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Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation

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INTRODUCTION

Perhaps the greatest controversy over statutory interpretation during the past two decades concerns the use of legislative history as evidence of the intent of the legislature. Opponents say that relying upon the historical record of the lawmaking process is undemocratic (committee reports are not enacted),[1] unreliable (history is often conflicting, and may even be planted to influence judges in the future),[2] and incoherent (the record does not represent the views of all members of the legislature, so it cannot be evidence of "legislative intent").[3]

More basically, the concept of legislative intent has itself been subject to attack.[4] Whose intent? What difference does it make what people intended as long as we know what they said? Oliver Wendell Holmes's 1899 statement, "[w]e do not inquire what the legislature meant; we ask only what the statute means,"[5] continues to be widely quoted today.[6] Moreover, although criticism of

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1. For interesting argument along these lines, see John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997) [hereinafter Manning, *Textualism*]. For arguments to the contrary, see Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 VAND. L. REV. 1457 (2000) [hereinafter Siegel, *The Use of Legislative History*]. See also Professor Manning's response, John F. Manning, *Putting Legislative History to a Vote: A Response to Professor Siegel*, 53 VAND. L. REV. 1529 (2000) [hereinafter Manning, *Legislative History*] and Professor Siegel's reply to Professor Manning's response, Jonathan R. Siegel, *Timing and Delegation: A Reply*, 53 VAND L. REV. 1543 (2000). I discuss this debate below in Part V.

2. *See* Blanchard v. Bergeron, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring) (arguing that legislative history is sometimes inserted "to influence judicial construction"); Manning, *Textualism*, *supra* note 1, at 684-88, 731–33; Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 376–77.

3. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29–37 (1997). Justice Scalia actually makes all of these arguments.

4. *See, e.g.*, *id.* at 29–30; Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988).

5. Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899).

legislative intent is generally associated with politically conservative "textualist"[7] judges and academics, critiques appear throughout the political spectrum. For example, William Eskridge, who is generally regarded as a progressive theorist on questions of statutory interpretation, expresses concern that resort to legislative intent can render the interpretation of statutes inappropriately unresponsive to changes in the interpretive environment over time.[8]

This Article defends the use of legislative intent in statutory interpretation. Using advances in linguistics, social and developmental psychology, and philosophy,[9] the Article argues that it makes perfectly good sense to speak of legislative intent.

We routinely attribute intent to a group of people based on the intent of a subset of that group, provided that there is agreement in advance about what role the subgroup will play. The legislature is a prototypical example of the kind of group to which this process applies most naturally. Moreover, resort to legislative intent need be no less democratic than the legislative process itself. To the extent that a small group of legislators participates in determining the details of a law, with the acquiescence of the legislative body, it does no harm to democratic principles for a court to recognize the process for what it is in trying to work out the application of those details in the real world.[10] In contrast, judicial reliance on portions of the legislative record that do not reflect delegation of planning to a subgroup, such as incidental remarks of individual legislators, cannot be justified on these grounds. Thus, evidentiary arguments that courts sometimes misuse legislative history may have merit, and should be dealt with on a case-by-case basis. In contrast, arguments against *any* reference

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6. *See, e.g.*, Hain v. Mullin, 324 F.3d 1146, 1151 (10th Cir. 2003) (Lucero, J., dissenting); St. Charles Inv. Co. v. Comm'r, 232 F.3d 773, 776 (10th Cir. 2000); Public Citizen v. Carlin, 184 F.3d 900, 904 (D.C. Cir. 1999); Eubanks v. Stengel, 28 F. Supp. 2d 1024, 1033 (W.D. Ky. 1998).

7. In this context, much of the focus is on the philosophy of Justice Antonin Scalia. For the seminal article on Scalia's textualism, see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990). See Part II below for further discussion.

8. *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 14-25 (1994) ("[N]one of the originalist schools (intentionalism, purposivism, textualism) is able to generate a theory of what the process or coalition 'would want' over time, after circumstances have happened.").

9. Several recent articles have expressed skepticism about this use of these disciplines, especially the philosophy of language, as tools in legal interpretation. *See, e.g.*, Brian H. Bix, *Can Theories of Meaning and Reference Solve the Problem of Legal Determinacy?*, 16 RATIO JURIS 281 (2003); Michael Steven Green, *Dworkin's Fallacy, or What the Philosophy of Language Can't Teach Us About the Law*, 89 VA. L. REV. 1897 (2003). These articles disagree with the claim that particular approaches to linguistic meaning can determine the outcomes of legal cases. The claim I make, in contrast, is that certain kinds of evidence of meaning, sometimes challenged as incoherent, are, in fact, perfectly coherent, and are appropriately considered in determining the meaning of a legal text. At that point, however, the weight given this evidence of meaning becomes a legal question. Because I see little disagreement between the stances of writers like Bix and Green on the one hand, and my own on the other, I do not discuss this literature further. The titles of their articles suggest a stronger statement than they actually make.

10. *See* Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205, 225-30 (citing cases in which the Supreme Court relied on the "busy Congress" model to justify reference to committee reports in interpreting statutes).

to legislative intent do not have merit, and should be rejected.

Part I of this Article briefly introduces the problem. Part II then addresses one of the major criticisms of using legislative intent: that there can be no single intent because the legislature consists of many people who do not share a single set of goals. First, relying largely on the work of philosopher Margaret Gilbert, I argue that it is both coherent and commonplace to speak of the intent of a group, whether or not everyone in the group shares that intent. What matters most is whether the group would be willing to accept the intent of a subgroup as that of the larger group. I then introduce a body of psychological research that explores how people, in identifiable circumstances, perceive groups as individuals and attribute to them states of mind, especially intent. Psychologists call this phenomenon "group entitivity."[11] The phenomenon applies quite generally, and especially when groups make decisions through a deliberative process.

Part III looks at another body of psychological research: studies showing that we acquire new words and concepts by developing a theory of mind about the individual who brought the new concept to our attention. We begin doing this as young children, and never stop. Basically, this is how we learn. This is why it seems only natural to ask what the legislature had in mind when it enacted a statute whose applicability is in dispute. Our drive to answer questions by looking into the minds of others is so strong that we may not be able to give it up even if we want to do so. For this reason, it should not be surprising that "intent" language slips through the rhetoric of even the most devoted textualists, and is used by the judiciary thousands of times each year.

Part IV turns to an important linguistic fact that relates to the issue of intent. Many of those who oppose speaking of intent advocate focusing more heavily on statutory language, which assumes that one can look at language independently of any inquiry into intent. This Part argues that this perspective is based on an illusion. When language is so clear that disagreement is unlikely, we can dispense with considerations of intent because anyone using that particular expression (absent mistake or insincerity) would do so only with a particular intent. It therefore makes sense to speak of a statute's "plain meaning." However, even when there is no dispute about meaning, intent lurks in the background as a crucial element of our understanding. In fact, it is commonplace for courts to justify their reliance on plain language, not because the language is somehow separate from legislative intent, as Holmes and some modern textualists would have it, but rather because plain language is the best evidence of intent.

Once consensus over meaning dissolves, intent becomes more or less a necessary part of the analysis. Knowledge of language must reside separately in each individual. Although we use language to facilitate social interaction, we each have only our personal capacity to speak and understand. When questions

11. *See, e.g.*, Jennifer L. Welbourne, *The Impact of Perceived Entitivity on Inconsistency Resolution for Groups and Individuals*, 35 J. EXPERIMENTAL SOC. PSYCHOL. 481 (1999).

of interpretation arise, we have little to ask other than questions about the intentions of those whose words or actions we are trying to understand.[12] This has significant legal consequences. It means that when we have doubts about our understanding of language, we cannot avoid asking which of our possible understandings most likely matches the meaning that the speaker intended. Indeed, courts frequently justify many of the canons of construction upon which textualists rely as good proxies for the intent of the legislature.

Part IV concludes with a discussion of whether other values espoused by judges and legal scholars, such as coherence, lenity, and avoiding constitutional problems, can replace intent. I propose a test (which I call the "Marshall Test" because it reflects the view of Chief Justice John Marshall) to evaluate the viability of approaches to statutory interpretation that would substitute other values for legislative intent. The test requires that the individual who claims intent is irrelevant state overtly that she would be willing to thwart the intent of the legislature by promoting such competing values. No value passes this test routinely, and few pass it at all. The principle of legislative primacy is too deeply embedded in our system for judges to be willing, except in unusual circumstances, to dispense with what they know to be the will of the legislature in favor of another interpretation that furthers competing values.

Part V briefly addresses the current debate about the use of legislative history from this psychological and linguistic perspective. Professor Manning has argued that judicial resort to legislative history is unconstitutional because it excessively aggrandizes the role of the legislature by giving too much power to small groups of legislators who were involved in the early stages of the legislative process.[13] But this Part argues that the use of legislative history in statutory interpretation should not be rejected on constitutional grounds, because it is not treated as authoritative, but rather only as evidence of intent. In contrast, arguments based on its evidentiary reliability may have merit and are worthy of further exploration.

Finally, Part VI places the role of intent in statutory interpretation in perspective. The fact that it is indispensable does not mean that it must be ubiquitous. I agree with those who argue that uncontroversial interpretations of statutory language should be afforded a privileged role in statutory interpretation. But the language can take us only so far. When disputes arise, we must have priorities to determine which arguments will be given more weight. Much of the debate over statutory interpretation is legitimate political conflict over setting these priorities. However, arguments that intent is irrelevant to the interpretive enterprise are not, I believe, legitimate in their own right.

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12. For an extensive presentation of this position, see DANIEL C. DENNETT, KINDS OF MINDS: TOWARD AN UNDERSTANDING OF CONSCIOUSNESS (1996) and DANIEL C. DENNETT, THE INTENTIONAL STANCE (1990). For discussion of how we conceptualize intent itself, see Susan T. Fiske, *Examining the Role of Intent: Toward Understanding Its Role in Stereotyping and Prejudice*, *in* UNINTENDED THOUGHT 253 (James S. Uleman & John A Bargh eds., 1989).

13. *See* Manning, *Textualism*, *supra* note 1, at 694–99.

I. LEGISLATION OR LEGISLATIVE INTENT?

The question of legislative intent has gained recent prominence in large part because it has been a major item on the agenda of Justice Antonin Scalia, appointed by President Reagan to the Supreme Court in 1986. But the debate is by no means new. About seventy-five years ago, in a biting article published in the *Harvard Law Review*, legal philosopher Max Radin wrote:

> A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.
>
> That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition. The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small. The chance is still smaller that a given determinate, the litigated issue, will not only be within the minds of all these men but will be certain to be selected by all of them as the present limit to which the determinable should be narrowed.[14]

Radin argued from the perspective of the legal realist movement, which believed that judicial rhetoric is often removed from the reality of the actual decisionmaking process, and masks the real reasons behind judges' decisions, which are frequently political.[15] Today, the same critiques are made by judges and scholars throughout the political spectrum.[16] Yet despite the large body of law and commentary addressing these questions, Radin's observations about the problems with attributing a single intent to an entire legislature have still not been fully answered by proponents of legislative intent.[17]

Defenders of legislative intent often argue that when the language of a statute is not clear, a court charged with interpreting the statute should resort to extrinsic evidence to see how best to effect the statute's goals. That is, the court must construe the statute to achieve what the legislature would have intended.[18] That intent can often be inferred, at least in part, from the circumstances surrounding the statute's enactment. Among those circumstances are the legislative proceedings in which the statute was written and its substance and form debated. In fact, not taking this sort of information into account increases the

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14. Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1930).

15. For one classic exposition of this perspective, see JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949).

16. *See* ESKRIDGE, *supra* note 8, at 14–21(providing liberal critiques); SCALIA, *supra* note 3 (providing a conservative critique).

17. An important exception to this generalization is the sophisticated debate over separation of powers. *See infra* Part V.

18. *See, e.g.*, Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 282 (1990).

likelihood of a court's accepting an interpretation that is absurdly at odds with the intentions of the enacting legislature.[19]

Justice (then Judge) Stephen Breyer makes these and other arguments in his important article defending the use of legislative history by judges.[20] Breyer catalogues situations in which the language of a law simply does not provide an adequate basis for interpretation. Sometimes, the legislature has made an obvious mistake.[21] In other cases, the statute is ambiguous.[22] In still others, the language of the statute seems applicable to a particular situation, but it would be absurd to apply the statute as written.[23] In all of these situations, there is more or less consensus that a court must look beyond the words of a statute to determine how to apply the law.[24] Concern for legislative primacy argues that inferring and then enforcing the intent of the enacting legislature is appropriate when statutory language alone does not suffice.

The counterargument goes something like this: much of the time the legislature probably had no intent with respect to the law's application in the particular situation.[25] That's what makes the situation a hard case. In any event the legislature is not a person, like the governor or the president. The legislature consists of a group of people with diverse goals and intentions. It cannot itself have "an intention."[26] In all likelihood, most legislators who voted for the bill did so because the party leadership told them to do so as a matter of party discipline: "Vote for Bill Number 802, and then we'll see if we can move some of your pet projects forward before the legislative session ends." Or perhaps: "The President wants this one badly. If you don't support it, I can't promise that the party leadership will help you to win the next primary election. We may

19. *See, e.g.*, United States v. Granderson, 511 U.S. 39, 41 (1994) (rejecting as absurd a linguistically plausible interpretation that would have a probation violation reduce a probationer's sentence). For a discussion of *Granderson*, see *infra* Part IV.A.1.

20. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

21. *See, e.g.*, United States v. X-Citement Video, 513 U.S. 64, 73 (1994); *Granderson*, 511 U.S. at 41; Green v. Bock Laundry Mac. Co., 490 U.S. 504, 509–10 (1989); *see also* Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309, 329-32 (2001) (discussing Justice Scalia's attitude toward errors).

22. *See* Moskal v. United States, 498 U.S. 103 (1990).

23. Sometimes the fact that a statute would produce absurd results is evidence that the language used reflects a mistake. *See, e.g.*, *Granderson*, 511 U.S. at 41. In other instances, the language of the statute typically produces desired results, but in non-prototypical situations that the legislature obviously did not consider, applying the statute would result in an absurd outcome. The classic example of this phenomenon is *United States v. Kirby*, 74 U.S. 482 (1869), where a sheriff who arrested a letter carrier wanted for murder was prosecuted for interfering with delivery of the United States mail. *Id.* at 486–87.

24. Examples abound. *See, e.g.*, Bayer AG v. Housey Pharms., Inc., 340 F.3d 1367, 1372 (Fed. Cir. 2003) ("Under these circumstances the text is ambiguous, and we must look beyond the particular language being construed."); United States v. Calor, 340 F.3d 428, 431 (6th Cir. 2003); United States v. Martin, 332 F.3d 827, 835 (5th Cir. 2003) (Dennis, J., concurring in part and dissenting in part).

25. *See* ESKRIDGE, *supra* note 8, at 14; SCALIA, *supra* note 3 at 31–32.

26. *See* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 254 (1992).

prefer a candidate who will cooperate better than you have."[27] Therefore, when a judge looks at legislative history to determine the intentions of the enacting legislature, what she is really looking at is a set of documents prepared by staff people, or speeches made by individual members, or other information that cannot possibly be considered representative of the thinking of "the legislature" as a whole. At worst, legislative history will be corruptly unreliable, perhaps "planted" by those who wish to influence courts without complying with the onerous process of legislative enactment.[28] Often, it will be self-contradictory, allowing first lawyers and then judges to pick and choose among statements that support a party's position.[29] In any event, poring through thousands of pages of material will run up the costs of litigation with the risk of doing more harm than good.[30]

Justice Scalia summarizes the danger of using legislative history in a number of his writings. In *A Matter of Interpretation*, he writes: "My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of a statute's meaning."[31] In other words, the concept of legislative intent is irrelevant to legal interpretation, so the use of legislative history to determine legislative intent must be irrelevant too. He continues:

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27. Public choice theorists have long maintained that legislative decisions are driven in part by legislators' making of strategic decisions necessary to get re-elected. *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE (1991); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974). This tactic can go too far. For example, in December 2003, Representative Nick Smith, a Republican member of the House of Representatives, "told a Michigan radio station . . . that he was promised $100,000 for his son's congressional campaign if he would vote for the Republican-backed Medicare bill. . ." *Probe Sought in Claim of Medicare Vote Bribe*, WASH. POST, Dec. 9, 2003, at A6. Though Smith later conceded that his allegation was 'technically incorrect,'" *id.*, it triggered an investigation by the House Committee on Standards of Official Conduct, which issued a report admonishing Majority Leader Tom DeLay for violating House Rules in soliciting Smith's vote. *See* HOUSE OF REPRESENTATIVES COMM. ON STANDARDS OF CONDUCT, 108TH CONG., INVESTIGATION OF CERTAIN ALLEGATIONS RELATING TO VOTING ON THE MEDICARE PRESCRIPTION DRUG, IMPROVEMENT, AND MODERNIZATION ACT OF 2003 (2004), *available at* http://www.house.gov/ethics/Medicare_Report.pdf.

28. *See, e.g.*, Blanchard v. Bergeron, 498 U.S. 87, 98-99 (1989) (Scalia, J. concurring); Manning, *Textualism*, *supra* note 1, at 687-88.

29. This is a major theme among those who oppose the use of legislative history. *See, e.g.*, Conroy v. Aniskoff. 507 U.S. 511, 527–28 (1993) (Scalia, J. concurring); SCALIA, *supra* note 3, at 32–34; Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1896 (1998). Eskridge regards this issue as an empirical question that has, notwithstanding all the rhetoric, not been adequately studied. William N. Eskridge, Jr., *Should the Supreme Court Read* The Federalist, *But Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1323 (1998). I agree with Eskridge's position. *See infra* note 273 and accompanying text.

30. This argument has, until very recently, resonated with English judges, who opposed the use of legislative history in legal argument. The House of Lords finally permitted the use of legislative history under limited circumstances in *Pepper v. Hart*, [1992] 3 W.L.R. 1032. See Vermeule, *supra* note 29, for further argument that resort to legislative history is inefficient.

31. SCALIA, *supra* note 3, at 29-30.

> As I have said, I object to the use of legislative history on principle, since I reject intent of the legislature as the proper criterion of the law. What is most exasperating about the use of legislative history, however, is that it does not even make sense for those who *accept* legislative intent as the criterion. It is much more likely to produce a false or contrived legislative intent than a genuine one. The first and most obvious reason for this is that, with respect to 99.99 percent of the issues of construction reaching the courts, there *is* no legislative intent, so that any clues provided by the legislative history are bound to be false.[32]

He finishes his argument by noting that committee reports and the like probably do not influence the votes of many in the legislature.[33]

Scalia's philosophy comes out strongly in his opinions as well, often in concurrences in which he agrees with the Court's result, but objects to its looking at congressional proceedings in reaching that result.[34] Consider *Conroy v. Aniskoff*:[35] A federal statute, the Servicemembers Civil Relief Act,[36] protects members of the military from losing their homes to foreclosure sales if they have not paid their local real estate taxes. State laws that permit municipalities to sell a house to collect the tax owed, allow for a period of redemption during which the owner can rescue the situation by paying the back taxes.[37] The federal law, enacted in the context of World War II's huge military conscription, suspends the running of this redemption period while the owner is in the military.[38] Sensible enough. But what happens when the homeowner is a career military person? Should he get twenty-five years of protection from paying his local taxes? The statute, read literally, suggests that he should. It makes no distinction between the draftee fighting in the north of France and the deadbeat who happens to be in the army.

In deciding to interpret the statute broadly to protect all members of the military notwithstanding the context of its enactment, the Supreme Court looked at the legislative history of the relevant statute and related statutes.[39] It found no serious contradictions between the historical record and the plain language, and some historical evidence in further support of the literal reading. For example, the relevant provision was re-enacted after World War II ended,

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32. *Id.* at 31–32.

33. *Id.* at 34–35.

34. *See, e.g.*, United States v. R.L.C., 503 U.S. 291, 308-09 (1992) (Scalia, J., concurring). For a recent example, see *Lamie v. United States Tr.*, 540 U.S. 526 (2004) (joining unanimous judgment except for section of opinion that discusses legislative history).

35. 507 U.S. 511 (1993).

36. 50 U.S.C. app. § 501 (2000).

37. 507 U.S. at 513 n.3.

38. 50 U.S.C. app.§ 561 (2000).

39. *See* 507 U.S. at 514–516.

during a time of peace.[40] It thus interpreted the statute according to its plain language, even though this meant enforcing the statute in circumstances broader than the policy behind its enactment would have demanded.

In response, Justice Scalia accused the majority of selecting snippets from the history and misunderstanding the role of the judiciary. He remarked:

> The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators. As the Court said in 1844: "The law as it passed is the will of the majority of both houses, *and the only mode in which that will is spoken is in the act itself*". . .. (emphasis added). But not the least of the defects of legislative history is its indeterminacy. If one were to search for an interpretive technique that, *on the whole*, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history.[41]

Scalia pointed to examples from the historical record which, if accumulated, could create the impression that Congress intended the opposite of what the plain language reading suggests.[42]

To this and related arguments, the defenders of legislative history respond, a little more weakly: Of course we should be honest in presenting the historical record, including the possibility that the record is internally inconsistent and does not teach us much in some instances. But laws are written in language and language can only be understood in context. The thinking of those who supported and proposed the law in the first place may not reflect the will of every legislator, but it certainly can make *some* contribution to statutory interpretation if used wisely. At the very least, it can help us to determine whether the difficulty in applying the statute results from an unfortunate choice of statutory language to effect a legislative goal that becomes clear once one investigates the matter. And it can be used to confirm that decisions made on other grounds are not likely to fly in the face of what the statute was intended to accomplish. In response to one of Justice Scalia's more aggressive concurring opinions, Justice White replied in a footnote:

> As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it. As Chief Justice Marshall put it, "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived." Legislative history materials are not generally so misleading that jurists should never employ them in a good-faith effort to discern legislative intent. Our precedents demonstrate that the Court's practice of utilizing

40. *Id.* at 515 n.8 (recognizing that "Section 14 of the Selective Service Act of 1948, 62 Stat. 623, provided that the 1940 Act 'shall be applicable to all persons in the armed forces of the United States' until the 1940 Act 'is repealed or otherwise terminated by subsequent Act of the Congress'").

41. *Id.* at 519 (Scalia, J., concurring) (citations omitted).

42. *Id.* at 520–26.

> legislative history reaches well into its past. We suspect that the practice will likewise reach well into the future.[43]

The quoted passage dates back to an 1805 opinion written by Chief Justice John Marshall.[44] When used sensibly, the argument goes, legislative history can lead to a more thoughtful analysis of a complex legal problem. Shouldn't courts embrace every opportunity to make a more reasoned decision?

I have in the past employed this argument to support the use of legislative history as evidence of legislative intent,[45] and continue to consider it to be the best course for reasons summarized below. But this response invites an important question: Why do the opponents of legislative history appear to have such an uphill battle against common sense when their arguments are so intellectually strong?

The answer to this question lies in the psychology of how we perceive groups as individuals, and in the nature of our knowledge of language. We routinely attribute beliefs and intentions to groups of people as if they were a single individual: "What's IBM planning for next year?" "Should the philosophy department hire a Descartes scholar?" Doing so when the group is a legislature is just a special case of an ordinary psychological process. This, I believe, leads us to speak of such things as the intent of the legislature, whether or not such concepts are fully defensible.

The larger stakes in the debate over legislative history and legislative intent, however, are about our conception of language and how it relates to our ability to govern ourselves by enacting laws. Assume, as I will argue later, that understanding language is very much a matter of striving to understand the intent of the speaker, just as speaking is an effort to facilitate our hearer's efforts to understand our message.[46] If this is true, then statutory language can be no

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43. Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991) (alteration in original) (citations omitted).

44. United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805).

45. *See* Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235.

46. In developing this position, I rely on Noam Chomsky's argument that language is essentially private and internal. *See infra* Part IV. Although I do not rely on the work of Paul Grice here, intention also plays a prominent role in his work, especially his Cooperative Principle: "Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged." H.P. Grice, *Logic and Conversation*, *in* 3 SYNTAX AND SEMANTICS: SPEECH ACTS 41, 45 (Peter Cole & Jerry L. Morgan eds., 1975). Jonathan Siegel argues that Gricean principles do not necessarily apply to legislation, which is not conversational, and which is the result of a painstaking process of word and language choice. *See* Siegel, *supra* note 21, at 347. No doubt he is correct about the differences, but these differences between laws and conversation do not suggest that we stop caring about what the legislature wanted us to do or refrain from doing when it wrote the statute. In fact, in applying certain statutes, such as antifraud statutes that make it illegal to mislead, it is hard to see how Gricean principles can *not* be said to play a role. *See* LAWRENCE M. SOLAN & PETER M. TIERSMA, SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE 212–35 (2005) (discussing perjury). For discussion about the limits of Gricean implicature in the interpretation of statutes, see M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*,

different, and our laws can be no more than efforts at communication based on the intention of the drafters.

Judge Frank Easterbrook expressed the problem in an opinion interpreting the federal Bankruptcy Code: "Statutes are law, not evidence of law."[47] As Easterbrook recognized, once we start talking about intent, then language, including statutory language, can be nothing other than evidence of that intent. It might be good evidence, and we might want to privilege it in some way as being more reliable than other evidence (such as legislative history), but it is still just evidence. This is a serious problem for a jurisprudence based upon the assumption that government defines our obligations through a democratically legitimate process, employing principles such as bicameralism and presentment, set forth in Article I of the Constitution.[48] It is a lot messier if we have to start thinking about the intent of the legislature because the enacted words are not good enough.[49]

Whether the quest for intent is for the good is a separate issue.[50] The legal system often has to deal with situations in which our psychological propensities are at odds with the system's goals. For example, the rules of evidence recognize that jurors are likely to make too much of a criminal defendant's prior criminal record. Therefore, except for limited purposes, such as to impeach a defendant's credibility on the witness stand, the rules prohibit the government from introducing evidence of prior convictions.[51] It may well be that judges are prone to make more of legislative intent and legislative history than should be relevant in interpreting a statute in a manner consistent with the basic values of a system of justice, and that they should therefore be barred from doing so. I take up that possibility later. For now, let us focus on just how natural it is to talk about groups as if they were individuals.

II. UNDERSTANDING GROUPS AS INDIVIDUALS

A. GROUPS AS ACTORS

To see how we regard groups as units in everyday life, consider the following story. Mario and Adela Rossi are both engineers. They met in graduate school in

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46 U. PITT. L. REV. 373 (1985). For an analysis that uses Gricean principles in this context, see Tiefer, *supra* note 10, at 255-64.

47. *In re* Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989).

48. U.S. CONST., art. I, § 7.

49. *See* Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 545 (1983); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

50. Dennis Patterson makes this important point about the limited extent to which one can draw conclusions about how the legal system should be designed from studies of cognitive and linguistic strategies. *See* Dennis Patterson, *Against a Theory of Meaning*, 73 WASH. U. L.Q. 1153 (1995) (calling linguistics "a red herring on the trail to the meaning of legal texts"); Dennis Patterson, *Fashionable Nonsense*, 81 TEX. L. REV. 841 (2003) (reviewing Anthony G. Amsterdam & Jerome Bruner, *Minding the Law* (2000); Steven L. Winter, A *Clearing in the Forest: Law, Life and Mind* (2001); Vincent Descombs, *The Mind's Provisions: A Critique of Cognitivism* (Stephen A. Schwartz trans., 2001).

51. *See* FED. R. EVID. 404, 609.

Italy, got married, and emigrated to the United States seven years ago when they were both offered jobs with large companies. You and I are friends of the Rossis, and we both admire them for the exciting vacations that they take. We also both know that Adela is the one who makes all the plans. Mario just tags along, knowing that Adela is certain to have put together something great, whether a trip to an exotic part of the world or a visit to a country inn within an hour of their home. You say to me:

"Where are Mario and Adela planning to go this year?"

I respond:

"I just talked with Adela yesterday. They're planning a trip to a wonderful small resort in Virginia. She told me all about it."

In fact, as you and I both know, Mario doesn't have a clue about this year's vacation, except for the barest outline. It would be very odd to say that he's planning anything—Adela's the one doing the planning. Yet our conversation about the Rossis' plans seems perfectly natural. We can think of Adela making plans, we can think of Mario making plans, and we can think of Mario and Adela making plans as a unit even if it is not the case that they are both, individually, making plans. In this case, it is fair to say that Adela and the plural subject, the Rossis, made plans, but not that Mario made plans.

The philosopher Margaret Gilbert uses examples very similar to this to describe what she calls "plural subject theory."[52] Gilbert makes an important point about situations like that of Adela and Mario. While Mario may not have personally made any plans, he has committed himself, as a member of the couple, to the plans that Adela made on their behalf. So if Mario later makes separate plans with a friend for the same time, and says to Adela, "I think I'll skip Virginia this year and go fishing with Fred instead," it would be more than an insult. Mario would be backing out of a commitment he made when he agreed to accept Adela's plans as the couple's plans. Even though only half of the couple has made plans, those plans *count* as plans for the couple as an entity, because they have agreed in advance that they should count as such.[53] Put somewhat differently, the couple really *did* make plans when Adela made them.

Gilbert writes of the ramifications of her work for social theory. But the ramifications for statutory interpretation are also significant. Mario and Adela tell us that we can and do speak of the intent of a unit consisting of more than

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52. *See* MARGARET GILBERT, SOCIALITY AND RESPONSIBILITY: NEW ESSAYS IN PLURAL SUBJECT THEORY (2000). My vignettes are modeled after hers, but altered to make them more relevant to the points that I wish to make about the interpretation of statutes.

53. With respect to joint beliefs, Gilbert writes:

> It does not, as I understand it, entail that each participant personally believe that *p*. . . . The requirement to believe as a body that *p* might be redescribed as the requirement together to constitute—as far as is possible—a body that believes that *p*. Presumably this requirement will be fulfilled, to some extent, if those concerned confidently express the view that *p* in appropriate contexts and do not call it or obvious corollaries into question.

Id. at 41.

one person, whether or not all of the people in that unit share that intent. We can similarly speak of the intent of the legislature without committing ourselves to the proposition that every legislator shares the intent that we attribute to the entity.

Consider another example. Your local government is planning to put a large sculpture in a park near your home. You've seen pictures of the sculpture, and you like it. But many of your neighbors are against it, including people who are unofficially considered the leaders of the neighborhood. You have no idea what percentage of the neighborhood supports the installation, and really haven't thought very much about it. When I ask you about the sculpture, you say: "I like it, but the neighborhood's against it." This would be a perfectly natural thing to say. But it is also a very complex thing to say. For one thing, it equates "the neighborhood" with the people who live in the neighborhood. This is not always the case. The concept "neighborhood" usually also includes information about the environment, ambiance, and so on.[54] Second, your answer attributes aesthetic responses to the neighborhood as though it were a single person. Third, your answer remains reasonable even if you are unable to say exactly who should count as being in the neighborhood and how you draw the line. Some neighborhoods have natural boundaries, like a river, others formally defined boundaries, like SoHo in New York City. But many neighborhoods have no such definitions as to their boundaries. Yet we can speak of the attitudes of "the neighborhood" without regard to these indeterminacies.

Moreover, when you say that the neighborhood is against the sculpture, you do so without any formal criteria for determining the neighborhood's position on the sculpture. You haven't taken a poll. Why would you? You thus have no proof that a majority of the people in the neighborhood oppose the sculpture, although you assume that to be the case. All you know for sure is that people who are usually thought to speak for the neighborhood as a whole (whatever that means, given that you don't know where the neighborhood begins and ends) are speaking out against the sculpture. And somehow, that seems good enough to make your statement, "the neighborhood's against it," seem natural and reasonable. If you later find out that only a few people agree with the informally recognized leaders in this case, you may decide that your initial conclusion about the neighborhood's negative reaction was premature and incorrect. But there is no doubt that taking a position at all is a coherent thing to do.

Similarly, as the philosopher Michael Bratman points out, a group can jointly intend something without having worked out the details of the plan.[55] The day

54. Similarly, Chomsky writes about the different ways we can understand "London" as referring to the population, the place, a romantic concept, etc. NOAM CHOMSKY, NEW HORIZONS IN THE STUDY OF LANGUAGE AND MIND 37 (2000).

55. *See* Michael E. Bratman, *Shared Intention*, *in* FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY 109 (1999). Although I have added Bratman's insights to Gilbert's for purposes of exposition, the two have somewhat different perspectives on group intent. For discussion, see

before the trip, Mario and Adela can intend to go to Virginia even if they haven't agreed on a departure time, where to stop on the way, and many other such details. For that matter, they can intend to go to Virginia even if they have delegated the details of the trip to a travel agent, who will then let them know where they have various dinner reservations, and where they will be stopping on the way.[56] But in order for each to say "we" intend to go, each by then has to intend to go, each has to know that the other intends to go, and whatever subplans exist must mesh reasonably well.[57]

Bratman further points out that people can jointly intend without sharing a common purpose for their intent. Let us say that Mario and Adela participated equally in planning their trip to Virginia, and are in complete agreement about where they will go. However, Mario's excitement about the trip comes from his love of the mountains, and Adela's comes from her love of the wonderful small town with its antique stores. According to Bratman, these differences do not interfere with our saying that they jointly intend to take a vacation in Virginia, as long as the details of the trip mesh well enough.[58] My intuitions accord with his.

Now let's return to the first Mario and Adela, with Adela planning the trip and Mario tagging along. What would happen if they lost the directions to the inn *en route*, and could not remember the name of the small town? Perhaps while one of them was looking at the piece of paper, it blew out the car window. They stop at a gas station and Adela asks the attendant whether he knows of a small town within a certain distance that is known for having a number of interesting antique stores. The attendant knows of the town and directs the couple there, and they find the inn.

The Rossis' inquiry is motivated by the history of the planning process. The sheet of paper that blew out the window said nothing of antique stores. It had a set of driving directions, and the address and phone number of the inn. Significantly, Mario had no complaint that the question that Adela asked was about *her* planning history. There would be no point in getting upset about that because Mario *had* no planning history. It would do no good to ask about going to the mountains, or other such vague statements. If Mario and Adela want to carry out their joint intent, the missing details will have to come from looking at the intentions of whoever was involved in developing those details. That's how the details got there in the first place.

To summarize, our conversations about the Rossis and the proposed sculpture in the park illustrate the following about the way we conceptualize:

1. Words like "neighborhood," which encompass a group of people in particular circumstances, can be used to refer to the people as a group.

CHRISTOPHER KUTZ, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE, 91 (2000); J. David Velleman, *How to Share an Intention*, 58 PHIL. & PHENOMENOLOGICAL RES. 29, 29–39 (1997).

56. *See* Hilary Putnam, *The Meaning of "Meaning"*, *in* 7 MINNESOTA STUDIES IN THE PHILOSOPHY OF SCIENCE: LANGUAGE, MIND, AND KNOWLEDGE 131, 139 (Keith Gunderson ed., 1975).

57. BRATMAN, *supra* note 55, at 121.

58. Bratman makes this point by discussing plans to paint a house. *Id.* at 120–21.

2. We attribute such human states as emotions, intentions and beliefs to the group as an entity.[59]

3. Our attributions hold even if we don't know exactly who the members of the group are.

4. Our attributions hold even if we don't have formal procedures in mind for determining their accuracy. What seems most important is that the members of the group would accept the attribution, whether their acceptance results from statements of the group's leaders, from views expressed by a majority of the members, or from other criteria.

5. For a group to intend something jointly, it need not agree on all the details in advance, and may even delegate the details to a subgroup or to an outsider.

6. A group can jointly intend without all its members sharing the same reasons for their intent.

The linguist Ray Jackendoff points out that we treat events, actual things, abstractions, mental states, and just about anything else we can think about as entities in our speech.[60] Below are some examples:

Did you see that? I hope *it* doesn't happen again.

I'll go to the party. *It's* an obligation, but I'll go.

The presumption of innocence is deeply embedded in our system. *It* is a symbol of freedom from governmental oppression.

Each sentence contains the word *it.* In the first, it represents an event (noticed, but unspoken), in the second, a predicate (going to the party), and in the third, an abstract concept (the presumption of innocence). In none does it refer to a simple object, like a book, although we use *it* to refer to a book as well. By treating all of these different kinds of concepts the same linguistically, we are able to use the same limited set of linguistic tools to talk about all of them. We can ask questions:

When did *it* (that is, the presumption of innocence) take root?

We can quantify:

How many times have you seen *it* happen that way?

We can embed observations in descriptions of our state of mind:

I thought I heard Bill say that *it's* an obligation.

In fact, when we speak about events and abstractions, we can perform all of the

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59. This phenomenon may be part of the larger phenomenon of personification which researchers have documented, largely in the context of showing the power of metaphor in reasoning, including legal reasoning. For an interesting discussion of how corporations are viewed as individuals and workers as violent groups in labor disputes, see GARY MINDA, BOYCOTT IN AMERICA: HOW IMAGINATION AND IDEOLOGY SHAPE THE LEGAL MIND *passim.* (1999). Minda, in turn, relies heavily on the work of George Lakoff and Steven Winter. *See* GEORGE LAKOFF, WOMEN, FIRE AND DANGEROUS THINGS (1987); STEVEN L. WINTER, A CLEARING IN THE FOREST: LAW, LIFE, AND MIND (2001). For a discussion of how our propensity to personify can be used to explain a diverse range of human behavior, including the propensity to accept religious explanation of natural phenomena, see generally STEWART ELLIOTT GUTHRIE, FACES IN THE CLOUDS: A NEW THEORY OF RELIGION (1993).

60. RAY JACKENDOFF, FOUNDATIONS OF LANGUAGE: BRAIN, MEANING, GRAMMAR, EVOLUTION 315–24 (2002).

linguistic operations available to us when we are speaking about objects.

Thus, there is a great deal to be gained, as a matter of linguistic flexibility, by treating groups as entities. Let us look a little more closely at the circumstances in which we are likely to treat a group of individuals as a single entity and attribute to that entity the ability to engage in ordinary human psychological processes.

B. HOW A GROUP OF PEOPLE BECOMES A SINGLE PERSON

Not every collection of people is seen as a group with a single mind and a unified set of beliefs. If you see a bunch of people standing together at a bus stop you are not likely to think they hold a collective belief about anything of importance. Even if they share beliefs, such as displeasure at the sorry state of the public transportation system, they do so as individuals with experiences and values in common, not as members of a coherent group. In contrast, we perceive Mario and Adela as a unit by virtue of their being married and by virtue of commitments they have made with respect to what counts as their collective intent. We understand the neighborhood as a group because of physical proximity, a common interest, and a tacit understanding about whose statements represent the views of the neighborhood. And the legislature is a group by virtue of a host of legal and social institutions, voting practices, and understandings about how its members' purpose is represented during the legislative process.

During the past decade, a number of psychologists, expanding on earlier research, have been investigating when we are most likely to regard a group of individuals as an entity, and what it is we attribute to that entity. Some fifty years ago, the psychologist Donald Campbell, in an important article, referred to the properties of a group that make it more likely to be conceptualized as an individual unit; such groups exhibit, as he calls it, "group entitativity."[61] Their properties include similarity, proximity, formation of a symmetrical pattern, and "common fate."[62] Recently, Robert Abelson and his colleagues mercifully shortened the term to "entitivity,"[63] which is what it is now called in the psychological literature.[64] The authors summarize the implications of entitivity:

> The greater the exposure to these factors, the higher the perceived entitivity. It will seem like a kind of person, in the sense that it will have the same sorts of features that a person has: a unitary identity and personality, and in the real world, a web of past, present, and future relationships with other groups. It

61. Donald T. Campbell, *Common Fate, Similarity, and Other Indices of the Status of Aggregates as Social Entities*, 3 BEHAVIORAL SCIENCE 14, 17 (1958).

62. *Id.* at 17–18.

63. Robert P. Abelson et al., *Perceptions of the Collective Other*, 2 PERSONALITY & SOC. PSYCHOL. REV. 243, 246 n.2 (1998).

64. *See, e.g.*, Welbourne, *supra* note 11.

> will have a set of goals and characteristic behaviors in the service of those goals.[65]

We tend to assume unity in the personalities of people.[66] We size up the people we know in terms of a small number of core characteristics and interpret what they say and do in a way that is consistent with how we characterize them to ourselves.[67] We expect consistency in people, and attempt to resolve apparent inconsistencies by looking at some external circumstance that led an individual to act other than as expected.[68] Studies show that the more entitivity a group has, the more people expect it to act in a consistent manner.[69] In other words, groups that are perceived as coherent are seen to behave more like individuals.[70] Interestingly, one of the most important factors that contributes to these judgments about consistent behavior is whether the group is perceived as being "highly organized with a specific purpose or intention that drives [its] behaviors."[71]

For our purposes, the most important characteristic of individuals that we can attribute to groups is the property of acting intentionally, as if the group were a person with thoughts and goals of its own. Psychologists have just begun to study how this happens. O'Laughlin and Malle observe that "people view each other as agents capable of intentional action, and intentionality is in turn conceptualized by reference to the agent's beliefs, desires, and intentions."[72] Given this, there are two ways of explaining a person's behavior. One is simply to attribute an intention to the person. If someone storms out of a meeting in a fit of anger, we are likely to say that he became angry at what someone said and left. But sometimes we look not at the person's own beliefs and intentions, but rather at what O'Laughlin and Malle refer to as the "causal history of reason."[73] We also may say, "He often behaves this way when there's too much pressure on him at his firm. If he loses this case, the company will fire him." One explanation attributes an intentional state of mind to the actor, the other a set of circumstances in which it may be reasonable for a person to act the way he or she did.[74]

O'Laughlin and Malle found that when given a choice of explanations,

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65. Abelson et al., *supra* note 63, at 246.

66. David L. Hamilton & Steven J. Sherman, *Perceiving Persons and Groups*, 103 PSYCHOL. REV. 336, 337 (1996).

67. *Id.*

68. *Id.* at 338–39.

69. *Id.* at 345.

70. *Id.*

71. Welbourne, *supra* note 11, at 499.

72. Matthew J. O'Laughlin & Bertram F. Malle, *How People Explain Actions Performed by Groups and Individuals*, 82 J. PERSONALITY & SOC. PSYCHOL. 33, 34 (2002).

73. *Id.*

74. This is not the only way that psychologists look at facts like these. *See, e.g.*, Michael W. Morris et al., *Causal Attribution Across Domains and Cultures*, *in* CAUSAL COGNITION: A MULTIDISCIPLINARY DEBATE 577, 587–90 (Dan Sperber et al. eds., 1995) (contrasting highly individualist cultures (particu-

people more often choose the one that attributes a reason to the person.[75] That is, we explain the behavior of other people in terms of their intent. Causal history acts as a backup when we don't know about a person's motives, or when a person appears to have acted peculiarly. Thus, when subjects were presented with a fictitious conversation about a young woman named Nina in which it came out that Nina had been using drugs, the subjects were more likely to explain the drug use by attributing reasons to Nina's intent than by describing historical circumstances.[76]

As for what causes a group to act as an entity, the more we perceive a group as deliberating and acting jointly, the more likely we are to attribute the actions of a group to the joint intent that we have attributed to the group as a unified agent. When O'Laughlin and Malle substituted, for example, "high school seniors" for "Nina," the number of explanations using causal history instead of intent increased to about half.[77] On the other hand, when a group appears to deliberate and act as a unit, people prefer intent-based reasons over historical background—as they do with individuals. Thus, "the department faculty" is more likely to produce explanations of intent than is "department chairpersons in the United States," although both are groups. The authors explain:

> The perception of jointly acting groups as unified agents, and the explanation of their actions with a preponderance of reasons, may derive from the nature of coordination in group activity. When acting together, such groups must make their intentions and reasons explicit in order to ensure participation and coordinated action by group members. When explaining such coordinated action, social perceivers will then use reason explanations to capture the deliberate and reasoned nature of the group action.[78]

Legislatures would seem to be a prototypical example of this kind of group. That explains why speaking of legislative intent comes so easily.

C. THE LEGISLATURE AS AN ENTITY WITH INTENT

At this point, we can easily enough transpose our stories about groups from examples about small talk to a discussion about the enactment and subsequent interpretation of a law. Assume that a small group of legislators who are members of the party in power believe that it would be a good idea to pass a law increasing (or decreasing) the amount of certain chemicals that can be poured down the drain without having to use expensive procedures for disposing of

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larly America) in which personal dispositions are seen as causes of behavior, and highly collectivist cultures (particularly China) in which social situations are seen as causes of behavior).

75. O'Laughlin & Malle, *supra* note 72, at 37. This preference may be culture dependent. *See* Michael W. Morris & Kaiping Peng, *Culture and Cause: American and Chinese Attributions for Social and Physical Events*, 67 J. PERSONALITY AND SOC. PSYCHOL. 949 (1994).

76. O'Laughlin & Malle, *supra* note 72, at 37.

77. *Id.* at 37–38.

78. *Id.* at 40–41.

hazardous waste. Most members of the party are sympathetic with the idea, but only those working on the project really understand the details. The language of the bill is worked out in the relevant committees. Compromises are reached with moderates from the opposing party, but in the end the bill passes along party lines.[79] It is a complicated, technical law. The committee reports explain some of the fine points, but most of the law is opaque to the legislators who vote either for or against the bill, largely based on instructions from their party's leadership.[80]

Some time after the law is enacted, a dispute arises as to whether it should be applied to the activity of a particular company. The language of the statute does not answer the question adequately. A lawsuit is brought (perhaps a prosecution for failure to comply with the law), and it is left to a court to determine whether or not the law was violated. The judge reads the committee report and concludes that the law's sponsors did not intend for it to apply to situations such as the one now in litigation. In her opinion, the judge writes: "The committee report suggests that the legislature did not intend the statute to reach the situation that is the subject matter of this case."[81]

From what we have seen thus far, the judge's remark is both natural and coherent, even though almost no one in the legislature had any intent at all with respect to this issue—just about every legislator either voted for the bill without understanding it, or voted against the bill. Just as I could say that the Rossis had planned to go to Virginia, and you could say that the neighborhood opposed the sculpture, the judge could say that the legislature did not intend the law to apply in this sort of situation, and that the legislature would accept the notion that its intent is reflected in the intent of those who most had a stake in framing and negotiating the final terms of the law. Thus, it really does seem to be the case that we glean legislative intent from both the words of a statute and the circumstances surrounding its enactment.

One need not rely on hypothetical situations to find this kind of argumentation. In *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*,[82] Justice Stevens, in his concurring opinion, made the following remarks in support of reliance on legislative history as evidence of the intent of Congress:

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79. For an extremely interesting discussion of this dynamic, see Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417 (2003).

80. More complex statutes typically have a more complicated history. Yet the general outline—a small number of people heavily involved in the details—is necessarily true for almost all statutes, given the enormous demands on members' time. For a legislative history relevant to my hypothetical story, see Arnold W. Reitze, *The Legislative History of U.S. Air Pollution Control*, 36 HOUS. L. REV. 679, 715–25 (1999).

81. It is not difficult to find almost exactly those words in judicial opinions. *See, e.g.*, Jones v. United States, 527 U.S. 373, 419 (1999) (Ginsburg, J., dissenting) ("The House Report suggests that Congress understood and approved that construction.").

82. 516 U.S. 264 (1996).

> Legislators, like other busy people, often depend on the judgment of trusted colleagues when discharging their official responsibilities. If a statute . . . has bipartisan support and has been carefully considered by committees familiar with the subject matter, Representatives and Senators may appropriately rely on the views of the committee members in casting their votes. In such circumstances, since most Members are content to endorse the views of the responsible committees, the intent of those involved in the drafting process is properly regarded as the intent of the entire Congress.[83]

Professor Tiefer calls this justification for reference to legislative intent as the "busy Congress" model, and cites numerous cases in which the court employs it, largely in opinions written by Justices Stevens and Breyer.[84]

Moreover, unlike the Rossis' reliance on Adela to work out the details of their vacations, or the neighborhood's informal social hierarchy, the legislature's reliance on committees to work out the details of legislation is a formal part of the process and always has been.[85] Article I, Section 5 of the Constitution states, "Each House may determine the Rules of its Proceedings."[86] Throughout this country's history, Professor Roberts points out, both houses of Congress have operated through committees formed pursuant to this power:

> One of the first bills passed by the Congress, H.R. 15 (introduced on July 22, 1789), required a conference committee to iron out differences between the House and Senate versions. Published committee reports, which often included explanation and background discussion on reported bills, made their appearance very early. To be sure, the role of early committees was limited as compared to modern practice, as was the legislative business of the House itself. But by 1810, the House had ten standing committees, each covering a distinct policy area, as well as other select committees. Written committee reports performing much the same function as they do today were quite common from the beginning. The Senate's history is similar, though it has always relied less on the committee system in processing and drafting the final form of legislation.[87]

Thus, not only does the legislature form its plans through the work of a small number of its members, but it is structured to do things just that way.

This should not be much of a surprise. It is difficult to see how a large body with such a broad mandate could function without a committee system. Even a much smaller departmental or law school faculty at a university cannot function

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83. *Id.* at 276-77 (Stevens, J., concurring).

84. *See* Tiefer, *supra* note 10, at 209, 252-53. Among the cases Tiefer cites are *United States v. Romani*, 523 U.S. 517, 533–34 (1996) (Stevens, J., using legislative history) and *Lewis v. United States*, 523 U.S. 155, 170 (1998) (Breyer, J., using legislative history).

85. *See* John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 CASE W. RES. L. REV. 489, 543–46 (2001).

86. U.S. CONST. art. I, § 5, cl. 2.

87. Roberts, *supra* note 85, at 545 (citations omitted).

without committees. Given that the government conducts its legislative business in this manner, and does so openly, it serves no democratic function to require the courts to pretend otherwise by ignoring this aspect of the legislative process.

Despite the primacy of the committees, however, attribution of intent is not logically bound to any particular set of events within the legislative process. What matters, as Professor Gilbert suggests, is that a particular statement be adopted by the group as representing its intent.[88] While committees will often be at the center of this inquiry, this will not always be the case. Sometimes, for example, the administration may propose legislation through members of Congress. When that happens, the relevant committees may adopt statements from the executive branch as reflecting the bill's purpose.[89] In other instances, the bill's journey through committees, floor debate and conference is complicated, with particular moments in the process being crucial to passage of the bill.[90]

Furthermore, it is not necessary that all members of the legislature have the same reasons for supporting a bill, as long as there is general recognition that those who ushered the bill through the process did so with particular subplans that deserve to be honored. Just as Adela's planning is most useful when the couple loses the directions to the inn, the historical record of a committee or agency that developed the details of a statute is typically useful evidence of that subgroup's, and thus the entire group's, intent. If a bill was introduced to increase the amount of pollutants that can be disposed of without a permit, the legislator who votes for it solely because there is a chemical plant in her district will typically recognize that implementation of the law's details will and should make reference to the work of the bill's planners. Empirical research supports this perspective. A study by Professor Eskridge shows that Congress is far more likely to enact legislation overriding a court decision based on a statute's plain language than it is to enact legislation overriding a court decision based on a statute's legislative history or its purpose and policy.[91]

But stray remarks from individual legislators most likely do not reflect even

88. GILBERT, *supra* note 52, at 25–26.

89. For discussion of one such example, see Michelle S. Marks, *The Legislative History of the "Equitable Remuneration" Provision Granted in the New Patent Term of 35 U.S.C. § 154(c)*, 4 U. BALT. INTELL. PROP. L.J. 33, 52 (1995) (describing statements made by the administration in context of the treaty negotiations that set the policy underlying the statute). In jurisdictions with parliamentary systems of government, where government ministries frequently propose legislation, judicial reference to the executive branch is commonplace. For a discussion of statutory interpretation in Canada, see Ruth Sullivan, *The Challenges of Interpreting Multilingual, Multijural Legislation*, 29 BROOK. J. INT'L L. 985 (2004).

90. *See, e.g.*, George A. Costello, *Average Voting Members and Other "Benign Fictions": The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History*, 1990 DUKE L.J. 39, 43–60; David Nimmer, *Appreciating Legislative History: The Sweet and Sour Spots of the DMCA's Commentary*, 23 CARDOZO L. REV. 909, 921–27 (2002); Rodriguez & Weingast, *supra* note 81, at 1464–73. These complicated moments that threaten the passage of the bill are frequently referred to as "veto gates" in the literature. *See* McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 11 (1994).

91. *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 350 tbl.8 (1991).

the intent of the subgroup, and are most often not probative of much of anything, as critics of using legislative history in statutory interpretation point out. For example, Reed Dickerson writes:

> Among the least reliable kinds of legislative history are floor debates. Not only are they laden with sales talk, but their frequent reference to what a provision means is an unconscious effort to finesse the courts in performing their constitutional function of having the last word on what the statute means. Besides, it would be rare for the authors of a statute to take such references into account.[92]

Although I have argued that legislative intent properly plays a role in statutory interpretation, the arguments I have made require that the evidence of intent be tied to what members of the legislature would legitimately regard as constituting the formation of the statute's details. Thus, except in unusual circumstances, I agree with the limitations that Dickerson and others have imposed on discussion of legislative intent.

Metaphors that legal theorists have used in describing how courts engage in statutory interpretation fit this story well. Posner writes of the field general whose communication with headquarters is interrupted before an important strategic decision must be made.[93] Aleinikoff employs a nautical metaphor:

> Congress builds a ship and charts its initial course, but the ship's ports-of-call, safe harbors and ultimate destination may be a product of the ship's captain, the weather, and other factors not identified at the time the ship sets sail. This model understands a statute as an on-going process (a voyage) in which both the shipbuilder and subsequent navigators play a role. The dimensions and structure of the craft determine where it is capable of going, but the current course is set primarily by the crew on board.[94]

Dworkin writes about creating the next chapter in a chain novel, based on everything that happened earlier, but with the goal of advancing the story.[95] All of these theorists support using historical context to make the next decision. When crucial information is missing from the statute itself, context becomes a valued source for drawing inferences about the legislature's intentions, which each theorist, despite otherwise divergent perspectives, regards as central to statutory interpretation.

That context includes the stated intentions of the subplanners, be they the members of a congressional committee or an administrative agency or some

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92. Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1131 (1983) (citations omitted).

93. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 269 (1990).

94. T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21 (1988) (discussing "nautical approach" to statutory interpretation).

95. RONALD DWORKIN, LAW'S EMPIRE 228–29 (1986).

other person or subgroup. It may be true that many who voted for a bill did so because the party leadership told them to, or because the bill contained some benefit for people in their district, or for some other reason having nothing to do with what the bill's authors and planners had in mind. Nonetheless, the bill's planners gave it content. When disputes arise, it would be odd for a member who voted for the bill without knowing what was in it to complain that the court was looking at the details of the planning process, just as it would be odd for Mario to complain that Adela considered her own planning when she asked for directions. Indeed, there is no such general outcry by legislators about the courts' regular reference to the intent of the legislature.[96]

In addition, just as experimental subjects rely upon both intentional and historical circumstantial explanations to account for group action, so do judges. While judges often speak of the intent of the legislature and attribute specific reasons to the legislature's actions, sometimes they rely on the history behind the legislature's decisionmaking process. For example, in *Smith v. United States*,[97] a majority of six justices held that the defendant's attempt to trade a machine gun for some illegal drugs should be considered "[using] a firearm during and in relation to a drug trafficking crime."[98] In perfect textualist fashion, the Court nowhere relied on committee reports or other legislative history to support its decision. But it did rely upon a report of the American Enterprise Institute, a conservative think tank, to describe the context in which Congress made the decision to enact the statute.[99]

Therefore, when judges speak of legislative intent and attribute reasons to the legislature as though it were a single individual with a mind of its own, they are simply doing what we all do when we talk about deliberative groups. Part V returns to the current debate concerning the use of legislative history in statutory interpretation. We turn now to one more body of psychological literature that investigates why we speak of intent so naturally.

III. LOOKING INTO THE MINDS OF OTHERS

A. HOW WE USE THEORIES OF MIND

For many years, developmental psychologists have been studying how children acquire words at such an incredible rate and seemingly with so little effort.[100] It seems that children build theories of words from a combination of their experience and the way their minds organize the information gleaned from

96. *See infra* Part III.B for discussion of the enormous frequency with which courts use such expressions.

97. 508 U.S. 223 (1993).

98. *Id.* at 225 (quoting 18 U.S.C. § 924(c)(1)) (quotation marks and ellipsis omitted).

99. *Id.* at 240.

100. *See* GEORGE A. MILLER, THE SCIENCE OF WORDS 237–39 (1991); Susan Carey, *The Child as Word Learner*, *in* LINGUISTIC THEORY AND PSYCHOLOGICAL REALITY 264 (Morris Halle et al. eds., 1978).

that experience. Adults do the same thing.[101]

Briefly, our theories of words consist of definitional features, salient features, background information, and sometimes even recognition that we have gaps in our knowledge. As for definitional features, to know a word is, at least in part, to know the conditions under which it is appropriate to use it, whether or not one can consciously express what those conditions are. Those who focus on the "plain meaning" of statutory terms generally focus on this aspect of word meaning. But our understanding of words also usually includes salient features, or even actual examples. I am likely to think of a crime, for example, in terms of my own knowledge of it, perhaps based on what I have read or seen on television or in film. This approach to word meaning is more consistent with the "ordinary meaning" approach to statutes that courts frequently employ.[102] When a word can refer to a broad range of events or things, we most often assume that it is being used in a typical fashion, even though we know that the word carries additional possible meanings. Psychologists now believe that our theories of words include both types of information, allowing us to look at legally relevant concepts both ways.[103]

Our theories may also include the recognition that part of the meaning of a word is beyond our grasp. I know that table salt is sodium chloride. I know that the chemical symbol for this molecule is NaCl. But that's about all I know about the chemistry of table salt. Yet I believe that there is much more to the concept of table salt and that there are people who know about such things.[104] Just as courts make reference to plain and ordinary meaning, they sometimes make reference to the expertise of others in construing technical terms of which the judges themselves may have incomplete knowledge.[105]

And our understanding of words is replete with background information that reduces the cost of learning new concepts. To say that burglary is a crime makes sense only if we already have a theory of social organization into which such a statement fits.[106]

How do we develop these theories of meaning in our minds? During the past decade, it has become clear that an important part of what makes it so easy to acquire new words and concepts is our innate ability to draw conclusions *about*

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101. *See, e.g.*, GREGORY L. MURPHY, THE BIG BOOK OF CONCEPTS 240-41 (2002); Gregory L. Murphy & Douglas L. Medin, *The Role of Theories in Conceptual Coherence*, *in* CONCEPTS: CORE READINGS 425 (Eric Margolis & Stephen Laurence eds., 1999).

102. It is typical for courts to say, "When terms used in a statute are undefined, we give them their ordinary meaning." *E.g.*, Jones v. United States, 529 U.S. 848, 855 (2000) (quoting Asgrow Seed Co. v. Winterboer, 513 U.S. 179, 187 (1995)). *See infra* note 135 for discussion.

103. I discuss the dual nature of conceptualization and its relevance for statutory interpretation in Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57 (1998).

104. Hilary Putnam uses this observation in his approach to meaning. *See* Putnam, *supra* note 56, at 144-45. Putnam uses "gold" to illustrate this point. *Id.*

105. *See, e.g.*, Utah v. Evans, 536 U.S. 452, 467 (2002) (examining "technical literature" to come to grips with the meaning of "sampling" in conducting census).

106. See Murphy & Medin, *supra* note 101, at 437–38.

what is in the minds of others. Psychologists call this the "theory of mind" approach to the acquisition of words.[107]

The claim that children come to understand the world through the minds of others may at first seem radical, but it really does accord with our experiences with young children. Consider this summary by Gopnik, Meltzoff, and Kuhl, who have written an accessible book that discusses this issue:

> When babies are around a year old, then, they seem to discover that their initial emotional rapport with other people extends to a set of joint attitudes toward the world. We see the same objects, do the same things with those objects, even feel the same way about those objects. This insight adds a whole new dimension to the babies' understanding of other minds. But it also adds a whole new dimension to babies' understanding of the world. One-year-old babies know that they will see something by looking where other people point; they know what they should do to something by watching what other people do; they know how they should feel about something by seeing how other people feel.[108]

To illustrate, in one experiment, an adult looked into one box with a happy expression and into another with an expression of disgust. She then pushed the boxes to the baby participating in the study. The infants were more likely to open the box that made the adult happy over the other one.[109] Since the child did not know in advance what was in the boxes, she could only have based her decision on an assessment of the experimenter's reaction. That is, she had to form a theory of what the experimenter was thinking in order to decide what to do.

Developmental psychologist Paul Bloom takes a similar position: "[C]hildren use their *naive psychology* or *theory of mind* to figure out what people are referring to when they use words. Word learning is a species of intentional inference or, as Simon Baron-Cohen has put it, mind reading."[110] Of course, as Bloom concedes, we don't *only* concern ourselves with the minds of others when we learn new words and concepts. It would be pointless to say that when a mother points to a caterpillar and says, "That's a caterpillar," that the caterpillar itself plays no role in the acquisition of the concept. Nonetheless, inferring what others have in mind plays an essential role in how we learn the meanings of words.

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107. *See, e.g.*, PAUL BLOOM, HOW CHILDREN LEARN THE MEANINGS OF WORDS 60–87 (2000).

108. ALISON GOPNIK ET AL., THE SCIENTIST IN THE CRIB: MINDS, BRAINS, AND HOW CHILDREN LEARN 34 (1999).

109. Betty M. Repacholi, *Infants' Use of Attentional Cues To Identify the Referent of Another Person's Emotional Expression*, 34 DEV. PSYCHIATRY 1017, 1019–24 (1998), *discussed in* GOPNIK ET AL., *supra* note 110, at 33.

110. BLOOM, *supra* note 107, at 61 (2000) (referring to SIMON BARON-COHEN, MINDBLINDNESS: AN ESSAY ON AUTISM AND THEORY OF MIND (1995)) (citation omitted); *see also* PAUL BLOOM, DESCARTES' BABY: HOW THE SCIENCE OF CHILD DEVELOPMENT EXPLAINS WHAT MAKES US HUMAN (2004).

Some very interesting work by Dare Baldwin illustrates how we use both worldly knowledge and our theories of the minds of others to understand words. In one experiment, Baldwin gave babies an object to play with. Another object was in a bucket. The experimenter looked at the bucket and said, "It's a modi" (or some other nonsense word). Children looked at the experimenter and redirected their attention to the bucket. Later, when shown the two objects together, they identified the modi as the object that had been in the bucket, even though they had not seen it when it was named.[111]

In an even more dramatic study, Baldwin had hidden two objects in separate containers. The experimenter looked in one container, said "It's a modi," and then gave the child the object that was in the other container. After a pause, the experimenter removed the object that was in the first container. When asked to identify the modi, babies were more likely to choose the one that the experimenter had identified as such, even though they had seen only the other object, and even though they didn't know what the modi object was when the experimenter named it.[112] Both of these experiments require children to draw conclusions from what the experimenter must have been thinking when she named the object.

Assessing the minds of others is not limited to children. It is how we interact in social contexts generally. As Steven Pinker puts it:

> A mind unequipped to discern other people's beliefs and intentions, even if it can learn in other ways, is incapable of the kind of learning that perpetuates culture. People with autism suffer from an impairment of this kind. They can grasp physical representations like maps and diagrams but cannot grasp *mental* representations—that is, they cannot read other people's minds.[113]

In fact, recent work has begun to trace the progression from young child to adult in the ability to derive conclusions about people's states of mind from their actions.[114]

To summarize what the philosophical and psychological literatures have shown so far:

1. We are used to understanding new concepts by reference to the intent of the person who introduced the concept to us. We form a theory of the person's mind.

2. We routinely treat entities as individuals, especially entities that make

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111. *See* Dare A. Baldwin, *Infants' Ability To Consult the Speaker for Clues to Word Reference*, 20 J. CHILD LANG. 395 (1993).

112. *See* Dare A. Baldwin, *Early Referential Understanding: Infants' Ability To Recognize Referential Acts for What They Are*, 29 DEV. PSYCHIATRY 832 (1993).

113. STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE 62 (2002).

114. For a summary of some of this work, see Andrea D. Rosati et al., *The Rocky Road from Acts to Dispositions: Insights for Attribution Theory from Developmental Research on Theories of Mind*, *in* INTENTIONS AND INTENTIONALITY: FOUNDATIONS OF SOCIAL COGNITION 287 (Bertram F. Malle et al. eds., 2001).

decisions deliberatively.

3. Once we do so, the human trait that we attribute to entities is the trait of acting with volition; in other words, we understand entities as having intent.

4. It is common and coherent to understand plural subjects as having beliefs, intentions, and other states of mind.

B. CAN TEXTUALISTS AVOID THINKING ABOUT THE MINDS OF OTHERS?

It is very hard to stop thinking in terms of the minds of others. We start doing it as babies, and we still do it every day to understand our world. Judges are no different in this respect. Regardless of the academic controversy, judges, including Supreme Court Justices, often talk of the "intent of the legislature" or what the legislature "meant." Consider the 2003 Supreme Court case *Roell v. Winthrow*.[115] The case involved a dispute between a group of prisoners and the medical staff at the prison. The prisoners challenged an unfavorable ruling by a magistrate judge on the grounds that the magistrate judge did not have jurisdiction because not all medical staff defendants had formally waived their right to have the case tried before a district court judge.[116] After looking at the language of the relevant statute, Justice Souter, writing for a majority of five, stated:

> These textual clues are complemented by a good pragmatic reason to think that Congress **intended** to permit implied consent. In giving magistrate judges case-dispositive civil authority, Congress **hoped** to relieve the district courts' "mounting queue of civil cases" and thereby "improve access to the courts for all groups." S.Rep. No. 96-74, p. 4 (1979); see H.R.Rep. No. 96-287, p. 2 (1979) (The Act's main **object** was to create "a supplementary judicial power designed to meet the ebb and flow of the demands made on the Federal judiciary"). At the same time, though, Congress **meant** to preserve a litigant's right to insist on trial before an Article III district judge insulated from interference with his obligation to ignore everything but the merits of a case.[117]

The highlighted words are all examples of intentional analysis.

Cases like this one are standard fare, although it would be difficult to quantify how frequently courts discuss the legislature's state of mind because there are so many ways to do so. Nonetheless, just to illustrate how prevalent this kind of thinking is among judges, during the 1990s state and federal courts combined used the language "legislature mean[s,t]" or "Congress mean[s,t]" about 4,000 times.[118] The words "legislature" or "Congress" were used by federal courts

115. 538 U.S. 580 (2003).

116. *Id.* at 583.

117. *Id.* at 588 (emphasis added) (citation omitted).

118. A Lexis search, conducted in the state and federal court databases on August 9, 2003, yielded 3,957 hits. The search terms used were (legislature mean! or Congress mean!). The date range searched was 1990-1999.

within six words of "intend" words (intend, intent, intention, and so forth) more than 3,000 times per year, or at least 30,000 times for the decade.[119] State courts used this combination just as frequently, for a total of at least 60,000 for the decade.[120] That is how judges think and how they express their thoughts.

One way of investigating the extent to which intent is embedded in our thinking is to see whether people who have rejected legislative intent as relevant to legal analysis continue to make reference to it anyway. Consider again the famous statement by Oliver Wendell Holmes: "We do not inquire what the legislature meant; we ask only what the statute means."[121] Maybe so. But below are a few quotes from Holmes's opinions, with intentional language bolded:[122]

> When it is considered that at the time the Act allowing the drawback was passed the tax was collected wholly by stamps, it seems evident that **Congress meant** to carry the policy of the Constitution against taxing exports beyond its strict requirement and to let the event decide about the tax.[123]

> Considering that only the principal of mortgages was taxed when the law was passed and that in those days no one thought of an income tax; that any contract of exemption must be shown to have been indisputably **within the intention of the Legislature**; that it is difficult to believe that the Legislature **meant to barter** away all its powers to meet future exigencies for the mere payment of a mortgage recording tax . . . .[124]

> We see no sufficient ground for supposing that **Congress meant** to open the questions that the other construction would raise.[125]

> Only words from which there is no escape could warrant the conclusion that **Congress meant** to strain its powers almost if not quite to the breaking point in order to make the probably very large proportion of citizens who have some preparation of opium in their possession criminal or at least *prima facie* criminal and subject to the serious punishment made possible by [the statute].[126]

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119. A Lexis search, conducted in the federal court database on September 18, 2004, yielded more than 3,000 hits for each year of the 1990s for the search terms ((legislature or Congress) w/6 inten!) (the words "intense" and "intensive" account for a minuscule portion of those hits). Lexis stops counting at 3,000.

120. The same process as above was repeated in the state court database.

121. Holmes, *supra* note 5, at 419.

122. Throughout this section I use bold face for words of intentionality without making mention of this alteration from the original text in each instance.

123. United States v. P. Lorillard Co., 267 U.S. 471, 473 (1925).

124. New York *ex rel.* Clyde v. Gilchrist, 262 U.S. 94, 98 (1923).

125. Am. Bank & Trust Co. v. Fed. Reserve Bank, 256 U.S. 350, 357 (1921).

126. United States v. Jin Fuey Moy, 241 U.S. 394, 402 (1916).

> We cannot suppose that the **Legislature meant** either to practice a cunning deception or to make a futile grant.[127]

There are many more like these.

I am not calling Holmes a hypocrite. In fact, Holmes's approach to statutory interpretation is more complex than simple reliance on an acontextual reading of the statutory text.[128] Yet his frequent mention of legislative intent in his opinions does seem inconsistent with his famous pronouncement about statutory interpretation. The best explanation for this, I believe, is that he wrote about intent because we think in terms of intent when language leaves us unsure. Because Holmes was not committed to textualist methodology, he did not make a post hoc effort to censor his remarks.

What about the argumentation of Justice Scalia, who *is* a committed textualist? He doesn't slip up often, but it happens to him as well, especially in his dissenting opinions. Here are a few examples, with the intentional language again bolded:

> When, *Chevron* said, Congress leaves an ambiguity in a statute that is to be administered by an executive agency, it is presumed that **Congress meant to give the agency discretion**, within the limits of reasonable interpretation, as to how the ambiguity is to be resolved.[129]

> Such a system of justice seems to me so arbitrary that **it is difficult to believe Congress intended it. Had Congress meant** to cast its carjacking net so broadly, it could have achieved that result—and eliminated the arbitrariness—by defining the crime as "carjacking under threat of death or serious bodily injury." Given the language here, I find it much more plausible that Congress **meant to reach**—as it said—the carjacker who intended to kill.[130]

> **It seems to me likely that Congress had a presumption** of offense-specific knowledge of illegality **in mind** when it enacted the provision here at issue.[131]

> By giving literally unprecedented meaning to the words in two relevant statutes, and overruling the premise of Congress's enactment, the Court adds new, Byzantine detail to a habeas corpus scheme **Congress meant** to streamline and simplify. I respectfully dissent.[132]

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127. Wright v. Cent. of Ga. Ry. Co., 236 U.S. 674, 679 (1915).

128. *See* Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1374 (1990) (showing that Holmes, despite his famous quote, was not devoted to textualism when it appeared that reliance on the plain language of a statute would lead to results inconsistent with broader principles of justice).

129. United States v. Mead Corp., 533 U.S. 218, 241 (2001) (Scalia, J., dissenting).

130. Holloway v. United States, 526 U.S. 1, 20 (1999) (Scalia, J. dissenting).

131. Bryan v. United States, 524 U.S. 184, 204 (1988) (Scalia, J., dissenting).

132. Hohn v. United States, 524 U.S. 236, 265 (1998) (Scalia, J., dissenting).

> The suggestion is halfhearted because that reading obviously contradicts the **statutory intent.**[133]

In fairness, Justice Scalia may have been responding to the intentionalist arguments of others in some of these examples, and therefore structured his arguments accordingly. Still, intentionality has even made its way into statutory analysis that appears prototypically textual. Consider this seemingly standard analysis by Scalia in a case involving the obligations of individuals who received more Supplemental Social Security benefits than they were entitled to receive:

> If Congress **had in mind** only shortfalls or excesses in individual monthly payments, rather than in the overall payment balance, it would have been more natural to refer to "the correct amount of *any payment*," and to require adjustment "with respect to *any payment* . . . of less [or more] than the correct amount." This terminology is used elsewhere in [the statute], whenever individual monthly payments are at issue ("the Secretary shall decrease *any payment* under this subchapter to which such overpaid person is entitled"; "shall decrease *any payment* under this subchapter payable to his estate").[134]

Scalia has made a routine textual argument—Congress would have used other words to convey the meaning that the losing party would ascribe to the disputed statute—but he has done so in intentionalist terms. We infer from the language, Scalia suggests, that Congress did not have the losing party's repayment scheme "in mind." And in doing so, we necessarily attribute intentionality to Congress as an entity.

The same holds true for other text-oriented interpretive devices. Take, for example, the rule of construction that statutory words are to be given their "ordinary meaning."[135] What is the rationale for this rule? It is based on the assumption that legislative drafters are most likely to use words that way. If a court adopts that assumption, it will be more likely to make a decision that is loyal to the legislature's intention. Again, consider Scalia's explanation of the rule:

> The question, at bottom, is one of **statutory intent**, and we accordingly "'begin with the language employed by Congress and the assumption that the

133. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Ore., 515 U.S. 687, 718 (1995) (Scalia, J., dissenting).

134. Sullivan v. Everhart, 494 U.S. 83, 90 (1990) (first alteration in original).

135. *See, e.g.*, Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110 n.5 (2002) ("In the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'") (quoting Walters v. Metro. Educ. Enters., 519 U.S. 202, 207 (1997)).

> ordinary meaning of that language accurately expresses the legislative purpose.'"[136]

Scalia argues that we are likely to honor the legislature's intention if we construe words in their ordinary sense because that is how the legislature probably intended them to be understood. It is very difficult to jettison this perspective in statutory interpretation, except in cases in which there is no legitimate controversy.[137]

Even arguments of statutory coherence, which imply values other than enforcing the will of the legislature, are often stated as good surrogates for intent, including by Scalia:

> The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) **most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind**. I would not permit any of the historical and legislative material discussed by the Court, or all of it combined, to lead me to a result different from the one that these factors suggest.[138]

This is not Justice Scalia's only use of this argument,[139] and Justice Scalia is not alone in describing the value of statutory coherence as the enforcement of legislative intent.[140]

Despite his frequently acrimonious tone in deriding the kind of intentionalist rhetoric he actually uses on occasion, I don't believe Scalia is being hypocritical. He has taken an intellectual position that certain kinds of analysis are not appropriate in statutory interpretation; the problem is that it is almost impos-

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136. Morales v. Trans World Airlines, 504 U.S. 374, 383 (1992) (quoting FMC Corp. v. Holliday, 498 U.S. 52, 56 (1990) (quoting Park 'N Fly, Inc. v. Dollar Park & Fly, Inc., 469 U.S. 189, 194 (1985))).

137. *See* Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Some Arguments for the Primacy of Intent in Interpretation*, 41 SAN DIEGO L. REV. — (forthcoming) (drawing similar conclusion), *available at* http://ssrn.com/abstract=446021(posted Sept. 25, 2003).

138. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

139. Nor is there only one example of his justifying coherence arguments on intentionalist grounds. *See, e.g.*, Pierce v. Underwood, 487 U.S. 552, 571-72 (1988) (Scalia, J.) (considering what "Congress meant" and what "Congress thought" in interpreting statute allowing for attorney's fees in certain contexts).

140. *See, e.g.*, Gutierrez v. Ada, 528 U.S. 250, 255-56 (2000) (Souter, J.) ("Surely a Congress that meant to refer to ballots, midway through a statute repeatedly referring to 'votes' for gubernatorial slates, would have said 'ballots.'"); Sullivan v. Stroop, 496 U.S. 478, 484 (1990) (Rehnquist, C.J.) ("These cross-references illustrate Congress' intent that the AFDC and Child Support programs operate together closely to provide uniform levels of support for children of equal need.").

sible to avoid thinking in the intentionalist terms that he would outlaw. Indeed, he can't always do it either.

Text-based canons of construction, then, are by no means an alternative to considering legislative intent, although they are commonly represented as such.[141] To the contrary, even according to their defenders, they are best seen as default rules for assessing the likely intent. This suggests that there may actually be less difference between intentionalists and textualists than the rhetoric would cause us to believe. If so, we need to explain why Holmes's warning—that we care about what the statute means, and not what the legislature meant—continues to resonate today.

IV. PRIVATE LANGUAGE AND THE LEGAL STAKES IN INTENT TALK

A. WHERE INTENT SEEMS TO MATTER

I have argued thus far that it is coherent to talk of the intent of a group, especially a group like a legislature, which makes decisions deliberatively. I have further pointed out that it is so natural to speak in intentionalist terms that even ardent textualists can't help themselves. This Part of the Article explores the circumstances in which the issue of intent arises most frequently and argues that, in certain circumstances, not only is it natural to speak of intent, but there are few, if any, alternatives. Much of the debate over this issue, I suggest, stems from the high stakes involved in the dispute: how we are to govern ourselves under a rule of law articulated pursuant to constitutional procedures. Seen in this broader light, disagreement over the role of legislative intent serves as a surrogate for a larger disagreement over whether government of laws is at least in part an illusion.

1. Legislative Errors and Absurd Results

Intent frequently plays a role in statutory interpretation when a court decides that the legislature has made a mistake. Consider *United States v. Granderson*.[142] Granderson, a letter carrier, was convicted of destruction of mail and sentenced to five years' probation; the maximum prison sentence under the Federal Sentencing Guidelines would have been six months.[143] While on probation, he tested positive for cocaine, in violation of his probation conditions. The district court sentenced him pursuant to 18 U.S.C. § 3565(a), which states, "If the defendant violates a condition of probation . . . the court shall revoke the sentence of probation and sentence the defendant to not less than one-third of

141. For an excellent study into contemporary use of this rhetoric, see James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. (forthcoming 2005), *available at* http://ssrn.com/abstract=534982 (posted Apr. 24, 2004).

142. 511 U.S. 39 (1994).

143. *Id.* at 43.

the original sentence."[144] What is "one-third of the original sentence?" Taken out of context, the most natural reading is that probation is revoked and the individual is resentenced to a much shorter period of probation. It can also mean, as the Government argued, that the individual must serve a prison sentence of at least one-third of the time that he would have been on probation had he not possessed drugs during his probation period (in this case, one-third of five years).[145] Alternatively, it can mean, as Granderson argued, that the individual must serve a sentence of at least one-third the sentence that he would have received had he been sentenced to prison in the first place rather than to probation—that is, one-third of six months.[146]

The Court accepted Granderson's interpretation. Although the majority of justices agreed with the Government that it would be absurd to interpret the statute to require Granderson's sentence to be reduced to an even shorter period of probation,[147] the Court ultimately rejected the Government's position, in part using the rule of lenity to resolve the ambiguity between the remaining two interpretations.[148] In so doing, the majority looked at the legislative history:[149] Congress drafted this provision hastily, and it appeared that the drafters may have had in mind an earlier sentencing scheme in which probation was granted by imposing a sentence and then revoking the sentence in favor of a probationary period of good conduct.[150] The intermediate position was truest to general principles of interpretation and to what the legislature was likely trying to accomplish.

Professor Manning argues that it is possible to maintain a version of the absurd-results doctrine without resort to the intent of the legislature.[151] Instead of concerning themselves with intent, Manning argues, courts could focus instead on statutory language as understood in its social context.[152] In *Granderson*, that would amount to saying that in the context of this statute, members of the relevant linguistic subcommunity typically would not use the expression "one-third of the original sentence" to mean one-third of the original period of probation. Thus, without referring to the intention of any particular legislator or group of legislators, it is possible to reject this interpretation as absurd within textualist methodology. The argument is akin to reliance on ordinary meaning in lieu of an investigation into the intentions of the legislature.

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144. 18 U.S.C. § 3565(a) (1990). This statute was amended in 1994 to cure the problem uncovered in *Granderson*; however, the 1990 version was still in force at the time of this decision. *Compare* 18 U.S.C. § 3565 (2000) (amendments enacted September 13, 1994), *with Granderson*, 511 U.S. 39 (decision issued March 22, 1994).

145. 511 U.S. at 44-45.

146. *Id.* at 47.

147. *Id.* at 45.

148. *Id.* at 53.

149. *Id.* at 51-54.

150. *Id.* at 52-53.

151. *See* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2388 (2003).

152. *Id.* at 2457.

Manning is surely correct that a more nuanced, context-sensitive understanding of language can reduce resort to extratextual material. The more information contained in the language itself, the less the need to look elsewhere.[153] The only problem with this analysis is its denial that intent underlies it. Why would the relevant linguistic subcommunity not understand "one-third of the original sentence" as reducing the sentences of probation violators? After all, because there was only one sentence—probation—the most natural or ordinary interpretation of the phrase would indeed lead to such a reduction. The principal reason to reject this interpretation is that it makes no sense to conclude that those in Congress responsible for drafting this language would have wanted to reduce the sentences of probation violators. That is, the social context matters only because it provides significant clues as to what the author intended to communicate within the range of possible interpretations. In this case, a linguistically less natural interpretation of the phrase "one-third of the original sentence" is appropriate precisely because Congress is unlikely to have intended the most natural one. Just as the ordinary meaning canon is repeatedly justified by textualists as good evidence of legislative intent,[154] the absurd result rule acts as a safety valve when resort to ordinary meaning fails. It may be possible, as Professor Manning further argues,[155] to bypass this entire discussion and rely on values other than intent to justify the rejection of absurd results. In *Granderson*, for example, one may reject as unconstitutionally irrational an interpretation of the statute that calls for higher sentences for those who abide by their conditions of probation than for those who violate them, regardless of what the legislature may have intended. This strikes me as a legitimate alternative analysis. Yet problems of intent continue to arise.

Consider *United States v. X-Citement Video, Inc.*[156] Congress had not drafted an appropriate mens rea requirement into a statute making it illegal to deal in child pornography.[157] The majority of justices assumed that Congress intended to write a constitutional statute, and implied the appropriate state of mind requirements in order to rescue the law from constitutional infirmity. Chief Justice Rehnquist's majority opinion is replete with inferences about legislative intent.[158] Only because of that presumed intent did the majority consider itself justified in amending the statute judicially. Justice Scalia, in dissent, regarded that position as too generous to Congress, which may well have intended the law to apply according to its plain, unconstitutional language.[159] He would have

153. I have taken this position as well. *See* Solan, *supra* note 45.

154. For a discussion of the ordinary meaning rule, see supra note 135; for a discussion of *Chisom v. Roemer*, 501 U.S. 380 (1991), in which Justice Scalia, in dissent, employed the ordinary meaning rule as the best evidence of legislative intent, see *infra* text accompanying notes 162-70.

155. Manning, *supra* note 151, at 2476-85.

156. 513 U.S. 64 (1994).

157. *Id.* at 67-68 (referring to 18 U.S.C. § 2252 (1988 & Supp. V)).

158. *See, e.g., id.* at 73 ("[W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by this Court.").

159. *Id.* at 80-81 (Scalia, J. dissenting).

declared the statute unconstitutional.

How this debate would play out in a case like *Granderson* is not at all clear. Once constitutional values are invoked to reject the "absurd" reading of the statute, a choice would arise between declaring the statute unconstitutional based on its ordinary meaning, or finding a constitutional reading of the statute at least plausibly consistent with the statutory language. Without resort to intent, it is difficult to see how a court could do anything other than declare the statute in *X-Citement* unconstitutional, a choice that the justices did not make.[160]

At the root of this discussion is the observation that it is intent that makes a mistake a mistake. We all have experiences like, "Did I say Tuesday? I meant Thursday." Alternatively, we sometimes believe that we were mistaken when, in retrospect, we failed to think through the consequences of our statements in unforeseen circumstances. The two types of mistake are quite different, and textualists draw a distinction between them.[161] In the first instance, the person says, "I didn't mean to say what I said." In the second, the person says, "I meant to say what I said, but now I see that it was a very bad idea." Sometimes, in the statutory context, it is not easy to tell which one occurred. One may come to different conclusions about which if either of these types of error should be corrected judicially. But it is difficult to avoid the conclusion that intent is relevant to the analysis.

2. Indeterminacy in Meaning

A second set of cases raises the issue of intent somewhat differently: those in which the language of a statute is subject to more than one interpretation. If a court pays attention to the ordinary meaning of a statutory term, it will reach one conclusion about how the statute should apply in the case before it. If, on the other hand, it asks whether the legislature would have wanted the statute to apply in a broader range of circumstances, it must reach the opposite conclusion.

This is exactly what happened in an important 1991 Supreme Court case, *Chisom v. Roemer*.[162] Section 2 of the Voting Rights Act requires that states not afford protected classes of people "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[163] The question in *Chisom* was whether the Act applied to judicial elections as well as to legislative elections.

Based on an analysis of legislative intent, the Court held 6–3 that the Act did apply to a judicial election in Louisiana.[164] The majority opinion by Justice

160. The relationship between resort to constitutional norms and legislative intent is discussed *infra* in Part IV.C.

161. *See* Siegel, *supra* note 21, at 329-32 (describing Scalia's philosophy of correcting only "scrivener's errors," the first type of error).

162. 501 U.S. 380 (1991).

163. 42 U.S.C. § 1973(b) (2000).

164. 501 U.S. at 399.

Stevens argued, among other things, that the statutory language quoted above was borrowed from an earlier Supreme Court opinion, *White v. Regester*.[165] That opinion, however, used the word "legislators," whereas the Voting Rights Act used the word "representatives."[166] Congress, the majority argued, would not have troubled itself to replace one word for the other unless it wanted the statute to apply to a range of elections broader than legislative ones.[167] Moreover, the legislative history suggested that Congress had no interest in limiting the range of elections to which that section of the Act applied.[168]

In a sharp dissent, Justice Scalia relied heavily on the ordinary meaning rule. Citing (but not quoting) *Webster's Second New International Dictionary*, Scalia argued: "There is little doubt that the ordinary meaning of 'representatives' does not include judges."[169] Scalia was right about the statute's ordinary meaning. Regardless of what the dictionaries say or do not say, the majority appears to have given the statutory term "representative" an interpretation broader than its ordinary meaning, using extrinsic evidence to draw inferences about what Congress really might have intended. Thus, the majority used evidence of intent to infer that a statutory term should be given a meaning consistent with the language, but not its most prototypical meaning.

But Scalia's dissent was equally intent-oriented. He explained his objection to the majority as follows:

> The Court, petitioners, and petitioners' *amici* have labored mightily to establish that there is *a* meaning of "representatives" that would include judges, *see, e. g.*, Brief for Lawyers Committee for Civil Rights as *Amicus Curiae* 10-11, and no doubt there is. But our job is not to scavenge the world of English usage to discover whether there is any possible meaning of "representatives" which suits our preconception that the statute includes judges; **our job is to determine whether the *ordinary* meaning includes them, and if it does not, to ask whether there is any solid indication in the text or structure of the statute that something other than ordinary meaning was intended.**[170]

Thus, Scalia's rationale for using ordinary meaning is that it serves as a surrogate for legislative intent. In this case, competition among the canons—resort to ordinary language against resort to extrinsic evidence in the face of

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165. 412 U.S. 755, 766 (1971).

166. 501 U.S. at 398.

167. *Id.* at 398-99.

168. *Id.* at 399 n.26.

169. *Id.* at 410 (Scalia, J., dissenting). For discussion of Scalia's ploy, see Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 315-18 (1998). I discuss Scalia's questionable reliance on dictionaries in this case in Lawrence M. Solan, *Finding Ordinary Meaning in the Dictionary*, *in* LANGUAGE AND THE LAW 255, 257 (Marlyn Robinson ed., 2003). Notably, as Professor Aprill points out, the third edition of *Webster's* had come out prior to the opinion, but appears to be less helpful to Scalia's argument than was the second. Aprill, *supra*,at 317-18.

170. 501 U.S. at 410 (Scalia, J., dissenting).

ambiguity—is merely evidentiary in nature. Both sides purport to base their decision on the intent of the legislature; they simply disagree about how to find that intent.

3. When Intent and Literal Meaning Collide

Sometimes, a party argues that the language of a statute should not be applied literally in a particular situation because Congress would not have so intended.[171] It is hard to call these situations outright errors because in most situations the statute is applied without much controversy.

The issue arose in 2000 when the Supreme Court held that the Food and Drug Administration had overstepped its authority in attempting to regulate tobacco during the Clinton administration. In *FDA v. Brown & Williamson Tobacco Corp.*,[172] the Court held that Congress did not intend, when it wrote the Food, Drug and Cosmetics Act, to give the FDA authority to regulate tobacco, despite language in the Act that arguably supported such authority.[173] The Court was closely divided, with the five more-conservative justices, including Justice Scalia, voting in the majority.

The holding was expressed largely in intentional terms:

> In this case, we believe that Congress has clearly precluded the FDA from asserting jurisdiction to regulate tobacco products. Such authority is **inconsistent with the intent that Congress has expressed** in the FDCA's overall regulatory scheme and in the tobacco-specific legislation that it has enacted subsequent to the FDCA. In light of this clear intent, the FDA's assertion of jurisdiction is impermissible.[174]

In fact, the opinion is replete with inferences drawn about the intent of the legislature. One argument asserted that the FDA has an obligation to ban completely all dangerous substances that fall within its regulatory authority.[175] But Congress has never suggested that tobacco should be banned.[176] From this, the court concluded:

> Thus, the FDA would apparently have to ban tobacco products, a result the court found clearly **contrary to congressional intent**. This apparent anomaly, the Court of Appeals concluded, demonstrates that Congress did not intend to give the FDA authority to regulate tobacco.[177]

171. The classic example is *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), discussed below in the text accompanying notes 274-83.

172. 529 U.S. 120 (2000).

173. *Id.* at 126.

174. *Id.*

175. *Id.* at 137.

176. *Id.*

177. *Id.* at 130 (citations omitted).

Later, the Court noted:

> **Congress' decisions** to regulate labeling and advertising and to adopt the express policy of protecting "commerce and the national economy . . . to the maximum extent" **reveal its intent that tobacco products remain on the market.** Indeed, the collective premise of these statutes is that cigarettes and smokeless tobacco will continue to be sold in the United States. A ban of tobacco products by the FDA would therefore plainly contradict congressional policy.[178]

There are many other examples in the decision, including the use of legislative history as a source from which legislative intent is to be inferred.[179]

The problem facing the majority was that the case was governed by the *Chevron* doctrine. In *Chevron U.S.A. v. Natural Resources Defense Council*,[180] decided in 1984, the Supreme Court reviewed certain regulations that the EPA had put into place under authority given to the agency by the Clean Air Act.[181] The regulations were being challenged as too weak to fulfill the policies underlying the Act. The Supreme Court unanimously held that it had had an obligation to defer to the EPA's interpretation if it found that the statute was "silent or ambiguous"[182] with respect to the specific issue in dispute. As long as the agency's construction of the Act was a "permissible construction,"[183] the agency was to have the last word.

In *Brown & Williamson*, the underlying statute permitted the FDA to regulate not only drugs, but also "device[s]" through which drugs are delivered.[184] It is easy enough to argue that cigarettes are not what one would ordinarily consider a device, and therefore not a proper subject of regulation. But the *Chevron* doctrine takes that argument away. Surely a cigarette *can* reasonably be considered a device to deliver nicotine. If so, the courts lack the power to substitute their judgment for that of the administrative agency that Congress empowered to enforce the statute. Justice Breyer, writing on behalf of himself and three others, made this point forcefully in his textually oriented dissent.[185]

Both sides make good points.[186] The majority is certainly correct, based on its analysis of other statutes that regulate tobacco, legislative history, and other contextual information, that Congress never intended to permit the FDA to

178. *Id.* at 139 (omission in original).
179. *Id.* at 143, 145 (referring to previous statutes and congressional hearings).
180. 467 U.S. 837 (1984).
181. 42 U.S.C. § 7401 (2000).
182. 467 U.S. at 843.
183. *Id.*
184. 21 U.S.C. § 353(g)(1) (2000).
185. *See* 529 U.S. at 170-71.
186. These positions are reflected in the contemporaneous academic debate as well. *Compare* Cass R. Sunstein, *Regulations: Is Tobacco a Drug? Administrative Agencies and Common Law Courts*, 47 DUKE L.J. 1013 (1998), *with* Richard A. Merrill, *The FDA May Not Regulate Tobacco Products as "Drugs" or as "Medical Devices"*, 47 DUKE L. J. 1071 (1998).

regulate tobacco. The dissent is just as correct in claiming that cigarettes can reasonably be considered devices for delivering nicotine, and that the FDA's interpretation falls well within the range of linguistically available interpretations of the statute's plain language. While it is unusual for the justices to align themselves so contrary to their professed positions on the role of intent in statutory interpretation, it is not unusual for intent to become an issue when the language of a statute appears to permit a broader range of interpretations than the legislature intended to include within the law's purview.

B. PRIVATE LANGUAGE, PUBLIC LAWS

Cases like these arouse a great deal of passion, provoking unpleasant concurring and dissenting opinions from judges, and a huge scholarly literature. The importance of these cases, I believe, lies in a remark that Judge Easterbrook made in an opinion interpreting the federal Bankruptcy Code. In discussing what to do when the legislative history suggests one result and the plain language of a statute the opposite result, Easterbrook noted: "Statutes are law, not evidence of law."[187]

If statutes have meaning on their own, without inquiry into the intent of their makers, then Easterbrook is at least arguably correct.[188] Decisionmakers need only read the statute to determine when it should apply. But if determining intent is a necessary element of interpretation, then statutory language can be no more than evidence of that intent. As soon as we begin to speak of "legislative intent" or "what the legislature meant" or "had in mind" or any other such thing, we automatically reduce the statute's language to "evidence of law," to use Easterbrook's words. The ramifications of this are serious. It means that constitutional procedures for enacting laws are not enough to determine the rights and obligations of the citizenry in a significant set of circumstances.[189] The textual-

187. *In re* Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989).

188. Judge Easterbrook is not, however, consistent in taking this position. In a controversial decision, Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997), he held that Section 2-207 of the Uniform Commercial Code (UCC) does not apply to a situation in which a computer company shipped a computer along with documentation that included additional terms of sale, and deemed the buyer to have accepted the terms unless he or she returned the machine within thirty days. Had Section 2-207 applied, the additional terms, in all likelihood, would not have been held valid. Judge Easterbrook, however, determined that this section of the UCC did not apply because the statute is irrelevant when there is only one form, since the statute applies to "the battle of the forms." *Id.* at 1150. But the statute does not make reference to any such battle, or to the number of forms involved. Its language refers only to such things as offers, acceptances, and terms. Whatever one thinks of the merits of this decision, it can only be supported if one looks at the statute as evidence of law, and not the law itself. For critical commentary, see Deborah Post, *Dismantling Democracy: Common Sense and the Contract Jurisprudence of Frank Easterbrook*, 16 TOURO L. REV. 1205 (2000).

189. Interestingly, as a historical matter, statutes in medieval England were treated by judges as nothing other than evidence of legislative intent because there was no definitive written version of statutes. *See* Peter M. Tiersma, *A Message in a Bottle: Text, Autonomy, and Statutory Interpretation*, 76 TUL. L. REV. 431, 444 (2001) ("Medieval judges could not have had primitive faith in the inherent power of the words of a statute, even if they were so inclined, because they had no authoritative text on which they could rely. Parliament at that time did not enact statutes that were meticulously drafted in

ists recognized this inference long ago and have been trying to eliminate intent as part of the interpretive enterprise ever since.

Political concerns, however, do not alter the nature of the human language faculty. Those who remember the Watergate scandal will recall Senator Sam Ervin's presence as chair of the Senate select committee investigating President Nixon's activities. At one point in the proceedings Ervin remarked that the President's duties did not include criminal activity. When asked how he knew that, he replied: "Because the English language is my native tongue, and I understand it."[190] What does this mean?

When I say that I know the English language as "my native tongue," I mean that I have in my mind the vocabulary, rules and principles that entitle me to call myself a speaker of English.[191] If I also identify you as a native speaker of English, I assume that your mind is similarly endowed and configured. When I say something to you, I expect that you will understand it more or less as I would if you said it to me. Similarly, when you say something to me, I expect that you intended to express more or less what I understood you to have said. But that is as far as I can go. When we communicate, all we have are intentions and some confidence that our language faculties are more or less the same. Chomsky refers to this concept of linguistic knowledge as "I(internalized)-language."[192] Put in these terms, Senator Ervin's remark is best interpreted: "Anyone who can legitimately claim to have English as his native tongue would understand this statement the same way that I do."[193]

Our language faculty consists of many components: vocabulary, a set of sounds, rules governing the sound system, syntactic rules and principles, conventions of inference. With respect to at least some of these, I can be *very* sure that you and I will be in accord. If I say, to take a simple, standard example, "The cat is on the mat," I have every reason to believe that you will understand the relationship between the cat and the mat the same way I do. You will not, for example, think that the mat is on the cat. While there may be small differences at the margin, it appears that knowledge of syntactic relations is quite uniform

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advance. Rather, the text was created after the fact by clerks. Moreover, being written and copied by hand, the text of the statute almost inevitably differed from one copy to another. Any type of textualist approach would have been impossible at this early stage of statutory development. Consider also that England at the time was a virtually absolute monarchy, where the king's word was law. It is clear that where there was doubt about the meaning of a statute, the only realistic interpretive approach would focus on discovering the intent or purpose of the lawmaker.").

190. Arthur Unger, *Watergate—a Greek Tragedy of Our Times—Relived on PBS*, CHRISTIAN SCI. MONITOR, July 22, 1983, at 17.

191. *See* NOAM CHOMSKY, KNOWLEDGE OF LANGUAGE: ITS NATURE, ORIGIN AND USE 21-24 (1986) [hereinafter CHOMSKY, KNOWLEDGE OF LANGUAGE]; NOAM CHOMSKY, NEW HORIZONS IN THE STUDY OF LANGUAGE AND MIND, *supra* n. 54, at 70–73.

192. *See* CHOMSKY, KNOWLEDGE OF LANGUAGE, *supra* note 191, at 21-24.

193. The distinction between knowledge of language in this sense, and skills in the use of this knowledge in various social settings, has been a matter of some controversy in the linguistic literature. For a valuable discussion, see Frederick J. Newmeyer, *Grammar Is Grammar and Usage Is Usage*, 79 LANGUAGE 682 (2003).

among speakers of a given language.[194] There may be words that you know that I don't, or that you and I appear to use in slightly different ways; for example, is the cat on a *bath*mat, a *place*mat or a *door*mat? For that matter, what you call a mat may for me be a small rug. Yet most of the time we seem to use words the same way. We may pronounce some words differently, but we seem able to make adjustments for this. In all of these cases, our experience is individual and personal.

Nonetheless, I do have the intuition that when I say I understand English, there is something external to my mind that constitutes English. This, however, is the result of an illusion. We can tell that language is an internal matter every time we misunderstand someone who speaks our language, and every time such a person misunderstands us. This can only happen if our internal states are similar enough for us to agree that we both speak English, but are different and individual in a host of small ways. The illusion, in contrast, comes from the great deal that speakers of English have in common.

To the extent that we can say with complete confidence that you and I will understand an English utterance the same way, it is as though there really is something called English "out there," apart from our intentions. There is no need to think about intended meaning, possible differences between us, or the context in which a statement is made if there can be no controversy over the statement's meaning even after taking those things into account. Unless I make a mistake, when I say "The cat is on the mat," I certainly don't mean that the mat is on the cat. By the same token, when a bribery statute makes it illegal for any person to "corruptly give something of value to a government official,"[195] we do not mistakenly think it means that a government official cannot give a Christmas present to her dry cleaner. The grammatical relations unquestionably inform us about the direction of the banned payments.[196]

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194. Chomsky argues that this is because a great deal of syntactic knowledge is innate, and therefore there is not much room for variation. My argument does not hinge on such claims, although there is strong evidence in support of them. For an accessible discussion, see NOAM CHOMSKY, LANGUAGE AND PROBLEMS OF KNOWLEDGE (1988) and STEVEN PINKER, THE LANGUAGE INSTINCT: HOW THE MIND CREATES LANGUAGE (1994).

195. 18 U.S.C. § 201(b)(1) (2000).

196. There are few, if any, published legal opinions in which the syntax of the bribery statute is brought into question, despite the fact that the statute is written in the form of a very long and syntactically complex sentence, characteristic of much statutory drafting. Section 201(b), for example, provides that

> Whoever (1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent (A) to influence any official act; or (B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person; (2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to

The point becomes clearer if we compare the following two questions, which roughly track the distinction that Holmes made between the intent of the speaker and the meaning of the language:

(1) What did you mean by that?

(2) What does that mean?

Philosophers sometimes distinguish between these two senses of meaning: some call the first "intentional" and the second "extensional":[197] others distinguish between "speaker's meaning" and "word meaning."[198] The distinction seems to disappear on close analysis. It is rather a matter of whether we focus on the individual intent of the speaker, or on the intent of the speaker as a member of a group with shared knowledge.

If you use an English word that I don't know, I can ask either of these questions appropriately. If I ask question (1), I am, sensibly enough, asking for your intent, given that you are trying to convey some thought to me; if (2), I am assuming that everyone with command of that word would have a similar purpose in uttering it, and I am asking what that purpose is. They both amount to the same thing. In contrast, if you are speaking French to a group of people, and say something that goes beyond my knowledge of that language, I am more likely to use (2) than (1) because I assume that French speakers by and large

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> receive or accept anything of value personally or for any other person or entity, in return for: (A) being influenced in the performance of any official act; (B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (C) being induced to do or omit to do any act in violation of the official duty of such official or person; (3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom; (4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom. . .

has has committed a felony and risks a fifteen-year prison term. For discussion, see Lawrence M. Solan, *Why Laws Work Pretty Well, but Not Great*, 26 L. & SOC. INQUIRY 243 (2001) (reviewing STEVEN PINKER, WORDS AND RULES (1999)).

197. For a very clear discussion of the difference, see M.B.W. Sinclair, *Legislative Intent: Fact or Fabrication?*, 41 N.Y.L. SCH. L. REV. 1329, 1358-60 (1997) (reviewing WILLIAM N. ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION (1994)).

198. H. P. Grice, *Utterer's Meaning and Intention*, 78 PHIL. REV. 147 (1969). For helpful discussion of these and related concepts, see Bix, *supra* note 9, and Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945, 962-67 (1990). For discussion of these perspectives in the context of expressive theories of law, see Matthew Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000). Adler rejects "speaker's meaning" as irrelevant to the expressive function of laws. I do not disagree with his ultimate conclusion in that he understands "sentence meaning" in terms of what speakers would agree was intended by a person making a particular utterance. *Id.* at 1394. To the extent, however, that he considers the "speakers' meaning" of a group incoherent because of the problems with group intent, *id.* at 1389, my position differs from his for reasons discussed in Part II of this Article.

would understand your utterance the same way, by virtue of sharing an I-language, but that my state of knowledge is deficient. The problem is the difference I perceive between myself and the community of people who can legitimately say that they speak French fluently. If, however, you say something vague, ambiguous, or otherwise unclear in a language in which I consider myself a competent speaker, (1) is the more appropriate question. In fact, (2) sounds rather nasty in many contexts: it more or less accuses you of not having a good enough command of the rules and vocabulary of English to use it as a native speaker. In other contexts, (2) serves a didactic purpose, as when a teacher is prodding a student to explore more fully the ramifications of an idea.[199]

Crucially, if you say something that I understand perfectly well, then neither (1) nor (2) is appropriate, and for exactly the same reason. I believe, as a speaker of English, that I understand what you have said, and that I understand it for the same reason that everyone else who speaks English can say that they understand it. This situation is exactly what courts have in mind when they invoke the plain language rule. A commonly quoted example appears in *Caminetti v. United States*,[200] a 1917 Supreme Court decision:

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.[201]

When the Court says that the language is "plain," it is saying that no one would disagree about what someone using that language intended to say. Let us return to the bribery statute. Assume that we have consensus about the relationships among the parties mentioned in the statute. The consensus does not mean that discerning communicative intent is irrelevant to our understanding of the statute's meaning. It means only that we do not have to worry about any distinction between language and intent because native speakers of English would only *have* a single intent if they used the language sincerely and without error.[202] In fact, courts at times actually state the plain language rule in terms of the "best evidence" of legislative intent, although the Supreme Court has not done so. For example, the United States Court of Appeals for the Third Circuit characterized the role of plain language in statutory interpretation as follows, quoting a

199. My thanks to Caleb Mason for this observation.

200. 242 U.S. 470 (1917).

201. *Id.* at 485; *see also* Lamie v. United States Tr., 540 U.S. 526, 532 (2004) ("It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'" (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000))).

202. *See* Solan, *supra* note 196, at 263-64.

leading treatise (again, the intentional language is bolded):

> As always, the most authoritative indicators of what Congress intended are the words that it chose in drafting the statute. *See* 2A N. Singer, *Sutherland Statutory Construction* § 46.03 ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will."). **Here, we think that Congress's use of the word "purchaser" by itself connotes an intent to include only volitional transactions.**[203]

The Third Circuit regards the language of the statute not as the law in Easterbrook's sense, but as "[an indicator] of what Congress intended."[204] This is so even when the language is plain. It is easy enough to find similar statements elsewhere, both in the opinions of federal[205] and state[206] courts.

Thus, when faced with a dispute about whether a law applies in a particular situation, our first impulse is to examine what the law says. After all, laws are intended to be both autonomous[207] and authoritative. If a law is clear enough, so also is our obligation to obey it in particular circumstances. Our second impulse is to ask what the legislature meant by what it said. These two impulses are so closely related that they are really part of the same task. For this reason, Scalia's concurrence in *Conroy v. Aniskoff*, asserting that "[w]e should not pretend to care about legislative intent (as opposed to the meaning of the law), lest we impose upon the practicing bar and their clients obligations that we do not ourselves take seriously,"[208] misapprehends what we do when we interpret the language of others. We do indeed care about the meaning of the law. We care so much that we look to the intent of the legislature to see what that meaning is, just as we look to the intent of others to understand most everything else in social contexts. As Justice Scalia regularly reminds us, the language that the legislature used is often enough the only evidence needed to determine what the legislature had to say. But that doesn't mean that we don't care about intent, and it doesn't mean that the language of the statute is always sufficient to allow us to make a final decision about the statute's applicability.

Most of the time, whether or not statutory interpreters speak of legislative intent makes little substantive difference. The language of the law as applied to

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203. United States v. Lavin, 942 F.2d 177, 184 (3d Cir. 1991) (additional citations omitted).

204. *Id.*

205. *See, e.g.*, Miller v. Carlson, 768 F.Supp. 1331, 1334 (N.D. Cal. 1991) ("In construing statutory provisions, courts must first consider the text of the statute. It is well-settled that the plain language of a statute provides the best evidence of legislative intent." (citation omitted)).

206. *See, e.g.*, *In re* Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender, 561 So. 2d 1130, 1137 (Fla. 1990) ("The best evidence of the intent of the legislature is generally the plain meaning of the statute."); State v. Martinez, 52 P.3d 1278, 1278 (Utah 2002) ("We discern legislative intent and purpose by first looking to the 'best evidence' of its meaning, which is the plain language of the statute itself.").

207. See Tiersma, *supra* note 189, for a discussion of the importance of autonomy in authoritative legal texts.

208. Conroy v. Aniskoff, 507 U.S. 511, 528 (1993) (Scalia, J., concurring).

the situation at hand leaves little room for controversy. The stakes go up, however, in those cases in which different interpretive approaches may lead to different results. Once we encounter even the smallest amount of controversy or uncertainty, we routinely begin thinking in terms of intent.

This explains why courts talk of intent so often. Whether it's the ordinary meaning canon, or the legislature's use of similar language elsewhere in the code, or the choice of one expression where another would have expressed a particular meaning better, or, for that matter, legislative history, we are searching for intent. We do so because that is the only question to ask if we care about what someone was trying to say and the words are not enough to answer the question. For these reasons, I don't believe that any judge or commentator can consistently maintain that courts should dispense altogether with discussion of legislative intent. The concept is just too deeply embedded in the way we see the world.

C. CAN PUBLIC-LAW VALUES REPLACE INTENT?

At least, this is almost so. Courts also resort to a set of interpretive arguments that do not rely upon intent. Instead, they rely on values that are thought to make a statutory code a good one. Among them are canons of construction that favor interpreting a statute to make the code read as a coherent whole, and the rule that criminal statutes are to be interpreted narrowly. Along these lines, Professor Elhauge has suggested that ambiguous statutes be resolved by default rules that favor political satisfaction at the time that decision is made.[209]

Consider Justice Scalia's opinion in *West Virginia University Hospitals v. Casey*.[210] The issue was whether the fees paid to expert witnesses should count as part of "a reasonable attorney's fee" with respect to a statute that allows the prevailing party in certain actions to recover attorney's fees.[211] Writing for a majority of six justices, Justice Scalia argued that they should not. The most compelling argument was that Congress had enacted other statutes that shift fees, some of which mention expert fees specifically.[212] Therefore, if Congress had intended the statute in question to provide for expert fees, it would have said so.

Earlier, I showed how arguments like this are frequently stated in intentionalist terms, even by devoted textualists.[213] But they need not be. One can say: Regardless of what Congress had in mind, the Court should, in order to

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209. *See* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*,102 COLUM. L. REV. 2162, 2195 (2002) [hereinafter Elhauge, *Preference-Eliciting*]; Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2045-46 (2002) [hereinafter Elhauge, *Preference-Estimating*]. Professor Manning also suggests that certain public-law values, such as constitutionality, can replace intent as a tool of statutory interpretation. *See* Manning, *supra* note 156, at 2477-85.

210. 499 U.S. 83 (1991).

211. Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 88 Stat. 236 (codified at 42 U.S.C. § 1988 (2000)).

212. *See Casey*, 499 U.S. at 88.

213. *See supra* note 138.

contribute productively to the legislative process, interpret statutes in such a way as to keep codes maximally coherent.[214] Dan Simon has argued that there is a strong psychological impulse toward coherence that governs a great deal of legal decisionmaking.[215] This principle would be a case in point. In fact, Justice Scalia made his point in just that way in *Casey*:

> Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law. See 2 J. Sutherland, Statutory Construction § 5201. We do so not because that precise accommodative meaning is what the lawmakers must have had in mind (how could an earlier Congress know what a later Congress would enact?), but because it is our role to make sense rather than nonsense out of the *corpus juris*.[216]

This interpretive methodology no doubt has merit in many cases. But the drive to reach coherence must serve some purpose for it to be justified. One such purpose, asserted frequently by judges, is effectuating the intentions of the lawmakers. Absent evidence to the contrary, it is fair enough to infer that legislators want to write coherent codes, and would be happy enough if courts maximized that value when a case arises involving some issue that they never noticed.[217]

Justice Scalia's stated purpose for promoting coherence in *Casey* is more radical. He justifies the practice as good judicial lawmaking, regardless of what the legislature might have intended. It shows less respect for legislative primacy than does the intentional approach. It more resembles Ronald Dworkin's approach to statutory interpretation, which requires decisionmakers to decide statutory cases in a manner that "follows from the best interpretation of the legislative process as a whole."[218] It is at least arguable that working towards coherence in the interpretation of legal codes serves the goal of "making sense of the *corpus juris*." Yet Scalia's approach is less constrained than Dworkin's, because Dworkin espouses looking at history as an important means of reducing the options available to the interpreter at any given time.

Whether the focus on coherence serves any other purpose, how well it serves as a proxy for intent is an open matter. Professor Buzbee has argued that

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214. Some of these values are explored in Paul H. Robinson, Michael T. Cahill & Usman Mohammad, *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 52-59 (2000) (valuing consistency in the grading of offenses in criminal codes, and demonstrating that the criminal codes of many states have incoherent grading).

215. *See* Dan Simon, *Freedom and Constraint in Adjudication: A Look Through the Lens of Cognitive Psychology*, 67 BROOK. L. REV. 1097 (2002).

216. 499 U.S. at 100-01 (citation omitted).

217. See *supra* notes 138-140 for examples of courts justifying coherence arguments on intentionalist grounds.

218. DWORKIN, *supra* note 97, at 337.

coherence arguments are not very good surrogates for intent,[219] which suggests that heavy reliance on coherence may at times undermine the principle of legislative primacy, not at all what Scalia purports to be doing. In reality, legislatures do not always pay attention to how a word in, say, the criminal code, might have been used in a statute that regulates mining or in some other remote law. *Casey*, in fact, may be just such a case. As Justice Stevens' dissent makes clear, in enacting the fee-shifting statute, Congress had intended to override a parsimonious Supreme Court decision that refused to shift fees in civil rights cases absent legislation requiring it.[220] Congress responded by enacting the disputed statute.[221] The Court in *Casey* then construed this new statute narrowly, and Congress had to respond once again by amending the statute to make it clear that it was to apply to expert fees as well.[222] This dynamic may explain why coherence arguments are, by and large, also justified by the goal of enforcing the will of the legislature.

Professor Elhauge presents a somewhat different argument, to the effect that coherence is a poor surrogate for enforcing the will of the legislature.[223] Although he directs his remarks against Dworkin's reliance upon coherence,[224] his critique has far more general application. Elhauge points out that various dictionary acts that are parts of the codes of many states often contain rules to the effect that specific legislative directives be given priority over general ones when conflicts occur. As Elhauge observes, the fact that a legislature instructs courts to ignore general principles in favor of specific, inconsistent rules provides evidence that the legislature does not itself value coherence; coherence cannot in such cases be supported on grounds of legislative intent.[225]

As for Justice Scalia's argument that intent is irrelevant because the Court should concern itself instead with coherence, his opinion does not test Elhauge's proposition, because coherence is evidence of intent as well as a value in its own right. To argue against the relevance of intent in such cases, Scalia would have to take the position that coherence values must prevail even if they thwart the clear intent of the legislature. Although the *Casey* dissent in fact accuses him of doing just that,[226] Scalia never made that argument in *Casey*, and I doubt that he would make it in any case in which coherence is the principal argument. In fact, Scalia argued in *Casey* that Congress uses specific language to call for

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219. *See* William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 245-46 (2000).

220. *Casey*, 499 U.S. at 108-09 (Stevens, J., dissenting).

221. Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 88 Stat. 236 (codified at 42 U.S.C. § 1988 (2000)).

222. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 1988(c) (2000)).

223. *See* Elhauge, *Preference-Estimating*, *supra* note 214.

224. *See* DWORKIN, *supra* note 95, at 329-37.

225. Elhauge, *Preference-Estimating*, *supra* note 209 at 2045-47.

226. W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. at 102 (Marshall, J., dissenting).

the shifting of expert fees in certain circumstances "when a shift is intended."[227]

I know of no case in which a court has overtly thwarted the will of the legislature for the sake of adding coherence to the *corpus juris*, to use Scalia's term.[228] Certainly, interpreting a code to enhance coherence makes good sense as a default position. Absent evidence of intent to the contrary, why not promote coherence as a value? Moreover, coherence can at least arguably serve as a proxy for intent in some cases. But coherence on its own is not a strong enough value to justify rejecting the contrary will of the legislature.

A somewhat stronger case can be made for rejecting intent in favor of other canons. The rule of lenity tells courts to resolve ambiguities in criminal statutes in favor of the accused in order to ensure that the statute gives fair notice to defendants and to promote the separation of powers.[229] Fair notice is an important enough value in its own right that courts may be justified in thwarting legislative intent if the statute is not clear enough on its face to put a defendant on adequate notice.[230] Chief Justice Marshall advocated doing just that in *United States v. Wiltberger*, decided in 1820.[231] A statute gave courts jurisdiction over manslaughter committed on the high seas. Provisions of the statute governing other crimes also referred to rivers, basins, and other bodies of water, but these were mysteriously left out of the manslaughter section. Marshall held that the rule of lenity should apply, even though Congress likely intended to write a statute broader in scope than the words conveyed:

> The probability is, that the legislature designed to punish all persons amenable to their laws, who should, in any place, aid and assist, procure, command, counsel, or advise, any person or persons to commit any murder or piracy punishable under the act. And such would have been the operation of the sentence had the words, 'upon the land or the seas' been omitted. But the legislature has chosen to describe the place where the accessorial offence is to be committed, and has not referred to a description contained in any other part of the act. The words are, 'upon the land or the seas.' The Court cannot reject this description.[232]

To Marshall, then, the value of providing fair notice to criminal defendants was important enough to override the intent of the legislature.

Professor Elhauge suggests a second, nonintentionalist value that the rule of lenity promotes. Elhauge argues that the Criminal Division of the Justice

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227. 499 U.S. at 90.

228. *See id.* at 101.

229. *See* Solan, *supra* note 103, at 134-41.

230. Justice Holmes took this position in the famous case *McBoyle v. United States*. *See* 283 U.S. 25 (1931) ("Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.").

231. 18 U.S. (5 Wheat.) 76 (1820).

232. *Id.* at 101.

Department has an excellent record when it comes to convincing Congress to override adverse rulings by the courts, whereas the criminal defense bar has a very weak record.[233] The result of lenity, then, is to create a dialectic between the courts, the executive, and the legislature, which will end when the legislature has enacted a statute sufficiently tough that it is satisfied with a narrow interpretation by the courts even when the executive asks for additional sanctions.

But courts are not willing to hold that all uncertainties in interpretation should lead to the narrower reading of the statute, and modern courts have used intent to temper the application of lenity. As Justice Thurgood Marshall wrote in *Moskal v. United States*,[234] with bold text indicating intentional language:

> Because the meaning of language is inherently contextual, we have declined to deem a statute "ambiguous" for purposes of lenity merely because it was *possible* to articulate a construction more narrow than that urged by the Government. Nor have we deemed a division of judicial authority automatically sufficient to trigger lenity. If that were sufficient, one court's unduly narrow reading of a criminal statute would become binding on all other courts, including this one. Instead, we have always reserved lenity for those situations in which a **reasonable doubt persists about a statute's intended scope** even *after* resort to "the language and structure, legislative history, and motivating policies" of the statute.[235]

It is not unusual for courts to combine intentionalist and other jurisprudential values, ensuring that legislative primacy is at least one of the values that courts consider.[236] The failure to consider legislative intent can lead to results more out of keeping with the legislative process than most judges are willing to tolerate.

Also capable of trumping intent are arguments that a statute's meaning has changed over time, or that its enforcement over time has resulted in a legal landscape worthy of preservation even if the enacting legislature would not have been pleased at the developments. As for changes in meaning over time, consider again *Moskal v. United States*. The statute in question banned the interstate transportation of "falsely made" securities.[237] As Justice Scalia argued convincingly in his dissent, at the time the statute was enacted, "falsely made" was largely a synonym for "counterfeit."[238] Over time, that meaning has

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233. Elhauge, *Preference-Eliciting*, *supra* note 209, at 2194. Elhauge relies on William N. Eskridge, Jr., 348 tbl.7, 362 *supra* n. 91.

234. 498 U.S. 103 (1990).

235. *Id.* at 108 (citations omitted); *see* Robert Bennett, *Justifying Dynamism*, ISSUES IN LEG. SCHOLARSHIP, Issue 3, Art. 4 (2002), *at* http://www.bepress.com/ils/iss3/art4.

236. *See, e.g.*, Granderson v. United States, 511 U.S. 39, 41 (1994) (rejecting the narrowest reading of the statute, the Court noted: "This construction, however, is implausible, and has been urged by neither party, for it would generally demand no increased sanction, plainly not what Congress intended."). See *supra* Part IV.A.1 for further discussion of the case.

237. 18 US.C. § 2314 (2000).

238. *Moskal*, 498 U.S. at 119-20 (Scalia, J. dissenting).

dissipated, and we are now more likely to understand it in terms of the meanings of its components: "made to be false." In *Moskal*, the defendant was a car dealer who had been rolling back odometers, sending the false information to the motor vehicle authorities, and then receiving clean titles procured with the false information.[239] There was nothing counterfeit about any of the documents, but the new titles certainly contained misinformation. The majority found that the clear notice of the statute was enough to trump the more limited mission of the enacting legislature, and affirmed Moskal's conviction.[240]

Professor Eskridge has argued in support of his theory of dynamic statutory interpretation that even when linguistic change has not occurred, values reflected in judicial practice over time may take priority over the enacting legislature's intent.[241] Eskridge's principal examples involve the civil rights laws, and especially cases concerning affirmative action. Although the Congress of 1964 that enacted the original federal Civil Rights Act could not be said, as a body, to favor affirmative action, the statute's early enforcement history, Eskridge argues, made it appropriate to accept affirmative action as necessary to enforce the civil rights laws without creating perverse incentives that would actually thwart the integration of nonwhite workers into the workforce.[242] I will not repeat Eskridge's arguments here other than to comment that he appears to be observationally correct that other values may trump intent in these cases.

For example, in *Gay & Lesbian Advocates & Defenders v. Attorney General*,[243] the Supreme Judicial Court of Massachusetts was asked by advocacy groups to declare that state's sodomy statute[244] unconstitutional. The court declined to do so, holding that the statute should be interpreted to ban only acts that are either public or nonconsensual, and none of the parties in the case before the court claimed to engage in such conduct.[245] The decision was in harmony with an earlier decision of the same court, *Commonwealth v. Balthazar*,[246] which held that criminal liability under a statute banning "any unnatural and lascivious act with another person"[247] should not apply to private, consensual behavior. There is little likelihood, however, that the enacting legislature in 1887 would have endorsed these decisions. The decisions' justification must lie in aspects of today's culture in which enforcement is sought. In other words, change has trumped intent.

The ultimate test of whether it is possible to dispense with legislative intent in favor of other principles is the one that John Marshall used in *Wiltberger*.[248] Let

239. 498 U.S. at 105-06.
240. *Id.* at 115-16.
241. *See* ESKRIDGE, *supra* note 8, at 48-80.
242. *Id.* at 14–18 (discussing United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979)).
243. 763 N.E.2d 38 (Mass. 2002).
244. MASS. GEN. LAWS ch. 272, § 34 (2002).
245. *Gay and Lesbian Advocates & Defenders*, 763 N.E.2d at 42.
246. 318 N.E.2d 478, 481 (Mass. 1974).
247. MASS. GEN. LAWS ch. 272, § 35 (2002).
248. 18 U.S. (5 Wheat.) 76 (1820).

us call this the "Marshall Test."

The Marshall Test

> For any given value proposed to replace legislative intent in the interpretation of a statute, that value supersedes legislative intent if a decision maker would accept the following proposition:
>
> "There are values more important than intent at stake here, so I am willing to undermine what I know to be the intent of the legislature in order to promote those competing values."

Marshall bluntly put fair notice into this category. Yet as far as I know, no other values stand up to the Marshall Test routinely, although many values become part of the mix of considerations that courts use in deciding cases, as Professor Eskridge has shown.[249] For lenity, courts at least sometimes answer affirmatively. If the language of a statute does not criminalize particular conduct, courts are not likely to expand its scope, even if the enacting legislature mistakenly wrote the statute more narrowly than it intended. Similarly, plain language arguments outside the context of lenity at times also survive the Marshall Test, even in the teeth of strong evidence that a mistake was made.[250] Decisions in this realm vary, as discussed above, but it would be strange indeed for a court to say: "We know for certain that Congress intended to include expert fees in a fee-shifting statute, but our drive for coherence leads us to undermine that intent in favor of promoting coherence." Coherence is not such a value, despite Justice Scalia's rhetoric in *Casey*.[251]

Of course, many other values contribute to the interpretation of statutes. These are reflected in such principles as the presumption that statutes should be construed to avoid constitutional problems and rules designed to preserve the traditional relationship between federal and state government. These principles do not substitute for intent either. Rather, they interact with intent, sometimes in novel ways.

Consider, for example, the rule that statutes are construed to avoid constitutional questions. This canon is often stated in intentionalist terms: the court assumes that the legislature did not intend to enact an unconstitutional statute, and therefore resolves difficulties in favor of a reading that survives constitu-

249. *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989).

250. *See, e.g.*, United States v. Locke, 471 U.S. 84, 93 (1985) (taking literally a statutory deadline that requires filings "prior to December 31," despite likelihood that Congress intended to set deadline as the end of the year).

251. *See supra* note 210.

tional challenge.[252]

Contrast this approach with that of *NLRB v. Catholic Bishop*,[253] in which the Supreme Court held that the National Labor Relations Act did not give religious school teachers the right to unionize.[254] The Court set a high hurdle for the National Labor Relations Board to vault: because application of the labor laws to religious school teachers could, on some future occasion, cause the courts to become enmeshed in questions of religious freedom, the Court required some "clear expression" by Congress that it intended to include this group.[255] Otherwise, the Court would assume the group not to be included. Yet the argument was repeatedly stated in intentionalist terms:

> There is no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act. Admittedly, Congress defined the Board's jurisdiction in very broad terms; we must therefore examine the legislative history of the Act to determine whether Congress contemplated that the grant of jurisdiction would include teachers in such schools.[256]

Notably, the Court did not claim that such values can survive the Marshall Test. That is, the Court did not say that the constitutional values are sufficiently important that the judiciary is willing to override the clear intention of the legislature. A court may at times do so surreptitiously, as Professor Eskridge argues was the case in *Catholic Bishop*,[257] but that the court has chosen to speak in intentional terms, even to mask its own agenda, reveals its own tacit recognition that legislative intent is an important consideration in its own right.

All of this shows not that legislative intent is the only approach to statutory interpretation, but rather that it is an indispensable part of any approach to statutory interpretation. Other values—important values—are surely part of the mix. But it is hard to see how a decisionmaker, absent some degree of dishonesty, can dispense with the concept altogether.

V. THE STATUS OF THE LEGISLATIVE HISTORY DEBATE

Whether legislative history is good evidence of legislative intent is another matter. Justice Scalia's disapproval of courts' relying on legislative history has two parts. The first is that legislative history can only be used to provide

252. *See, e.g.*, United States v. X-Citement Video, Inc., 513 U.S. 64, 73 (1994) ("[W]e do not impute to Congress an intent to pass legislation that is inconsistent with the Constitution as construed by this Court.").

253. 440 U.S. 490 (1979).

254. *Id.* at 507.

255. *Id.* at 504-07.

256. *Id.* at 504.

257. *See* Eskridge, *supra* note 249, at 1066-67 (criticizing the Supreme Court for ignoring the will of Congress in *Catholic Bishop*).

evidence of legislative intent, and legislative intent is not a legitimate subject of inquiry to statutory interpreters, whose job it is to interpret laws, not intentions. The second prong is that even if it is legitimate to speak of legislative intent, legislative history is a notoriously bad way to investigate intent. Although I have expressed strong disagreement with the first prong of the argument, the second prong presents questions that have not yet been adequately answered.

A. CONSTITUTIONAL OBJECTIONS

Critics of legislative history point to exactly the kinds of examples I have presented to argue that this kind of focus subverts basic constitutional values. In a nuanced version of this critique, Professor Manning argues that when a court relies on what only a small group of members (perhaps as small as zero) puts into a committee report, it in essence has permitted Congress to delegate lawmaking authority to its own committees, which would be unconstitutional.[258] The Constitution requires that the two houses of Congress pass a bill by majority vote before it can become law.[259]

Professor Manning correctly rejects the stronger textualist argument that legislative history is illegitimate authority merely because it did not survive the legislative process.[260] Many arguments that textualist judges make—from reliance on dictionaries to reliance on external historical circumstances—were not voted on by Congress. What is special about legislative history, Manning argues, is that it amounts to a small group of legislators controlling the interpretation of statutes.[261] If a law were passed delegating all questions about interpretation of, say, the USA PATRIOT Act[262] to the chair of a subcommittee of the Senate Judiciary Committee, surely that delegation would be unconstitutional. When courts rely upon legislative history, the argument continues, they are doing more or less the same thing.

Professor Jonathan Siegel has argued that Professor Manning is incorrect because the legislative history upon which courts rely is already in existence when Congress enacts a statute.[263]Because Congress has the right to incorporate by reference anything it wishes into law, there is nothing unconstitutional about reliance upon the pre-enactment historical record that was in place at the time a statute was enacted.[264]

I agree with Siegel, in part for the reasons he presents, and in part for a separate reason. In his response to Siegel, Manning summarizes his earlier argument as follows: "In particular, I have argued that the Court's separation-of-

258. *See* Manning, *Textualism*, *supra* note 1.

259. U.S. CONST. art. I, § 7.

260. Manning, *Textualism*, *supra* note 1, at 695-705.

261. *See id.* at 710-20.

262. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of the United States Code).

263. Siegel, *The Use of Legislative History*, *supra* note 1, at 1479.

264. *Id.* at 1480-1504.

powers case law powerfully undermines any approach to legislative history that generally treats it as authoritative."[265] The key word is *authoritative*. The entire debate between Manning and Siegel is about authoritative texts. But the approach to group intent that I have espoused here regards legislative history not as authoritative, but as evidence of intent, and what constitutes good evidence of intent will vary from statute to statute depending on the specifics of the enactment history. Sometimes, it may be a statement from an agency. Often, it will be a committee report. Sometimes, the record will be such a mess that there is no decent evidence because no one can sort it out well enough to make convincing arguments.

Manning anticipates this objection to his proposal. In response, he argues that the only reason committee reports and the like are good "evidence" is because they were authored by a subgroup within Congress that supposedly represents the intent of the entire group.[266] To the extent that the courts find such evidence of intent to be decisive, he argues, they have allowed the committee (or sponsor, or some other small group within Congress) to co-opt the process, at least with respect to how a statute should be applied in close cases.[267]

It is appropriate to be concerned about a legal system that permits laws to be interpreted on the basis of statements of a small group with no official status to give authoritative interpretations. But Manning is incorrect in concluding that just because a committee report or sponsor's statement provides convincing evidence of intent, it is something other than evidence of intent. Convincing evidence and decisive evidence are still only evidence. What makes the evidence convincing is its relationship to what seems to be the reality of the legislative process. The worse the match, the less convincing the evidence and the more subject to criticism courts should be for using it. But evidence is evidence, and good evidence should not be rejected out of hand. Even proponents of using legislative history as evidence of legislative intent agree that courts should be discerning in their use of historical information.[268]

Consider a dispute that is not about the applicability of a statute, but rather about whether a corporation had a culpable state of mind when it engaged in some action, perhaps misstating the status of some new product in a prospectus for a public offering of stock. Various emails from senior officers and directors on the new product's progress are available. This information will constitute evidence of what the corporation knew at the time of disclosure. How good any such item of evidence is depends on such things as timing, the role that the author played in the disclosure process, the extent to which the language of the disclosure and the piece of evidence are consistent or contradictory, and so on. By the same token, legislative history is evidence, with varying persuasive force

265. Manning, *Legislative History*, *supra* note 1, at 1530.

266. *Id.* at 1533.

267. Manning, *Textualism*, *supra* note 1, at 725-31.

268. *See* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 610 n.4 (1991) (defending "good-faith effort to discern legislative intent" through legislative history).

depending on a host of circumstances.

For these reasons, what I have said thus far about treating the legislature as an individual may cause concern about questions of governance, but it does not rise to the level of constitutional crisis. Perhaps the real concern should be that the legislative process works the way it does, with so many members voting on bills with which they are only marginally familiar at best.[269] Conceivably, our propensity to view a deliberative group as a single entity with a mind of its own makes it too easy to see this process as natural.

B. EVEN IF LEGISLATIVE INTENT IS IMPORTANT, IS HISTORY "GOOD EVIDENCE" OF INTENT?

Much of the debate about legislative history focuses on the question of how good a window into legislative intent it really is—once we accept that legislative intent is a legitimate inquiry in the first place. Opponents, focusing largely on cases in which courts appear to pick and choose snippets of the Congressional Record to make a point, argue that it is not reliable at all.[270]

It is very difficult to assess this objection. For the most part, I do not believe it to be very important, despite all the attention it has received in both the case law and the scholarly literature. How often does a dissenting or concurring opinion, or a well-researched law review article, show that judges actually misuse legislative history in a way that seriously threatens a legal system based on decent legal values? It happens, but not very often. For example, Scalia's remarks in his concurring opinion in *Conroy v. Aniskoff*,[271] discussed above in Part I, purport to demonstrate that the majority did a sloppy job in selecting snippets of legislative history.[272] Scalia's point strikes me as valid. Because the statute was clear on its face, and the historical research shoddy, perhaps the research should not have been reported as part of the basis of the decision. Yet the history was used only to confirm the decision based on the statute's language. Remember, Scalia concurred in the judgment.

On the other side of the equation, just how often is legislative history demonstrably useful? And when it is, how often does it do enough good to justify its use, as weighed against those cases in which its misuse leads courts astray? To the best of my knowledge, no one has investigated these questions systematically. In a recent article, Professor Eskridge has called for research into these kinds of issues.[273] I agree with him. That is the only way to separate

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269. *See* Arthur Lupia & Matthew D. McCubbins, *Lost in Translation: Social Choice Theory Is Misapplied Against Legislative Intent*, J. CONTEMP. LEGAL ISSUES (forthcoming), *available at* http://ssrn.com/abstract=529742 (posted Apr. 14, 2004) (arguing that social-choice theorists have mistakenly concluded that social-choice theory, when rigorously applied, renders irrelevant legislative intent).

270. *See, e.g.*, Manning, *Textualism*, *supra* note 1, at 687-88.

271. 507 U.S. 511 (1993).

272. *Id.* at 519 (Scalia, J., concurring).

273. Eskridge, *supra* note 29, at 1323. For an excellent example of an empirically-driven account of the use of legislative history, see Jane S. Schacter, *The Confounding Common Law Originalism in*

the facts from ideologically based biases asserted with no serious empirical foundation.

In just this context, an exciting debate has developed over whether legislative history was misused by the Supreme Court in *Holy Trinity Church v. United States*,[274] probably the first Supreme Court case in which legislative history trumped the language of the statute. A statute made it illegal "in any manner whatsoever, to prepay the transportation . . . of [an] alien . . . to perform labor or service of any kind in the United States."[275] Did that make it illegal for a church to pay for the transportation of its minister from England to New York? A lower court had said yes. The Supreme Court reversed, based on a number of arguments concerning the intent of Congress. Some were linguistic: although the church's acts fell within the plain meaning of the statute, "[i]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[276] Other arguments involved inferences of intent from the statute's substance. The Court concluded that Congress, respecting the United States as a Christian nation, would never have intended to impede the practice of religion and possibly create a First Amendment violation.[277]

More germane for our purposes, the Court also relied on a committee report that suggested that Congress intended the statute to apply to manual labor, but did not have time to make the language more precise before recessing for the term.[278] A recent article by Adrian Vermuele, who reviewed the entire legislative history surrounding the enactment of the statute at issue, argues that the Court got it wrong.[279] Vermeule argues that the work it takes to learn the full history—and the likelihood of error from picking and choosing—makes legislative history an unreliable source.[280] In response, Carol Chomsky has written an article defending the Court's use of legislative history.[281] She suggests that when the enactment history and social context are taken together, the Court's decision is vindicated.[282] She further claims that this sort of investigation is necessary if the interpreter wishes to base a decision on a full understanding of the context in which the statute was enacted.[283]

Controversy over the use of legislative history is most stark when there is no

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Recent Supreme Court Interpretation: Implications for the Legislative History Debate and Beyond, 51 STAN. L. REV. 1 (1998).

274. 143 U.S. 457 (1892).

275. Act of Feb. 26, 1885, ch. 164, 23 Stat. 332-33.

276. 143 U.S. at 459.

277. *Id.* at 465-72.

278. *Id.* at 464-65.

279. *See* Vermeule, *supra* note 29, at 1837.

280. *See id.* at 1863.

281. *See* Carol Chomsky, *Unlocking the Mysteries of* Holy Trinity*: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901 (2000).

282. *See id.* at 907.

283. *Id.* at 952.

serious allegation that the history was strategically culled to create a false impression, and the historical analysis suggests that the legislature did not want the statute to be applied as the most natural reading of its language would seem to demand. The issue arises most often when the history is at odds with the ordinary meaning of a statute's words, as happened in *Chisom v. Roemer*[284] and *Brown & Williamson*,[285] discussed in the previous Part. In both of those cases, the Court chose to look at extrinsic evidence of legislative intent, which ultimately trumped the most natural reading that the statute would have without the additional context.

The analysis presented here suggests that as a default position courts should indeed take legislative intent into account, and then make a decision as to whether evidence of legislative intent that contradicts the way in which most people would understand the statute as written should be given priority over the language itself. If even plain language is by and large only evidence of communicative intent, albeit privileged evidence, then this is really the only conclusion to reach. In this way, the tension between rule-of-law values and the intent of the legislature dissolves. This is because intent *is* a rule-of-law value, although at times a value in competition with others. As for legislative history as evidence of legislative intent, evidentiary issues will always remain. When is it the best evidence? When is it supportive, but equivocal? How much weight a court should give to each type of evidence will depend on the facts of the case and the political orientation of the judge. That cannot be helped.

In most cases, the language of the statute does lead to the conclusion that only one interpretation is possible. Consider *United States v. Jefferson*,[286] a recent case in the Court of Appeals for the Seventh Circuit. A statute made it illegal to "sell or otherwise dispose of" a firearm to a known felon.[287] The defendant was convicted of violating this statute after buying two guns and giving one to his brother, a convicted felon, for temporary safekeeping.[288] The question was whether this transfer should count as "disposing of" the gun under the statute.[289] The language would support, but not require, a finding that the defendant violated the statute. In affirming the conviction, the Seventh Circuit held:

> Although we must keep in mind that ambiguity in criminal statutes should generally be resolved in favor of lenity, this maxim must of course yield to the paramount consideration—to follow congressional intent. Here, our best evidence of congressional intent is the legislative history cited above, which

284. 501 U.S. 380 (1991).
285. 529 U.S. 120 (2000).
286. 334 F.3d 670 (7th Cir. 2003).
287. 18 U.S.C. § 922(d) (2000).
288. 334 F.3d at 671.
289. *Id.* at 673.

> indicates that Congress wanted to broaden the reach of the gun control statute to cover a wider range of firearms transfers.[290]

The court in *Jefferson* probably overstated its position. Assume that the statute, instead of saying "dispose of," said "transfers permanently," or some such thing. Assume further that the legislative history clearly indicated that Congress intended the statute to reach far beyond the statutory words, to cases like this one. I know of no judge who would permit the intent of the legislature to criminalize conduct clearly outside the scope of *any* reasonable interpretation of the statute. Due process values set limits on the extent to which extrinsic evidence of intent can trump the intent indicated in the statute itself.[291] But this does not mean that intent is irrelevant to statutory interpretation or that legislative history cannot be credible evidence of intent. It means only that a host of substantive considerations play a role in determining the weight that each type of evidence should be given in each case. Obviously, there is likely to be disagreement over the weightings.

When legal values conflict, choices always have to be made. Sometimes, these choices will be result-oriented, as Radin suggested seventy-five years ago,[292] and as cases like *Chisom* and *Brown & Williamson* strongly imply. Furthermore, some will ordinarily give more weight to one value than to the other, as a matter of political values and cognitive style. But, as I hope to have shown, it is very hard indeed to find a judge who can consistently claim to eschew intent as a value, and no judge that I know of would even try to eschew plain language as a leading consideration in statutory interpretation.

CONCLUSION

I have argued that it is both natural and sensible to talk about the intent of a group, especially a group that makes decisions together through deliberation. I have argued further that the distinction between the language of a statute and the intent of the legislature is largely a false one. All we can do when we interpret language is hope that we have absorbed whatever a speaker or writer has intended to convey. If intent is basically all that interpretation is about, then there is no point in positing rules pretending to avoid it. As I hope to have shown, even those who try to avoid intent talk do not always succeed, and often use intent as the rationale for rules that they claim to be alternative approaches to interpretation.

This does not mean, however, that the language of a statute does not count for much. Nor does it create an open season for those who would like to see courts create policy without regard to what the legislature wrote. For one thing, with

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290. *Id.* at 675 (citation omitted).

291. Elsewhere, I refer to this as "the linguistic wall." Solan, *supra* note 103, at 84. Peter Tiersma makes a similar point. *See* Tiersma, *supra* note 189, at 474-75.

292. Radin, *supra* note 14.

respect to every statute, an overriding aspect of the intent of the legislature was to write a law of general application. It is no accident that each federal statute is given a "Public Law" number. For this reason and because, as textualists point out, laws must be enacted pursuant to a set of rigid constitutional procedures, courts (and others) construing statutes should clearly give disproportionate weight to the statute's language. And they do.

Nor does this mean that intent should automatically trump other values, such as fair notice, when these values are espoused for their own sake. It may well be, for example, that the rule of lenity should be applied in some cases regardless of whether the enacting legislature would have wanted a statute to be applied more broadly. But this does not make intent irrelevant to interpretation. Rather, it makes intent one of a number of competing values, which may be given different weights in different cases.

Questions of intent arise when a statute is subject to more than one reasonable interpretation, when it appears that the legislature has made a mistake, or when the statute is written in terms broad enough to capture situations that the legislature would almost certainly have thought to be outside the statute's proper scope. When a statute is ambiguous, an interpretive effort is unavoidable. When there is an error, or when the statute's reach is arguably excessive, it is possible for courts to wash their hands of the problem and apply the statute literally,[293] although our legal tradition has, quite appropriately in my opinion, permitted courts to address these problems substantively. When the problems reach the level of absurdity, all judges, even textualist ones, agree that judicial intervention into the legislative process should occur. This makes intentionalists of us all.

How should courts determine intent? Many principles of interpretation espoused by those who eschew legislative intent as a legitimate inquiry are rules of thumb that the proponents justify as good proxies of intent. Among them are the ordinary meaning rule, the plain language rule, and the rule that statutes be construed so as to maximize coherence within the code. Interpreters also reasonably presume that legislators have in mind a number of noncontroversial background principles when they interpret statutes.[294] As for legislative history, the only legitimate question is the quality of the evidence it provides. Thus far there has been more rhetoric than evidence that the use of legislative history as evidence of intent has done our system great harm. Serious empirical investigation, as Professors Eskridge and Schacter suggest, is clearly in order.

None of this seems very radical to me, although there is clearly room for disagreement about what weight to give each of these factors in an individual

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293. *See* Lamie v. United States Tr., 540 U.S. 526, 533-34 (2004) (interpreting § 330(a) of Bankruptcy Code literally despite obvious drafting error); United States v. Locke, 471 U.S. 84 (1985) (taking literally a statutory deadline that requires filings "before" December 31, despite likelihood that Congress intended to set deadline as the end of the year).

294. *See* Siegel, *supra* note 21, at 348-49. For a similar set of considerations, see Michael S. Moore, *Do We Have an Unwritten Consitution?*, 63 S. CAL. L. REV. 107, 112 (1989).

case. Moreover, the situation gets no better if we decide to avoid speaking of intent. We will still need to find principles upon which a court should rely. Most of these are now stated in intentionalist terms, even by textualists. We can begin to state some of these instead as default rules by which courts should interpret statutes for the sake of making the law better, but that would reduce the role of the legislature in the lawmaking process without adding any certainty to the system. For example, adjusting the quest for coherence so that it is no longer stated intentionally will do nothing to rid us of the task of determining in which cases this principle should apply, and how much weight to give it when it does apply. The same holds true for other interpretive rules of thumb.

We understand our world by conjecturing about the intent of others. Will the world really collapse if our judges remain human too?