature of communication. By definition, communication requires a sharing in common. Not only is this part of the etymology of the term (the word "communication" derives from the Latin root *comm-nis*[6]) but it also makes good sense that one person's efforts to communicate with another suppose that they have shared purposes with respect to that communication.[7] Two individuals who do not speak one another's language will find it rather difficult, without further aids, to make sense of what the other says. Although we offer no particularly sophisticated view about how "sharing in common" is accomplished,[8] we make the simple point that an assessment of a communication's meaning requires, *at the very least*, a sharing in common.

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[6] WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 367 (2d ed. 1983).

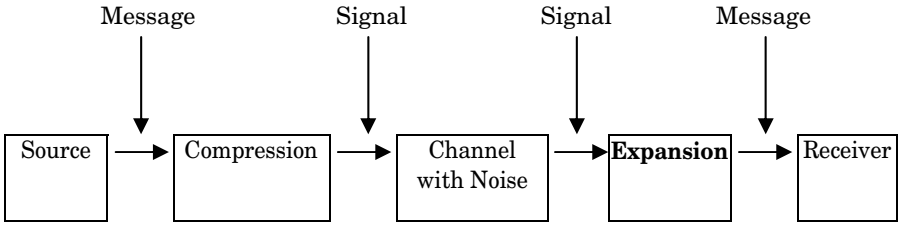
[7] *See* Boudreau et al., *The Intentional(ist) Stance*, *supra* note 1, at 2140-42.

[8] The sharing-in-common phenomenon has been examined in several fields of study. Disciplines ranging from communication theory to linguistics to anthropology continue to advance our understanding of these vital questions.

A few scientific propositions about human communication can aid those who seek to determine what a statute's authors meant when they chose to include (or to not include) particular words in a piece of legislation. To this end, we build from well-known communication theories. The key insight of these theories is that successful inference about meaning requires that the manner in which a communication is decoded (i.e., the *expansion* of the signal into information) relate to aspects of its manufacture (i.e., the *compression* of information into a signal) in particular ways.[9] What this insight suggests for scholars of statutory interpretation (and for judges interpreting statutes) is that discerning the meaning of any piece of legislation requires an understanding of how it was manufactured throughout the legislative process.[10]

Communication involves both a *sender* and a *receiver*, both of whom must usually make costly efforts to ensure that a message is faithfully received. Basic tenets of information theory suggest that communication can be viewed as a series of processes (represented in Figure 1 below) where an idea borne in the sender's mind (1) is transcribed in a message that, (2) with some distortion, is transmitted to the receiver, with error, and (3) received and decoded by the receiver.

Figure 1. The Process of Communication



The process of communication and the requirements for accurate interpretation are the same for statutes as they are for all other forms of communication. Indeed, the literature on communication theory and cognitive science suggests that the communication process is ubiquitous; that is, whether we are communicating written words, electrical signals, spoken

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[9] Boudreau et al., *What Statutes Mean*, *supra* note 1, at 959.

[10] PIERCE, *supra* note 5, at 118; Boudreau et al., *What Statutes Mean*, *supra* note 1, at 959.

language, gestures, or viruses, all communication involves the processes of *compression* and *expansion*.[11] In general, compression takes a large domain of information and transforms it flexibly so that the compression can be carried forward for future expansion. Ideas and concepts are compressed into language and transmitted by actions such as speaking, writing, and gesturing; this is analogous to the process by which our voices are compressed into electrical signals, transmitted, and then expanded back into sound waves when we talk on the phone.

In the communication process, the signal begins as a message that the sender transmits through a channel. In the channel, the message is compressed into a signal, which then passes through a transmitter. The transmitter then sends the signal along one or more channels to the receiver, who expands the signal back into a message. At the end of the process, the receiver discerns from the message the information that was successfully transmitted.

Crucially, successful communication depends *both* on the sender's ability to properly compress the message being sent and on the receiver's ability to correctly perceive the message and to apply the correct expansion algorithm to reverse the compression process.[12] *In an ideal world, the expansion algorithm would precisely match the compression algorithm used to send the original message*. As communication in the real world departs from this ideal, the receiver's ability to faithfully decode the original message deteriorates.

To this point, our depiction of the compression-expansion process has neglected the identity of the sender and the recipient. In the context of statutory lawmaking, the sender is the legislature, and the recipient is anyone who needs to understand the statute's meaning. To sharpen this matter, we focus on judicial statutory interpretation. While courts are certainly not the only—and perhaps not even the primary—intended recipients of the communication, they do, at the very least, play a key role in interpreting statutory meaning and, to that end, frame the process as a communication in which the

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[11] *See generally* GILLES FAUCONNIER & MARK TURNER, THE WAY WE THINK: CONCEPTUAL BLENDING AND THE MIND'S HIDDEN COMPLEXITIES (2002); RAY JACKENDOFF, PATTERNS IN THE MIND: LANGUAGE AND HUMAN NATURE (1993); C. E. Shannon, *A Mathematical Theory of Communication*, 27 BELL SYS. TECHNICAL J. 379 (1948).

[12] *See generally* ARTHUR LUPIA & MATHEW D. MCCUBBINS, THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW? (1998).

structure of compression and expansion help the interpreter better illuminate the task at hand.

II. LEGISLATIVE INTENT, AUTHORITY, AND PROCESS

Who, after all, is doing the communicating? As Larry Alexander and James Brudney have rightly noted in their response to our recent article,[13] a key puzzle in an account of statutory meaning that looks squarely to communication theory is how to best view the 535 federal legislators (perhaps adding the President to this mix as well). Can we overcome the objection that Congress, being a "they" not an "it," is hard to perceive as any sort of communicator?[14] While this observation is particularly potent in connection with our description, it is not a new critique. Many prominent scholars have raised various objections to the notion of collective meaning in connection with "intentionalist" theories of statutory interpretation more generally. The critiques are powerful, if somewhat far-flung—sometimes raising social-choice-related critiques to legislative intent, other times questioning the metaphysical properties of (to use William Buzbee's felicitous phrase) the "one Congress fiction" of statutory interpretation,[15] and generally questioning the idea that legislative will is reduced to an act of communication from a body with a singular will.

Though appreciating the dilemma of drawing conclusions about legislative intent from evidence produced within a collective body, our basic responses track two large themes. First, we insist that the act of communication manifest through legislative action is that established by a distinct public act (i.e., a statute) whose pedigree is established by constitutional rules of enactment—namely, the final vote on passage. Whatever we might say about the greater political stature of a law enacted by, say, 500 legislators than one enacted by a slim majority, we would never say that the former is a statute and the latter is not. Article I, Section 7, of the U.S.

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[13] Larry Alexander, *How to Understand Legislatures: A Comment on Boudreau, Lupia, McCubbins, and Rodriguez*, 44 SAN DIEGO L. REV. 993 (2007); James J. Brudney, *Intentionalism's Revival*, 44 SAN DIEGO L. REV. 1001 (2007).

[14] *See* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 239 (1992). For a rejoinder, see Arthur Lupia & Mathew D. McCubbins, *Lost in Translation: Social Choice Theory Is Misapplied Against Legislative Intent*, 14 J. CONTEMP. LEGAL ISSUES 585 (2005).

[15] William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171 (2000).

Constitution gives the legislature the authority to convert its myriad individual preferences (or hopes, dreams, etc.) into a statute, and it does so by the requirement of majority assent.[16] The realities of the legislative process are, of course, considerably more complicated than this simple resort to an Article I provision would suggest. But our point here is that constitutional rules of procedure solve what would be an insurmountable problem of aggregating heterogeneous individual intentions into a collective intent. Meaningful communication is not the extrinsically derived aggregation of intent but the statute that is enacted. We have called this understanding—with a hat tip to philosopher Daniel Dennett—the "intentional(ist) stance,"[17] a phrase capturing the use of intent as a heuristic device to understand communication rather than an admittedly intractable inquiry into the epistemology of multiple intentions.

Second, we see legislative intent in the details of legislative procedure—this time focusing on the practical dimensions of legislative procedure, rather than specific constitutional constructions, to support the idea that statutes are meaningful communications.[18] Some scholars have taken the view that legislative intent is meaningless, concluding that statutes do not accurately track the democratic will of disagreeing legislators.[19] However, the constitution of legislative procedure that enables diverse lawmakers to collaborate on legislative initiatives and pass (with some frequency) statutes in a polarized environment belies the contention that legislative processes are simply too chaotic or incoherent to warrant authority and respect. To be sure, we have not offered any response to the democratic objection. Our

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[16] *See* U.S. CONST. art. I, § 7.

[17] Boudreau et al., *The Intentional(ist) Stance*, *supra* note 1, at 2131-32, 2138-43.

[18] Professor Lawrence Solan has written extensively—and, to us, persuasively—about legislatures' capacity to implement through its statutory text a publicly available legislative intent. *See, e.g.*, Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427 (2005). Although Solan is interested squarely in the insight of cognitive psychology (particularly, "theories of mind") and its application to collective intent, he focuses fruitfully on the construction of the legislative process as a mechanism for synthesizing and articulating collective intent through rationally constructed procedures and instruments. *Id.* at 444-49. In referring to Congress's delegation of lawmaking prerogatives to legislative committees, for example, Professor Solan notes succinctly that "not only does the legislature form its plans through the work of a small number of its members, but it is structured to do things just that way." *Id.* at 446.

[19] *See generally* JEREMY WALDRON, LAW AND DISAGREEMENT (1999); Lupia & McCubbins, *supra* note 14, at 594-98; Shepsle, *supra* note 14.

burden here, however, is more modest: to (at least) support the argument that statutes are meaningful communications and, moreover, that legislative processes facilitate these communications by enabling legislators to negotiate discernible, enactable outcomes.

We cannot answer the question, "what do statutes mean?," without first considering the question, "how are statutes made?" The legislative process defines the compression algorithm with which congressional communications are transmitted. Thus, efforts to interpret law—to essentially construct an expansion process that most closely resembles the compression process—must begin with a coherent theory of lawmaking. While we present one such theory elsewhere,[20] any model of the legislative process must define how multiple legislators successfully coordinate to collectively adopt a single statute (the communication) and the internal legislative process through which law is made.

III. COMMUNICATION AND INTERPRETATION

In our view, statutes are compressed policy instructions or procedural guidelines, chosen by the legislators who pass them (specifically, members of the majority party); subsequent actors (such as judges, agencies, or citizens) are left to expand a statute's meaning when applying or interpreting it. Because discerning the meaning of these communications requires corresponding compression and expansion schemes, the interpretation of federal statutes *must* begin with an examination of the congressional legislative process. If we ignore the process by which members of the majority party compress meaning when writing statutes, how are we to develop an expansion scheme that accurately discerns such meaning? We cannot develop a proper expansion scheme without an understanding of the legislative process. For this reason, we now briefly discuss the various stages of the legislative process with an eye toward developing a corresponding expansion scheme that jurists can use when interpreting statutes.

Federal legislators in the United States must go through a number of stages to pass statutes, and crucially, the majority party in each chamber has a veto (or vetoes) over what gets

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[20] *See* Boudreau et al., *What Statutes Mean*, *supra* note 1, at 971-81.

passed.[21] Indeed, legislators typically delegate the legislature's agenda-setting authority and the task of allocating the legislature's scarce resources to the majority-party leadership. Given this delegation of authority, the issue becomes how members assure that the people to whom agenda-setting power has been delegated do not take advantage of this authority and use it for their own personal gain. In general, legislators use checks and balances to solve this dilemma. They provide others with a veto over the actions of agenda setters, and give others an opportunity and incentive to act as checks. These checks and balances may be very subtle. In the U.S. House of Representatives, for example, backbenchers may check their leaders' actions through the committee process and must give their approval to their leaders' actions on the floor of the chamber.

For our purposes, it is important to note the numerous places where a statute may be discussed, revised, or amended by legislators *in the majority party*. For example, in the initial stages of the congressional lawmaking process, the majority-party members of substantive committees in each chamber have significant agenda control within their jurisdiction. It is at this stage where the drafting of statutes begins, where the writing of committee reports takes place, and where conversations between committee chairs and majority-party committee members are held. Additionally, because the majority party in Congress always holds a majority of seats on each substantive committee, members of the minority party are largely shut out, even at this early stage of the legislative process.

As a given proposal approaches the floor, the majority party's influence continues to grow. Indeed, the majority party's members delegate to their leadership a broad variety of matters. The Rules Committee and the Speaker, the Senate majority leader (and, in many cases, the Senate minority leader)—as well as the Budget and Appropriations Committees if any funding is required to implement the proposal—check

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[21] *See generally* GARY W. COX & MATHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE (1993); GARY W. COX & MATHEW D. MCCUBBINS, SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES 42 (2005); D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS 34 (1991); Gerald Gamm & Steven S. Smith, *Policy Leadership and the Development of the Modern Senate*, *in* PARTY, PROCESS, AND POLITICAL CHANGE IN CONGRESS: NEW PERSPECTIVES ON THE HISTORY OF CONGRESS 287 (David Brady & Mathew D. McCubbins eds., 2002); Charles O. Jones, *Joseph G. Cannon & Howard W. Smith: An Essay on the Limits of Leadership in the House of Representatives*, 30 J. POL. 617, 617-18 (1968).

committee members' ability to propose legislation, for these two central coordinating bodies control access to plenary time. If a substantive committee's proposal is not representative of the majority party's collective interests, and if it is an issue of importance to the majority party, then either the Speaker or the Rules Committee is likely to kill the proposal.

Before a proposal leaves the chamber, there are floor debates, floor amendments, and the votes themselves. During floor debates, the bill manager for the majority party controls the time devoted to debate and to particular amendments, determining which members speak and for how long. It is not unusual for a number of amendments to be added to a proposal during this stage unless, as in the House, the majority-party-controlled Rules Committee grants a special rule that limits the number and nature of amendments (in the Senate, bills are often considered under Unanimous Consent Agreements, or the majority leader can "fill the agenda tree," leaving no room for other amendments to be offered). And given the majority party's influence at nearly every stage of the legislative process, by the time the proposed legislation reaches a final-passage vote on the floor, the majority party has typically ensured its own victory (although there are occasionally instances where the majority party and its leaders must corral a few additional votes on the floor).

The congressional process is, in essence, a running conversation in which some members—specifically those to whom the majority party has delegated authority to set the agenda and write statutes—use the tools required by their principals (e.g., committee reports, statements by the bill manager, communications by the party whips, etc.) to signal the meaning of their actions (i.e., the statutes they have written) to the remaining members of the majority party. As we discuss below, checks and balances within the legislative process serve to make these communications trustworthy. The system may not be transparent to members of the minority party—who are often even left out of committee meetings and hearings, and have limited influence in the choice of statutory language both in committee and on the floor. However, the system is transparent *for members of the majority party*, as the discussion above demonstrates. Throughout the legislative process, the compression of legislative meaning occurs in several ways and at a variety of stages, beginning with the drafting of statutes, proceeding to the writing of committee reports and the debating of statutes on the floor, and ending with the bill manager's

statements and floor amendments. Because each stage involves the compression of meaning on the part of legislators in the majority party, a proper expansion scheme must correspond to these stages. In other words, to properly expand the compressed communication, the interpreter must understand the processes by which the communication has worked its way through the legislative process.

Identifying these key actors and paying particular attention to the pivotal role of some legislators (or some small body of legislators) in the legislative process can often help judges adjudicate between competing candidate interpretations of the same statute.[22] To be sure, minority-party legislators, as Professor Brudney helpfully reminds us, are important players in the legislative process.[23] Minority-party legislators are particularly influential in the Senate, where traditional norms of Senate process impact in various ways the ability of pure majorities to implement their will.[24] But this point depicts statutes as the revealed will of majority-party preferences, a depiction to which we do not subscribe. We see statutes as the products of complex bargaining processes; they are instruments of a diverse set of legislators and will entail judgments, compromises, and tradeoffs involving members of both parties. And we certainly agree that "the architecture of legislative conversations culminating in enactment may also vary based on the subject matter area being addressed by Congress."[25] The generalization we draw from the large literature on congressional process and performance is three-fold: First, legislators develop and use internal lawmaking processes to facilitate their discrete aims. Second, they collaborate, cooperate, and occasionally compete with others on these agendas. And third, the outcome of these processes is statutes that communicate meaningful information about what a majority of Congress enacted into law. Furthermore, whatever we can learn about how legislators forged these deals will help us better understand the meaning of what they enacted.

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[22] *See generally* Rodriguez & Weingast, *The Positive Political Theory of Legislative History*, *supra* note 4; McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS., Winter & Spring 1994, at 3; McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992).

[23] Brudney, *supra* note 13, at 1013-16.

[24] *Id.*

[25] *Id.* at 1016.

IV. POSITIVE POLITICAL THEORY OF LAWMAKING AND STATUTORY INTERPRETATION

Communication theory and a theory of lawmaking based on positive political theory (PPT) can help illuminate some of the key issues in statutory interpretation.[26] Moreover, we will say more ambitiously (if still tentatively) that these twin theories can support particular interpretive techniques—for instance, an informed use of legislative history to resolve disagreements over statutory meaning. To generate further conversation along these lines, we offer some thoughts about the canons of statutory interpretation. In general, we suggest that these canons' suitability to resolving interpretive issues be judged by how informative they are in addressing the compression-expansion structure and, as well, how accurately they track the PPT of the lawmaking process.

Communication theory and PPT share in common the recognition that the legislative process reflects a "conversation" among legislators. Indeed, at each stage of the legislative process, legislators communicate with each other and compress meaning by drafting statutes, writing committee reports, participating in floor debates, offering amendments, and engaging in various other legislative tasks.[27] In interpreting statutes, judges must "listen to" and interpret these "conversations." Judges must not assume that legislators were speaking to them in their conversations; nor should judges treat legislators' conversations as though legislators were either naïvely listening to everything said in the conversation or being lied to about everything. Instead, judges must passively listen to legislators' conversations so that their expansions (i.e., interpretations) correspond to the way that statutory meaning was compressed.

Because judges are not flies on the wall during the processes of legislative deliberation, they must orient their interpretations of these conversations around plausible accounts of what available information reveals.[28] The debate over the relevance and utility of legislative history deals squarely with this difficult process. As we and others have written, not all legislative history is equal.[29] In addition to

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[26] *See* Boudreau et al., *What Statutes Mean*, *supra* note 1, at 971-81.

[27] *See supra* Part III.

[28] Boudreau et al., *What Statutes Mean*, *supra* note 1, at 979-81.

[29] *Id.*

communicating their intent, individual legislators may send messages designed to claim credit for policy victories, to shift blame for defeats, to jam the signals of their opponents, and, more generally, to ensure their reelection in the next electoral contest.[30] Having advocated legislative history as a tool for statutory interpretation and as a key component of our approach, we in no way suggest that judges use legislative history indiscriminately. Rather, we emphasize that some aspects of legislative history are trustworthy indicia of legislative meaning and others are not. Thus, the task for judges interpreting statutes is to determine which aspects of legislative history are trustworthy and to rely only upon those aspects when discerning the meaning of statutes. Elsewhere, we provide some key criteria judges can use to identify trustworthy sources of information.[31]

This process also implicates debates over the use of canons of statutory construction. Consider, for example, the plain-meaning approach to statutory construction, a general approach undergirded by the canon that statutory language should be accorded its plain—rather than any especially imaginative or counterintuitive—meaning.[32] The suitability of this hoary rule turns squarely on what we expect to be the processes by which legislators have compressed their communications in the first instance and, in turn, what their expectations are with respect to the processes of expansion by the receiver. Where certain language has a plain meaning—without making any effort here to define what is or is not plain—the plain meaning would seem to have the great asset of minimizing noise and, within the structure of the compression-expansion algorithm central to the communication process, minimizing the risk of error. Yet the plain-meaning approach goes wrong in its positive assertion that language usually does have a plain meaning and that the process is not really about interpretation

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[30] *See generally* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (2d ed. 1974).

[31] *See* Boudreau et al., *What Statutes Mean*, *supra* note 1, at 971-79.

[32] While plain-meaning interpretation has often been treated synonymously with interpretive textualism, it is important to see them as distinct. Textualism refers to a comprehensive theory of interpretation that regards the text as the only legitimate subject of interpretation and sees extrinsic evidence of statutory meaning (such as legislative history) as irrelevant to the enterprise. Reference to plain-meaning interpretation has in mind a particular perspective on how one reads the text and thus is seen properly as a rule of interpretation.

and is merely a matter of application.[33] In short, what we need to know to make use of this canon are (at least) two critical things: (1) the capacity of language in a particular instance to be rendered to a plain (rather than, to use a clumsy term, "unplain") meaning, and (2) the expected treatment of certain language by those with authorized involvement in both the compression and expansion process. If we lack sufficient knowledge in either of these dimensions—and, to be sure, our focus in this essay is on the second of these matters—then the plain-meaning canon will not meet its intended goals. So "it depends" is all we are in a strong position to say about the plain-meaning canon in the context of statutory interpretation generally.

Next, consider rules that impute to the legislature the intent to create broad remedial policies where the language used in the statute does not point ambiguously in the direction of those policies. Examples of these rules include the implied right of action, the presumption of reviewability, and the old canon that liberal statutes be broadly construed. While they reflect different aims and histories, they are of a common piece with the notion that proper statutory interpretation puts a thumb on the scale in favor of "progressive" social policy. Relatedly, it gives an edge to judicial intervention (as in the case of the implied right of action and the reviewability presumption). From our perspective, these rules, taken as a whole, are inconsistent with both the structured process of communication and, as well, the positive political theory of lawmaking.

First, these rules essentially rewrite the statute to insert provisions regarding the statute's scope and the procedures to be followed in the statute's implementation. So, for example, the creation of an implied right of action adds language where none existed; it also reorients the administration of the statute (an administration that will frequently entail an administrative agency) by adding a new institution to the mix—an institution with its own roles, rules, and powers.[34] A statute might have, in the first instance, contained an administrative mechanism that gave relevant legislative committees and subcommittees principal

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[33] For especially influential renderings of this claim, see ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988).

[34] *Cf.* Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743 (1992).

prerogative to engage in various forms of "police patrol" or "fire alarm" oversight.[35] Interposing a court in this process by providing a route to judicial review will inevitably, and at the very least, reconfigure the processes of legislative scrutiny and the general structure of policy implementation.

In essence, statutes reflect complex tradeoffs. No matter how strongly worded a particular policy directive is,[36] the choice of how best to implement this policy both in terms of the level and technique of enforcement and in terms of the resources devoted to these initiatives in one or another budgetary cycle (a choice manifest acutely in the constitutionally prescribed appropriations process) entails difficult tradeoffs. A canon that layers onto a legislative compromise a particular directive that the legislature either did not consider or, as is more likely, declined to create, undermines these tradeoffs. And whatever we might say about this strategy as a normative matter, we are content here to say that such an interpretive rule is fundamentally inconsistent with both the theory of communication and the positive political theory of lawmaking.

In earlier work, we considered two additional canons—the whole act rule and the appropriations canon—and explained why they conflict with theories of communication and lawmaking.[37] The whole act rule presumes, implausibly, that the legislature set out to write a completely coherent policy in which all parts would mesh seamlessly and every embedded policy would reinforce the other. This idea, too, conflicts with the notion that statutes are inevitably about tradeoffs and compromise. Moreover, the whole act rule supposes that the communication being compressed and later expanded is one omnibus communication that meets strict standards of transitivity, consistency, and coherence. That may well be our democratic ambition. But we can all conjure up

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[35] *See* Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 165-66 (1984).

[36] For instance, the directions in the federal environmental statutes to regulate all "significant risks" and to use the "best available technology" to clean up air and water pollution. *See, e.g.*, 33 U.S.C. § 1311(p)(1) (2006) ("Such modified requirements shall apply the best available technology economically achievable on a case-by-case basis, using best professional judgment, to set specific numerical effluent limitations in each permit."); 42 U.S.C. § 6905(b)(2)(A)(ii) (2006) ("As promptly as practicable . . . the Administrator shall submit a report describing . . . any significant risks to human health posed by these emissions . . . .").

[37] *See generally* Mathew D. McCubbins & Daniel B. Rodriguez, *Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon*, 14 J. CONTEMP. LEGAL ISSUES 669 (2005).

examples in which this ambition is not met in the crucible of real political decision making and real statutes. Relatedly, the claim that legislative changes made through the appropriations process lack the deliberative qualities of substantive legislative decisions is problematic—both from the vantage point of the (undertheorized, empirically problematic) notion of deliberation[38] and from a plausible account of how legislators communicate through their fiscal decisions. There is absolutely no reason to expect that the kinds of choices and tradeoffs made by legislators in their decision making over annual appropriations cannot be subject to exactly the same logic of compression and expansion as can other legislative choices. Moreover, the structures embodied in legislative decision making on appropriations jibe in ways that have been neglected by both political scientists and legal scholars with a sensible account of legislative policymaking. In short, the PPT account of the appropriations process undermines the canon of construction invented in *TVA v. Hill*[39] and more or less followed ever since: that legislative changes through the appropriations process ought to be narrowly construed.

The more global lesson to draw from this analysis is that familiar canons of statutory construction can be hard to square with what we believe to be the best assessment of how and why the legislature functions to communicate through the statutory-enactment process. Still, these canons may serve important normative goals. These goals may include the improvement of legislative processes and the implementation of what William Eskridge and Philip Frickey label "quasi-constitutional" objectives.[40] However we evaluate the merits of these objectives, we should see them as orthogonal to the core positive objective of facilitating interpretive approaches that are broadly congruent with theories of communication and democratic lawmaking. While much has been said in the voluminous literature on statutory interpretation—and even more remains to be said—about these important normative objectives, our contribution here to the debate is principally positive; that is, we endeavor to show that plausible

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[38] Mathew D. McCubbins & Daniel B. Rodriguez, *When Does Deliberating Improve Decisionmaking?*, 15 J. CONTEMP. LEGAL ISSUES 9, 39 (2006); McCubbins & Rodriguez, *supra* note 37, at 691.

[39] Tenn. Valley Auth. v. Hill, 437 U.S. 153, 189-93 (1978).

[40] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 597 (1992).

interpretive principles can be derived thoughtfully from a model of statute making that builds upon theories of communication and legislative process.