LAW & ECONOMICS SEMINAR
Monday, April 26
4:20-6:00 pm, Boalt 13

Rethinking the Appropriations Canon of Statutory Interpretation

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Participants at Berkeley Workshop (4/26/04):

The enclosed materials are background reading for my presentation on the topic, *"Rethinking the Appropriations Canon of Statutory Interpretation."* The "canon" paper is part of a larger project with Professor Mathew McCubbins of the UC San Diego Political Science Department, a book-length project tentatively entitled, ***"What Statutes Mean: Positive Political Theory Perspectives on Legislation and its Interpretation."***

My objective in the workshop presentation on Monday is to lay out the general themes of this larger project and, as well, discuss the particular elements of the "appropriations" canon argument. The background reading is from one published article (with Stanford political scientist Barry Weingast) and one unpublished chapter section from the McCubbins & Rodriguez book.

I look forward to seeing you next Monday in Berkeley.

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ARTICLE

THE POSITIVE POLITICAL THEORY OF LEGISLATIVE HISTORY: NEW PERSPECTIVES ON THE 1964 CIVIL RIGHTS ACT AND ITS INTERPRETATION

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I. LAWMAKING PROCESSES, STATUTORY DESIGN, AND THE THEORY OF LEGISLATIVE RHETORIC

Understanding how to extract the meaning of legislation through the process of interpretation requires a clear understanding of how legislators construct legislation and how they communicate both separate and collective views about what the legislation means. To provide this understanding, we draw on positive political theory and its implications for a preliminary theory of legislative rhetoric. From this the-

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We are grateful for the comments and reactions of many professional colleagues, including John Aldrich, Michael Bailey, James Brudney, John Donohue, William Eskridge, Jr., John Ferejohn, Morris Fiorina, Pamela Karlan, Morgan Kousser, Mathew McCubbins, Roger Noll, Daniel Ortiz, Richard Pildes, Eric Posner, Michael Rappaport, Andy Rutten, Eric Schickler, Kenneth Shepsle, Paul Sniderman, and Raymond Wolfinger, as well as participants in the various workshops and professional meetings at which earlier versions of this Article were presented. For financial support of this project, we thank the Hoover Institution, the Boalt Hall Fund at the University of California, Berkeley, and the Smith-Richardson Foundation.

ory, we derive a positive theory of legislative intent and statutory purpose.

A. *Principles of Positive Political Theory*[34]

The positive political theory of legislative decision making[35] describes the statute-making process as a collection of purposive, strategic decisions made by rational decision makers within the structure of legislative institutions. These legislative institutions are themselves the creation of legislators acting to maximize their own varied interests through collective choice mechanisms.[36] The "industrial organization of Congress" represents the constructed environment within which legislators bargain with one another in order to facilitate their indi-

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[34] The ideas developed in this Section build specifically upon a recent positive political theory literature that includes Eskridge & Ferejohn, *supra* note 33; John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565 (1992) [hereinafter Ferejohn & Weingast, *Limitation of Statutes*]; John A. Ferejohn & Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 (1992) [hereinafter Ferejohn & Weingast, *Statutory Interpretation*]; McNollgast, *Legislative Intent*, *supra* note 11; McNollgast, *Positive Canons*, *supra* note 11; McNollgast, *The Theory of Interpretive Canon and Legislative Behavior*, 12 INT'L REV. L. & ECON. 235 (1992); Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213 (1990); Edward P. Schwartz et al., *A Positive Theory of Legislative Intent*, LAW & CONTEMP. PROBS., Winter/Spring 1994, at 51; Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949-1988*, 23 RAND J. ECON. 463 (1992). The ideas build more generally on the positive political theory of legislative decision making as described in, for example, Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform*, 72 WASH. U. L.Q. 1, 52-80 (1994).

[35] At various junctures, we use "legislative decision making" as a synonym for statutory enactment. This is a convention of convenience, for we recognize, of course, that legislatures do much more than enact statutes. *See, e.g.*, MICHAEL W. KIRST, GOVERNMENT WITHOUT PASSING LAWS 1-11 (1969) (focusing on the impact of nonstatutory means of congressional action, such as appropriations proceedings, hearings, and the adjustment of funding levels). Since we confine our inquiry to statute making, we do not engage the extensive literature that considers positive theories of legislative action in addition to, or separate from, the enactment of statutes.

[36] *See, e.g.*, MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT 37-47 (2d ed. 1989) (criticizing Congress for establishing a legislative system advantageous to members seeking to remain career politicians); D. RODERICK KIEWIET & MATTHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS 231-37 (1991) (claiming that congressional parties have successfully managed the delegation of policymaking authority to their members serving on committees); KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION 247-58 (1991) (examining the role of internal legislative organization on public policy); KREHBIEL, *supra* note 9, at 20-48 (creating a new theory to identify pivotal players in political decision making).

vidual and collective goals.[37] Statutes—including both the text of the enacted law and the legislative "history" encoded into the public record of the statute—reflect not only legislative specialization and expertise, but the vitally important object of trade and negotiation. The legislators' statements that make up the legislative history that attaches to the statute also reflect these important objects.[38] Critically, the statute's implementation will be influenced by the meaning given to it by interpretations.[39]

To accomplish their aims within this dynamic process of legislative decision making, legislators act within coalitions. A legislature is, after all, a "they" not an "it"; decisions—statutes included—are made only by collections of legislators acting in concert.[40] The basic democratic principle of majority rule, established in Article I of the U.S. Constitution, ensures that legislators must create a coalition at least as large as a majority of the legislators in each house in order to enact legislation.[41] The process of legislation, then, is shaped by the decisions made by legislators to form and maintain coalitions within the institutional structure of the legislature and within the structure of those nonlegislative institutions (the presidency, the judiciary, and the bu-

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[37] On the general "industrial organization of Congress," of which there are multiple theories, see Kenneth A. Shepsle & Barry R. Weingast, *Positive Theories of Congressional Institutions*, 19 LEGIS. STUD. Q. 149 (1994). *See generally* GARY W. COX & MATHEW D. MCCUBBINS, LEGISLATIVE LEVIATHAN: PARTY GOVERNMENT IN THE HOUSE 1-15 (1993) (viewing political parties as "legislative cartels" that usurp rulemaking power for the legislative process); RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES 94-114 (1974) (exploring the decision-making importance of congressional committees); KREHBIEL, *supra* note 36, at 30-42, 66-67 (offering distributive and informational theories of congressional organization); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 1-9 (1974) (focusing on reelection as the driving force behind congressional decision making and organization); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, like Firms, Are Not Organized as Markets*, 96 J. POL. ECON. 132, 132-37 (1988) (providing a theory of legislators based on the theory of firms and contractual institutions).

[38] *See, e.g.*, Daniel B. Rodriguez, *Statutory Interpretation and Political Advantage*, 12 INT'L REV. L. & ECON. 217, 220-25 (1992) (considering how Congress uses legislative history to influence statutory interpretation).

[39] *See, e.g.*, R. SHEP MELNICK, BETWEEN THE LINES: INTERPRETING WELFARE RIGHTS 3-22 (1994) (giving examples of how judicial interpretation of statutes can change the meaning of legislative provisions).

[40] *See* David P. Baron & John A. Ferejohn, *Bargaining in Legislatures*, 83 AM. POL. SCI. REV. 1181, 1181-86 (1989) (modeling legislative equilibria based on theories of bargaining); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 239-42 (1992) (arguing that collections of individuals cannot have intent, and thus judges, lawyers, and legislators misplace their reliance on legislative intent).

[41] U.S. CONST. art. I, § 7.

reaucracy) upon which legislators rely to facilitate their legislative aims.[42]

As far as legislative purposes are concerned, we need not imagine that legislators share some collective meta-intent.[43] Indeed, it is often clear that different members of Congress support a piece of legislation for very different reasons. Bruce Ackerman and William Hassler's study of the Clean Air Act Amendments of 1977 provides a good illustration: when environmentalists sought to amend the Clean Air Act, they found they did not have sufficient support to pass their legislation.[44] To pass their bill, pro-environment legislators in Congress negotiated with representatives of unionized coal miners.[45] This coalition produced an act that compromised some of the environmentalists' principles, thereby addressing environmental problems less efficiently.[46] Yet, faced with the choice between a compromise bill and no bill, the environmentalists chose the compromise bill.

The positive political theory of legislative decision making emphasizes that legislatures act through collections of coalitions; it is in the understanding of the formation, maintenance, and actions of these

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[42] *See, e.g.*, McCubbins et al., *supra* note 33, at 466-68 (illustrating how an acceptable bill can emerge from three distinct stances by the Senate, House, and President).

[43] We would volunteer, though, that one is probably on safe ground in assuming that coalitions of legislators are made up of a variety of individuals with different goals, dreams, personalities, and such. *See, e.g.*, John A. Ferejohn & Morris P. Fiorina, *Purposive Models of Legislative Behavior*, 65 AM. ECON. REV. 407, 412 (1975) (presenting a political scientist's view that legislators "desire[] reelection, good public policy, and institutional influence—different mixes for different Representatives").

[44] BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR 29 (1981); *cf.* B. Peter Pashigian, *Environmental Regulation: Whose Self-Interests Are Being Protected?*, 28 ECON. INQUIRY 551 (1985) (considering the 1976 amendments to the Clean Air Act as a function of self-interest, geography, and regional growth).

[45] ACKERMAN & HASSLER, *supra* note 44, at 31.

[46] *See id.* at 42-56 (describing the diminished standards of the final bill). Gilligan, Marshall, and Weingast's study of the formation of the Interstate Commerce Commission provides another illustration. They argue that the Interstate Commerce Act did not serve a single purpose, such as allowing the railroad industry to create a cartel. Instead, it was a compromise between railroads, seeking a cartel, and one type of shipper (so-called "short-haul" shippers) against another type of shipper (so-called "long-haul" shippers). *See* Thomas W. Gilligan et al., *Regulation and the Theory of Legislative Choice: The Interstate Commerce Act of 1887*, 32 J.L. & ECON. 35, 48-51 (1989) (stating that the compromise bill made both railroads and short-haul shippers better off, but neither was as well off individually as would have been the case under pending legislative alternatives).

coalitions that the general theory of legislative decision making must be grounded.[47]

The fact that legislators must collect themselves into coalitions in order to pass statutory proposals raises a number of difficulties for the statutory enactment process.[48] In the tackling and surmounting of these difficulties, the contours of the positive theory of legislative decision making come into relief.

Consider, first, the set of impediments to bargaining faced by legislators.[49] In order to facilitate their purposes, legislators must negotiate with one another over the design of a proposal. What is the appropriate scope of the statute? What is the optimal enforcement regime? Should there be exemptions for certain individuals or groups? Even supposing they can agree among themselves, this proposal must nonetheless run a daunting gauntlet of legislative procedures including, most significantly, consideration on the chamber floor.[50] Once on the floor, the problems of chaotic decision making forecasted by social choice theory—including cycling, agenda manipulation, strategic amendments, and other maneuvers—can turn proposals into recreations that bear little resemblance to the bargains struck by coalition members.[51] Given the potential for uncontrollable

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[47] *See* sources cited *supra* note 11 (arguing for a method of interpreting legislation that accounts for legislative bargaining); *see also* Baron & Ferejohn, *supra* note 40, at 1183-201 (explaining how a bill is passed and how its political benefits are distributed among individual legislators or coalitions of legislators depending on the legislature's amendment rules and session frequency).

[48] *See generally* R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 88-118 (1990) (discussing strategies for assembling coalitions with which to support or oppose legislation).

[49] *See* Baron & Ferejohn, *supra* note 40, at 1200 (contrasting coalition-based form with "the noncooperative bargaining theory of legislatures"); Weingast & Marshall, *supra* note 37, at 138-39 (explaining that bargaining is hampered by the "uncertainty over the future status of today's bargain").

[50] The Senate filibuster is one of the key procedural obstacles that legislation may face. Recognizing this, the pivotal politics model describes the filibuster pivot as one of the "key" pivots in enacting legislation. BRADY & VOLDEN, *supra* note 9, at 17; KREHBIEL, *supra* note 9, at 23-24; *see also* Weingast & Marshall, *supra* note 37, at 138 (describing problems with the legislative exchange).

[51] *See, e.g.*, Richard D. McKelvey, *Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control*, 12 J. ECON. THEORY 472, 479-81 (1976) (describing manipulation of voting agendas); Charles R. Plott, *A Notion of Equilibrium and Its Possibility Under Majority Rule*, 57 AM. ECON. REV. 787, 796 (1967) ("The exchange of information associated with any decision process may serve actually to change the utility function."); William H. Riker, *Implications from the Disequilibrium of Majority Rule for the Study of Institutions*, 74 AM. POL. SCI. REV. 432, 445 (1980) ("[O]utcomes are the consequence not only of institutions and tastes, but also of the political skill and artistry of those who . . . exploit the disequilibrium of tastes for their own advantage.").

and even chaotic amendments on the floor, and thus wasted legislative effort, why bother?

The answer concerns institutions: The structure of legislative rules, party organization, processes, and mechanisms are designed in part to facilitate legislative bargaining and statutory enactment by ensuring that decisions will be respected—or, perhaps more aptly, protected—by the body.[52] Self-interested legislators create institutions to facilitate bargaining and control.[53] When successfully constructed and maintained, these institutions guard against chaotic, unpredictable decision making; they insure the maintenance of what has been called a *structure-induced equilibrium*, which undergirds the industrial organization of Congress.[54]

For our purposes, the most important institutional details of Congress concern the complex set of institutions granting individuals or groups special powers.[55] Not only must legislation command majori-

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For a summary of, and introduction to, these results, see MELVIN J. HINICH & MICHAEL MUNGER, ANALYTICAL POLITICS (1997); KENNETH A. SHEPSLE & MARK S. BONCHEK, ANALYZING POLITICS: RATIONALITY, BEHAVIOR AND INSTITUTIONS (1997).

[52] *See, e.g.*, Kenneth A. Shepsle, *Institutional Arrangements and Equilibrium in Multidimensional Voting Models*, 23 AM. J. POL. SCI. 27, 35-37 (1979) (explaining mathematically how institutional arrangements allow legislatures to reach equilibrium); Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503, 507-11 (1981) (showing that "institutional restrictions on the domain of exchange induce stability"); *cf.* Gordon Tullock, *Why So Much Stability*, 37 PUB. CHOICE 189, 193-200 (1981) (documenting the influence of committees and formula allocation of funds in getting legislation passed easily).

[53] *See* FENNO, *supra* note 37, at xv (illustrating how member goals and environmental constraints interact within legislative committees to shape decision-making processes and, finally, decisions); FIORINA, *supra* note 36, at 121-22 (explaining how subcommittees help promote bargaining despite "[h]eterogeneity of interests across districts and states"); KREHBIEL, *supra* note 36, at 264 (observing that congressional institutions lead to specialization, sharing policy expertise, harnessing self-interest, and "aligning . . . individual incentives with collective goals"); MAYHEW, *supra* note 37, at 110-25 (explaining how legislators manipulate office structure, committees, and parties in order to win passage for a bill).

[54] *See* sources cited *supra* note 52 (describing the stabilizing effect of institutional structures on legislatures); *see also* JOHN H. ALDRICH, WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF PARTY POLITICS IN AMERICA 221-26 (1995) (evaluating the "homogeneity of preferences" and "status quo policy" of Congress); COX & MCCUBBINS, *supra* note 37, at 79-82 (suggesting that most House committees reflect the preferences of the House as a whole, with "draft legislation reflecting the diversity of interests in the chamber"); DAVID W. ROHDE, PARTIES AND LEADERS IN THE POSTREFORM HOUSE 162-92 (1991) (explaining how partisanship can lead to an emphasis on party politics at the expense of institutional arrangements); Shepsle & Weingast, *supra* note 52, at 511-14 (explaining how institutions induce stability).

[55] The recent literature on congressional institutions is reviewed in Shepsle & Weingast, *supra* note 6. Other contributions to the volume *Positive Theories of Congres-*

ties, it must also gain the approval of committees in each house, the majority party, and the Rules Committee in the House,[56] and succeed against any attempt at filibuster in the Senate. The majority party also retains numerous controls in each chamber to make sure that legislation serves its interests; for example, in the House, the majority party caucus serves this function.[57] Legislation must also be approved by the President, subject to the veto-override provisions of the Constitution.[58]

These details are all well known. What are frequently ignored are their implications for statutory interpretation.[59] The fact that there are many specific sites of power within Congress not only means that legislation is difficult to pass; it also means that the pivots will differ across legislation, where the political pivot is defined as that legislator whose support at the margin is needed to ensure the legislation's passage.[60] Thus, for some bills, a member of the relevant House commit-

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sional Institutions, *supra* note 6, suggest the range of approaches in contemporary scholarship on congressional institutions. Other important works include ALDRICH, *supra* note 54; COX & MCCUBBINS, *supra* note 37; KREHBIEL, *supra* note 36; ROHDE, *supra* note 54; ERIC SCHICKLER, DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS (2001).

[56] *See, e.g.*, STEWART, *supra* note 7, at 274-335 (detailing the formation and function of committees).

[57] Scholars, including Aldrich, Cox, and McCubbins, have focused on the role of parties in legislative decision making. *E.g.*, ALDRICH, *supra* note 54; COX & MCCUBBINS, *supra* note 37.

[58] U.S. CONST. art. I, § 7; *see also* Terry M. Moe & Scott A. Wilson, *Presidents and the Politics of Structure*, LAW & CONTEMP. PROBS., Spring 1994, at 1, 22 ("[G]overning structures are designed subject to presidential veto, and thus with sensitivity to presidential concerns.").

[59] *But see* Eskridge & Ferejohn, *supra* note 33, at 593-64 (outlining how statutory interpretation has shifted to accommodate bicameralism, presentment to the President, and, most notably, the emergence of lawmaking by agencies dominated by the President); Ferejohn & Weingast, *Limitation of Statutes*, *supra* note 34, at 580-82 (suggesting a method through which Congress can consciously protect its interpretation of a newly enacted statute against possible judicial review); McNollgast, *Legislative Intent*, *supra* note 11, at 36 (arguing that congressional institutions and processes allow one to find the pivotal moments leading to a bill's passage and thereby identify the intent of pivotal legislators); McNollgast, *Positive Canons*, *supra* note 11, at 718-27 (identifying the main issues of proper statutory interpretation as figuring out which coalitions enabled the bill to pass, identifying the legislators in those coalitions, deciding whether the President was aligned with those coalitions, and identifying the interpretation understood by the pivotal members of those coalitions). An important recent critique of the relevance of positive political theory to theories of statutory interpretation is JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE THEORY TO IMPROVE PUBLIC LAW 81-105 (1997).

[60] *See* McNollgast, *Legislative Intent*, *supra* note 11, at 21 (identifying the following issues in determining pivotal legislators: a member's preferences for, and knowledge of, a bill's effects, which members ensure the bill is veto-proof, and centrists' knowl-

tee will be the pivot; for others, the senator required to break a filibuster will play that role; and, for other bills, the pivotal actor will be the President.[91]

These institutions imply that the process of building a legislative coalition is not simple, nor is there a general pattern, at least in the American context, that holds across all bills.[92] What remains to be explored is how coalitions are formed, what legislators expect from the bargains struck within these coalitions, and, further, what our expectations are as readers of the statute. On this latter point, we are brought back to the central question of this project, namely, what does this theory of legislative decision making tell us about the proper approach to interpreting legislation?

B. *A Typology of Statutory Coalitions*

A central, often unstated, presumption in the standard approach to statutory interpretation based on legislative history is that there are two relevant groups in the enactment process, the supporters and the opponents. These two sides present their arguments, compete for political support, and then one wins. Of course, after enactment these groups become the "winners" and the "losers." In its simple form, this description functions both as a basic principle underlying how legislation is successfully enacted and as a data point in competing normative theories of statutory interpretation. These theories quite naturally credit the arguments of winners in this process. To interpret the legislation, we inquire what the winners said it meant. The losers' history is correspondingly not referred to by courts seeking to understand legislative intent.[93]

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edge of, and stake in, a bill); McNollgast, *Positive Canons*, *supra* note 11, at 724 (focusing on the intent of pivotal coalition members—those members who "hold key veto gates in the legislative process").

[91] For analyses that identify the congressional "pivot" in different political settings, see BRADY & VOLDEN, *supra* note 9; KREHBIEL, *supra* note 9.

[92] *See* MASHAW, *supra* note 59, at 98 (discussing the intentions of "enacting coalition[s]").

[93] *See, e.g.*, BankAmerica Corp. v. United States, 462 U.S. 122, 145 (1983) (White, J., dissenting) ("[T]he characterization of a bill by one of its opponents has never been deemed persuasive evidence of legislative intent."); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 203 n.24 (1976) (classifying remarks "made in the course of legislative debate" as "entitled to little weight," especially so "with regard to the statements of legislative opponents"); NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 66 (1964) ("[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of its legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach.").

On closer inspection, this dichotomous characterization fails to capture the complexity of statutory decision making. The simplifying presumption that there are just two relevant groups is fundamentally misleading, and traditional theories of interpretation that build upon this idea are therefore inadequate. To undergird a more complete theory of statutory interpretation, we need a more nuanced conception of legislative decision making that reflects the coalitional realities of drafting statutes.

To begin, we look at the legislative process as multifaceted. For major policy issues, legislators cannot be dichotomized into two simple supporter and opponent groups. Rather, multiple views are represented.[84] Furthermore, the contents of the bill itself are not set in granite but evolve over the legislative process. Although this is a truism, its implications are often ignored in the process of statutory interpretation. Put simply, the coalition structure supporting the bill and the bill's contents evolve simultaneously.[85] Supporters of the bill seek alliances with legislators in order to enact their version of the bill; opponents do likewise in efforts to kill or cripple the proposal. With these shifting alliances, some versions of a bill simply cannot pass for want of a majority; other, perhaps less extreme versions of the bill, may become more successful.[86]

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[84] Analysts of particular pieces of legislation commonly adopt this perspective. Nearly all analysts of the Act divide legislators into three groups with distinct interests: northern Democrats, southern Democrats, and Republicans. *See, e.g.*, ESKRIDGE ET AL., *supra* note 14, at 4-23 (recounting the interaction among these groups in the House and Senate); GRAHAM, *supra* note 20, at 125-29 (surveying the gauntlet of southern Democrats in essential committee positions that faced President Kennedy during the introduction of the bills that would become the 1964 Act); WHALEN & WHALEN, *supra* note 13, at 100-23 (explaining the role of Republicans and northern Democrats in maneuvering H.R. 7152, 88th Cong. (1963), through debate on the House floor). For multifaceted analyses of the Clean Air Act, the Interstate Commerce Act, and the savings and loan bailout respectively, see ACKERMAN & HASSLER, *supra* note 44, at 42-54; Gilligan et al., *supra* note 46, at 53; John Romer & Barry R. Weingast, *Political Foundations of the Thrift Debacle*, *in* POLITICS AND ECONOMICS IN THE EIGHTIES 175, 175-204 (Alberto Alesina & Geoffrey Carliner eds., 1991). *See also* BRADY & VOLDEN, *supra* note 9, at 14 (using a continuum to illustrate legislator positions); KREHBIEL, *supra* note 9, at 51-75 (explaining how congressional diversity beyond the two parties' traditional interests helps alleviate gridlock).

[85] Indeed, the drama accompanying many accounts of the passage of particular acts often focuses on negotiations with pivotal legislators, simultaneously adjusting the legislation's contents and changing the set of legislators who support it. For an example of one of the classic "bill becomes a law" texts, see T.R. REID, CONGRESSIONAL ODYSSEY: THE SAGA OF A SENATE BILL (1980). As we show in Part II, the drama and suspense surrounding the passage of the Civil Rights Act of 1964 also exhibits this feature.

[86] *See, e.g.*, Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canoni-*

To see the larger implications of how the problem of coalition structure is important for understanding legislative intent, let us suppose that a proposal is before a legislative chamber. We can break the legislators down into three groups.[67] First, the *ardent supporters* represent those legislators who enthusiastically support a strong version of the proposed legislation. Whether these supporters will support a weaker version to no version is uncertain; assessing this requires that we know more about their preferences and strategies. All that is critical to our analysis here is that their support is ardent with respect to alternative versions of a legislative proposal, where such versions can be arrayed along a continuum from weak to strong.

At the other extreme are the *ardent opponents*, that is, those legislators who not only oppose a strong legislative proposal but oppose any proposal to alter the status quo as favored by the ardent supporters, no matter how weakened it may become by subsequent amendment and revision. Of course, the reasons for their opposition may differ within this group; all that unites them is a preference for the status quo over all pertinent policy proposals.

Finally, and critical to our picture of legislative decision making, there is an intermediate collection of legislators, those whom we call *moderates* or the *pivotal legislators*. In this group are legislators who are willing to support moderate versions of the ardent supporters' proposal but not strong versions. This group may be more or less heterogeneous with respect to the general or particular views of the legislators within the group's purview. What defines the members of this group as pivotal is that the fate of the legislation is in their hands: if they support it, it will pass; if they oppose it, it will fail. For most major legislation, we cannot reliably forecast ex ante whether pivotal legislators will support or oppose the proposal on the table.[68] Support of the pivotal legislators depends in part on the compromises ardent sup-

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cal Construction and Its Consequences, 45 VAND. L. REV. 748, 768-76 (1992) (discussing the difficulties of forming a majority to approve a bill and then maintaining that majority to add an amendment precluding judicial review).

[67] We use three subsets of legislators for convenience. Nothing about this argument requires that there be but three groups of legislators. Indeed, a generalization of this argument holds when every legislator feels differently about the policy in question. *See* McNollgast, *Legislative Intent*, *supra* note 11, at 19 (noting that "[t]he number of legislators does not change the basic dynamic of policymaking"); McNollgast, *Positive Canons*, *supra* note 11, at 741 (explaining that a multidimensional issue can generate a majority coalition).

[68] For a preliminary discussion of this typology, see Ferejohn & Weingast, *Limitation of Statutes*, *supra* note 34, at 575-76; McNollgast, *Legislative Intent*, *supra* note 11, at 16-21; McNollgast, *Positive Canons*, *supra* note 11, at 718-27.

porters are willing to make in adjusting the content of their proposed legislation from their ideal legislation in order to suit the demands of the pivotal legislators. Sometimes no compromise desired by the moderates is acceptable to the ardent supporters, in which case the legislation typically fails. Yet many times the ardent supporters and the moderates find a mutually beneficial compromise that members of both groups prefer to the status quo. This brief description illustrates the principle noted above: the coalition supporting the legislation and the legislation's contents—and hence its meaning—evolve in tandem.[69]

Before we proceed to consider these three subsets of legislators in action, allow us to describe more thoroughly this third category of pivotal legislators. We have said that this group may be quite diverse within itself—there may be liberals and conservatives, those inclined to support the bill and those inclined to oppose it. Moreover, we will concede that this group is dynamic; that is, as the contents of the proposed legislation change, members may shift so that those inclined to support may, in the end, oppose the legislation.

These parallel changes respond to the evolution over time of two interrelated processes: the legislation's textual contents and how the legislation is perceived among constituents. Either change can alter a legislator's position. We focus on the first process, noting that which members belong to which coalitions is not static but rather endogenous, depending on the contents of the legislation. Thus, there is nothing settled or predetermined about our typology of legislative coalitions. Yet, this typology permits us to see how the preferences of individual legislators forming themselves into coalitions interface with versions of legislative proposals, which can be arrayed from weak to strong.[70]

A particular methodological step is critical to our analysis. Legislative preferences are often regarded as revealed preferences, that is, a legislator reveals her preferences through her votes on particular bills. The dichotomous structure of legislative decision making makes sense when one sees legislators acting only through their votes on bilateral options, that is, "yes" or "no" on specific legislative proposals. This dichotomy further makes sense to the extent that scholars usually evalu-

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[69] *Cf.* MOORE, *supra* note 15, at 15-17 (discussing the relationship between policy bargaining and "the actual substance of the bill for which advocates are attempting to build support").

[70] *See id.* at 15-19 (discussing bargaining and policy compromise by advocates who initially sought a stronger bill).

ate either the prediction that a certain legislator will vote "yea" or "nay" on a proposal, or the statutory result itself. In neither case is it necessary to get at a description of the legislator's preference any richer than that revealed by her vote.[71]

However, this characterization misses the texture of legislative decision making prior to a final vote on a version of the proposal. To the extent that positive political theory contributes the insight that legislative bargaining is ubiquitous, occurring not only during floor consideration but throughout the period prior to the bill's floor consideration, we need to explore more thoroughly how legislators shape legislation in the enactment process. We need to understand the ways in which coalitions take form and how they operate in combination and competition with one another with the objective of bargaining toward a final version of the proposal to be considered by the entire body.[72] The methodological question, then, is how to characterize legislators' preferences in a way other than by looking at their final votes. We offer a preliminary answer to this question through our analysis of the Civil Rights Act of 1964, as described more systematically in Part II.[73]

The basic methodological answer lies in the examination of legislators' preferences by looking at their propensity to support or oppose versions of legislation of this type. We do this in two ways. First, by studying the legislative record, including the early legislative and committee statements, to see the patterns in the types of legislators

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[71] There is an extensive literature on the formation of legislator preferences from the perspective of representation, that is, how (and whether) legislators incorporate into their decision-making matrices the preferences, wishes, and agendas of their constituents. This is not so much about preferences as it is about the elements that go into legislator decisions about how to act; however, certain theories of representation surely reengage the question of how legislator preferences do or should intersect with constituent preferences. *See, e.g.*, HANNAH FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 144-67 (1967) (considering the "mandate-independence" controversy regarding whether a representative should do what her constituents would want or what the representative herself believes is best for her constituents). Modern congressional analyses of this topic draw on RICHARD F. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS (1978); MORRIS P. FIORINA, REPRESENTATIVES, ROLL CALLS AND CONSTITUENCIES (1974).

[72] *See* ARNOLD, *supra* note 48, at 88-118 (analyzing how congressional coalition leaders employ persuasive and procedural strategies to build support for their chosen positions).

[73] Moreover, this type of analysis is standard in studies applying the pivotal politics model. *See* BRADY & VOLDEN, *supra* note 9, at 14-15 (using the pivotal politics theory to argue that there is a "'gridlock region' within which no policy change can occur"); KREHBIEL, *supra* note 9, at 20-48 (proposing the theory of pivotal politics to describe how policy change is brought about by breaking legislative gridlock).

supporting all forms of legislation, those opposing all forms of legislation, and those who seem willing to support some forms of legislation but not others. Second, we use various types of statistical methods to associate members of Congress with the propensity to support certain types of legislation.[74]

In this view, whether legislation is enacted depends on whether the ardent supporters and the pivotal legislators negotiate an effective compromise. If the moderates seek only modest compromises in the ardent proponents' ideal legislation, compromise is likely. When the pivot demands drastic changes to the legislation in order to support it, the ardent supporters may deem this sacrifice too great, preferring the legislation to die instead of supporting a bill they deem as too weak or merely symbolic.[75]

C. *Strategic Elements in Communicating Legislative Intent*

Insofar as the issue of statutory interpretation fundamentally concerns how to understand the final bill, we need a better understanding of the strategies of legislators bargaining with one another over the language and history of a statute.

Legislative communication is, in part, an exercise in spin control. The meaning of legislation is a product of the statutory "history" as explicated in the documents upon which courts rely in interpreting the statute.[76] Because legislators know that courts often turn to legisla-

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[74] These methods fall into two categories. First, political scientists rank or score legislators according to some criterion, often on a scale of 0 to 100. These scores typically reflect interest group rankings (the most well-known of which are ADA scores created by the Americans for Democratic Action). Second, political scientists also use statistical methods, such as logit and probit analysis, to study the determinants of congressional voting. The most well-known of these methods is associated with Professors Poole and Rosenthal. *See* KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING (1997) (using statistical analysis to study the dynamics of roll call voting).

[75] Although we discuss persuasion here only in the context of intralegislative negotiation, we are aware that ardent supporters will be engaged in the process of persuading the public as well. *See* ARNOLD, *supra* note 48, at 92-99 ("At times coalition leaders mount large-scale campaigns to shift elite and mass opinion toward a major programmatic initiative . . . .").

[76] *See, e.g.*, ESKRIDGE ET AL., *supra* note 14, at 937-1039 (defining legislative history as "the entire circumstances of a statute's creation and evolution"); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1357-60 (1990) (criticizing "[t]he Court's present mode of analyzing history" because it fails to explain such questions of legislative process as the ways in which legislative history is produced, and arguing that the Court should adopt a fact-finding model to better understand legislative histories).

tive indicia to resolve ambiguities in the legislation, legislators have an incentive to influence—and even manipulate—the record to serve their ends rather than those of others.[77]

Legislators' propensities to manipulate and manufacture legislative histories confound efforts to recover accurate indicia of legislative intent.[78] The confusion is not insoluble, however. We can do better than the contemporary literature suggests in discovering probative evidence of the purposes shared by pivotal legislators. This involves an attempt to distinguish the various types of strategic descriptions of legislative intent offered by legislators positioned to encode their preferences into accessible legislative histories.[79] The quest for a more accurate rendition of legislative intent is in essence a quest for a coherent theory of legislative rhetoric.

We start by considering the dimensions of legislators' incentives. All legislators seek to advance their particular interpretation of the legislation, in part to claim credit with their constituents and in part to influence future interpreters of the legislation. Because legislators have different views of the legislation and its purposes, they seek to advance different interpretations. Ardent supporters share a common interest in characterizing a piece of legislation strategically in order to implement their particular vision of sound policy. When the bill is being considered in the legislature, ardent supporters face crosscutting incentives: In order to garner and maintain the support of pivotal legislators, they have an incentive to accommodate pivotal legislators by characterizing the bill in a moderate, ameliorative fashion. Describing the proposal as narrow, limited, and, where appropriate, purposively opaque or ambiguous, moreover, can serve the function of reassuring pivotal legislators who are concerned with the scope of the proposal. The other incentive faced by ardent supporters cuts in precisely the opposite direction. In many circumstances (to be detailed

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[77] *See, e.g.*, James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 26-32 (1994) (noting the "windows of opportunity" that exist in the creation of legislative history).

[78] *See supra* text accompanying notes 9-11 (looking beyond the rhetoric of ardent supporters, who may create a record with an eye toward expansive future interpretations of the ensuing statute). Congress may also engage in more direct strategies of regulating the process of interpretation. *Cf.* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2090-92 (2002) (suggesting that Congress has "at least some constitutional power over interpretive methodology").

[79] *See* McNollgast, *Positive Canons*, *supra* note 11, at 718-27 ("The question to be answered by an interpretive method, then, is what agreement the coalition thought it might be making that is not explicit in the language of the statute.").

below), ardent supporters will also seek to push interpreters in the direction of a strong, clear version of the bill, that is, away from the limiting compromises necessary to gain the support of pivotal legislators. Accordingly, as any lawyer knows, legislative history is often rife with bold statements purporting to reveal the clear, unalloyed meaning of a law.[80] Because of these countervailing incentives, ardent supporters often make contradictory statements about the legislation, sometimes providing expansive readings and sometimes providing moderate and temperate ones.

By contrast, ardent opponents often seek to temper their extreme descriptions of legislation in order to encourage courts to interpret legislation narrowly. Thus we see legislative histories in which ardent opponents describe a bill as having far-reaching effects in one context and, in another, a relatively narrow scope.[81] Although ardent opponents may well find themselves on the losing end of the battle over a legislative proposal, they will predictably fight hard to spin the meaning of the legislation in a way favorable to their interests.

Pivotal legislators face strong incentives to articulate the compromise necessary to garner their support of the act. They will thus attempt to engage the ardent supporters in colloquies on the floor that make explicit this understanding. Of particular importance are provisions added to the legislation that temper the ardent supporters' vision of the act, perhaps by limiting its scope; redefining its coverage or including exemptions; or devising arduous procedures that limit an implementing agency's ability to move quickly—or at all.[82]

A good example of this latter strategy was the Toxic Substances Control Act (TSCA), in which Congress passed into law a series of extraordinarily cumbersome procedures that set an unrealistic timeframe within which the Environmental Protection Agency was expected to act to regulate toxic substances.[83] The result of this

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[80] Consider, for example, the Court's holding in *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), that "Congress has directly spoken to the issue here," in that case precluding the FDA from regulating tobacco products.

[81] For examples of cases illustrating the selective use of legislative history to reach particular outcomes, see Kosak v. United States, 465 U.S. 848 (1984); Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

[82] *See* McCubbins et al., *supra* note 33, at 431 (analyzing the 1977 amendments to the Clean Air Act as an example of provisions added to legislation that impose limiting procedures on an agency).

[83] Pub. L. No. 94-469 § 6(c), 90 Stat. 2003, 2022-24 (1976) (codified as amended at 15 U.S.C. § 2605 (2000)) (describing the procedures to be followed by the EPA in promulgating testing rules for regulated chemicals).

procedural mechanism was that no substances were regulated under the scope of the TSCA for the first twenty-five years of its existence.[84] The legislative history of this Act suggests that these mechanisms were introduced by key legislators as a necessary condition for securing sufficient support to enact the bill.[85]

Pivotal legislators may also seek to replace ambiguous phrases in the bill with more detailed language. Often the latter merely reflects the shared meaning—among the chamber's members—of the ambiguous phrase. Because a later reader of the act, such as a court, may not share this meaning, the pivotal legislators sometimes seek to replace such phrases when multiple interpretations can be foreseen. As we discuss in more detail below, this device was an important element in the strategy of pivotal legislators in the 1964 Civil Rights Act.[86]

Let us take stock. Thus far we have argued that ardent supporters have countervailing incentives to express multiple and contradictory views of an act. So, too, do the ardent opponents, though their visions will differ from the ardent supporters. Finally, the pivotal legislators articulate yet another vision.

To make sense of this, we draw on recent developments in the positive political theory of statutory interpretation to provide a new theory of legislative rhetoric. A critical distinction for understanding legislative rhetoric is that between *cheap talk* and *costly signaling*.[87] The distinction hinges on whether the legislator making the statement incurs a cost, such as diminishing the likelihood legislation will pass, for a misinterpretation or misrepresentation. For example, consider an ardent supporter who engages in a colloquy on the chamber floor with a pivotal legislator over the nature of their compromise. The ardent supporter's propounding of an ideal and expansive interpretation—one that deviates from the understanding of the compromise necessary for the pivotal legislator to support the legislation—jeopard-

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[84] *See* Mathew D. McCubbins & Talbot Page, *The Congressional Foundations of Agency Performance*, 51 PUB. CHOICE 173, 184-86 (1986) (explaining the effect of the TSCA's procedural requirements in particular regulatory efforts).

[85] *See id.* at 183 (describing the conflict in Congress and among governmental agencies surrounding the passage of the TSCA).

[86] *See infra* Part III (considering the effect of legislative history in the implementation of a statute, and explaining the incentives for strategic manipulation of the historical record).

[87] *See* McNollgast, *Legislative Intent*, *supra* note 11, at 21-29 (discussing the economics of signaling); *cf.* Arthur Lupia & Mathew D. McCubbins, *Designing Bureaucratic Accountability*, LAW & CONTEMP. PROBS., Winter/Spring 1994, at 91, 94-95 (explaining what can be learned from legislative signaling).

izes the pivot's support and hence the bill's passage. Such statements are thus costly signals about the bill's meaning because the speaker bears a real cost for misinterpretation. In contrast, an ardent supporter writing his memoirs after the legislation has become law is engaged in cheap talk—he bears no penalty, in terms of the act's passage, for misinterpretation.[88] Similarly, legislators' statements inserted in the *Congressional Record* or made in press conferences are typically cheap talk.[89] Alternatively, interpretations provided by a committee report are costly since misrepresentations potentially jeopardize an act's passage. Legislators, in their remarks opening committee and floor consideration of legislation, typically engage in grandstanding—statements offered more to their constituents than to each other. These statements are therefore typically cheap talk.[90] An ardent supporter, acting on the floor as bill manager, represents the quintessential costly signaler; an ardent supporter outside the legislature, particularly after the legislation has passed, represents the quintessential cheap talker.[91]

Another important distinction concerns the timing of remarks. Remarks made at the beginning of the legislative process are often prior to the critical compromises necessary to produce a bill that can pass. As such, we must be wary of taking them as representations of an act's meaning since, typically, they reflect a version of the legislation that could not pass.

Our theory of legislative rhetoric implies that multiple interpretations of an act exist simultaneously in the legislative record. Those who criticize constructing original intent from legislative indicia are clearly correct in claiming that legislative history in and of itself fails to

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[88] On the application of signaling models to political science, see JEFFREY S. BANKS, SIGNALING GAMES IN POLITICAL SCIENCE 57 (1991); JAMES D. MORROW, GAME THEORY FOR POLITICAL SCIENTISTS 219-57 (1994); Randall L. Calvert, *The Value of Biased Information: A Rational Choice Model of Political Advice*, 47 J. POL. 530, 552 (1985); Arthur Lupia, *Busy Voters, Agenda Control, and the Power of Information*, 86 AM. POL. SCI. REV. 390, 395-96 (1992). *See also* Lupia & McCubbins, *supra* note 87, at 94-95 (discussing the difference between truthful and untruthful signals).

[89] *See* McNollgast, *Legislative Intent*, *supra* note 11, at 28-29 (asserting that, because of the incentives to act strategically, "a statement by a member acting as an individual, and minority views and reports, should carry no weight in statutory interpretation").

[90] *See id.* at 26-29 (describing the behavioral norms that produce such statements).

[91] On the role of presidential-signing statements, see William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 713-14 (1991); Rodriguez, *supra* note 38, at 226-28.

provide a unique and unproblematic indication of an act's meaning.[90] Our theory demonstrates why. Legislators have incentives to provide multiple interpretations and, in some cases, to obscure the meaning of the compromise reflected in the legislation.[91] The advantage of a theory of legislative rhetoric, however, is that it allows us to pull apart these various and seemingly contradictory strands of interpretation. It thus gives us a basis to rescue legislative history from the criticism that it is hopelessly incoherent and unhelpful.[92]

Cheap talk by ardent supporters is especially likely at the beginning of the legislative process. This follows because the early legislative stages typically occur prior to the critical negotiations necessary to gain the pivotal legislators' support.[93] Put simply, ardent supporters at this stage typically do not yet know the types of compromises necessary to pass the act, so they cannot be expected to articulate them even if they wanted to do so. Under other circumstances—such as floor debate over the critical amendments about the compromises necessary to gain the moderates' support—ardent supporters have an incentive to articulate the nature of the compromise, including limitations necessary to gain the moderates' support.

Our theory of legislative rhetoric has three separate dimensions. First, because legislators of different types face incentives to characterize an act in different ways, we must determine which type of legislator made a given statement, that is, whether the given legislator is an ardent supporter, ardent opponent, or pivotal legislator. Second, we must assess whether statements are costly signals or cheap talk. To the extent that such a distinction is not made in practice, legislators have strong incentives to propound multiple interpretations of the act, hoping that a sympathetic judge will subscribe to their point of view. Third, we must assess when particular statements were made, in particular, whether they were made before or after critical compromises affecting the act.

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[90] *See supra* note 76 and accompanying text (discussing the creation of legislative history as a product, in part, of manipulation by individual legislators).

[91] *See, e.g.*, Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 641 (2002) ("Ambiguity . . . allows legislators to claim short-term victory, and to shift accountability for a potential eventual defeat to the courts." (footnote omitted)).

[92] *Cf. supra* text accompanying notes 76-77 (considering the unreliability of legislative history and the factors that explain it).

[93] On the stages of legislative enactment in the modern Congress, see generally BARBARA SINCLAIR, UNORTHODOX LAWMAKING: NEW LEGISLATIVE PROCESSES IN THE U.S. CONGRESS (2d ed. 2000).

The strategic components of legislative rhetoric provide guidelines for choosing among multiple and conflicting statements about an act's meaning. Because ardent supporters have an incentive to bias the interpretation of an act in their favor and away from the final compromise needed to ensure passage, we must give greater weight to their costly signals than to their cheap talk.[96] Pivotal legislators, in contrast, have strong incentives to provide a clear understanding of the compromise, and thus their statements and understandings tend to be the least problematic. In parallel with traditional theories, our approach gives the least weight to statements by the act's opponents.[97] We focus on the statements by pivots in part because they have the strongest incentives to communicate reliably the act's meaning, whereas ardent supporters have countervening incentives and opportunities for cheap talk, causing many of their statements to be misleading.

If the theory of legislative rhetoric conjures up an image of congressional speech, then the modern legislature is a veritable marketplace of ideas in which legislators pitch their positions and make their histories for the purpose of shaping and implementing statutory policy. As we will see in our examination of the Civil Rights Act of 1964, strategic legislators will characterize and recharacterize a legislative proposal at various junctures for various purposes throughout the legislative process.

D. *Lessons for Statutory Interpretation*

The theory of legislative rhetoric demonstrates why a more complete method of constructing legislative history must be based on a theory of legislative decision making. The theory of legislative rhetoric explains why the process of statute enactment necessarily implies that multiple and conflicting interpretations of an act exist simultaneously in the record. Without an objective means of choosing among these competing views—that is, without a means that does not rely on the interpreter's own preferences and prejudices—statutory interpretation based on legislative indicia is hopelessly arbitrary.[98] Courts fre-

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[96] *See* McNollgast, *Legislative Intent*, *supra* note 11, at 26 ("Observing costly actions can help judges exclude some alternative interpretations.").

[97] *See supra* note 63 (outlining cases in which the Supreme Court expressly rejected any reliance on opponents' statements).

[98] *Cf. supra* notes 76-78 and accompanying text (discussing the problem of strategic legislator behavior in anticipation of judicial reliance on the legislative record).

quently select from disparate sources of legislative history to support one or another result.[99]

The late Judge Harold Leventhal captured this phenomenon of random selection of historical evidence nicely when he described the process of interpreting legislative history as akin to looking over a crowded room and picking out your friends.[100] This image fits well with patterns of judicial practice. Our theory of legislative rhetoric shows that multiple and conflicting statements necessarily exist simultaneously in the record. Accordingly, a judge interested in expanding the scope of a statute can frequently find support for her view in the legislative record; likewise, a judge determined to read the statute narrowly will grasp onto other information in the record. Without any basis to evaluate these multiple and conflicting statements, we are in no position to criticize one judge or the other. She is, after all, merely selecting her friends from the crowd.

The lesson that many scholars and judges draw from this predicament is that all interpretations based upon legislative history are equally plausible; therefore, there can be no basis to assess a judge's use of such history.[101] We believe that this is the wrong lesson. A more consistent, and ultimately more defensible, rendering of the legislative history will emerge if judges focus deliberately on the process and theory of statutory enactment. Specifically, judges should focus on statements by pivotal legislators and on statements by ardent supporters that are costly signals, rather than on such supporters' cheap talk. Once we understand the processes of legislative decision making and of legislative rhetoric, we are in a position to evaluate more sensibly the proper uses of legislative history. In the remainder of this Section,

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[99] For a general survey of the reports, bills, and hearings from which a court recreates legislative history, see Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294, 298-306 (1982). *See generally* ESKRIDGE ET AL., *supra* note 14, at 937-1012 (examining judicial use of legislative statements made in committee reports, during hearings and floor debates, and by bill sponsors).

[100] *See* sources cited *supra* note 10 (recounting Judge Leventhal's aphorism).

[101] *See* Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1120 (1998) ("[T]he judicial branch serves best by enforcing enacted words rather than unenacted (more likely, imagined) intents, purposes, and wills. An interpreter who bypasses or downplays the text becomes a lawmaker without obeying the constitutional rules for making law."); Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 812 (1998) (recognizing the "widespread misuse of legislative history to achieve substantive ends" and the corresponding refusal of many judges to rely on it).

we trace out some ideas about how we ought to think about legislative history in light of the preceding positive political analysis.

To the extent that interpretation in hard cases is about the unraveling of legislative intent, positive political theory suggests that we are not interested in just *any* legislator's intent; instead, we are interested particularly in the intentions of those in a critical position to forge a final legislative compromise and whose assent is critical to the act's enactment.[102] As we have emphasized, these views are important, not because the pivot signs on last, but because they are the most reliable indicators of the compromises necessary to produce a bill that can pass. Without the pivot's assent and the compromises necessary to gain it, there would be no legislation. These legislative compromises are therefore central to an act's meaning. Further, as we argue in Part IV, courts that ignore this process of bargaining and compromise hinder the legislative process—moderates are far less likely to help pass legislation if they believe that courts will set aside the compromises necessary to gain their support.

In one sense it can be said that every legislator who voted for a bill was equally critical: who is to say ex ante whether one or another vote was expendable with regard to the final legislative outcome? In a more fundamental sense, however, this seemingly intuitive claim is false. Positive political theory emphasizes: (a) the structure of legislative decision making; (b) the building of legislative coalitions; and (c) the strategies of legislative communication of statutory meaning.[103] Using this approach, we can better sort out the strands of legislative decision making.

As we have noted, positive political theory emphasizes that coalitions and the legislation's contents evolve simultaneously: as leaders adjust the legislative contents, who favors and opposes the bill also

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[102] In criticizing the relevance of positive political theory to statutory interpretation, Professor Mark Movsesian challenges the use of analogies to contract law noting, quite plausibly, that there are too many salient differences between the legislative process and the multilateral contracting process to justify this analogy. *See* Mark L. Movsesian, *Are Statutes Really "Legislative Bargains"? The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145, 1167-90 (1998) (highlighting differences in contracting and statutory interpretation, especially focusing on third-party effects and the problematic concept of legislative intent). In the main, we agree with his critique. The structure of the legislative process is fundamentally distinct from the private ordering that occurs in contractual negotiations and drafting. *See id.* at 1167-90 (describing why the contract analogy fails). However, the connection Movsesian draws between this critique and the generally "problematic concept of legislative intent," *id.* at 1181, is more controversial. *Infra* Part III.B.

[103] *See infra* Part IV (applying these key tenets of positive political theory).

shifts. This observation has striking implications for understanding legislation. The ardent supporters who typically initiate the legislative process often cannot pass legislation to suit their ends. Put simply, most proposals devised by the ardent supporters cannot pass the United States Congress and become public law. For legislation to succeed, the ardent supporters are typically forced to adjust the legislation's contents to attract pivotal legislators on whose support the legislation's future depends. We observe this process again and again with respect to major national legislation.[104] Because the adjustment of legislative content is both fundamental and necessary to garner the support of the pivotal legislators, the bargains associated with these adjustments are essential to understand the meaning of the laws that Congress does pass.[105]

The positive political theory of legislative rhetoric arms an interpreter with the tools to understand what legislators were attempting to communicate—not merely sincerely, but also strategically. Which legislators were communicating which message? Was this communication cheap talk by legislators who were predisposed to support or to oppose the proposal? Worse yet, was it a message of legislators aiming to spin the proposal in a direction inconsistent with the understanding of the majority whose assent is necessary to its passage? Or was this communication indicative of an understanding of legislators whose support was crucial to constructing the bargain which is the object of the interpretation? What is centrally at stake is the ability of conscientious interpreters to separate useful from useless legislative history.[106]

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[104] Professor Moore describes this situation well:

> [P]olicy compromise typically entails concession(s) on the part of advocates, such that what is offered in return for support is a weakening of the policy provisions initially sought by supporters. The proposal is scaled back in one respect or another. . . . [S]uch concessions typically affect the scope and enforcement provisions of a proposed bill, more so than the proclamation portions of the bill.

MOORE, *supra* note 15, at 17.

[105] *See* Movsesian, *supra* note 102, at 1150-53 (discussing the contract theory of statutory interpretation expounded by McNollgast, which would require a court to "search the statute's legislative history for 'implicit bargains,' relating to interpretation and other matters, that do not appear in the statutory text" in order to "capture the complete agreement").

[106] Ultimately, this analysis requires a normative basis. That is, the lessons for interpretation provided by our positive account of legislative decision making and rhetoric turn squarely on what one regards as the essential project of statutory interpretation. For reasons that are mostly beyond the scope of this Article, we insist that the project must be about the determination of legislative meaning recovered from the

III. Intentionalist Puzzles

A. Individual and Legislative Intent

In order to propound an intentionalist theory of statutory interpretation as we do, we obviously must believe that there is such a thing as "legislative intent." Though once the dominant school of statutory interpretation, intentionalism has become passe over the past few decades, due largely to widespread skepticism about the existence of "intent." This skepticism comes in different varieties. At the extreme, some scholars argue that individuals do not have intent. More common, however, is the argument that language cannot communicate understanding, so that there can that there can be no shared understanding among people (hence, no shared intent). From this, people conclude that groups—including legislatures–do not have intent. Finally, a third line of criticism revolves around the aggregation of preferences. The gist of these arguments is that a legislature is a collection of individuals with divergent intentions, and that the aggregation of preferences that produces a legislative decision does not so much represent collective intent as the vicissitudes of agenda manipulation or pressure of interest group lobbying. In this section, we articulate an argument that confronts these criticisms. We contend that: 1) individual intent exists, 2) under a broad range of circumstances, it can be communicated and mutually understood within a group, 3) legislatures meet the conditions for this mutual understanding, and 4) legislators' preferences can be meaningfully aggregated into a collective preference. Hence, legislative intent does indeed exist.

1. Individual Intent and Communication

That people have intentions, and that their behavior is at some level goal-oriented, is a fundamental premise across law and the social sciences.[5] For example, the law considers intent by distinguishing pre-meditated crimes from lesser offenses; "economic man" is assumed to deliberately pursue material wealth; members of congress are treated as "single-minded re-election seekers" in political science (Mayhew 1973); even cultural theories of behavior, which tend to focus on differences in beliefs and goals across cultures, treat people as goal-oriented (Wildavsky 1987). From a rational point of view, moreover, the very fact that someone takes an action strongly suggests that they intend to achieve some change in the world around them: because any action is costly, one would act only if they expected that action to change the state of the world around them with the expected consequences to them great enough to offset the cost of the action.

In a seminal work that is now an early landmark in the development of both cognitive and social science theories of individual choice, Simon (1955) argued that people live in a world prominently characterized by scarcity and complexity. Scarcity necessitates proactive behavior on the part of individuals in order for them to get those things that they need and want; along with complexity, which far exceeds the individual human brain's capacity for understanding complexity, this means that "virtually all

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[5] Economists employ useful fictions about group intent: for example, that firms seek to maximize profits (**cites), that cartels (**cites) and interest groups (**cites) seek to maximize rents, that bureaucrats seek to maximize their budgets (**cites), etc (**general cites). Political scientists often assume, among other things, that nations seek to maximize power (**cites). Indeed, it is quite common to assume that groups have shared intentions behind their actions. Much of our discussion of goal-oriented behavior, cognition, and communication follows, in greatly condensed form, from Lupia and McCubbins (1998). See that volume for a more detailed version.

human behavior is [goal-oriented]. People usually have reasons for what they do" (Simon 1995, 45).

Intentional behavior, moreover, need not be deliberative; in other words, a person need not consciously deliberate about the intended consequences of an action, nor even about the choice that they make, for their chosen actions to be goal-oriented (Satz and Ferejohn 1994). Indeed, scholars in cognitive science emphasize that goal-oriented behavior usually *is not* conscious behavior. As an adaptation to scarcity and cognitive limitations, people form behavioral habits and routines that reflect previous decisions about how to react to recurrent situations (Holland 1995). In fact, such "shortcuts" for decision-making take on physical structure—the structure of the brain changes and develops in ways that facilitate "instinctive" reactions to recurrent situations (Cipra 1995; McBeath, Shaffer, and Kaiser 1995). Thus, even such mundane and seemingly mindless behavior as eating a peanut-butter-and-jelly sandwich for lunch everyday, or following the same routine in getting ready for work every morning, reflects intent on the part of an individual.

Similarly, people usually understand and learn about their environment via shortcuts that economize on cognitive costs. So, for example, a person need not understand electrical engineering or computer programming to use a computer; rather, they need only know what will happen when they press a key on the keyboard or click the mouse button. Instead of developing an encyclopedic understanding of the world around them, people use their impressive capacity for using analogy and pattern

recognition to develop beliefs about the state of the world around them (Churchland 1995). Despite their lack of comprehensive knowledge, individuals are frequently able to apply such beliefs in order to anticipate the consequences of their actions.

It follows from the foregoing discussion that, when people communicate with one another, they do so with a purpose. The purpose of a statement is to affect another person's beliefs about the world—and people *are* able to make inferences about the intent behind others' communications. If, for instance, a person is driving down the street and a passenger says "turn left here," the driver understands the intent behind the statement. Similarly, the driver could readily understand the meaning (i.e., the information that is conveyed about the state of the world) of such statements as "watch out, I think the guy in the pickup is drunk," "we'll get there faster if we go the other way," or "I knew I should've driven."

Of course, the fact that people *sometimes* understand the meaning of others' statements does not imply that they *always* understand the meaning of others' statements. Inferring the meaning of a statement can be particularly difficult when one is uncertain of the speaker's knowledgability or interests. Under such circumstances, the meaning of statements is often unclear: "I didn't do it" might mean "I didn't do it," but it might also mean "I did it but don't want to admit it." Even in these adverse conditions, it is possible for people to learn from others' statements. Lupia and McCubbins (1998) show that, even without confidence in the speaker's motives or knowledge, three external forces—verification of a statement, penalties for lying, and observable costly action—can allow listeners to learn the meanings of statements. Both verification and penalties for

lying reduce the speaker's expected gain from lying, thereby making it less attractive, while observable costly action allows the listener to infer how much the speaker stands to gain by persuading the listener about the state of the world. When these conditions hold, then people are able to communicate and share common beliefs about the state of the world. Put another way, a group of people can reach a common understanding; this refutes claims that language cannot effectively communicate meaning, and that there can be no shared (i.e., group) understandings among people.[6]

2. Legislative Structure and Legislative Intent

The existence of shared understandings does not imply that *all* groups have shared understandings. Especially given that a legislature is a forum for competition among individuals with divergent interests, one might still rightfully ask if it is possible or plausible that legislators share a common understanding of the intent of a bill when they enact it.

We argue that it is both plausible and likely. In fact, a legislature is a type of group in which the conditions for trust and learning are *extremely likely* to be met—in part because legislators are good at identifying people and groups with similar interests, and in part because legislative structure incorporates all three types of external forces that facilitate learning (Lupia and McCubbins 1998). A wide array of political scientists, approaching the topic from a variety of methodological angles, echo the theme that

[6] We find great irony in the fact that those who claim meaning and understanding cannot be shared *use language and communication to try to persuade others of their beliefs*. In other words, such claims are self-contradictory.

members of the House of Representatives put significant amounts of effort into identifying people and groups with similar interests (Fenno 1973, 1978; Kingdon 1977), whose advice can then be used as a shortcut for learning about issues on which a legislator is not well informed (Kingdon 1973; Jackson 1974; Matthews and Stimson 1970, 1975; McConachie 1898). They also carefully screen those to whom they delegate influence over the House agenda (Cox and McCubbins 1993; Fenno 1973; Kiewiet and McCubbins 1991; Krehbiel 1991; Polsby 1968; Polsby, Gallaher, and Rundquist 1969); Rohde and Shepsle 1973; Shepsle 1978; Smith and Deering 1990; Thies 2001).

Even when legislators do not perceive common interests with a speaker, they can learn from one another as a result of the same external forces that we discussed in the previous section: penalties for lying, verification, and observable costly action. We discuss this topic in greater detail in the next section of the paper, in which we discuss how to apply an understanding of the legislative process in order to read legislative intent. For now, however, we briefly overview the ways in which the legislative process facilitates learning among legislators.

There are various types of penalties for lying: party leaders and committee chairs can be removed if they do not represent party members' interests (Rohde 1991), party leaders sometimes sanction party members (Cox and McCubbins 1994; Schickler and Rich 1997), lobbyists can be sanctioned if they provide misinformation (Evans 1991a, 1991b; Hall and Wayman 1990; Herzberg and Unruh 1970; Wright 1990), and those giving testimony face perjury charges.

In addition, the structure of the legislative process reflects various delegation relationships. For instance, party members delegate to party leaders and the majority party delegates to party contingents on committees and subcommittees. In any principal-agent relationship, checks and balances are one way to help ensure that agents are faithful, by giving agents incentives to monitor each others' actions. In the case of Congress, the legislative process creates a competitive system of checks and balances between parties and committees, party leaders and party backbenchers, and policymaking committees and "control" committees (Lupia and McCubbins 1994).[7] This structured competition means that, at various points in the process, a bill must pass the scrutiny of an array of individuals whose expertise allows them to verify (or not) the statements of others, and whose incentives are to do so. In addition, procedures are structured in ways that provide both opportunities and incentives for third parties from outside the legislature to monitor and verify statements, and to reveal untruthful statements to legislators (McCubbins and Schwartz 1984; McCubbins, Noll, and Weingast 1987, 1989, and especially McNollgast 1994).

Finally, Lupia and McCubbins note that many types of observable costly effort occur in a legislature:

[7] "Policymaking" committees are the substantive committees that hold jurisdiction over a particular policy area, such as foreign affairs, and that initially authorize spending or other actions related to that jurisdiction; "control" committees are the Appropriations, Budget, and Rules Committees, each of which serves the collective interests of majority party members by mitigating collective action problems that the party faces (Kiewiet and McCubbins 1991; Cox and McCubbins 1993). Typically, for example, each policymaking committee would like to provide benefits to constituents in their jurisdiction, while having others pay for those benefits—but if every policymaking

> Legislative rules, procedures, and practices often impose costs on the actions of legislators, thereby establishing the conditions for [learning from others]. For instance, drafting legislative proposals, holding hearings and investigations, writing reports, striking deals, and whipping up support for legislation all require the expenditure of valuable resources (e.g., time, effort, and money). (1998, 214-5)

In short, there are many points in the legislative process at which decision-makers with the ability to affect the outcome of a bill take costly action. We will elaborate on this theme in section **, when we discuss legislative process and reading legislative intent in greater detail.

In addition to these institutional arguments, there are additional reasons to believe that communication and shared understanding of intent are common. We believe that the difficulty of communication has often been overstated. Regardless of the institutional setting, we know from cognitive science that other factors help to indicate meaning (in this case, the meaning of a bill): the language of the text, the context of the bill's passage and debate, and the context of the time and place all refine the meaning of the bill (cites). Rules of language use, convention, and context help to exclude some, if not most, possible meanings (**cites). As the context grows richer or the language of a bill is more

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committee were allowed to do so, the Budget as a whole would be in deficit and all members of the party would suffer from damage to the party's reputation.

carefully crafted, the range of reasonable interpretations of the bill's meaning becomes narrower (**cites).

To take a famous example from H.L.A. Hart, suppose that a city council passes an ordinance that says "no vehicles are allowed in the park." (Hart, 19xx) The meaning of this law might be open to debate—for instance, it might mean "no motorized vehicles are allowed in the park," or it might mean "no motorized vehicles, or horses, or bikes, etc." are allowed in the park. There may be some ambiguity about whether, for instance, a baby carriage can be brought into the park. Or one might object that a bronze statue of a Model T to be built in the middle of this park is not within the ambit of the prohibition of "vehicles." There are, after all, a range of acceptable meanings of the statutory term. One thing, however, is clear and indisputable about the meaning of the bill: it does not mean "all vehicles are allowed in the park.

Returning now to the question of legislative intent, all this leads to the conclusion that legislators have ample opportunities to communicate and learn from one another about the intentions behind a bill, and to share a common understanding about the intent of the bill's author. When a bill is amended, moreover, this does not change: the same external forces facilitate learning about the intent of a given amendment. It is therefore the case that, when legislators choose between a bill and the status quo on a final passage vote, they can have a common understanding of the intent of the bill. From this we conclude that an individual legislator's vote for a bill, as well as legislature's passage a

bill, should be interpreted as acceptance and recognition of the bill's intent, as framed by the bill's authors and as amended by the legislature.

3. Aggregating Individual Intent

We now turn to the final criticism of the notion of legislative intent, which is that legislative intent is meaningless, an oxymoron. The most radical of these criticisms argues that social decisions are "incoherent" or meaningless -- devoid of any real measure of social "preference" – and that seeking legislative intent is therefore a fools' errand. This line of argument is summarized by Shepsle (1992, 254): "If legislative intent must go ... then so, too, must deference to it. The courts cannot defer to something that is nonsense."

In fact, there is dissension within social sciences about the extent to which we can believe that groups (such as a legislature) have intentions. On the one hand, many have criticized the notions of collective and legislative intent because legislatures are a "they" not an "it." All 535 voting members of Congress have their own preferences over policy and, hence, their own most preferred interpretation of any piece of legislation. Moreover, as social choice theorists have known since Condorcet, majority-rule decision making in the absence of agenda control is often unstable. Arrow (1951) and others have shown that collective choices may not reflect a transitive ordering of alternatives for the group. Schwartz (1986) showed that the collective choice of a group may indeed cycle. McKelvey (1976) has shown that, under very specific and extreme circumstances,

collective choices *will* cycle. Often, scholars interpret these findings as meaning that collective choices are "unstable" or "chaotic".[8]

But, even if collective choices are intransitive, does that imply that collective actions are unintentional or meaningless, as is often argued? The instability results say nothing of this sort. Rather, they point out that social choices need not necessarily be transitive--this is far from saying that social choices will be chaotic. The instability results, moreover, depend entirely on the implausible assumptions that all legislators are omniscient, and that legislators' resources for changing law and policy are infinite. McNollgast note the critical importance of these assumptions:

> [I]f you want to claim that social choice theory implies legislative intent is oxymoron, then you must accept two implausible assumptions about legislators' knowledge and resources. If, however, you replace these assumptions with ones that are more realistic, then you can no longer claim that discovering legislative intent is impossible (1994, XX).

Certainly, if three of us get together to push a boulder up a hill, it seems reasonable to infer, once we have finished, that each of us understood that the group was pushing a boulder up a hill. The three members of the group understood that it was a group effort to push the boulder up the hill, and that the consequence of their action would be to transport the boulder to the hilltop. The members of the group may not have all agreed, to the same extent, on the necessity or wisdom of transporting the boulder, and they may not have all put in the same level of effort toward moving it. Nonetheless, they

[8] For a rebuttal to this argument, see Tullock (cites).

each undertook costly effort toward a collective goal. If we assume that they had free will in choosing whether or not to push, then we can assume that it was their intention to move the boulder, and that they understood the consequence of their collective action.

Using similar reasoning, collective intent is routinely recognized by areas of the law other than statutory interpretation. For example, both corporate and contract law grant legal recognition to collective entities such as corporations, and to the collective decisions that they make (McNollgast 1994).

By analogy, when the legislature comes to a final decision whether to accept or reject a bill, each member of the legislature knows that they are making a choice between the proposed bill and the status quo (that is, the existing law), regardless of the agenda, procedure, and rules that got the proposal to this point. Legislators may disagree about the wisdom of the bill, or they may prefer different versions of the bill. They do, however, have shared beliefs about the consequences of the bill, and voting for it indicates a collective intent to change policy away from the status quo and toward the bill's consequences.

On top of the fact that intransitivity does not imply that collective intent is non-existent, many social scientists have also argued that organizational structures and institutional settings can and do provide stability to social choices (c.f., Weingast and Marshall 1988; Krehbiel 1991; Cox and McCubbins 1993; Laver and Shepsle.1994; for a counter-argument, see Riker 1980). In particular, a division of labor (Shepsle 1979,

Shepsle and Weingast 1987) and a hierarchy (Williamson 19XX) are the principal means for translating individual intentions into a collective intent.

In legislatures, the structure and process of legislative decision making lead to policy choices that are structurally stable. In addition, choices over structure and process are neither random nor unstable, but are chosen by members of the majority party in each legislative chamber in order to establish an order of business that a majority of legislators view favorably. In other words, legislative decisions are quite stable -- rather than being "unstable," "chaotic," etc. – and institutional structure that produces stability is chosen quite deliberately in order to produce collective choices in a way that the majority favors.

The details of the rules and procedures under which a bill is considered matter a great deal in determining which (sets of) legislators influence the collective decisions that legislatures make. In the next section, we turn to the question of how to interpret legislative intent. Our argument about how to read intent is founded upon a detailed understanding of the legislative process, and how it works.

B. The Legislative Process and Interpreting Legislative Intent

Our approach to discerning statutory intent, which derives closely from that of McNollgast 1994), consists of two steps: first, identifying the key political actors who cooperated to enact a bill, and second, detecting the actions that reveal those actors' policy preferences. Both are essential to discovering the nature of the agreement that the members of the enacting coalition thought they were making. In particular, to ascertain

legislative intent requires separating the meaningless, inconsequential actions (or signals) of participants in the legislative process from the consequential signals that are likely to reveal information about the coalition's intentions.

To understand the intent of a statute, an outsider to the legislative process must be able to determine whose interests were key in developing the legislative agreement and what bargain was struck. All bills are bargains among the members of some winning coalition, but the way a bargain is composed depends critically on the route a bill takes through the decision making structure of Congress, as well as the reversionary policy that is in place. By understanding the route a bill took -- including who the decision makers were at key stages in the legislative process and what demands they made on the bill -- an outside observer can begin to identify the elements of the agreement the coalition thought it was making that are not explicit in the language of the statute.

In this section, we begin by describing the legislative process in some detail, in order to provide a framework for understanding who the key actors are and how their action should be understood. We then discuss how the system works, and what how we can use this information to learn about intent. Finally, we discuss certain aspects of the process that should *not* be used to make inferences about intent.

Legislatures make law, which involves a collective effort on the part of at least a majority of legislators. This collective effort requires the allocation of scarce resources, the most important of which is plenary time, among numerous legislators who are competing over its use. To overcome the implied problems of collective action,

legislatures typically delegate the task of allocating the legislature's scarce resources to the majority party leadership. This delegation, however, creates the potential for agency losses, whereby the legislature's agents might use their power to allocate resources for their own benefits rather than for the legislature's benefit as a whole.

Legislatures each attempt to strike a balance between solving collective action problems and mitigating potential agency losses by creating institutions that govern the allocation of resources and the flow of proposed legislation through the system. The rules, procedure, and institutional design of law-making make up the legislative process. In addition, they provide a framework for identifying key decision-makers and for making inferences about their preferences. Hence, we go into some detail to describe this process.

Three elements of procedure are common to all legislatures. First, because each legislature must allocate plenary time, a substantial fraction of each legislature's rules, procedures, and structure are devoted to defining and proscribing the means by which the legislature's agenda is controlled. Second, the rules must also proscribe what happens when no new laws are passed, i.e., how is it that the "reversionary policy" is set? Third, once plenary time is allocated and the reversionary policy is set, the legislature must have rules and procedure that dictate how a collective decision on policy change will be reached. While the just listed features of the legislative process are ubiquitous, of course, there are many additional elements to the legislative process that vary from one legislature to the next, and which have important effects on the flow of legislation. Many

of these involve attempts to mitigate the aforementioned problem of agency loss and are important for our purposes. We will discuss these elements of the legislative process later in this section.

1. Controlling the Agenda

Controlling the legislative agenda involves the creation and proscription of two types of powers. One type of power is the authority to get proposed policy changes onto the legislative agenda; we call this authority *positive agenda control*. The alternative type of power is the authority to keep proposed policy changes off of the legislative agenda, and thereby protect the status quo—or reversionary policy—from change; we call this authority *negative agenda control*. In what follows, we discuss each.

a. Positive Agenda Control

Positive agenda control is the power to propose new policies. The issues of who has it or controls access to it, and who does not, may affect the decisions that a legislature can make depending on the various policy makers' preferences. Possessing positive agenda power grants the policy maker the formal right to introduce bills, or at very least, it entails the privilege to bring up for consideration a motion or an amendment before the full legislative body.

are considered in their own chamber. Within the House, committees of a particular jurisdiction and specialized task forces have the power to initiate policy change in their policy area. But simply proposing legislation hardly implies that it will be considered by the full legislative body. With the exception of some bills that are "privileged,"[9] most House scheduling is controlled by the Speaker and the Rules Committee.

To untangle who really controls the legislative agenda, it is important to know both who can initiate proposals and who controls the consideration of proposals—and to whom those actors are accountable. The power to initiate policy and the power to schedule policy consideration may be defined by the constitution or such procedural decisions may be delegated to the legislative chamber itself to resolve. In the United States, these determinations were left entirely to the chambers themselves. Over time, something of a dual system has developed, in which the legislature divides positive agenda power between individual committees and the parties. Committees act as a filter, shaping nearly all proposals in their particular policy jurisdiction, but the majority party leadership may be given the power to allocate scarce common resources, including committee assignments. Presumably, each party's committee contingent acts as a representative of the whole party. To the extent that the party exercises control over committee assignments, and to the extent that those assignments are desirable to individual members, the party's representatives should be faithful to the party's collective interests. A similar relationship holds with regard to the leadership's scheduling

[9] For example, outlined in US House Standing Rules, five committees, such as Appropriations and Budget, have direct access to the floor on select legislation.

activities, such that the leadership will pursue the majority party's preferences to the extent that the party can discipline its agents, their leaders.

b. Negative Agenda Control

An alternative form of agenda control also exists, which essentially is the veto power. We call the authority to halt or to delay a bill's progress *negative* agenda control, and it can be exercised either explicitly through vetoes or implicitly through inaction. Veto power is usually held by the legislature, although when the executive possesses a decree power, for example, policy may be changed without legislative assent.

Any person or faction with the power to block, or significantly delay policy, is often referred to as a veto gate. There exists significant variance across nations in the number of veto gates that inhabit the legislative process. The United States' presidential system with its bicameral, decentralized legislature represents one end of the spectrum, and the United Kingdom occupies the other end of the spectrum with its more centralized parliamentary form of government. In the House of Representatives alone, the substantive committees, Rules Committee, Speaker, and the Committee of the Whole each constitute veto gates through which legislation must pass, and the Senate has even more veto gates due to their liberal restrictions on debate. By contrast, in the United Kingdom, the legislative process is much more efficient, since the Cabinet and Prime Minister serve as the main veto gates through which new legislation must pass.

c. Reversion control

Whenever legislatures consider passing a law, they must always consider its effects relative to what would occur if no law were passed. Indeed, in virtually every legislature the final vote taken on a proposal is that for final passage, which forces members to contrast directly the proposed change and the status quo. Reversion control is the power of setting the default policy outcome that will result if no new legislation is enacted. It is important to note that the reversionary policy is not necessarily the extant policy. For example, some laws are crafted with 'sunset provisions,' which mandate that a program be dissolved or an appropriation be terminated by some specified date.

To understand law making, it may be important to know whether the reversion policy can be manipulated, and if so, who possesses the power to do so. This requires an understanding of the relationship between the reversion policy, any new policy proposal, and the various policy makers' preferences. Reversionary policies can be defined formally by a constitution and/or statutes, or as the result of informal solutions to immediate problems. In Germany and the United States, for instance, the constitution defines the reversion for budgetary items, but the reversionary policy for entitlements, such as Social Security, are typically defined by statutes to be adjusted incrementally.

The importance of reversion control can be seen in the following example of the effect of varying the regulatory burden of proof. The US Federal Food, Drug, and Cosmetics Act of 1938, as amended, requires that before a pharmaceutical company can market a new drug, it must first prove that the drug is both safe and efficacious. By contrast, in the Toxic Substances Control Act of 1976, Congress required that the

Environmental Protection Agency (EPA), before regulating a new chemical, must prove that the chemical is hazardous to human health or the environment. In one case, then, the burden of proof is on the industry that wishes to promote its product; while in the other case the burden of proof is on the regulator that wishes to halt a product's introduction. The results of the differences in the burden of proof are stark: few new drugs are marketed in the United States relative to European democracies, while the EPA has managed to regulate none of the 50,000 chemicals in commerce under these provisions in the Toxic Substance Control Act.

In fact, the effectiveness of agenda control may itself be contingent on the reversionary outcome. Whether or not those who possess positive agenda control will be able to make "take-it-or-leave-it" offers (also known as ultimatum bargaining) to the legislature depends largely on the attractiveness, or unattractiveness, of the reversionary outcome to the policy makers.

d. Procedural control

Most legislatures possess rules that structure the handling of proposed legislation. Rules define voting procedures, the types of amendments that will be allowed, if any, how amendments will be considered, provisions for debate, the public's access, and so forth. It is possible to draw a distinction between two different forms of procedural rules: standing rules and special rules. Standing rules guide the day-to-day procedure by which the legislature conducts itself and the internal lawmaking processes. Standing rules may

continue from a previous legislative session, or they may be redrafted each new legislative session.

By contrast, special rules create exceptions for consideration of a bill, which violate the standing rules. In the House of Representatives, floor debate usually takes place under a special rule restricting debate and amendments, and the Rules Committee possesses the power to write special rules. Successful consideration of most nontrivial bills typically entails giving certain members procedural privileges, whether accomplished by a special rule or by a suspension of the rules. Restrictive rules, such as limiting debate or amendments, are one way for the majority party leadership to eliminate opportunities for defection by their party members.

The procedure structuring debate, and restrictions on debate, are typically encompassed by a legislature's standing and special rules. In addition to the obvious importance of who gets to participate in the deliberative process and how extensively, control of debate may have serious policy implications. For example, in the United States, judicial interpretation of laws often refers to the congressional record to ascertain the lawmakers' intent. As a consequence, the ability to participate in debate is an opportunity to possibly have your preferences or understanding of a law incorporated in its interpretation.

In the House of Representatives, unless proposed legislation is governed by a special rule or there is a suspension of the rules,[10] the House's standing rules and precedents limit each member's speaking time to one hour during debate and five minutes when considering amendments. Upon recognition, a member controls her allotted time to yield or allocate as she desires, but this rule is circumscribed by the fact that the Speaker of the House possesses recognition power. Hence, given their power to suspend the rules, and to write special rules, and given the Speaker's discretion to recognize members, the majority party leadership is able to structure chamber debate quite effectively.

In the Senate, however, the majority party's control over debate is a bit more tenuous. The Senate's standing rules do not limit debate, and the chamber has developed a notorious reputation for members' ability to frustrate a majority through the filibuster. Over time, the rules have been modified, to allow a three-fifths majority to invoke what is called "cloture," ending a filibuster by either limiting debate to one hour per member, establishing a maximum of thirty hours more for debate.

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[10] As mentioned above, special rules (e.g., limiting debate) are recommended by the Rules Committee and approved by simple majority in the full chamber. The Rules Committee is stacked with majority party loyalists selected by the Speaker. Suspension of the rules, however, requires a two-thirds majority and thus typically requires some bipartisan support.