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# STATUTORY INTERPRETATION AND THE INTENTIONAL(IST) STANCE

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## I. INTRODUCTION

For over one hundred years, legal scholars, jurists, lawyers, and many others have debated whether and to what extent the actual intent of the legislature should play a role in statutory interpretation. These scholars have pondered whether individuals and collectivities can have intentions; they have asked whether it is possible for judges to discover the legislature's actual intent; and they have questioned whether legislative intent should play a role in judges' interpretations of statutes. In addressing these questions, scholars have amassed a voluminous literature devoted to defining, discovering, and implementing legislative intent; but, as we argue in this paper, such debates have sidetracked us from asking a more important question: namely, what do statutes mean?<sup>2</sup>

In this paper, we explain that judges need not search for the legislature's actual intent when interpreting statutes. Rather, they

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1. With apologies to Daniel C. Dennett whose title we borrow. DANIEL C. DENNETT, *THE INTENTIONAL STANCE* (1987).

2. The literature focusing on the subsequent question has asked how we figure out statutory meaning. There are several branches of this debate: intentionalists, non-intentionalists, textualists, currentists, and legislative historians. *See e.g.*, WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 216 (2000); ABNER J. MIKVA & ERIC LANE, *AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS* (1997); MATHREW D. MCCUBBINS & DANIEL B. RODRIGUEZ, *WHAT STATUTES MEAN: STATUTORY INTERPRETATION AND THE POSITIVE POLITICAL THEORY OF LAW* (2005) (manuscript on file with authors); WILLIAM D. POPKIN, *MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS* (3d ed. 2001).

must figure out what the legislature's statutes mean. This distinction is a subtle but important one, for while actual legislative intent may or may not ever exist, the discovery of statutory meaning is almost always possible. Further, the discovery of statutory meaning merely requires judges to use the approach that they and other humans use on a constant basis to figure out what the actions of others mean. Indeed, whether we are discerning the meaning of statutes, determining what our colleagues' statements mean, or discovering what our pets' actions mean, all humans use what scholar Daniel Dennett dubs the *intentional stance*.<sup>3</sup> That is, we treat the individual, collectivity, animal, or object whose meaning we seek to understand as a rational agent with beliefs, desires, and intentions.<sup>4</sup> Of course, such intentions need not be actual intentions written into neurons and synapses; rather, they are metaphorical intentions that we impute to others in order to figure out what their actions, statements, or writings mean.<sup>5</sup>

This paper proceeds as follows: We first provide a brief overview of the debates about actual legislative intent and statutory interpretation. After reviewing such debates, we emphasize that scholars' avowal or disavowal of actual legislative intent has prevented us from asking the more important and more fundamental question of what statutes mean.<sup>6</sup> In an effort to shift the terms of the

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3. DENNETT, *supra* note 1, at 15–21.

4. *Id.*

5. *Id.*

6. Costello provides a good discussion of this topic:

[A] court wishing to attribute any purpose or intent to Congress must necessarily indulge assumptions, conventions, or benign fictions.

....

... The appropriate focus is on what the statutory words mean and not on what a particular committee meant, what a group of voting Members meant, or what a hypothetical 'average' Member meant.

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, 64; see also *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527–28 (1989) (Scalia, J., concurring) (claiming the presumption that Congress always has the surrounding body of law in mind when it writes a statute is nothing more than a "benign fiction"); *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989) (arguing that "original meaning" better summarizes "the interpretive task" than does original "intent"); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517. Scalia argues:

debate back to its original formulation (indeed, Oliver Wendell Holmes<sup>7</sup> and William Blackstone<sup>8</sup> seem to have had the question of statutory meaning precisely in mind), we discuss the modern cognitive science and philosophy literatures—both of which emphasize that humans regularly impute intentions to everything in their environment in order to figure out what the actions that they observe mean. After providing several simple examples of how imputing intentions helps us to find meaning, we then extend our discussion of intentionality to the legislative context. We conclude with a discussion of how the intentional stance and metaphorical intent enable judges to determine what statutes mean. While a full-fledged theory of statutory interpretation is beyond the scope of this paper, the focused discussion of legislative intent undergirds a general, more theoretically complex approach to discerning the meaning of statutes.

## II. THE SEARCH FOR ACTUAL LEGISLATIVE INTENT

“[I]ntentionalism’s professed goal . . . is to implement the *actual* intent of the enacting Congress.”

—Eskridge, Frickey, and Garrett<sup>9</sup>

For more than two hundred years, legal scholars and jurists have

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[T]he quest for the “genuine” legislative intent is probably a wild-goose chase anyway. In the vast majority of cases I expect that Congress *neither* (1) intended a single result, *nor* (2) meant to confer discretion upon [an administrative] agency, but rather (3) didn’t think about the matter at all. If I am correct in that, then any rule adopted in this field represents merely a fictional, presumed intent, and operates principally as a background rule of law against which Congress can legislate. *Id.*

7. As Oliver Wendell Holmes stated, “[w]e do not inquire what the legislature meant; we ask only what the statute means.” Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417 (1899).

8. Indeed, William Blackstone emphasizes that “[t]he fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable.” WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 59 (1765).

9. ESKRIDGE, JR. ET AL., *supra* note 2.

debated what role the legislature's actual intent should play in statutory interpretation.<sup>10</sup> According to some, the search for actual legislative intent when interpreting statutes is a fool's errand, for it is impossible for collectivities, such as legislatures, to have intentions.<sup>11</sup> Kenneth Shepsle, for example, drawing lessons from the theory of social choice, concludes that "[l]egislative intent is an internally inconsistent, self-contradictory expression."<sup>12</sup> Not surprisingly, this claim has sparked the attention of several scholars, who argue that the theory of social choice is not so conclusive and that Shepsle's conclusions may not be warranted.<sup>13</sup> For example, Arthur Lupia and Mathew McCubbins demonstrate that Shepsle's conclusions rest on wildly unrealistic assumptions about the nature of human decision making.<sup>14</sup> William Eskridge, Philip Frickey, and Elizabeth Garrett go one step further, arguing that "[a]ny 'legislative intent' is not only a collective intent, but under Article I, Section 7 of the Constitution must be a coincidence of at least two different collective intents, that of the Senate and the House."<sup>15</sup>

Moving beyond debates about whether legislatures can have

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10. See, e.g., BLACKSTONE, *supra* note 8, at 58–62; Holmes, *supra* note 7, at 419; Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 381 (1907); Zechariah Chafee, Jr., *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381, 399–400 (1941); William D. Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S. CAL. L. REV. 543, 595 (1988); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 239 (1992); ESKRIDGE, JR. ET AL., *supra* note 2, at 216; MCCUBBINS & RODRIGUEZ, *supra* note 2; Arthur Lupia & Mathew D. McCubbins, *Lost in Translation: Social Choice Theory is Misapplied Against Legislative Intent*, 14 J. CONTEMP. LEGAL ISSUES 585 (2005).

11. See, e.g., JEREMY WALDRON, *LAW AND DISAGREEMENT* 119–46 (1999); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 437 (1988) (positing finding the "legislative center of gravity" as one way to solve the problem of finding the intent of the collectivity); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 251–52 (1986); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870 (1929–1930); Shepsle, *supra* note 10, at 254.

12. Shepsle, *supra* note 10, at 239.

13. See, e.g., ESKRIDGE, JR. ET AL., *supra* note 2; Lupia & McCubbins, *supra* note 10.

14. Lupia & McCubbins, *supra* note 10.

15. ESKRIDGE, JR. ET AL., *supra* note 2.

intentions, other scholars question whether judges will be able to discover the legislature's intent when one exists. According to Max Radin, it is impossible for judges to accomplish such a task, for "[a] legislative intent, undiscoverable in fact, irrelevant if it were discovered . . . is a queerly amorphous piece of slag."<sup>16</sup> Many scholars have made similar arguments,<sup>17</sup> while others suggest that it is possible for judges to discover legislative intent, so long as they do not face new problems that were unanticipated by the drafters of the statute.<sup>18</sup>

Still other scholars ask whether judges interpreting statutes should even care about legislative intent (assuming, of course, that actual legislative intent exists and that judges can discover it).<sup>19</sup> For those who believe in legislative supremacy, the search for legislative intent is of paramount importance. These scholars emphasize that Article I of the United States Constitution grants sole lawmaking authority to the legislature and that judges must, therefore, base their interpretations of statutes on the intent of the enacting legislature.<sup>20</sup> As Roscoe Pound emphasizes: "The object of genuine interpretation is to discover the rule which the law-maker intended to establish; to discover the intention with which the law-maker made the rule, or the sense which he attached to the words wherein the rule is

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16. Radin, *supra* note 11, at 872.

17. See Farber & Frickey, *supra* note 11, at 425 (asserting intent is not wholly irrelevant but rather part of the judicial inquiry, which in the end "is an exercise in practical reason rather than foundationalist formalism"); Sanford Levinson, *Law as Literature*, 60 TEX. L. REV. 373, 379 (1982) (questioning "why intentions of long-dead people from a different social world should influence us . . .").

18. See ESKRIDGE, JR. ET AL., *supra* note 2, at 214.

19. See Macey, *supra* note 11, at 227 (favoring the "traditional approach" to statutory interpretation, under which judges interpret statutes based on "what the statute actually say[s] rather than on what the . . . bargain was between the interest group and the legislature").

20. See MCCUBBINS & RODRIGUEZ, *supra* note 2; McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 737 (1991) [hereinafter McNollgast, *Positive Canons*]; see also McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 6 (1993) [hereinafter McNollgast, *Legislative Intent*] (stating that "judges and citizens who are directly affected by a statute need to have a reasonably accurate method of ascertaining the policy intent of a statute").

expressed.”<sup>21</sup>

Other scholars take issue with Pound’s claim and argue that judges should look not to legislative intent, but rather to other factors (such as society’s current norms and values) when interpreting statutes.<sup>22</sup> Taking the middle ground between these two extremes, still others suggest that judges should interpret statutes on the basis of legislative intent only when they know what members of the legislature had in mind when they wrote the statute. For example, Zechariah Chafee notes that “we should firmly resolve never to speak of the intention of a testator or other writer on a given point except after we have carefully convinced ourselves that that point was actually in his mind when he wrote the words in question.”<sup>23</sup> Similarly, Henry Hart and Albert Sacks state:

In interpreting a statute a court should: 1. Decide what purpose ought to be attributed to the statute and to any subordinate provision of it which may be involved; and then 2. Interpret the words of the statute immediately in question so as to carry out the purpose as best it can, making sure, however, that it does not give the words either—(a) a meaning they will not bear, or (b) a meaning which would violate any established policy of clear statement.<sup>24</sup>

Although these scholars ask slightly different questions and provide dramatically different arguments about the role of legislative

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21. Pound, *supra* note 10, at 381.

22. See generally WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994) (exploring the thesis that as the distance between statutory enactment and interpretation grows, an originalist inquiry becomes impossible or irrelevant); T. Alexander Aleinikoff, *Patterson v. McLean: Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21–22 (1988) (defending a “nautical” model of interpretation, which understands a statute as an “ongoing process”); Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 528 (1982) (arguing that propositions of law are neither descriptions of legal history nor expressions of the speaker’s preference but rather are “interpretive of legal history, which combines elements of both”); Eskridge, Jr., *supra* note 10 (exploring the role public values play in statutory interpretation); Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505 (1992) (critiquing Stanley Fish’s post-modern approach to the interpretive process).

23. Chafee, Jr., *supra* note 10, at 398.

24. HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1200 (William N. Eskridge & Philip P. Frickey eds., 1999).

intent, they all share one feature: all are concerned with discovering *actual* legislative intent. Indeed, much of the early scholarship, and nearly all of the contemporary scholarship on statutory interpretation, seeks to discover and implement what legislators actually had in mind when they passed a statute.

We seek to move beyond this focus on the actual intent of the legislature. Specifically, we seek to shift the terms of the statutory interpretation debate away from the search for actual legislative intent and toward a search for what statutes mean. We thus echo Holmes<sup>25</sup> and other early writers (for example, Blackstone<sup>26</sup>) who recognized the importance of statutory meaning. Indeed, in keeping with Holmes, we “do not inquire what the legislature meant; we ask only what the statute means.”<sup>27</sup>

In this way, we seek to bring the statutory interpretation debate back to its original focus on statutory meaning, and in doing so, we introduce a new theory of how judges should interpret statutes. Specifically, we argue that judges should adopt an intentional stance. The intentional stance, unlike the search for actual intent, does not require knowledge of what legislators were actually thinking when they wrote a statute.<sup>28</sup> Rather, it involves the imputation of intentionality to the legislature in order to figure out what its statutes

25. Holmes, *supra* note 7, at 417.

26. BLACKSTONE, *supra* note 8, at 59.

27. Holmes, *supra* note 7, at 419.

28. See generally MCCUBBINS & RODRIGUEZ, *supra* note 2; Stephen Breyer, *The Usefulness of Legislative History: Examples*, 65 S. CAL. L. REV. 845 (1992) (defending courts' careful use of legislative history); Harry William Jones, *Extrinsic Aids in the Federal Courts*, 25 IOWA L. REV. 737 (1940) (presenting a critical analysis of the use of extrinsic aids in statutory construction); McNollgast, *Legislative Intent*, *supra* note 20 (proposing a method for interpreting legislation that is grounded in a positive theory of the behavior of legislators and the president); McNollgast, *Positive Canons*, *supra* note 20 (positing positive political theory as way to ascertain legislative intent); 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) (setting forth a theory of legislative rhetoric that takes into account the negotiations that go into the drafting of legislation); Arthur Lupia & Mathew D. McCubbins, *When Can Legislative Records Aid Statutory Interpretation? Inference, Credibility and Collective Intent in the U.S. Congress* (2005) (manuscript on file with authors) (discussing the branch of non-cooperative game theory that examines legislative decision making).



mean. As we discuss at length in the next section of this paper, all humans regularly use the intentional stance as a tool for determining what something means; thus, it should pose no problems for judges. Indeed, whether we seek to understand statutes, the actions of our pets, corporations, or markets, we must first treat the object as if it had intentions and then ask “what does it mean?”

### III. THE INTENTIONAL STANCE

It is well known among both cognitive scientists and philosophers that humans impute intentions to nearly everything they encounter.<sup>29</sup> Indeed, as humans, we treat others as rational actors when we make choices in social situations or when we design mouse traps by reasoning about what mice prefer (i.e., cheese). We even impute intentions to inanimate objects, such as “the stubborn sticking car door; the uncooperative computer; the automobile with a personality; and especially the pet who understands.”<sup>30</sup> Dennett refers to this tendency to impute intentions to objects in our surroundings as the intentional stance—that is, “treating the object whose behavior you want to predict as a rational agent with beliefs,” desires, and intentions.<sup>31</sup>

Lest one think that the intentional stance is little more than a manner of speaking, Gilles Fauconnier and Mark Turner argue that imputing intentionality to individuals, collectivities, and objects is a fundamental characteristic of human cognition.<sup>32</sup> These scholars emphasize that intentionality emerges from the process of conceptual blending, a process in which humans project their own intentionality onto otherwise non-intentional objects and events. They suggest that such blending enables humans to construe virtually any individual, collectivity, object, or event as intentional.<sup>33</sup> Thus, in these scholars’ view, the intentional stance that Dennett describes is a direct result of

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29. DENNETT, *supra* note 1, at 15; GILLES FAUCCONNIER & MARK TURNER, *THE WAY WE THINK: CONCEPTUAL BLENDING AND THE MIND’S HIDDEN COMPLEXITIES* 100 (2002); Alexandra C. Horowitz & Marc Bekoff, *Naturalizing Anthropomorphism: Behavioral Prompts to Humanizing Animals* (2005) (unpublished manuscript, on file with authors).

30. Horowitz & Bekoff, *supra* note 29, at 6.

31. DENNETT, *supra* note 1, at 15.

32. See FAUCCONNIER & TURNER, *supra* note 29, at 349 (noting that intentionality is part of a “pattern of meaning construction”).

33. *Id.* at 100–01.

the way that humans think.<sup>34</sup>

The intentional stance, however, is far more than simply a characteristic of human cognition. It is also an essential part of how humans come to construct meaning, to predict the actions of others, and to interpret phenomena in the world around them.<sup>35</sup> According to Fauconnier and Turner, imputing intentions to others serves a functional purpose because “[w]e interpret each other on the basis of the view that people’s actions and reactions are intentional . . . everything we do and think and feel is based on the relations it covers.”<sup>36</sup>

To take a concrete example of the functional purpose the intentional stance serves, consider Dennett’s discussion of how every time we drive on the highway, we stake our lives on our expectations about other drivers’ intentions.<sup>37</sup> For example, in order to drive on the highway in the first place, we must believe that the other drivers share our intent to drive safely, to stay within the lanes, and to drive in the proper direction.<sup>38</sup> If we did not have this belief and, instead, thought that the other drivers intended to drive recklessly so as to cause as many accidents as possible, it is unlikely that we would enter the highway at all.

Taking the highway analogy one step further, consider how imputing intentions to other drivers helps us to figure out what they mean when they undertake certain actions. For instance, suppose that we observe another driver on the highway use his left turn signal. What does this signal mean? For anyone who has driven in modern society, the answer is obvious: it means the other driver intends to turn left. Although this answer seems obvious to the modern driver, deeper reflection reveals that it is actually anything but obvious. Indeed, it is possible that the driver using his left turn signal has accidentally turned it on (and, therefore, does not intend to turn left). This possibility, however, rarely, if ever, crosses our minds. Rather, upon observing the other driver use his left turn signal, we impute intentionality to him and conclude that his use of

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34. FAUCONNIER & TURNER, *supra* note 29, at 349.

35. DENNETT, *supra* note 1, at 48; FAUCONNIER & TURNER, *supra* note 29, at 100.

36. FAUCONNIER & TURNER, *supra* note 29, at 100.

37. DENNETT, *supra* note 1, at 48.

38. *See id.*

the left turn signal means that he is going to turn left—a prediction that, more often than not, turns out to be correct. In this way, the intentional stance enables us to determine the meaning of the other driver's signal, to understand his actions, and to make accurate predictions about his behavior. This is no less true of other situations and other types of signals, for although the use of the intentional stance is by no means foolproof, "there are large areas in which [the intentional stance] is extraordinarily reliable in its predictive power."<sup>39</sup>

Note also that in the highway analogy, we are concerned with metaphorical (not actual) intent. For example, when interpreting what the other driver's turn signal means, we do not consider his actual thought processes, nor do we care about his actual intent. Herein lays the beauty of the intentional stance: our capacity to use it is "quite unaffected by ignorance about brain processes—or even by large-scale misinformation about brain processes."<sup>40</sup> Thus, when we take an intentional stance toward the other driver, we simply treat him as though he is a rational actor with beliefs, desires, and intentions. We then interpret his signal in that light.

For our purposes, the most important aspect of the above discussion is that we also use the intentional stance when interpreting the actions of collectivities. Consider the following examples:

*With benign intent, the United States has behaved, and until its power is brought into a semblance of balance, will continue to behave in ways that annoy and frighten others. . .*

. . .<sup>41</sup> Most Americans saw little need to explain our actions.<sup>42</sup>

*The Santa Clara case held that a corporation was a person under the fourteenth amendment, and thus entitled to its protection. . .*<sup>43</sup> Most later progressive legal thinkers,

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39. *Id.*

40. *Id.*

41. Kenneth N. Waltz, *America as a Model for the World? A Foreign Policy Perspective*, 24 PS: POL. SCI. & POL. 667, 669 (1991) (emphasis added).

42. *Id.* at 668.

43. Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 173 (1985–1986) (emphasis added).

however, followed Ernst Freund's more "realistic" effort, dismissing the idea of corporate "personality" as merely a "metaphor."<sup>44</sup>

*The jury must first decide whether aggravating circumstances exist in the so-called aggravation phase . . . .*<sup>45</sup>  
[O]ne must assume the jurors followed the court's instructions during deliberations and their subsequent recommendation of death reflected a belief in the existence of at least one aggravating circumstance.<sup>46</sup>

[I]t is evident that *each department should have a will of its own*; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others.<sup>47</sup>

*The Court's opinion serves to communicate an institutional decision. . . .* In most cases, justices therefore try to persuade as many others as possible to join an opinion.<sup>48</sup>

[M]any *Asian stock markets have continued to rally this year. . . . "Such behavior may seem odd . . . but it does appear that markets are behaving entirely rationally. . . ."*  
[I]nvestors had been buying stocks like Semen Gresik, a cement maker in Indonesia, helping to push that market higher.<sup>49</sup>

*The law provides a basis for bureaucracy's existence, specifies its powers and jurisdiction, and enables its*

44. *Id.* at 221.

45. Marc R. Shapiro, *Re-Evaluating the Role of the Jury in Capital Cases After Ring v. Arizona*, 59 N.Y.U. ANN. SURV. AM. L. 633, 648 (2004) (emphasis added).

46. *Id.* at 653.

47. THE FEDERALIST NO. 51 (James Madison) (emphasis added).

48. DAVID M. O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS*, 239–40 (6th ed. 2003) (emphasis added).

49. Conrad de Aenlle, *Why Stock Markets Stayed Calm in Southern Asia*, N.Y. TIMES, Jan. 16, 2005, at 3.9 (quoting Paul Niven, Head of Strategy at a London fund management company) (emphasis added).

*decisions to be enforced. . . . Bureaucracies frequently are monopoly providers of services for the public. . . .*<sup>50</sup> Of course, speaking of “bureaucracy” is to engage in oversimplification. . . . Bureaucratic agencies certainly are not monolithic. . . . Notwithstanding these very real methodological and epistemological problems, the actor-oriented, bureaucratic-centered image . . . captures bureaucracy’s role in the governance process.<sup>51</sup>

The above quotations make four things clear: 1) we take an intentional stance toward nearly everything we encounter, including collectivities; 2) our intentional stance involves metaphorical (not actual) intent; 3) our intentional stance helps us to understand, predict, and discern meaning from the actions of collectivities; and 4) our intentional stance, by and large, works for us.

Our third point—namely, that the intentional stance helps us to understand, predict, and discern meaning from the actions of collectivities—is perhaps best understood by returning once again to our highway analogy. Just as we imputed intentionality to the other driver to understand what his use of the left turn signal meant, so too do we impute intent to collectivities in order to understand what their actions mean. As was the case with the other driver, it is not the actual thought processes of individuals within the collectivity that interest us; rather, we treat the collectivity as an actor with beliefs, desires, and intentions in order to figure out what its actions mean.

To illustrate our fourth point (that the intentional stance, by and large, works for us), we return, once again, to Dennett.<sup>52</sup> Specifically, he states:

Do people actually use this [intentional] strategy? Yes, all the time. There may someday be other strategies for attributing belief and desire and for predicting behavior, but this is the only one we all know now. And when does it work? It works with people almost all the time . . . . The strategy also works on most other mammals most of the time. . . . It also works on some artifacts. . . . The strategy

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50. Larry B. Hill, *Who Governs the American Administrative State? A Bureaucratic-Centered Image of Governance*, 1 J. PUB. ADMIN. RES. & THEORY 261, 271 (1991) (emphasis added).

51. *Id.* at 263.

52. DENNETT, *supra* note 1.

even works for plants.<sup>53</sup>

#### IV. THE INTENTIONAL STANCE AND STATUTORY MEANING

The preceding discussion of the intentional stance suggests two important lessons for scholars engaged in debates about legislative intent and statutory interpretation. First, because the legislature is a collectivity in the same sense that corporations, courts, markets, and juries are collectivities, it makes little sense for us to try to discern its actual intent. Indeed, we do not attempt to discover the actual thought processes of Supreme Court justices when trying to understand their latest opinion,<sup>54</sup> nor do we ask ourselves about the actual thought processes of individual investors when trying to understand the market.<sup>55</sup> Rather, we take an intentional stance and impute metaphorical intent to these collectivities in order to figure out what their actions mean. We should do nothing different when we seek to understand the legislature and its statutes.

Second, because actual intent (if it exists) is not necessary for understanding what the actions of individuals and collectivities mean, we seek to shift the terms of the statutory interpretation debate away from the search for actual legislative intent and toward the quest for what statutes mean. While we do not deny that discussions of actual intent are important parts of metaphysical debates within philosophy,<sup>56</sup> such discussions are *fruitless* in normative debates

53. *Id.* at 21–22.

54. Although there is a large industry in political science that predicts Supreme Court votes, these studies do not claim to be examining the thought processes of individual jurists. Rather, they use various measured indicia to predict voting patterns. See, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); DAVID W. ROHDE & HAROLD J. SPAETH, *SUPREME COURT DECISION MAKING* (1976); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993); Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812 (1995).

55. Indeed, attempts to model market behavior on the basis of the rational behavior of individual investors have failed. See Jayendu Patel et al., *The Rationality Struggle: Illustrations from Financial Markets*, 81 AM. ECON. REV. 232 (1991); Thomas Russell & Richard Thaler, *The Relevance of Quasi Rationality in Competitive Markets*, 75 AM. ECON. REV. 1071 (1985).

56. See, e.g., DENNETT, *supra* note 1; FRED DRETSKE, *KNOWLEDGE AND*

about how judges should interpret statutes and in positive debates about legislative action. Indeed, because Article I of the United States Constitution<sup>57</sup> grants sole lawmaking authority to the legislature and because it requires the legislature to pass statutes in order to change the law, the task of statutory interpretation must involve a consideration of what statutes mean. Elsewhere, we provide a more detailed account of how exactly judges ought to go about discerning statutory meaning,<sup>58</sup> but suffice it to say for now that understanding what statutes mean begins and ends with the intentional stance and the imputation of metaphorical (not actual) intent.

In closing, we wish to draw one final distinction between our approach and those that others have adopted: namely, our intentional stance toward acts of Congress does not imply that we believe that jurists should read into the language of a statute whatever whim suits them,<sup>59</sup> whether it be the law's integrity,<sup>60</sup> the current view of political or social opinion,<sup>61</sup> public motives,<sup>62</sup> or a rational, public purpose.<sup>63</sup> Nor do we believe, as does Stanley Fish,<sup>64</sup> that we exist within an interpretive community and that certain interpretations and

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THE FLOW OF INFORMATION (1981); JERRY FODOR, THE MODULARITY OF MIND (1983); JERRY FODOR, PSYCHOSEMANTICS: THE PROBLEM OF MEANING IN THE PHILOSOPHY OF MIND (1987); J. SEARLE, INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND (1983).

57. U.S. CONST. art. 1.

58. See generally MCCUBBINS & RODRIGUEZ, *supra* note 2; see also Mathew D. McCubbins & Daniel B. Rodriguez, *Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon*, 14 J. CONTEMP. LEGAL ISSUES 669 (2005); McNollgast, *Legislative Intent*, *supra* note 20 (proposing a positive theory of behavior of legislators and the president as a means to interpret legislation); McNollgast, *Positive Canons*, *supra* note 20 (positing positive political theory as a way to ascertain legislative intent).

59. See Schanck, *supra* note 22, at 2597 (noting that a postmodern theory, no matter how general, will never serve in all contexts as the correct method of interpreting statutes).

60. See Dworkin, *supra* note 22.

61. See ESKRIDGE JR., *supra* note 22; Aleinikoff, *supra* note 22.

62. See Macey, *supra* note 11.

63. See HART & SACKS, *supra* note 24.

64. See Schanck, *supra* note 22, at 2541–46 (asserting that Fish argues “all facts, ideas, principles, thoughts, and propositions are socially and culturally produced, and therefore all purported knowledge consists of interpretations and beliefs”).

reasoning are impossible to escape. Rather, we emphasize that the passage of legislation is political and partisan,<sup>65</sup> and so, too, is its interpretation. Indeed, key aspects of any legislation will be hotly debated and the partisan battle that gave rise to the legislation will be repeated at each opportunity to interpret (or re-interpret) the legislation.

Thus, we believe that, far from being reflections of jurists' whims, statutes are authoritative policy communications from the legislature and are, in many ways, analogous to wills. For example, when interpreting wills, we impute intentions to the testator, just as we impute intentions to the legislature when interpreting statutes. Often, the testator establishes a trustee to carry out his or her instructions and to interpret the meaning of the will under changing circumstances. This is similar to executive agencies' implementation of statutes. When interpreting wills, we do not leave it to the reader to find his or her own interpretation, for if we did, we would soon find inheritance practices completely changed, with new equilibrium behaviors arising to replace wills, trusts, and bequests.<sup>66</sup> Rather, when questions arise as to what a will means, we may need to look at other indicia of meaning. Is the meaning explained elsewhere, in some extrinsic aid that allows us to understand a will's meaning? Similarly, should we look to trustworthy extrinsic aids that help to define a statute's meaning?<sup>67</sup> This exercise is intentionalism, in the

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65. GARY W. COX & MATHEW D. MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* 17–189 (Cambridge University Press 2005).

66. See Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630, 649 (1992) (“Limiting attention to the reliably evidenced, authenticated words of the will . . . ensures that private decisions expressed in proper and objective form will be protected against interference by others who may disapprove of or resent those decisions”).

67. Justice Scalia has argued that trustworthy extrinsic aids do not exist. See ROY M. MERSKY & J. MYRON JACOBSTEIN, 13 *THE SUPREME COURT OF THE UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS OF SUPREME COURT JUSTICES BY THE SENATE JUDICIARY COMMITTEE, 1916–1986*, at 65 (1989). We disagree. See MCCUBBINS & RODRIGUEZ, *supra* note 2. However, we will leave to another venue discussion of the conditions for trust, see generally ARTHUR LUPIA & MATHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* (1998) (explaining how citizens gather and use information), that define which statutes and actions within the legislature are trustworthy and which are not.



imputed metaphorical sense. It is a commonly used method of inferring the meaning of actions and an appropriate approach to statutory interpretation.