Statutory Interpretation for Courts and Lawyers

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Victoria Nourse, Misreading Law, Misreading Democracy (2016).

Since the New Deal, when more information became available about the hearings and reports that accompanied the passage of bills through Congress, lawyers and judges have been fighting over how to read legislation. Law professors have joined the fray, debating questions such as how far courts can stray from the plain meaning of the text and how reliably courts can look to legislative history in attempting to make sense of the words of the statute. Every interpretive method promises fidelity to Congress as the first branch of government, but the methods deliver very different forms of fidelity. Some prize the words themselves, using dictionaries and canons to give them meaning; others look for meaning in the purposes and debates that animated the legislation.

Enter Victoria Nourse. In a series of articles drawing on her experience as a key staffer in Congress, Nourse argues that we should all take a class in Congress 101. That is, both textualists and purposivists approach the words of a statute with a shared misunderstanding of the way members of Congress do their work. The words of the statute count in Nourse's telling, but they must be read with an appreciation of the nature of the legislative process. That insight, shared with positive political theorists, sets the stage for Nourse's critique of modern methods of interpretation and her attempt to construct an alternative approach, one she calls a "legislative decision" mode of interpretation.

Nourse bases her approach to interpretation on a deep appreciation for the rules that structure the way bills become law. On this view, statutes emerge not from a process of careful and iterative drafting in which all the members sharpen their quills, but from an intensely political process. Nourse calls it an election. To win, a bill must attain a supermajority vote in the Senate (that is one key rule of the legislative decision process). To understand the compromises that led to the bill's passage, one has to attend to the choices that allowed its sponsors to round up sixty votes in the Senate. Cheap-talk speeches by proponents and opponents tell us little about those crucial compromises. Instead, we must attend to the drafting choices at mark-up and during floor debate, when costly choices are being made to secure the votes needed. To figure out what happened, it may be necessary to reverse engineer the legislative process to home in on the crucial inflection point around which the supermajority coalesced. Other rules govern the process of compromise. When a conference committee meets to resolve differences between the House and Senate, it acts within a set of rules that narrows its options. Conferees cannot fashion new or more ambitious approaches.

Nourse takes this insider's guide to the legislative process and applies it to a range of familiar statutory-interpretation problems. Consider the Supreme Court's approach to the discriminatory impact of tests and other job requirements in Griggs v. Duke Power. Much was made at the Court of the defeat of the Tower amendment as part of the Senate's deliberations over Title VII. Nourse explains that Tower was a loser in the election, trying to reopen the deal that had ended the Senate filibuster; defeat of the Tower amendment thus tells us little about the deal struck to get to sixty votes in the Senate. Or the lengthy legislative history Justice Rehnquist compiled in his dissent from the decision in United Steelworkers v. Weber to allow affirmative action programs by private employers. Nourse shows that the Rehnquist dissent focuses on legislative history that occurred months before the addition of the key textual provision during Senate deliberations.

Or the Court's interpretation of the term "utilize" in Public Citizen v. DOJ, which asked whether the President had "established or utilized" the ABA for purposes of judicial evaluations and was thus obliged to ensure that their meetings were open and their membership balanced. The Court labored to avoid a finding that the President "utilized" or used the ABA, but Nourse shows that the Court might have avoided this struggle through careful attention to the origins of the text's "or utilized" language, which first appeared in the conference substitute. Since both the House and Senate had agreed on "established" and since legislative decision rules prohibit conferees from changing text on which both chambers have agreed, the right thing to do was to ignore the nettlesome addition.

Finally, Nourse tackles the fate of the snail darter, which came to the Court as a conflict between the Endangered Species Act and a series of appropriations bills that had funded the dam that was said to threaten the darter. Nourse shows that the Court backed the wrong statute, in effect treating the ESA as taking precedence while members of Congress would have surely regarded appropriations legislation as controlling.

Nourse draws general conclusions from these examples. We should not waste too much time on the early versions of legislation, but should attend more carefully to late-stage developments. She criticizes scholars and courts for the way they talk about the legislative process. True, the process of holding statutory elections can produce messy laws. But no member ran for a seat in Congress on their drafting prowess; the people care about policy and not about the nice interpretive questions that occupy the scriveners on the federal bench. Nourse offers a thoughtful defense of legislation—it is different from the process that judges deploy to settle disputes over meaning. For Nourse, true fidelity to the legislative process calls for a greater appreciation of the way it really works. Hence her argument, reflected in the book's title, that courts today approach statutes in a way that misreads the law and misunderstands the democratic (legislative) process.

Nourse writes in an engaging and accessible style and offers a model of interpretation that lawyers and judges can understand and "utilize." One comes away from the book wishing Nourse had tackled more examples of flawed interpretation, had reverse engineered more statutes, had shed light on more instances in which courts, in the course of demeaning their legislative colleagues, reached conclusions that would have mystified those involved in the lawmaking process. But perhaps that is work we will have to do for ourselves, now that Nourse has illuminated the rules of Congress 101.

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