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Are Mental States Relevant for Statutory and Constitutional Interpretation

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ESSAY

ARE MENTAL STATES RELEVANT FOR STATUTORY AND CONSTITUTIONAL INTERPRETATION?

Kent Greenawalt†

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† University Professor, Columbia University School of Law. In developing my thoughts on this topic, I have learned a great deal from my colleagues John Manning, Peter Strauss, and Jeremy Waldron, and from workshops at Columbia and at a conference of analytical legal philosophers. Stephen Munzer made a crucial suggestion about organization and Melvin Eisenberg provided incisive criticisms of a near-final draft. Michael Dowdle has given me extremely helpful research assistance. I am also grateful to the editors of the Cornell Law Review for their careful job of editing, which has made the Essay clearer and more readable.

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INTRODUCTION

Judges in the United States must interpret statutes and constitutions. Largely because these texts are framed in the English language, a language shared by legislators, judges, and other citizens, judges employ sufficiently common techniques to sustain a coherent practice. Lawyers can often say with some confidence how judges will construe particular legal provisions, and, when they have serious doubts, they can sketch the likely alternatives. But we are now in an era of sharp theoretical disagreement over what judges do when they interpret authoritative texts.

In difficult cases of statutory interpretation, are judges mainly trying to give language its ordinary significance,[1] to discern the intent of legislators,[2] to carry out broad legislative purposes,[3] to legislate in the interstices,[4] to make statutes the best they can be in some complex sense,[5] or to perform yet some other task or tasks? Similar questions arise with constitutional interpretation. Disagreement exists regarding the soundest way to conceptualize what judges do and what they should do. Scholars further disagree about the practical relevance of extrinsic evidence as to what legislators or the Constitution's adopters meant to accomplish. A central issue both for conceptualization and for possible use of legislative history is the significance of discoverable attitudes of legislators about what they adopted.

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1 *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 44-47 (1997).

2 *See, e.g.*, Commonwealth v. Welosky, 177 N.E. 656, 658-59 (Mass. 1931).

3 *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1124-25 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

4 In some of his writings, Judge Richard Posner seems to take this position, although his language is different. *See, e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 73 (1990).

5 *See* RONALD DWORKIN, LAW'S EMPIRE 313-54 (1986).

For the first half of the last century, the prevailing opinion was that judges should seek to carry out the intent of the legislature.[6] A parallel position in constitutional law was that "the intent of the framers" ought to guide interpretation. Exactly what constituted a relevant intent was never crystal clear, but many people, including most of those who did not think very hard about the subject, supposed that the intent of the legislature was based on what actual legislators believed and hoped. On this view, when judges reach conclusions about "intent," they are making estimates about legislators' probable mental states when they adopted the statute in question.

Most modern scholars have not looked kindly on this view. Some assume not only that reasons other than evaluations of intent should figure in statutory interpretation, they challenge the coherence of such a concept of intent and regard mental state intentions of individual legislators as irrelevant to proper statutory interpretation.[7] This challenge to coherence emphasizes the difficulty in discerning what mental states matter and in combining the mental states of many legislators. Among various claims of irrelevance is the assertion that legislators legislate by adopting formal language, not by having intentions. In place of legislative intent, many critics have emphasized reader understanding, or a broad sense of legislative purpose that does not depend on individual intentions, or judicial appraisals of how the law may best develop. Before we embrace an alternative that excludes the mental states of legislators, we need to examine carefully whether the challenge to reliance on intentions is sound and whether any proposed alternative escapes the problems that legislative intent involves.

Re-examination of a mental states version of legislative intent may seem quixotic, but we can appraise alternatives thoughtfully only when we see how they differ from each other. No one writing about common law systems has undertaken a systematic study of just how various interpretive approaches do or do not rely on assumptions about the mental states of participants in the legislative process. Nor has anyone explored how far reader understanding approaches implicitly rely on assumptions about mental states and raise difficulties similar to those that trouble a mental states version of legislative intent. This Essay begins to fill that gap. Although it does not present a comprehensive program for how courts should interpret statutes and constitutions, it does examine in depth what various interpretive ap-

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6 *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETION 4-5 (1994) (summarizing the history of statutory interpretation).

7 For in-depth attacks on the use of legislative intent in statutory interpretation, see DWORKIN, *supra* note 5, at 313-54; Jeremy Waldron, *The Dignity of Legislation*, 54 MD. L. REV. 633 (1995); Jeremy Waldron, *Legislators' Intentions and Unintentional Legislation*, *in* LAW AND INTERPRETATION 329 (Andrei Marmor ed., 1995).

proaches entail and it attacks some common assumptions about why certain approaches are preferable to others.

Here are my major conclusions. First, reader understanding approaches to the meaning of statutory provisions do involve assumptions about mental states, and they raise difficulties similar to those that infect a mental states version of legislative intent. Second, versions of legislative intent that are "objective" or depend on the conventional weight of particular sources, like committee reports, do not wholly escape mental state difficulties, although the precise avenue for incorporating mental states will depend upon the method chosen for discerning legislative intent. Third, the difficulties concerning mental states are similar whether one focuses on narrow legislative objectives or broader purposes. Fourth, the "simple" mental states version of legislative intent proves more complex than one might first suppose, but it is capable of coherent statement. Fifth, the mental states problems of some approaches may be more severe than the mental states problems of other approaches, but no plausible approach wholly avoids mental state difficulties. Sixth, judges need not resolve all the subtle variations in theoretical understanding of statutory interpretation that scholars may profitably discuss.

Part I of this Essay clarifies what is at stake with an illustrative example. Part II sets the problems of statutory and constitutional interpretation in a broader theoretical context. Part III draws on informal analogies, and Part IV offers what I regard as the most attractive mental states version of legislative intent. With this account in hand, we are better able to evaluate both the more "objective" approaches to legislative intent and the reader understanding approaches. Parts V and VI discuss these in turn. Part VII contains brief comments about alternative approaches. Part VIII addresses the respective tasks of theorists and judges.

I do not mean to suggest that any one approach should be employed to the exclusion of all others. No single criterion—not legislative intent, nor reader understanding, nor anything else—comprises the whole of statutory interpretation. The relevant question about any particular approach is whether it belongs as *one element* in a total strategy of statutory interpretation. To reach final conclusions on this subject, one must build a more comprehensive theory about relations between courts and legislators and address substantial arguments about why judges should or should not consider various sources of guidance to meaning, such as legislative history.[8] Although my discussion does not yield definitive conclusions about what should count in

[8] I undertake a more comprehensive appraisal in *Statutory Interpretation: Twenty Questions*, but that book falls well short of a full theory of relations between courts and legislators. *See* KENT GREENAWALT, STATUTORY INTERPRETATION: 20 QUESTIONS (1999).

statutory and constitutional interpretation, it does have serious practical implications. It shows that difficulties in determining mental states do not create an insurmountable barrier against judges relying on the attitudes of legislators. And, by highlighting mental state complexities in approaches based on objective intent or reader understanding, I undercut one possible basis for embracing one of these approaches to the exclusion of any reliance on a mental states conception of legislative intent.

I concentrate primarily on statutory interpretation, but questions about legislators' intent and reader understanding exist for constitutional adjudication as well. In constitutional law, "originalists" are divided between those whose central guide is the intent of the framers, or more precisely the adopters of the Constitution,[9] and those whose test of original meaning is how the citizens or lawyers of the time would have understood the language of the Constitution. Most theorists and judges who reject originalism nevertheless believe that original meaning has some interpretive relevance; like originalists, they must decide the respective importance of the adopters' intent and readers' understanding, if the two diverge. At some points in this Essay, I note significant differences between statutory and constitutional interpretation, but most of my analysis applies to both. For the sake of convenience, I rely primarily on statutory examples.

I provide at the outset a cautionary note about the term "mental states." This Essay is not about the nature of individual mental states from a philosophic or scientific point of view. It does assume that human beings have hopes, expectations, and a sense of what they are trying to accomplish when they act. It also assumes that individuals can, to a substantial degree at least, explain their own mental states to others. And it further assumes that others can sometimes infer the likely mental states of actors who have not explained themselves, as a jury infers whether a gunman intended to kill a person he shot. These modest metaphysical assumptions are sufficient to sustain what follows.

I
AN ILLUSTRATION OF HOW INQUIRIES INTO INTENT CAN MATTER

An actual case reveals how the dispute over the significance of legislators' intentions matters practically.

In 1892 and 1893 Congress considered legislation to curb the killing and maiming of railway workers. One provision concerned automatic couplers on railway cars. Manual couplings were very

9 The "adopters" include all those who voted to ratify provisions of the Constitution.

dangerous. In 1890, for example, 369 men were killed and 7842 were injured making couplings.[10] Although many railway cars possessed automatic couplers, large numbers still lacked them.[11] Also, due to the wide variety of automatic couplers, many automatic couplers did not couple automatically with automatic couplers of different designs. In particular, the dominant coupler used for freight engines and cars, the Janney coupler, did not couple automatically with the Miller hook used on most passenger engines and cars.[12]

As adopted, the statute required that beginning in 1898:

> [I]t shall be unlawful for any [railroad company] to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.[13]

The statute imposed fines on violating railways and denied any defense of assumption of the risk in suits by injured workers.[14]

Suppose that one car with a working automatic coupler needed to be coupled to another car fitted with a working automatic coupler incapable of coupling automatically with the first coupler. Would a manual coupling of the two cars violate the act? The statutory language is ambiguous, not clearly indicating whether automatic couplers must always work compatibly with one another. One might read the statute merely to require that cars have automatic couplers; one might read it to require that any two cars to be coupled be able to couple automatically with each other. Initial reflection might suggest that reading the specific statutory language in the context of the law's broad purpose eliminates this ambiguity. The act's stated purpose is "to promote the safety of employees and travelers . . . ."[15] Requiring all cars to couple automatically with each other would best promote safety. But the matter of costs precludes easy resolution in favor of universal compatibility. The achievement of statutory purposes usually should be reasonable in terms of cost. Perhaps the safety gain from requiring full interchangeability would be very expensive.[16] A

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10 *See* U.S. INTERSTATE COMMERCE COMM'N, STATISTICS OF RAILWAYS IN THE UNITED STATES 75 (1891).

11 *See id.* at 34.

12 *See id.* at 36-38.

13 Act of Mar. 2, 1893, ch. 196, § 2, 27 Stat. 531, 531, *repealed by* Act of July 5, 1994, ch. 1, § 2, 108 Stat. 1379.

14 *See id.* §§ 6, 8, 27 Stat. at 532.

15 *Id.* § 1, 27 Stat. at 531.

16 An imaginary set of facts helps make this point. The Great Plains Railroad has 80,000 freight cars and engines equipped with Janney couplers, 15,000 freight cars unequipped with automatic couplers, and 15,000 passenger cars and engines, all equipped with Miller hooks. The cost of equipping any car with either kind of device is $300. (The figure in 1893 was roughly $30—more than $300 in today's dollars. *See* BUREAU OF THE

rational legislator could decide to require all cars to have automatic couplers but not to demand compatibility.[17] A judge's knowledge that worker safety is the statute's purpose thus does not settle how to interpret the ambiguous language about coupling.

A look at the legislative history surrounding the Act strongly suggests an aim to require compatible coupling. The House of Representatives had adopted language that clearly called for compatible couplers.[18] Senators objected to other features in the House provision[19] and made two changes in the bill's language to eliminate them.[20] Proponents of the amended language indicated that they did not mean to eliminate a requirement of compatible coupling. Despite expressing worry that one change in language might eliminate the

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CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 489 (1998); BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, THE STATISTICAL HISTORY OF THE UNITED STATES 125-27 (1965)).

It would cost Great Plains $4,500,000 to equip all of its cars and engines with automatic couplers (15,000 cars x $300). Equipping all of its engines and cars with devices compatible with each other would cost the railroad at least $9,000,000 (if it puts Janney couplers on the 15,000 unequipped freight cars and on the 15,000 passenger cars and engines). Over a period of ten years, 200 Great Plains workers have died and 4000 have injured themselves making manual couplings. Ninety-nine percent of the railroad's couplings join freight cars to other freight cars or engines or join passenger cars to other passenger cars or engines; only one percent of the couplings intermix passengers cars or engines with freight cars or engines. (Any serious evaluation of this sort would require inclusion of couplings between the engines and cars of one railroad line with the engines and cars of other railroad lines.)

Thus, if the railroad equips all its freight cars with Janney couplers and keeps all its passenger cars equipped with Miller hooks, and if automatic couplings produce no deaths or injuries, Great Plains will save 198 lives and prevent 3960 injuries. The cost of these life-saving measures will be $4,500,000, or $22,727 per life. The further expense of $4,500,000—needed to make all couplers compatible with each other—will save two lives and prevent 40 injuries. The cost of each extra life saved will be $2,250,000. Given the sense of a life's value in 1893, a legislator doing a cost-benefit evaluation might have concluded that a cost of over $2,000,000 per life saved was too great, that it would impose too high a price on passengers and shippers and drive some railroads out of business. If the statutory language is unclear about whether railroads must take the extra step of achieving compatible coupling, a judge might hesitate to assume that the broad purpose of the legislation requires that measure.

17 I here pass over the possibility, suggested by Peter Strauss in conversation, that legislators might have calculated that railroads would decide not to achieve full compatibility even though the statute required it, and that the legislators both approved such decisions and thought railroads should be liable when failures of compatibility happened to cause injury.

18 *See* H.R. 9350, 52d Cong. (1893); 24 CONG. REC. 1246 (1893).

19 Railroads controlling seventy-five percent of railway cars were to determine what kind of couplers all railroads would use, and if they failed to achieve a resolution, the Interstate Commerce Commission would make the decision. *See* 24 CONG. REC. 1246-47. During the Senate debates, certain Senators opposed the procedure for deciding what couplers would be used, as they were unwilling to countenance any particular maker of couplers achieving a monopoly. *See id.* at 1250, 1274.

20 *See id.* at 1332, 1370-71. Under the remaining language, railroads were left to ensure that their couplers were universally compatible. *See* Act of Mar. 2, 1893, ch. 196, § 2, 27 Stat. 531, 531 (statement of Sen. Cullom).

demand for compatibility, the Senate sponsor of the Act finally said he was willing to take the "sense of the Senate" on that point.[21] Judging from the number of Senators who spoke and who voted, the debates over this major piece of legislation were well attended. A reader of the debates gathers that most Senators understood that the compatibility requirement remained part of the Act. Because the House bill unambiguously contained the requirement, most concerned members of the House probably supposed that the ambiguous language of the final version of the Act continued that requirement.[22] Thus, if we ask what most members of Congress who had a view on the issue intended, we conclude that they probably regarded the final provision as requiring that automatic couplers couple with each other. Judges who thought that the actual attitudes of legislators should carry weight for statutory interpretation, *and* who thought that judges should consult debates and related materials to discern those attitudes, might well have read the ambiguous language to require compatibility, *even if* they would otherwise have reached a contrary conclusion.

Court opinions ruling on this statutory requirement indicate how techniques of judicial appraisal can make a difference. Writing for the Eighth Circuit, Judge Sanborn noted that the language of the statute obviously did not demand full compatibility.[23] Here is part of what he said:

> The primary rule for the interpretation of a statute or a contract is to ascertain, if possible, and enforce, the intention which the legislative body that enacted the law, or the parties who made the agreement, have expressed therein. But it is the intention expressed in the law or contract, and that only, that the courts may give effect to. They cannot lawfully assume or presume secret purposes that are not indicated or expressed by the statute itself and then enact provisions to accomplish these supposed intentions. While ambiguous terms and doubtful expressions may be interpreted to carry out the intention of a legislative body which a statute fairly evidences, a secret intention cannot be interpreted into a statute which is plain and unambiguous, and which does not express it. The legal presumption is that the legislative body expressed its intention, that it intended what it expressed, and that it intended nothing more.[24]

The full import of this passage is debatable. But the "intention" that counts is the intention expressed. Evidence of intention from

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21 24 CONG. REC. 1372.

22 The language of the Act adopted by the House conference committee was the same as that passed in the Senate. *Compare* text accompanying *supra* note 13, *with* 24 CONG. REC. at 1417-18.

23 *See* Johnson v. Southern Pac. Co., 117 F. 462, 466 (8th Cir. 1902), *rev'd*, 196 U.S. 1 (1904).

24 *Id.* at 465.

outside the text cannot contravene a plain meaning, and even ambiguous terms may be interpreted to carry out only those intentions "which a statute fairly evidences." The court speaks of legislative intention, but the overriding guide to interpretation is what the full text means on its face, including objectives that one can imply from the text.

Justice Fuller's opinion for the Supreme Court, on the other hand, read the statutory language to demand full compatibility.[25] To support the conclusion that Congress intended to require that cars couple automatically with each other in all instances, he relied on presidential messages urging the legislation.[26] He also referred to the Senate's changes in the bill's language, noting that "[t]hese demonstrate that the difficulty as to interchangeability was fully in the mind of Congress and was assumed to be met by the language which was used."[27] The Court employed a source for its decision—the Senate debates—not readily available to a typical reader of the text.[28]

II
BROADER CONTEXTS

Questions of interpretation and meaning arise for a wide range of human communications; they are subjects of study in the philosophy of language, literary interpretation, religious hermeneutics, and other fields. To think carefully about legal interpretation, we need to recognize what is distinctive about it and to assess whether general theories about human communication can settle how people should understand legal texts.

Possible guides to the meaning of language are similar for different domains, including law. Importantly for our purposes, one may think that the meaning of a communication is determined by the writer (or speaker), or, alternatively, by reader (or listener) understanding. One may believe that the meaning is determined by people's actual mental states or by some construct of a reasonable writer or reader. If people's actual mental states determine meaning, it might vary with different individuals or depend on some combination of the mental states of many individuals. Thus, we can place the main possibilities on the following grid.[29]

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25 *See* Johnson v. Southern Pac. Co., 196 U.S. 1, 14-15 (1904).

26 *See id.* at 19-20.

27 *Id.* at 20.

28 The Court claimed that the statutory language itself evidently required full compatibility. *See id.* at 14-15. One wonders how both the Supreme Court and the Eighth Circuit found the language so unambiguous, yet reached contrary conclusions.

29 This grid does not exhaust the possibilities for ascribing meaning. Some writers believe that "natural" terms like "death" and theory-laden terms like "freedom" should be assigned their best meaning. *See, e.g.*, Michael S. Moore, *A Natural Law Theory of Interpreta-*

POSSIBLE DETERMINANTS OF MEANING OF COMMUNICATIONS

	Meaning Varies With Understanding of Different Individuals	Meaning Depends on Combination of Individual Understandings	Meaning Depends on Understanding of Reasonable Person
Writers	Understanding of Individual Writers	Combined Understanding of Writers	Understanding of Reasonable Writer
Readers	Understanding of Individual Readers	Combined Understanding of Readers	Understanding of Reasonable Reader

The idea that meaning might vary with individual mental states is most easily illustrated, and may be especially attractive, with respect to poetry. It is often suggested that, at least within some range, whatever a poem means to a reader is its meaning for that individual.[30] I do not mean that this is simply the meaning the individual assigns, but rather that if two individuals have different understandings of the poem, neither has a better or worse sense of the poem's meaning than the other, and no combination of the two meanings is called for. No one has to combine various understandings; the individual meanings are irreducible. This individualist approach to meaning may be appealing for poetry, but it is less so for more mundane communications, such as exam instructions.

What is true for individual readers of poetry *could* be true for individual authors if they are jointly responsible for a communication. One might speak of a meaning peculiar to each writer, with no sense of any combined meaning.

For statutory and constitutional provisions, such individualist approaches cannot afford an appropriate interpretive standard. A skeptic about legal reasoning might claim that, in reality, judges are individual readers who impose their own senses of meaning on the text. But whatever they do in fact, judges aspire to find a meaning

tion, 58 S. CAL. L. REV. 277, 322-28 (1985); Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 202-46 (1981). What counts as "death" under a statute using that term should be what is "death" under the best understanding of death, not what legislators or readers might suppose death to be. Thus, someone who is brain dead but still breathing might be "dead" even if most legislators and citizens would think that such a person is alive.

Heidi Hurd has urged that statutes are not really communications at all. *See* Heidi M. Hurd, *Sovereignty in Silence*, 99 YALE L.J. 945, 950 (1990). If so, analysis of the meaning of communications might be thought inappropriate for consideration of statutory meaning. Nonetheless, I proceed on the assumption that statutes and constitutions are forms of communication. If statutes are not communications, analogies drawn to somewhat similar forms of communication are still instructive. *See* KENT GREENAWALT, LAW AND OBJECTIVITY 245-46 n.25 (1992).

30 There may be limits that allow us to say that some understandings do not reflect the meaning of the poem.

that transcends their individual reactions. Judicial reasoning is designed to persuade other judges and actors in the legal system, and, indeed, a majority opinion of an appellate court itself represents the position of at least two judges. Judges realize that the statutory meaning they discern will be the basis for resolving a dispute and coercing the losing party, and, further, that the basic rationale of a decision will constrain future courts. From the inside, that is, from the perspective of judges who assign meaning to statutory or constitutional provisions, the meaning that matters does not vary with individual readers or individual legislators.[31] For purposes of judicial decision, the meaning of statutory and constitutional texts must be largely determined by some combination of people's actual understandings or by some objective construct of reasonable readers or legislators.[32] From the judge's perspective, we can eliminate the two boxes on the left.

How do our four remaining boxes relate to each other? To what extent do any of them determine legal meaning? With ordinary communications, what the speaker aims to convey is also what listeners will understand. The speaker has the likely perceptions of listeners in mind, and listeners attribute meaning according to their sense of the speaker's aims. In successful communications about ordinary subjects, speakers convey what they aim to their listeners. The speakers' meaning coalesces with the listeners' understanding. But various things can "go wrong." The listener and speaker may understand differently the significance of what is said. In that event, whose understanding *counts* as the meaning of the communication itself? An utterance might mean what the speaker subjectively intends, or what actual or reasonable listeners would understand. Alternatively, the speaker's meaning might differ from literal or sentence meaning, with neither being *the* meaning of the communication.[33] General features of language and communication might be viewed as supporting one approach to meaning over another.

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31 I do not deny the possibility that judges might deem two or more meanings equally plausible, in which event they would have to choose among those meanings on some basis. Nor do I deny that in some legal circumstances, the role of courts may be to determine whether meanings assigned by administrative agencies or others are reasonable. However, judges cannot say that the simple fact that some individual reader or legislator embraces a meaning renders the meaning a valid one.

32 This is not all that contributes to the interpretation of statutory and constitutional meaning; precedents, administrative rulings, canons of interpretation, and broader legal policies all may be significant. But these other items supplement—they do not displace—reader understanding and, perhaps, legislative intent.

33 For a brief discussion of the possibilities, see Kent Greenawalt, *The Nature of Rules and the Meaning of Meaning*, 72 NOTRE DAME L. REV. 1449, 1450-52, 1459-60 (1997). *See also* Kent Greenawalt, *From the Bottom Up*, 82 CORNELL L. REV. 994 (1997) [hereinafter Greenawalt, *From the Bottom Up*] (discussing issues involved in carrying out instructions given by people in authority).

Meaning in law is more complicated and yet more simple. Courts assign meaning to texts and apply statutory and constitutional provisions in accord with the assigned meaning. Judges do not say, "We conclude that this provision means that persons like defendant are covered, but we nevertheless conclude that he is not covered."[34] A theorist might draw a distinction between statutory meaning and the rule used to decide a case. Frederick Schauer has suggested that once a court has determined what a statute means, it can then proceed to determine whether or not it should resolve the case in accordance with that meaning.[35] Or a theorist might distinguish the meaning of the provision in some narrow sense from the meaning afforded the provision for purposes of legal enforcement. The first meaning would be assessed using general principles of linguistic philosophy; the second meaning would include all else that is legally relevant. I am interested here in the final meaning to be assigned a legal provision and will not examine whether some basis for "real" meaning exists that is narrower than the relevant bases for meaning in application. I assume that interpretation of statutes and constitutional provisions includes all that is relevant for assigning a legal meaning to those texts. I examine the question about "alternative" approaches in this light.

For most laws, reader understanding is clearly relevant. Reasons of fair notice and adequate guidance support giving significance to how readers understand a statute. For many technical statutes, the relevant readers may be trained lawyers or experts in the field, but the meaning that statutory words convey to the readers that *count* bears on how judges should interpret those words. It follows that no viable approach to legal meaning can wholly exclude reader understanding approaches.[36] Such an approach, on the other hand, *might* exclude intent approaches. One might believe that intent of legislators is irrel-

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34 Such an approach, cy pres, does exist for enforcement of charitable trusts. If the testator expresses a general charitable purpose, but carrying out the terms of the trust would be impractical or against public policy, courts will permit the trust property to be distributed to a different charity. *See* RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

35 *See* FREDERICK SCHAUER, PLAYING BY THE RULES 157-60, 211-12 (1991).

36 However, in some contexts, legislator (or adopter) intent might conceivably be offered as a complete alternative to one kind of reader understanding. If a judge asks about the original meaning of a text adopted a long time ago, she might believe that what readers then understood is not now important, although what the adopters then intended is now important. Under this approach, modern reader understanding but not original reader understanding would have significance. But if the crucial text is as open-ended as are most of the provisions of the Bill of Rights, a judge might think that any reader understanding not informed by history subsequent to passage holds little value. In this way, one might defend judicial opinions that attribute overriding significance to the thoughts of framers of the Bill of Rights, without asking what readers of that period would have understood. Under this view, original meaning at the original time (which would include reader understanding) could differ from the original meaning that is now relevant (which would not include that reader understanding).

evant except insofar as readers take it into account, or it provides evidence of what readers understood.

Another plausible position is that reader understanding and legislators' intent both prove relevant for a final determination of statutory meaning.[37] Judges might make both assessments in a case, assigning weight to each factor. When I say each factor has weight, I mean that each counts independently, in addition to whatever evidence one approach may provide for the correct result under a different approach. The judgment about how readers would understand a statutory text provides, of course, one basis for determining what the legislators intended. The converse may often be assumed in regard to the original Constitution and the Bill of Rights. We may have better evidence for how some framers understood the Establishment Clause than we have for how ordinary readers of the period conceived of the clause. If the fundamental test of original meaning is reader understanding, the remarks of the framers, especially if published at the time, can constitute evidence of that understanding.

Older texts raise an important complication regarding reader understanding. The relevant reader might be one living at the time a provision was adopted or one alive at the time that a court interprets a particular provision.[38] If one is seeking the original meaning of a provision, reader understanding at adoption is critical. For modern guidance, however, reader understanding when the court decides proves most salient.

Will a judge's conclusion in a case depend on which of the criteria from our four boxes she employs? Possibly yes. The intent of actual legislators might differ from the understanding of actual readers (even those alive at the time of adoption). Each of these might differ from what a reasonable legislator would intend or what a reasonable reader would understand.[39] Readers may not perceive all that writers meant to convey, because writers sometimes fail to communicate their objectives adequately. Our automatic coupling case illustrates the possibility that judges might discern some difference between what legislators aimed to do in a particular statute and what most readers understood that statute to mean. To discern such a difference, judges

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37 Alternatively, assessments of legislative intent might come into play only when the text is unclear in its implications—the practice under what used to be called the "plain meaning" rule. Yet another possibility is that intent should count only when it treats those who are regulated more favorably than a reader of the text would assume.

38 We can imagine yet a third reader living at the time the crucial events of a legal dispute took place. I shall assume in what follows that understanding does not change from the time of the events that subsequently are litigated to the time the court makes a decision in the case.

39 The likelihood that a judge would reach this conclusion depends greatly on how she constructs the reasonable legislator or reader. *See infra* Parts V.B, VI.B.

in practice will require information about the intent of legislators that is not assumed to be part of what the relevant reader has at hand. Judges themselves are, of course, one kind of reader. For reader understanding and legislator intent approaches to diverge, the relevant reader must be someone who does not possess all the information about intent that the judge possesses.

One might think initially that the understandings of a reasonable legislator and a reasonable reader would necessarily coalesce. But a judge might decide that a reasonable legislator acts with an awareness of the foibles of readers and would thus aim at less than reasonable readers. Or she might decide that reasonable readers would perceive legislators as unreasonable, and interpret their actions accordingly. A judge with either view might reach a different conclusion if she focused on a reasonable legislator rather than a reasonable reader. Further, to assess what a reasonable legislator aimed to convey, a judge might employ sources that would not be available to a reasonable reader, or she might suppose that the outlooks or expertness of legislators and readers differ sufficiently to yield different understandings for reasonable legislators and reasonable readers.

Thus far, I have treated approaches that look to actual understandings as alternatives to those that ask about a reasonable understanding. But judges may also combine "objective" elements with estimates of actual mental states in various ways. They might do so because a combination approach strikes them as intrinsically most appropriate, independent of informational shortfalls, or because available sources reveal so little about the actual mental states of most legislators or readers.

Much of the debate about the appropriate perspectives judges should take in discerning statutory meaning connects to the disagreement concerning whether judges should use legislative history in statutory interpretation. Nevertheless, we can distinguish questions about legislative history from the more abstract concerns about perspective.[40] Although *conclusions* about the value of legislative history may have implications for how judges should conceive standards of interpretation, the best arguments for and against use of legislative history do not depend on arguments as to whether legislator or reader perspectives should control. This Essay concentrates on questions other than the sources judges should use, though those questions remain crucial for final judgments about how statutory and constitutional provisions should be interpreted.

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40 *See, e.g.*, DWORKIN, *supra* note 5, at 313-54 (defending the use of legislative history while rejecting a mental states version of legislative intent). Others might conceive legislative intent in terms of mental states but suppose that judges should not rely on legislative history to discover that intent.

In my analysis, I do not distinguish between conceptual grasp of the meaning of a statutory prescription and application of the prescription. Two people may agree on the definition of a word or phrase and yet disagree about its possible applications.[41] One *might think* that legislators' intent matters more for conceptual meaning than for applications—that applications are uniquely the province of judges or juries. But sometimes, perhaps always, a full understanding of a concept includes a sense of its applications, and legislators who choose specific statutory language might intend that their own ideas about applications carry as much force as their more abstract conceptual ideas.[42]

III
INFORMAL INDIVIDUAL DIRECTIVES: A COMPARATIVE PERSPECTIVE

Whose understanding *counts* as the meaning of a communication itself? In this Part, I concentrate on instructions from one person to another about what to do.[43] Among forms of ordinary speech, these seem to most closely resemble legislation, and perhaps allow us to draw some lessons for interpreting legislation.

The connection between meaning and a faithful or desirable performance is a crucial component in any analysis of instructions. Faithful performance refers to actions by the recipient of instructions that appropriately fulfill his relationship with their giver. Courts, as I have noted, work from the assumption that the appropriate applications of a statutory provision follow its meaning. If we look at informal contexts to gain a perspective on statutory meaning, we should assume a close tie between faithful performance and meaning.[44]

Suppose that *R* receives authoritative instructions from *G*. If *R* only pays attention to *G*'s words in context, she will interpret them to require action *x*. Shortly after receiving the instructions, *R* talks to a mutual friend, who reports a conversation with *G*. This report leads *R* to believe that *G* assumed his instructions required action *y*—a conclusion that fits a different plausible understanding of *G*'s words. Should

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41 I subsequently use an example of a man and woman who conceptualize what "consent" means with exactly the same words and yet differ as to whether consent is present in a concrete circumstance. *See infra* Part VI.C.

42 Of course, legislators may also choose vague, open-ended concepts precisely because they intend others to apply those concepts in light of changing conditions and values.

43 For a more detailed discussion of informal instructions, see Greenawalt, *From the Bottom Up*, *supra* note 33.

44 Of course, someone who examines informal contexts might propose a radical shift in how lawyers and judges talk about statutory meaning—one that would drive a wedge between meaning and performance.

R follow her understanding of *G*'s intent or should (or may) she stick to what she believes is the best understanding of the *words of the instructions* as a listener who lacks independent knowledge of *G*'s intent would take them?

We might quickly decide that intent matters here and then move on to the complexities of law and its multi-member legislatures. But, before doing so, we need to explore different contexts in which instructions are given. Three dichotomies are critical: (1) between a role that calls for carrying out any (communicated or not) wish of a superior and a role in which one acts only upon instructions; (2) between a role in which one's aim is to fulfill the aims of an instructor and a role in which instructions curb one's usual freedom; and (3) between instructors who are more expert or have greater legitimacy than their recipients and those lacking such qualities. Consider each of these contexts in turn:

(1) For an *R* whose job is to fulfill all of *G*'s relevant desires, instructions from *G* largely constitute powerful evidence of those desires.[45] If *R* confidently knew that *G* wanted a certain kind of fulfillment, *R* would obviously follow that intent, even if her initial judgment about the language of the instructions strayed from that intent. The question of whether performance should follow intent becomes a genuine question only if one assumes that *R* has a responsibility to comply with instructions but not to satisfy uncommunicated desires.[46]

(2) Those with a duty to carry out instructions can stand in very different relationships with those who have the authority to issue instructions. At one end of the spectrum, *R* is an agent of *G*. Her job leaves her with no relevant aspirations other than to accomplish the objectives *G* communicates in his instructions. At the other end of the spectrum, *R* has her own independent standards and legitimate aspirations. *G* may restrict what *R* does in various respects, as a parent may restrict a teenage child, but neither *R* nor *G* regards *R* as mainly carrying out *G*'s purposes. Both recognize that *R* has her own goals and objectives, albeit ones whose pursuit *G* may limit. When *R* is an agent of *G* without independent aspirations, *R* naturally follows *G*'s ascertainable intent in issuing instructions. When *G* is fundamentally restricting *R*'s otherwise legitimate pursuits, *R* may not be constrained to fulfill *G*'s intent, if that intent is to restrict *R* further than *R*'s reading of the instructions would indicate. If *G* intends to restrict *R* further than the instructions themselves would indicate, *R* may be free to follow the import of the instructions taken by themselves.

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45 However, even if *R*'s role is to fulfill desires of *G*, *R* may have a special responsibility to carry out desires expressed in instructions.

46 More subtly, similar questions may arise if instructions have an independent importance that exceeds the extent to which they provide evidence of desires.

(3) Not all recipients of instructions are inferiors in competence and legitimacy to those who give instructions. Imagine a tutor or a lawyer. Each may rightly regard herself as superior in judgment to her client and as having an independent calling to do the best job possible, subject only to contrary instructions from the client. In many other situations, everyone recognizes that the client-instructor is more competent and would carry out the task himself if he had the time and interest. The more that *G* exceeds *R* in competence, the more *R* should pay attention to what *G* intends in the instructions he has given. If doctors know much more than nurses about medicine, a nurse will try to carry out a doctor's unclear dosage instructions according to the doctor's intent.

R's reason to follow *G*'s intent may lie in *G*'s special legitimacy, rather than his greater expertness. *R* may regard herself as being equally competent to *G*, but she may recognize that the people who are free to choose *G* have selected to make the usual decisions. *R* may be a trainer in a sports facility with as much professional competence as *G*, but the team has selected *G* as its trainer. If the question is how to treat a team member, and *G* has instructed *R*, *R* should typically interpret the instructions in accord with *G*'s intent.

What we can conclude is that for many informal instructions, a recipient should pay attention to the giver's intent and interpret the instructions accordingly, even if she would reach a different conclusion based on the instructions alone.[47] For some other instructions, a recipient may be entitled to disregard an intent that differs from the facial import of the instructions.

The transition from informal instructions to statutes is not hard to grasp. If people with special competence or legitimacy adopt statutes, or if those carrying out statutes do not have interests (or convictions) opposed to the objectives of legislators, interpreters can reasonably construe statutes in accord with legislators' intentions. Unfortunately for simplicity's sake, statutes almost always address more than one class of recipients. Very crudely, we might imagine executive branch actors as usually not having interests opposed to the objectives of legislators.[48] Private citizens and companies have many indepen-

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47 I have not explored here what an appropriate reading would be if *R* relied entirely on the instructions themselves. I assume that past communications between *G* and *R* on that subject would count as part of the context for the instructions, thus coloring their understanding by a relevant reader. *See* Greenawalt, *From the Bottom Up*, *supra* note 33, at 1003-1007. For the issuer's intent to vary from what the instructions appear to indicate, that intent must be revealed in some other way than past communications between *G* and *R*.

48 Executive branch actors may consider themselves more competent in dealing with a problem or they may believe that certain legislation trespasses on a domain of executive privilege, such as the conduct of foreign affairs, but those are not opposing interests in the relevant sense. Interests or convictions might be opposed, however, if executive officers

dent interests and frequently regard legislation as curbing their freedom. Typical statutes favor some private actors over others. Courts do not often have interests, in the sense I mean, opposed to the aims of the legislature, but they act as arbiters of meaning among those who do have interests opposed to legislative objectives, those whose interests are served by the legislators' aims, and those whose job is to fulfill legislative objectives. For many statutes, executive actors and courts have good reason to pay some attention to legislators' intent, *unless* conceiving the relevant intent is too difficult, ascertaining the intent is too hard, or giving weight to the intent is unwise or constitutionally unsound.[49]

IV
LEGISLATIVE INTENT: ACTUAL MENTAL STATES OF LEGISLATORS[50]

This Essay now explores in depth how mental states may figure in various approaches to legislative intent and reader understanding. This exploration will sometimes confront degrees of subtlety beyond those that would trouble judges deciding cases, but it is desirable to work out the implications of an approach as fully as possible.

Although reader approaches are more indisputably part of legal interpretation, I begin with the details of an approach that relies on the actual mental states of legislators. I do so both because the idea that communications mean what the writers intend has a strong intuitive appeal, and because the difficulties in relying on mental states have been most fully canvassed for legislative intent. We can fairly assess such difficulties only by building the best account possible; and surveying the terrain wherein they are familiar allows us best to understand how similar problems beset other approaches in ways not yet recoguized.

A. Initial Clarifications

1. *Group Intent—Why It Is Not Directly Relevant*

The phrase "legislative intent" suggests a group intent, one that can be ascribed to both houses of the legislature and perhaps to the

believe they represent different constituencies from the legislature, or that legislators are corruptly serving special interests. Within a federal system, state governments may perceive their interests as partly opposed to those of the national government.

49 One might agree with my claim that problems of conceptualization are not insurmountable and nevertheless conclude that limits on legislative authority, separation of powers, scant reliable evidence of intent, or the way that evidence can be manipulated, should lead courts to ignore the intent of legislators.

50 For a more thorough development of the analysis in this Part, see GREENAWALT, *supra* note 8, at 91-159.

chief executive who signs a bill. Although some critics doubt whether such a large group can have an "intent,"[51] the construct of group intent does not uniformly fail. One can undoubtedly speak of group intentions when all, or virtually all, members of the group have the same specific intention, the intention is relevant to their participation together, and the members know that the intention is shared. Whether one should speak of the intentions of a group in other circumstances is more doubtful. A theorist might try to resolve the precise limits of group intentions, applying the fruits of that inquiry to legislative bodies. But the crucial legal issue is not whether the mental states of members of a legislature often amount to a "group intention"; it is whether judges interpreting statutory provisions should consider the mental states of legislators. That question is best faced directly. The "group intent" issue is more distracting than illuminating.

2. *Mental States About Coverage and Purpose*

The mental states that concern us are about the coverage and purpose of enacted provisions. Someone who rejects a mental states account might agree that *some* mental states are relevant—that it would undermine the authority of their votes if legislators voted while drugged or under a threat to blow up the legislature.[52] But the mental states on which this discussion focuses are legislators' attitudes about what legislation accomplishes.

3. *One Single Mental State?*

Once we recognize that the crucial issue is what mental states of legislators judges should take into account, we should realize that judges might not restrict themselves to one mental state and might even consider ideas of legislators that are more complex than easily identifiable mental states.

4. *Specific Intent and Purpose*

Legislators may have views about what a specific provision accomplishes and broad attitudes about the purposes of a law. In the literature of statutory interpretation, scholars speak of specific intent or purpose. More precisely, one could talk of a spectrum extending from the most immediate to the most ulterior objectives.[53] As to any

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51 *Cf.* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) (claiming that legislatures do not have "intents," only outcomes).

52 *See* Joseph Raz, *Intention in Interpretation*, *in* THE AUTONOMY OF LAW 249, 264-66 (Robert P. George ed., 1996).

53 *See* ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY 166 (1992). I assume that certain motivations are not relevant "purposes." The fact that a legislator votes for a bill to

of these objectives, issues about what legislators actually thought can arise.

5. *Evidence of Probability, Not Certainty*

When one person assesses another's mental states, he relies on what the person says and on how he behaves. Judges trying to discern the actual mental states of legislators must use evidence, primarily statutory provisions themselves and various legislative statements, to infer what the legislators thought. As the analysis of Senators' attitudes about automatic couplers shows,[54] judges may attain confidence, but not certainty.

6. *Manifested Mental States as an Alternative*

Instead of assessing actual mental states, judges might rely directly on manifested mental states—views participants in the legislative process actually present. Such an approach could differ radically or only slightly from one that inquires about actual mental states.

Judges might consider *only* manifested views, drawing no inferences about the opinions of silent legislators. In modern legislative life, only a small minority of members usually expresses opinions about statutory provisions (except, implicitly, by their actual votes). If judges scrupulously refused to attribute manifested views to anyone except the legislators who expressed them, the views might have little influence on interpretation. Alternatively, legal conventions might assign a significant place to the opinions of committee members or sponsors. In that event, positions taken in a committee report could exert a substantial influence, but not because they represent the opinions of silent legislators.[55]

We can, however, conceive of a more modest role for "manifestation." Under this approach, no mental state would count *unless* it is manifested; but once manifested, it could be attributed to silent legislators. Perhaps judges should not guess about attitudes that have never been expressed. And, perhaps they should consider only views expressed prior to an act's adoption, because other legislators are not in a position to respond to understandings that have not been expressed by then. The grounds for attributing expressed views to silent legislators would rest on assumptions about legislators' likely actual

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please his constituents or a major contributor has no direct relevance for interpretation. Such a motivation may or may not bear on the legislator's opinions about what the bill does; only these opinions make a difference.

54 *See supra* Part I.

55 The relationship between conventions about weight and mental states is discussed more fully below. *See infra* text accompanying notes 84-89, 97-103; *see also* GREENAWALT, *supra* note 8, at 194-96.

attitudes. Silent legislators might positively agree with the positions expressed in a committee report or they might accept the report as having authority to speak for them.

Under an approach that combines manifestation with attribution, judges would estimate the actual mental states of many legislators, though imposing a minimum requisite that these views be formally expressed. This approach reasonably qualifies the notion that judges seek to discover likely mental states and treat manifestations only as relevant evidence. The practical conclusions a judge reaches will not look very different if she requires manifestation to this degree, since, in any event, she relies mainly upon manifested views to infer actual mental states.

7. *Individual or Group?*

Naturally, individuals within a group will not share exactly the same mental states. Judges who are trying to infer actual mental states will thus recognize that different legislators may have different opinions about specific coverage and purposes. However, we can imagine combinations of sources and methods of inquiry that would wash away these distinctions. Judges who considered only statutory language and commission reports indicating the need for legislation would lack any basis to distinguish among the mental states of those who voted in favor of a particular statute. Judges who considered only committee reports in addition to these sources would not be able to distinguish among the views of members joining the report.[56] In short, whether judges have a basis to discern varying mental states among legislators will depend on what evidence they consider. I am assuming that judges consider materials that leave them open to differences in legislators' mental states.

B. What Mental States Count?

This section considers what mental states should count. It assumes that specific intent about a particular issue and a more general sense of purpose may be relevant. We can imagine at least three mental states that might matter: (1) hopes; (2) expectations; and (3) sense of proper interpretation.[57]

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56 I assume that judges will not compile an extensive biography of individual committee members to determine what the language in a report might mean to each of them.

57 Ronald Dworkin has suggested a different possible "mental state." *See* DWORKIN, *supra* note 5, at 327-33. (This is his third alternative, since he does not consider views about proper interpretation.) He talks about a legislator's overall convictions, and how a statute fits with those convictions. *See id.* This "convictions approach" is a possible guide to interpretation, but it has little to do with actual mental states at the time legislation is adopted. Since a legislator may agree to language that he does not think accords with his overall convictions, these convictions often prove a poor guide to his mental state inten-

At first glance, the hopes of legislators might seem most significant. If legislators chose statutory language without compromise, *and* administrators and judges were to apply a provision on behalf of a public that had no interests opposed to the aims of legislators, legislators' hopes would be a good guide for interpretation. Those applying the law could seek to carry out the will of the legislators, thus fulfilling these aspirations. But it is almost always the case that statutory terms result from compromise, or that the aims of the legislators are at odds with certain interests of important addressees. Under these ordinary conditions, hopes should not play a major role.

Let us revert to our railway car coupling statute. Senator *C*, from a strong railroad state, thinks imposing high costs on railroads will be highly detrimental to the economy of his state. He has worked to eliminate the requirement that automatic couplers work compatibly with each other, but he believes he has failed. Although the language of the final act is less clear than the original language, *C* understands it to retain the requirement of compatibility. He votes for the bill, because he approves most of its major provisions. He hopes that judges will interpret the act not to require compatible coupling, but that is not how he understands the final language. Senator *W*'s constituents are mostly workers, and *W* has argued for worker interests, insisting on a requirement of compatible coupling. However, as a holder of railroad stocks, *W*'s personal hope is that courts will not construe the statute to impose such a requirement.

What *C* and *W hope* administrators and judges will take the provision to do is much less relevant than what they *understand* the provision to require. This distinction is most obvious for *W*, whose personal hopes deviate from his public endeavors, but it is also true for *C*, whose hopes track his legislative efforts. If both Senators have accepted language that they regard in a certain way, that understanding represents their relevant state of mind more than do their hopes for the future.[58]

Do legislators' expectations constitute their relevant intentions? A legislator may lack confidence in judges, worrying that they will probably misinterpret statutory language. Such beliefs about likely judicial errors should not ordinarily determine what a statute means. A

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tions about particular language. Moreover, convictions change; a legislator's past convictions need not reflect his mental state intentions when he votes for a new law.

Dworkin himself does not defend a "convictions" approach; it is a stalking horse for his own favored method of interpretation.

58 The same analysis holds for aims that lie behind legislative details. Judges should not understand a legislator's view about purposes as a reflection of personal hopes, but rather as a sense of how the law's underlying objectives should be viewed. A racist may accept racial equality as a law's underlying purpose, although he actually hopes that purpose will be frustrated.

legislator does not intend language to be construed mistakenly, even though he thinks incompetent judges may do so. Even hopes and expectations together need not constitute a crucial intention. Senator *C* hopes that courts will not require compatible coupling and he may predict that conservative judges will reach that result, but if he thinks the language cannot reasonably be understood in that way, he does not intend that construction.

One must be careful, however, not to dispose of expectations too quickly. Legislators act against a background of judicial practice. Suppose I know that someone who speaks English poorly believes that the word "window" refers to doors. I say to him, "Please shut the window," wanting and expecting him to think I want the door shut. The meaning of my communication to him, given the linguistic competence I know that he has, is that he should shut the door.

A legislator with definite opinions about how judges *should* understand statutory language may realize that few judges employ this approach. But when he performs as a legislator, he takes a different, dominant interpretive practice as the context for his activities.[59] Like many political actors, he accepts, as a kind of given, decisions made by others in their spheres of special competence. He agrees to statutory language that he wants and expects to produce a certain result. Though he believes that judges should require more explicit language to reach this result, he does not undertake a fight for the more explicit language because he views such a battle as practically unnecessary under dominant interpretive practice. The legislator who accepts this practice as part of his legislative environment intends the statutory language to achieve the result he expects and wants, even though he thinks that ideally the language should be interpreted otherwise. Thus, a legislator's expectations are of major importance when they are based on relatively settled methods of interpretation that he takes as given.

A third mental state that might be the key for interpretation is how legislators believe language should be interpreted. In the railway car coupling example, the legislators' belief that the statutory language should be understood to require compatible coupling would be critical. If *C* believes that judges *should* understand a provision in a certain way, is that not his relevant intention? This approach fits with models of normal communication in which the speaker's intentions depend on how he believes the listener should understand him.

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59 *See* Raz, *supra* note 52, at 268-71 (discussing legislators who intend to enact statutes that will be interpreted according to accepted conventions for interpretation).

We need to face two related problems before embracing the central relevance of legislators' views about how provisions should be understood.[60]

The first problem about a legislator's understanding of how judges should interpret language is one I have just discussed: the tension between existing interpretive practices and a legislator's ideal for those practices. If a legislator acts assuming settled interpretive practices as given, his intent should not be judged in terms of what he thinks courts "ideally" ought to do.

The second problem is more troublesome. Statutory interpretation is a complicated business. If we think of interpretation as including everything that is relevant to a final decision, including fair warning, coherence among related statutes, compatibility with the common law, and the desirability of avoiding serious constitutional issues, we may recognize that judges are more expert at the entire task of interpretation than legislators. Suggesting that judges be guided by legislators' cruder notions as to how judges should do their jobs may seem misguided, if not destructively circular. Fortunately, two ways out of this dilemma present themselves.

The first is to notice that legislators' notions of proper interpretation (or any mental states of legislators) are only one ingredient in proper judicial interpretation, not the final criterion. Thus, judges, while giving some weight to legislators' intentions, would not necessarily follow the less expert views of legislators about interpretation.

Another way out of the dilemma is to distinguish ordinary understanding of language from other aspects of interpretation. Judges might give weight to the views of legislators about how primary addressees and judges should understand langnage, *putting aside* those complexities of interpretation on which judges should not follow legislators.

With this approach, judges could avoid giving any weight to legislators' opinions on subjects about which the judges are more expert. Suppose, for example, that many legislators hold the view that the statutory language of our coupling statute does not require compatible coupling, but that this view is partly formed by a misunderstanding as to how judges should treat unclear language in a law that promotes safety by altering rules of civil liability and imposing modest fines. A

60 Another problem is that various groups interpret statutory language. A legislator might conceivably think that initial addressees, say private persons or companies, should understand language in one way but that courts should understand it in another. For example, a legislator might believe that a company should regard a certain practice as prohibited, but also believe that a court should conclude that the language is not clear enough to give the "fair warning" required of a criminal statute. I shall pass over this complexity, assuming that legislators regard the right interpretation as being the same for everyone.

judge who accepted the legislators' view without qualification would balance other considerations, including the judge's more expert views about how to treat statutes of this variety, against the significance of the legislators' intent. A judge following the alternative approach would instead give no weight to legislators' views on subjects about which judges are more expert. She would, in effect, carve those elements out of the understandings of legislators.

Legislators, of course, do not typically distinguish between how statutory language should be understood, putting aside interpretive complexities on which judges are more expert, and how it should be understood, period. The "mental state" a judge would discern under this approach might not be an actual mental state at all.[61] It might be an artificial or hypothetical "intention"—what a legislator *would think* if his actual mental state were purged of elements falling within judicial expertness.

Should an approach relegate to the scrap heap legislators' opinions about subjects as to which judges are more expert? Unclarity about comparative expertness and the "givens" against which legislators legislate should give us pause. Saying that judges are more expert than legislators about some interpretive matters is easy, but exactly which matters are these? And, do legislators' views count for nothing at all on the subjects about which judges are *more* expert? Perhaps ideally judges should start with a legislator's overall view about how statutory language should be interpreted and then discount that view to some degree in respect to components as to which judges are more expert; the degree of discounting for any component depending on a balance of comparative expertness.

"Givens" affect discounting in the following way. Suppose judges develop an interpretive practice, such as: "Penal statues should be strictly construed," that becomes settled. Judges are more expert about the desirability of that practice than are legislators. A legislator, *S*, thinks penal statutes should be very strictly construed, and his legislative behavior is guided by the strict construction "given." *S* does not think certain behavior (e.g., compatible coupling) should be required. He nevertheless votes for language whose ordinary meaning appears to require such coupling, because he counts on the strict construction canon to yield a contrary result in court. He would have voted against adoption of such language were the strict construction canon not in place. Judges subsequently decide that the prior strict construction approach is really too strict. Is the legislator's view about proper interpretation, developed according to a canon of strict construction, to be disregarded because judges are more expert than he

61 I do not deny that some legislators might actually divide their opinions about interpretation in some such way, but I believe that this is rare.

is? Insofar as the legislator has relied on settled interpretive practices, his views about the meaning of statutory language should carry some weight, even if based on aspects of interpretation about which judges are specially expert.[62]

Thus far, I have assumed that the attitudes of legislators toward the coverage and purpose of statutory provisions are significant. Joseph Raz has proposed what appears to be a radical alternative to this approach, namely, that the crucial intention of legislators is to have statutes interpreted according to accepted conventions for interpretation.[63] If this is indeed the crucial intention, judges may simply proceed to interpret according to accepted canons of construction. However, this "intention" adds nothing new to the interpretive process.[64] Should judges take this intention as supplanting more particular intentions legislators might have about what legislation does? The answer, at least for the United States, is "no."

Considering an ordinary instruction helps clarify Professor Raz's suggestion. If I instruct Mabel, I assume she will understand the instruction and do what I have intended, and I also assume that she will understand the instruction according to the standard ways people understand instructions in English. My two assumptions are fully compatible. But at the forefront of my mind is having Mabel act as I intend, not having her employ standard techniques to comprehend instructions. If she fails to do what I want and what I believe my instruction covers, her response that she understood what I said according to standard techniques of understanding English may forestall any blame, but I will hardly conclude that she has carried out my dominant intention.[65] The justification for deciding that the crucial mental state of legislators is having statutes interpreted according to conventional techniques cannot be simply that this is a straightforward application to law of what is generally true for personal communications. The reasons for choosing this mental state must rest on special features of the law.

One such reason might be that in a complex system of governance, judges should not take into account the more particular inten-

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62 I have previously argued that settled interpretive practices can count even when a legislator believes they should be abandoned. *See supra* text accompanying note 59. Perhaps a legislator's assumptions about existing interpretive practices should have no extra weight simply because a legislator happens to endorse them, if, as we are assuming, the basis for the interpretive practice is some subject on which judges are much more expert than legislators.

63 *See* Raz, *supra* note 52, at 268-71.

64 This "intention" might or might not be taken to rule out sharp changes in interpretive methods.

65 If she correctly guesses what I expect to be done, she will not be subject to blame if someone later persuades me that my instruction was faulty—that someone using standard techniques of understanding would have done something else.

tions of legislators, and thus should treat the significant intention as having interpretation according to conventional techniques. A more precise rationale for treating the intent to have conventional interpretation as dominant might rely on an understanding of legislators that they are part of a system of separate institutions in which judges fill the interpretive role. On the other hand, many legislators are unaware of all the subtleties of interpretation and, in the United States at least, they do realize that judges disagree on difficult points. A process beset with so much ignorance and contention is unlikely to determine the actual dominant intention of legislators.[66]

Within any legal system, one might discern by empirical inquiry whether most legislators usually have a dominant intention that statutory interpretation should follow conventional techniques. Within any legal system, one might argue about whether judges should take this as the dominant intention even if descriptively it is not. But the central issue for the United States is not which intention *dominates*, it is whether judges should give weight to intentions about specific coverage and purpose.

Interpretive practices in other countries aside, judges in the United States have long recognized the relevance of legislative intent about coverage and purpose. Many statutory and constitutional opinions are phrased as if actual mental states about specific coverage and purpose matter. Despite some modern dissent, conventional interpretive techniques probably include these attitudes; certainly these techniques do not bar them. Thus, a position that legislators primarily intend interpretation according to conventional techniques does not, for the United States, exclude reference to the mental states of legislators about specific coverage and purpose.

To summarize, it is doubtful whether the dominant intention of legislators is, or should be taken to be, having interpretation according to conventional techniques. In any event, conventional techniques in the United States do not exclude legislators' views about specific coverage and purpose. If we focus on actual mental states of legislators about coverage and purpose, the crucial state of mind is something more complicated than a simple hope, expectation, or belief about proper interpretation. The closest we can come to a single formula is this: what a judge should regard as most relevant to interpretation is how a legislator believes language should be understood under interpretive practices that the legislator accepts as given, with the judge giving some discount when a legislator's belief is based on a subject about which judges are more expert than legislators.

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66 Further, we should probably not regard legislators as opposing shifts in interpretive techniques, although one could meet this difficulty by assuming that the legislative intention is simply to have judges interpret as they think best.

It does not follow that judges should disregard every other state of mind. When the proper interpretation is otherwise very close, legislators' hopes may count to some degree. If language could easily be read in either of two ways and judges believe that legislators divided evenly about how it should be interpreted, the judges could appropriately rely on a conviction that virtually all legislators *wished* the language to be construed in one of the those ways.

C. Levels of Intention

An interpreter may conclude that fulfilling the legislators' specific intentions about a provision would frustrate the legislators' purposes. In our railway example, a judge might conclude that legislators meant to require compatible coupling but would have deemed it to be unreasonably expensive had they grasped the high cost of such coupling. How should an interpreter then be guided by mental state intentions?

One strategy for resolving this sort of difficulty is to adhere as faithfully as possible to the intentions of the legislators.[67] For statutory language whose application is unclear, we might ask whether legislators would prefer their specific intentions or their broader purpose to dominate if the two are in conflict? If judges think legislators had an opinion about whether specific intent or purpose should prevail, they would follow that opinion. Otherwise, judges would decide what legislators probably would have taken as most important had they focused on conflicts of this sort.

Andrei Marmor suggests that since specific applications are merely a means to pursue further intentions, "application intentions ought to be taken into account—from the legislator's own point of view—only if, and to the extent that, their realization is likely to enhance his further intentions."[68] This conclusion proves vulnerable, however, once one acknowledges the realities of the legislative process. Purposes rarely stand alone. A specific intent that conflicts with one purpose may fulfill another. Relatedly, people who see a conflict between means and ends may find themselves more attached to the

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67 A different approach to conflicts of specific intention and purpose does not rely on legislators' views about how such conflicts should be resolved, but asks what emphasis best fits the interpretive process. Judges might decide that one kind of intention or another is most helpful to follow in light of the comparative competence and authority of legislatures and courts. The appropriate emphasis might vary depending on the particular legal problem, the statute's language, and its age. Judges might prefer broader purposes because these prove more enduring than narrowly conceived specific results, or they might prefer specific results because legislators have concentrated more carefully on them.

68 MARMOR, *supra* note 53, at 171. This conclusion is plausible only if one focuses on relatively discrete purposes attached to the statute. One might say a legislator wants to promote justice and the public good. But such a conclusion does not mean that judges should reject all statutory outcomes that fail to meet those broad objectives.

means and less attached to the ends than they previously believed. The complex constellations of purposes and the untidiness of how means relate to ends should give judges pause in affording preeminence to purpose. Moreover, an interpreter's judgment that in a particular instance specific and further intentions conflict may be debatable. For example, judges may suppose that legislators would not have wanted to bear the high expense of compatible coupling, but perhaps coupling accidents had become so abhorrent, no legislator would have wanted to acknowledge that the extra saving in lives was too expensive.

To determine a legislator's "intent" about a conflict of specific intent and purpose, a judge would first need to conclude that the legislator would have perceived a conflict.[69] She would then look to the legislator's view about how such conflicts should be resolved. One factor influencing a legislator's view might be the fact that legislatures consist of many people. When a provision about means is relatively settled, legislators' views regarding purposes and their respective importance often vary considerably. Some legislators may perceive a conflict that other legislators do not acknowledge because their view of purposes differs. Given this complexity, individual legislators might prefer to have their ascertainable specific intentions prevail over their purposes. On the other hand, legislators might recognize that their broad purposes have greater staying power than their specific resolutions and would thus want their purposes to prevail as a statute ages. For some statutory provisions, legislators may even have specifically intended the interpretation of specific provisions to evolve with changing conditions.

D. Hypothetical Intentions

For many litigated disputes about statutory meaning, few legislators will have specific intentions. This problem is greatest when old statutes are applied to circumstances the adopting legislators did not foresee. A judge who focuses on mental states might ask how legislators *would* have resolved a problem of interpretation had they considered it. Of course, hypothetical intentions are not really mental states, but so long as we confine the inquiry to how actual people *would* have responded, it does not become a judgment about reasonable persons. Such hypothetical intentions raise some concerns beyond those that

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69 If newly learned facts generate a conflict, a legislator aware of those facts should recognize the conflict. I omit here the more complex situation in which the apparent conflict arises from a normative appraisal different from that made by the legislators of an earlier era. Legislators might intend that judges make fresh normative appraisals. In that event, the conflict might not be between how legislators view purposes and specific intentions, but between legislators' specific intentions and the views about purpose taken by those to whom the legislators, in some sense, delegated later appraisals.

accompany reliance on actual intentions, but reliance on actual mental states presses in various ways toward reliance on hypothetical states as well.

One concern about hypothetical intentions is that they must be partly constructive. It is hard to be confident as to what one would have thought ten years ago about a problem one never considered; this difficulty increases greatly when one person assesses what *somebody else* would have thought.

For most estimates of actual and hypothetical mental states, this problem of construction is a question of degree, not qualitative difference. One can have a high degree of confidence about many hypothetical factual judgments. Suppose that during consideration in the House of Representatives of articles of impeachment for President Clinton, a friend mentioned a young, conservative, moralistic, Democratic Representative who was three years old when President Nixon resigned. The friend asks me two questions: (1) what does this Representative really believe about whether President Clinton should be removed from office; and (2) what would he have believed about whether President Nixon should have been removed from office, had he been in the Congress at that time? I might well have answered the Nixon question more confidently than the one about Clinton. The construction that occurs with hypothetical questions does not necessarily put answers on a more doubtful ground than estimates of actual mental states.

A more focused concern with hypothetical intentions involves various voting paradoxes. Suppose that a legislator's crucial hypothetical intention is determined by whether a legislator would have voted for language that would have resolved a disputed case one way or the other. For various reasons, one may not be able to answer that question in a way that bears on what a court should decide about intent.

Theorists of social choice point out features about voting in legislative bodies that make it sometimes impossible to answer how a person would have voted on a particular issue.[70] Most notably, how someone would vote may depend on the option against which any position was paired, and that pairing can depend on fortuities of the order in which options are considered. Another complicating factor

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70 *See* KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963); DWORKIN, *supra* note 5, at 326-27; ESKRIDGE, *supra* note 6, at 16, 36-37, 222-24; Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 252-53 (1992); William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 379-93 (1988). *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991) (discussing the role of legislators in public choice theory). For a more detailed analysis of this problem, see GREENAWALT, *supra* note 8, at 133-36.

is strategic voting. Legislators sometimes vote against discrete alternatives that they favor because they want to load a bill they do not like with enough controversial features to ensure its defeat.[71] That a particular legislator would have voted against an option for strategic reasons does not bear on his intention about whether a law already passed includes that option. Finally, there may be occasions when a legislator believes language will accomplish an objective he desires and expects but would not be willing to support were it set out in unmistakably clear language.[72] He may worry that clear endorsement of that objective would offend too many constituents. This possibility further compromises the idea of basing hypothetical intentions on imaginary votes.

Fortunately, the approach I have suggested largely, though not entirely, avoids these concerns that: (1) a judge may not be able to determine how a legislator would have voted on a particular issue; or (2) the legislator's vote would not fairly reflect his intention about the statute as it was actually adopted. The critical question about "specific intent" concerns how a legislator, addressing the question at the moment of passage, thought the statute's language should be understood with respect to the problem now facing the court. The parallel hypothetical question is how a legislator would have thought the language should be understood if he had been presented with the question at the moment of passage. If we conceive of the hypothetical inquiry as an either-or question of whether a provision requires a particular result, the inquiry is not subject to the drawbacks that can arise from hypothetical questions about preferences.[73]

Whatever the difficulties of hypothetical intentions, interpretive strategies that give significant weight to actual intentions inevitably incline toward giving weight to hypothetical intentions. One explanation for this conflation concerns discovery. A court interested in the attitudes of most legislators faces a difficult (perhaps impossible) task in figuring out just what subjects crossed the minds of legislators. If

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71 *See* Riker & Weingast, *supra* note 70, at 389-91 (discussing strategic voting about aid to education).

72 *See* Jonathan P. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest-Group Model*, 86 COLUM. L. REV. 223, 232-33 (1986) (discussing the use of legislative "subterfuge" to disguise interest group influence).

73 Matters are not necessarily so simple. The crucial decision in a case may be among three or more possible interpretations, or there may be crucial disagreements about both the meaning of statutory language and the application of a particular meaning to the facts of the case. Lewis Kornhauser and Lawrence Sager discuss a somewhat similar problem concerning the choice between various judicial voting protocols. *See* Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1 (1993). Another complexity is that a legislator's view about how language should be applied to one situation may depend on how the statute treats other situations. It should be noted, however, that these difficulties can arise from actual states of mind as much as from hypothetical ones, as the Kornhauser and Sager article illustrates. *See id.*

judges give weight to hypothetical intentions, they need not settle exactly which actual intentions existed.[74]

A second reason for judges giving weight to hypothetical intentions concerns similar treatment of closely related factual circumstances. Suppose legislators have considered a number of situations and have a clear view of their resolution. Judges should reach similar results for slightly different factual circumstances that the legislators did not consider and that the terms of the statutory language do not clearly embrace or exclude. Here, judges could easily reach a conclusion about the legislators' hypothetical intentions, and they should follow it.[75]

Changing conditions constitute a third reason to consider hypothetical intentions. As circumstances become less and less like those any legislators had in mind, it becomes harder and harder to suppose that legislators had an actual intention about how unclear language should be construed. If their actual mental states should count, should not their highly probable hypothetical mental states also count?[76]

An approach that counts actual mental states should also count hypothetical ones. But judges should take care that the exercise of discerning legislators' hypothetical intents does not transform itself into a covert means of externalizing the judges' own proclivities.

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74 The strength of this argument for using hypothetical intentions diminishes if one emphasizes purpose to the exclusion of specific intentions. Virtually all legislators will have some sense of a law's broad purposes. Indeed, one may think of much interpretation as involving judicial use of actual purposes to draw out hypothetical judgments about narrower, more specific issues.

75 An opponent of reliance on hypothetical intentions could concede this practical conclusion but propose an alternative avenue to reach it, by saying that results of cases should be consonant with actual mental state intentions. Judges should decide cases unforeseen by legislators to correspond best with the results the legislators consciously intended. Judges might treat the results covered by actual intentions like precedents, to guide decision in novel, unforeseen situations. Insofar as judges rely on actual purposes to resolve problems about unforeseen specific applications, the strategy could similarly be conceptualized in a way that does not depend on hypothetical judgments.

76 Two further possible reasons to pay some attention to hypothetical intent concern the respective weight given to specific intentions and further intentions, and the problem of mistake-based understandings. If legislators have not considered future conflicts of that sort, judges may need recourse to hypothetical intentions to decide which intentions were dominant.

Some legislators who have specific understandings about provisions may have made a mistake about what they contain, failing to recognize, for example, that a conference committee excised crucial language. It is arguable how much their actual understandings should count, as compared with the understandings they would have had if they had been aware of the final language.

E. Whose Intentions and in What Combination?

Whose intentions count and in what combination? On examination, we shall find *no single answer* either as to whose intentions should count or how much the intentions of some should count in comparison with the intentions of others.

1. *Whose Intentions Count?*

One initially attractive possibility is that only the intentions of those who voted *for* a law count, and that enough of those legislators must believe (with whatever relevant mental state) that a law reaches certain behavior for that behavior to be covered by controlling mental state intentions.[77] But this option presents an obvious difficulty. Suppose a vote is fifty to forty-nine. One idiosyncratic member of the majority does not think the law forbids behavior that all ninety-eight other voters are sure is covered. Concluding that legislative intentions do not reach the behavior, because only forty-nine of ninety-nine legislators voted in favor of covering it, is not plausible.[78]

More generally, when legislatures are genuine collective bodies, in which members work together to find appropriate language, the views of participating members should count to some degree, even if they ultimately vote against a bill. Their views are most obviously significant if their negative votes do not concern the specific problem at issue; but their views should also matter when the very provision explains their vote against the bill. If legislators work together on statutory language, with input from members who finally vote against a bill, the understandings of dissenters matter.

2. *Comparative Weight and Minority Intentions*

As these remarks suggest, one needs a sense of the actual legislative process to decide whose intentions count and for how much. This

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77 Paul Brest has lucidly developed this notion of a majority of "intention votes." *See* Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B.U. L. REV. 204, 209-13 (1980). However, it is not clear from Brest's discussion whether he thinks the intentions of a negative voter might count if the negative voter wants the law to cover the doubtful situation and voted against the law only because of some unrelated provision of which he disapproved. Ronald Dworkin has commented:

> If the theory of legislative intent is to remain faithful to democratic principles, however, a minimum requirement must be met: a sufficient number of those who voted for a statute must have an understanding in common, so that that number alone could have passed the statute even if everyone else—all those who did not share that understanding—had voted against.

RONALD DWORKIN, A MATTER OF PRINCIPLE 322 (1985).

78 On the "vote to cover" theory, it is conceivable that no behavior would be covered (if at least one of the 50 positive voters thought that for some reason any particular behavior would not be covered).

process can differ significantly not only among political systems but also with respect to laws adopted in a single system.

Intentions of the majority should normally matter most; and a substantial majority of these should usually determine overall intentions (even if this majority falls short of an absolute majority of those voting). Judges should assign more weight to the views of those who have considered a topic closely than to the views of fringe participants.[79] This may seem antidemocratic, but in taking the "temper" of a group, one should pay special attention to the people who are most involved with a subject. Typically, fringe participants lack opinions about how some particular statutory language is to be understood. In that event, interpreters appropriately consider the views of those who have worked on a problem.

The practical importance of mental state intentions about specific coverage turns largely on how one deals with silent participants. Only rarely when a text is unclear in context will most voters have had a definite, ascertainable, opinion about the way it should be interpreted.[80] If mental state intentions counted for interpretation only when some majority shared an ascertainable view about specific coverage, mental state intentions would rarely make a difference.

Once we grasp firmly why mental state intentions may count, we should acknowledge the relevance of intentions possessed by less than a majority of legislators. Although scholars have trouble formulating the precise difference in significance between statutory instructions themselves and the intentions that underlie them, virtually everyone agrees that a difference exists. Statutory language is the subject of a formal vote; it has an official status unlike that of any intentions not reflected in the statute itself.[81] Yet, we have seen that strong reasons often support interpreting unclear instructions in accord with the understanding of those who issued them.[82] If most legislators have no opinion about how a provision should be interpreted in context, but a minority with an opinion agrees that it should be interpreted in a particular way, their views should carry some weight, so long as that minority is not unrepresentative in some important respect. Because voting is formal and by majority, the intentions of a few should not count heavily for interpretation, although they should carry some weight.

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79 *See* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 73 (1975).

80 In this respect, our coupling example may be an exception; most Senators, at least, may have had a view that judges could discern.

81 Insofar as the intentions are put in a preamble or in introductory language to particular sections, they possess a formality somewhat like that of operative language.

82 *See supra* Part III; *see also* Greenawalt, *From the Bottom Up*, *supra* note 33 (discussing issues involved in carrying out instructions given by people in authority).

Less stark approaches to the problem of ignorant or silent participants create a bridge from the active few to the silent majority. Even if my claim is sound that the intentions of a minority may have some relevance in and of themselves, a bridge to majority sentiments makes a difference because the intentions of the few will count more heavily if they are attributable to the majority.

The three possible bridges are hypothetical intentions, delegation, and convention. The argument for hypothetical intentions is straightforward. If a majority have not considered a problem, and a minority shares a certain opinion on this problem, the chances are good that most of the majority would reach the same conclusion if they addressed the issue.[83] Judges can ascribe hypothetical intentions by referring to what the informed minority actually thought.[84]

Another possibility, suggested in various opinions, is "delegation."[85] The basic idea is that passive legislators actually choose to delegate to knowledgeable and active colleagues the formation of relevant mental states.[86] Judges may also make room for variations in weighting that are more subtle than complete delegation. A legislator who has considered an issue slightly may assume that his views should count, but less so than the views of more active colleagues.

A variation on the delegation concept relies on a hypothetical intent about whose mental states should count. Whether legislators have consciously chosen to delegate authority to others to determine meaning by intention, they would likely choose to delegate if they thought about it (particularly if they realized that they would receive, in return, reciprocal delegations for the subjects on which they are knowledgeable and active).[87]

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83 *See* GREENAWALT, *supra* note 8, at 132-41.

84 If a minority expressed themselves in one way and a majority remained silent, judges may assume that many of the majority actually held the same opinion as the minority. In that event, judges infer actual opinions, not hypothetical ones. Frequently, judges will not be able to tell if silent members actually held a view or would have held it if they had thought about the subject.

85 *See, e.g.*, Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 276 (1996) (Stevens, J., concurring) ("Legislators, like other busy people, often depend on the judgment of trusted colleagues when discharging their official responsibilities."); SEC v. Robert Collier & Co. 76 F.2d 939, 941 (2d Cir. 1935) ("[A]s to the details of [the legislation's] articulation [the legislators] accept the work of the committees; so much they delegate because legislation could not go on in any other way.").

86 *See* DICKERSON, *supra* note 79, at 71 (suggesting that those who have not read a bill probably intended to adopt the intent objectively manifested by the bill itself *or* the intent of those conversant with the bill's language).

87 Judges might instead regard delegation as a judicial doctrine (independent of what legislators do or would think) that focuses on the intentions that will lead to the most sensible interpretation. If delegation comes down to principles of sensible interpretation as determined by judges, it varies little from the more bold assertion that the opinions of the few (or at least some few in especially influential positions) count by themselves.

"Convention" lies close to ideas of delegation, but may shift the mental state that is taken as crucial for most members of a legislature. If conventions exist about who are authoritative spokespersons for the meaning of the language of a bill, and those persons ascribe particular meaning to language, others are taken to agree if they do not express themselves to the contrary. As with delegation, legislators might actually subscribe to these conventions and their siguificance, or might do so if they thought about them.[88]

I refer to this approach as one of convention, but natural conversational understandings here slide into artificial social conventions. In an informal context, if someone making a proposal goes on to explain the proposal, and her coparticipants remain silent, they would ordinarily be taken to accept what she has said. If one of them later says to her, "The language of the proposal itself was unclear and I never accepted your gloss on it," she would reasonably respond, "If you didn't agree, why didn't you say so then. I took your silence as agreement." Of course, dissenting legislators must make a much greater effort to form a judgment about the section of an obscure statute, to follow what spokespersons have said about it, and to express disagreement with the spokespersons' comments than those who disagree in ordinary conversation; and the natural inference from dissenting legislators' silence is accordingly much less. But the fundamental idea that what those responsible for a statute say about it has some special authority if not contradicted is not just an artificial convention about legislative practice. It is a lineal descendent of common conversational understandings.

If a convention took the expressed understanding of authoritative spokespersons as determinative, even for members who explicitly rejected that understanding, the convention would move much further from natural conversational understandings which leave room for disclaimers.

The minimally required state of mind for a silent legislator bound by convention differs subtly from the state of mind of conscious agreement or positive delegation to decide a question one has not addressed oneself. The legislator need only accept the meaning ascribed by an authoritative spokesperson as preferable to the effort of developing and stating a contrary view.[89]

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88 *See* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 870-71 (1930) (discussing the interpretive value of legislative "acquiescence").

89 The legislator might accept a statement *in this way*, even though he has a definite contrary opinion he does not want to take the time and effort to express. A similar phenomenon *could* exist with delegation. A legislator *might* delegate his "intention" to someone else even though he knows his view is actually at odds with the view of the person who receives the delegation.

If one views the "conventions" about what counts for legislative intent as judicially created and not dependent on what legislators think, a conventional approach moves further away from reliance on actual mental states and closer toward an objective account of legislative intent.

3. *Nonlegislators*

As we have seen, judgment about which legislators' intentions count and how much they count requires careful evaluation of the realities of the legislative process and of how that process works in relation to statutory interpretation. Such an evaluation should also guide analysis of whether the intentions of any nonlegislators count.

When members of the executive branch propose legislation that is adopted without much change, these officials are an important part of the legislative process. Their understandings should be relevant. One might explain this relevance as deriving from a "delegation" by less well informed legislators who believe that the mental states of the executive drafters play an important role.

The Chief Executive, with the power to veto subject to legislative override, also figures formally in the legislative process. It is reasonably arguable how much a president's (or governor's) understanding of statutory language should matter; but this participation in the legislative process should be sufficient to give that understanding some significance.[90]

The drafters of statutory language within the legislative branch and staff members of individual legislators and committees, who examine bills more closely than the legislators themselves, also play important parts in the process by which laws are enacted. Notions of delegation from legislators to drafters and other staffers are sufficient to support the conclusion that the opinions of these crucial participants in the legislative branch count.

The mental states of people not involved in government, but possessing influence, do not merit independent weight. Their role is less regularized than staffers, and they have neither been popularly elected nor appointed by elected officials. The intentions of private

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90 *See, e.g.*, Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 424 (1996) (considering signing statement of Governor Mario Cuomo); United States v. Story, 891 F.2d 988, 993 (2d Cir. 1989) (considering signing statement of President Ronald Reagan). *But see* Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363, 370 (1987) (questioning the use of presidential signing statements by courts to interpret congressional intent, on both constitutional and policy grounds).

persons should matter only insofar as their actual opinions are accepted by government actors.[91]

4. *No Single Formula Applies*

Scholars who focus on mental state intentions tend to assume that if interpreters of a law know everything about the mental states of every legislator, they should be able to fix upon the same single mental state and set combination of legislative actors as crucial in all instances. Difficulties in arriving at such conclusions demonstrate that a mental state approach is wholly unworkable[92] or should play a modest subsidiary role.[93] Any practical difficulties in determining mental states, then, merely add to more fundamental reasons not to accord mental states much weight.

Our examination has shown, somewhat surprisingly, that even if judges fully comprehend the mental states of legislators, they might not form a uniform approach to what and whose mental states count. Of course, judges deciding cases must implicitly reach conclusions on these points, but their intuitive calculations about whose mental states matter may be too complex to state in formulaic terms.[94] This ineradicable inarticulateness may seem odd and regrettable, but it is a common phenomenon that accompanies human choices. The complexities involved in assessing and discerning relevant mental states undoubtedly create opportunities for insincere judicial manipulation. But such complexities may also underlie a more optimistic view that judges may in fact perform more perceptively than they are capable of articulating in formulas.[95]

If my analysis has been persuasive so far in its own terms, someone may still reply that an interpretive process that genuinely gives weight to "mental state intentions" encounters too many difficulties to make that exercise desirable. If so, one possible solution is to adopt a more objective version of legislative intent that might be distinguishable from what any actual legislators have thought or said. Even if one

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91 That is, the required degree of acceptance by insiders should be actual agreement with particular views, not merely some delegation to whatever views the outsiders happen to have. However, the role of some groups is to advise in the public interest. When the American Law Institute develops model codes and issues formal comments explaining proposed legislation, the comments can be accorded significance.

92 *See, e.g.*, DWORKIN, *supra* note 5, at 317-27.

93 *See, e.g.*, Brest, *supra* note 77, at 221-22 (focusing on the role of adopters' intentions in constitutional interpretation).

94 For an eloquent claim that political decision making depends on experienced judgment not reducible to abstract formulas, see MICHAEL OAKESHOTT, RATIONALISM IN POLITICS AND OTHER ESSAYS 7-13 (1962).

95 *See* Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533, 554-58 (1992) (offering an interesting summary of empirical evidence about decision making).

does not purport to drop all reliance on actual mental states, one might salt such reliance with various objective elements. Another option is to drop all reliance on legislative intent (except perhaps as a conclusory label)[96] and to rely wholly on other techniques of interpretation.

V

MORE OBJECTIVE APPROACHES TO LEGISLATIVE INTENT: CONVENTIONAL WEIGHT AND THE REASONABLE LEGISLATOR

One might believe that judges do, or should, consider only an "objective" legislative intention, not some combination of subjective mental states of actual legislators and staff. In the law, the most traditional objective approach is to posit a reasonable person, here a reasonable legislator. Legislative intent might thus represent the understanding a reasonable legislator would have about a statutory provision. Another possibility, mentioned briefly above, is that judges assign a conventional weight to various sources, such as committee reports, rather than trying to assess legislators' actual mental states.

In thinking about a conventional approach for the United States, we should certainly not imagine that all judges adhere to some rigid conventional practice of assigning weight to various legislative sources. Some Supreme Court Justices decline to give any weight to legislative sources traditionally used in the United States.[97] Moreover, those judges who do rely on legislative sources recognize some rough hierarchy, but attribute no fixed weight to each source.[98] Thus, the notion of conventional weight, for the United States, amounts to some broad understanding among most judges about the strength of various legislative sources.

With both "conventional weight" and a "reasonable legislator," we are especially interested in two questions. How far does the approach

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96 Justice Holmes, an objectivist par excellence, once suggested that legislative intent represents whatever techniques judges use other than textual exegesis. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538 (1947). Because some interpretative aids have little to do with legislative ambitions, this "residuary clause" approach is implausible.

97 Most notably, see SCALIA, *supra* note 1, at 17 (emphasizing "reader understanding" as central to statutory meaning).

98 Indeed, it is not clear that any set of fixed weights would be possible, since the weight of a source in a particular case depends on its status *and* the strength with which it points in one direction or the other. I suppose one could conceive of a combined weighting of the status of a source and the strength with which it points. Thus, courts might assign committee reports twice the weight of a sponsor's floor statements. But if a committee report points with a magnitude of 20 toward a result and a floor statement points with a magnitude of 50 toward the contrary result, the floor statement would carry more total weight. I am not aware of anyone proposing such a scheme of quantification, much less suggesting that judges should employ it in practice.

rely on assumptions about mental states? How far does the approach involve assessment of mental states in particular instances? I discuss conventional authority first.

A. Conventional Authority

The idea that "legislative intent" reflects the conventional weight of various sources can be a modest alteration of, or a radical departure from, a mental states approach. Everything depends on the extent to which one links the conventional weight of sources such as committee reports to likely mental states.

The view that most strongly divorces conventional weight from mental states proceeds as follows: whatever the origin of the weight judges give various sources,[99] that weight does not now depend on the mental states of legislators. Courts establish conventional weight; it is not mainly dependent on the acceptance of legislators, although implicit acquiescence by legislators in this judicial practice may have some bearing.[100] If we thus separate a conventional approach to legislative intent from mental states, conventional weight would not depend on whether sources accurately reflect the mental states of legislators.[101]

The United States system of using legislative sources does not reflect any such radical divorce of conventional weight and likely mental states. It is not fortuitous that committee reports count for more than isolated statements on the floor of Congress about what legislation means; they are much more likely to represent the views of legislators (or their staffs) who have considered the issues. Perhaps judges do not worry too much about how well various materials represent actual (and hypothetical) mental states in each instance, but instead assign a weight that roughly approximates mental states over the run of legislative enactments. A common argument for placing less weight on committee reports than judges had previously done is that committee

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99 Sources like committee reports have carried significant weight because of the extent to which they once were thought to represent relevant mental states. Sources given little or no weight, such as statements in debate by individual legislators, were traditionally poor indicators of the attitudes of most legislators.

100 Conventional weight will be part of the interpretive techniques known to legislators, and this will affect their behavior. Legislators proceed on the assumption that certain materials have great weight for those judges (still a majority) willing to consider legislative history. One might thus conceive of conventional weight as reflecting a kind of dialogue between courts and legislators.

101 This apparently is Ronald Dworkin's view. *See* DWORKIN, *supra* note 5, at 342-50. This version of conventional authority, like all others, does not abandon a feature that exists if judges assess actual mental states—judges may conclude that different sources represent competing understandings. Judges must then decide which understandings count most heavily; they must engage in some combinational exercise.

reports are now less representative of legislators' views.[102] This argument would be flawed if judges assign purely conventional authority to committee reports.

A more realistic theory of conventional weight recognizes that the conventional weight of various sources bears some significant connection to assumed mental states of legislators. Conventional weight might reflect legislators' actual beliefs about the coverage of provisions or legislative acquiescence in the practice of assigning weight to various sources, or both. Judges might regard a particular source, such as a committee report, as indicating what some important legislators probably thought about specific statutory intent or purpose. Or, judges might consider conventional weight as reflecting certain legislators' desire to delegate interpretive responsibility. Knowing roughly what weight judges have assigned to sources in the past, legislators accept that judges will assign similar weight in the future. Conventions represent their understandings about how judges will, and should, determine legislative intent. Legislators lacking any relevant attitude about the coverage of a particular provision agree that judges should look to conventional sources to reach a determination. Instead of deferring to the mental state intentions of those writing a report or speaking on the floor, a legislator defers to the views the more active participants in authoritative sources actually express. Even legislators who happen to have definite opinions about a provision's coverage might accept that these authoritative public expressions will be taken to represent legislative attitudes.

A judge might believe that conventional weight correlates to either of these kinds of mental states in each relevant legal dispute or in some much more general manner. How could conventional weight possibly best reflect legislators' views in every instance? Certain committee reports better reveal actual mental states than do others; in that sense, no single assigning of weight can be best in every case. But judges may be unable to determine just how well any report reflects actual mental states. Conceivably, in each case, judges do the best they can to assess actual mental states by following conventional practices. In this way, conventional weight could be the best practical means of carrying forward a mental states approach to intent.

The connection of conventional weight to mental states could be significantly looser. A judge might say:

> It's too complicated to try to figure out how well conventional weight reflects mental states in individual instances. I realize that

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102 *See, e.g.*, SCALIA, *supra* note 1, at 29-37 (arguing that such reports deserve no weight at all); *see also* Blanchard v. Bergeron, 489 U.S. 87, 99 (1989) (Scalia, J., concurring) (criticizing the Supreme Court's "excessive preoccupation" with committee reports and the cases cited therein).

> on occasions committee reports seem more or less to reflect the opinions of most members, but I don't try to gauge that. I try to assign a constant weight to committee reports, one that crudely reflects their average weight with respect to legislators' attitudes.

This judge assigns weight to a source based on a rough correlation with mental states, and this weight could change over time as various sources become more or less reliable indicators of what legislators believe. But the judge does not suppose that conventional weight represents the very best method for determining mental states in particular instances.

Even if judicial practice abstracts to some degree from assessments of mental states in each particular instance, judges nonetheless are relying on general correlations with relevant mental states. In particular cases, judges would likely depart from conventional weight if it were clearly out of line with actual attitudes. Consider this illustrative, but unrealistic, example which tests the standard practice of according little or no weight to the statements made by ordinary members in floor debates. Suppose that a Senate committee report decisively supports one interpretation of a provision, but a majority of senators, all of whom vote for the bill, individually indicate a contrary attitude on the floor. Would a court faced with interpreting the provision engage in conventional weighting or instead conclude that the legislators' floor statements (reflecting their actual individual beliefs) best reflect legislative intent? I would expect the latter.

Just how far does conventional weight avoid troublesome mental state inquiries? If I am correct about the proper approach to understanding conventional weight, weighting rests at least on general assumptions about legislators' attitudes. Assigning conventional weight to sources does avoid daunting inquiries about what numerous individual legislators actually believed. But we should not be too quick to reject an actual mental states version of legislative intent on this basis. Given the limits of time and judicial capacity, a judge's practical implementation of a mental states approach would approximate the practice of giving conventional weight. The judge would assign a rough weight to a source based on its ability to represent legislators' attitudes accurately.

As with a straightforward mental states approach, the conventional approach I have sketched requires judgments about what views are relevant, about whose views count, and about how views should be combined. Committee reports and sponsors' floor statements typically tell us what a statute does and what its underlying purposes are. These expressions are more about how provisions *should* be understood than about hopes or expectations, though they may typically imply all three attitudes.

A judge's assignment of weight to conventional sources reflects judgment about whose views count and for how much. The present debate over the significance of committee reports provides an apt example.[103] In comparison with past practice, reports are now more completely the work of staff members; the legislators who sign these reports no longer understand them as well. Should this reality encourage less judicial reliance on reports? The answer depends, in large part, on whether the views of staffers should count. In short, a conventional weight approach, although it poses questions about mental states at a more general level than does an approach that focuses on the realities of adopting discrete statutes, must nevertheless implicitly provide answers to the same sorts of inquiries.

B. A "Reasonable Legislator"

One might view legislative intent as the intent of a "reasonable legislator." The extent to which such an approach relies on assumptions about mental states and requires their assessment depends on how a judge conceives of the reasonable legislator *and* on the sources the judge uses to discern the legislator's understanding. For the reasonable legislator approach to differ from a reader understanding approach,[104] a judge must assume that legislators had access to sources, such as legislative history, that the readers who matter do not employ. More precisely, inquiry about a reasonable legislator might yield a different outcome from inquiry about a reasonable reader if a judge: (1) uses somewhat variant sources for legislator understanding and reader understanding; (2) uses a source that carries more or less weight for legislator understanding than for reader understanding (for example, perhaps legislators would care *more* about prior law than would readers); or (3) uses a source to which legislators would react differently from readers.

The reasonable legislator a judge constructs may be essentially "representative" or substantially "normative." By "representative" legislator, I mean one who fairly reflects the legislative body as a whole.

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103 *Compare* DICKERSON, supra note 79, at 145 (arguing that "sound communication principles" caution against consideration of committee reports because there is "no basis for assuming that they are in fact shared by the legislative audience or its conduit group"), *and* SCALIA, *supra* note 1, at 35 (arguing that it is an unconstitutional delegation for Congress to authorize a committee to "'fill in the details' of a particular law in a binding fashion"), *with* ESKRIDGE, supra note 6, at 220 (describing the Burger Court's reliance on committee reports as "the most authoritative source of legislative intent"). *See also* GREENAWALT, *supra* note 8, at 173 (comparing the relative value of various types of committee reports).

104 If a judge takes what the text expresses to a relevant reader as what the reasonable legislator intends, the two approaches collapse. This version of legislative intent is, or comes close to, Judge Sanborn's approach. *See* Johnson v. Southern Pac. Co., 117 F. 462, 467 (8th Cir. 1902), *rev'd*, 196 U.S. 1 (1904).

Such a legislator would represent not only the drafter or sponsor of a bill but all those called to vote upon it. A representative legislator would look to legislative history to see what meaning or purposes the heavy weight of that history discloses.[105] In this way, the reasonable legislator would integrate and combine various expressed views, a task that we have previously supposed the judge would undertake. Of course, the judge still performs this synthesis, although she now does so via the reasonable legislator construct. She still needs to determine what and whose mental states matter and to assess the mental states of legislators, relying more or less on conventions about weight. The judgments of the reasonable legislator will end up reflecting the likely mental states of actual legislators or some crude measure of conventional weight.

The exercise of examining legislative history looks different if the judge takes the reasonable legislator as using legislative history to help construct the best purposes and meaning for a statute, perhaps adopting a decidedly minority view so as to improve the text. A judge who employs this normative sense of the reasonable legislator could assign attitudes to that legislator which she regards as preferable to those held by any actual legislators. A normatively constructed reasonable legislator is much further removed from anyone's actual mental states than is a reasonable legislator designed to reflect the attitudes of actual legislators.

A judge whose reasonable legislator construction both gives weight to the opinions of actual legislators and makes important normative judgments,[106] must engage in a dual evaluation. She would need to undertake the kind of mental state inquiries required for a representative reasonable legislator; but these inquiries would become less decisive to the degree that she emphasizes normative elements.

Even if the reasonable legislator's response to legislative history is primarily in terms of normative judgment, his views will presumably reflect the evils that astute legislators would perceive or attribute to their constituents.[107] Thus, a judge will attribute to his reasonable leg-

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105 I assume that the reasonable legislator would know what the final vote was on a statute, although someone who views the legislator more like an author might suggest that the legislator's knowledge would end before that time.

106 Hart and Sacks's proposal that judges should presume legislators are "reasonable men pursuing reasonable purposes reasonably," HART & SACKS, *supra* note 3, at 1125, has strong normative elements, *cf.* Macey, *supra* note 72, at 250-56 (examining the interaction between traditional statutory review and special interest legislation).

107 Were the reasonable legislator not to consult ordinary legislative history, perceived evils would still constrain his sense of purpose. For example, the reasonable legislator adopting the Act of March 2, 1893, would likely pay attention to the series of presidential messages that had indicated the urgent need for greater safety among railroad workers. *See Johnson*, 196 U.S. at 19.

islator an understanding of a law's purposes based on demands put before the legislative body.

Attribution of legislative purposes to a reasonable legislator involves some mental states inquiry. I demonstrate this by an extended illustration, which has force whether or not the reasonable legislator relies on legislative history, and which, as we shall see, also reaches reader understanding approaches. Consider Lon Fuller's familiar example of an enactment that makes it a misdemeanor "to sleep in any railroad station."[108] Fuller's point was that all statutory language must be understood according to its purpose, and thus, that a well-dressed man who nods off while sitting up and waiting for a delayed train does not violate the ordinance. The man would be "sleeping" in a literal sense, but not within the meaning of the ordinance.

Fuller assumed that the purpose of the ordinance was to prevent people from camping out in railroad stations. Suppose, however, that a particular affluent town has no problem of homeless and transient persons sleeping in the station, but suffers from another severe and widely recognized problem: people who have fallen asleep while waiting for trains have been victims of theft, robbery, and murder. The town council passes the same antisleeping ordinance to protect those who might fall asleep and to assure that waiting passengers will be awake to witness any crimes against other passengers, thus discouraging predators. A reasonable legislator would assume that this ordinance does indeed apply to a well-dressed passenger who nods off. Thus, reasonable legislators in two different communities would intend the identically worded antisleeping ordinances to have different coverage. The reasonable legislator in each community would consult the social context in which a statute arises. To discern what the reasonable legislator in the second community intends, a judge might look at formal reports about crime in the community, newspaper articles describing concerns about attacks at the railroad station, and official statements by the mayor indicating that something must be done about that problem, as well as testimony before and discussion within the town council.

How then would a judge decide what a reasonable legislator intends if the language and general context leave it unclear whether a law covers certain action? What if the sources the judge legitimately consults fail to clearly indicate whether a third city council that adopted the antisleeping ordinance intended to target transients camping out or crimes committed against nontransients? Perhaps, the judge will conclude that, within this community, people and legislators worried more about transients sleeping in the station than

108 Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 664 (1958).

about crimes committed against sleeping passengers. If the ordinance, including any preamble, gives little help, how does the judge decide whether the ordinance covers "nodding off" by the well-to-do passenger?

Of course, the reasonable legislator would not be a dogged literalist. He will not have meant that simply because the passenger is "sleeping" according to some scientific definition of sleep, he is automatically guilty. That was Fuller's original point. But now the judge is uncertain whether the legislators' purposes cover the passenger's behavior. More precisely, she is unclear as to whether the concern about crime was serious enough to generate in the council an anticrime purpose that would reach the innocuous behavior of "nodding off."[109]

To decide that question, the judge needs to determine what attitude about purpose is relevant and whether the reasonable legislator has that purpose. The possibility of indifferent legislators gives rise to questions about what state of mind the reasonable legislator would need to have regarding a purpose and its implementation, if the ordinance is to cover specific behavior. Suppose that a reasonable legislator wants to endorse a purpose, such as preventing crime, but is deeply troubled by criminalizing (even to a minor degree) the innocuous behavior of upstanding citizens? Suppose instead that he is indifferent about the achievement of that purpose at that cost. Or, suppose he thinks that such a restriction is desirable on the merits but that criminalizing nodding off would raise strong objections in the community. In accord with my emphasis on how a legislator thinks a provision should be interpreted, I believe that one should consider a reasonable legislator as having purposes that he thinks the statute should be taken to embody. But whether or not this view is right, we can see that a judge must decide what a reasonable legislator's attitude about a purpose needs to be if the judge is to attribute that purpose to a statute.

Because legislation responds to perceived dangers, the purposes a judge would assign to a reasonable legislator depend substantially on what dangers legislators recognized. The judge would not list crime prevention as a legislative purpose if she thinks the crime problem was grave but concludes that no politicians and few citizens were concerned about it. The judge might ask how an ordinary, well-informed legislator would have reacted to the circumstances before him. If *most* honest, well-informed legislators would have a purpose, then so also would a reasonable legislator.

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109 This issue exemplifies a fairly common phenomenon when purpose is not easily distinguishable from specific intent. Legislators who had the "anticrime" purpose would also have had the specific intent to cover a nodding passenger.

The judge's assessment might be somewhat more complicated. She might conclude that only a minority of actual legislators would be concerned about crime, but that many others would be indifferent about the extra coverage of nodding passengers. Would a reasonable legislator have a purpose that only a minority of actual legislators would care about but that a majority of legislators would be willing to satisfy? This question returns us to difficult problems about combinations.

Mental state questions do not remain exactly the same if one shifts inquiry from actual legislators to a reasonable legislator. For instance, a judge working with the reasonable legislator construct might ask herself how most people in the position of a legislator *would respond* to information and arguments presented to the legislature, rather than how most actual legislators who adopted the statute *did respond.* Although the formulation of issues may change, the reasonable legislator construct fails to eliminate all mental state questions.

One might object to my conclusion on the ground that the reasonable legislator should be taken as primarily normative, even as he develops purposes. Such a reasonable legislator would acquire all the information in materials appropriately available to legislators and make the best law possible, given the language the legislature has actually voted to approve. In that event, the probable mental states of the actual legislators, or of people who might find themselves in the role of legislators, would lose significance.

But this position misconceives the nature of legislation, as judges should understand it. Actual legislators do not respond to bare facts; they respond to facts that they and their constituents perceive. Reasonable legislators should be similar in this respect. For example, assume that in our third community enough crimes have occurred in the railroad station to justify a law covering the nodding passenger, and that the town council has access to an eight-hundred-page report describing the circumstances of every serious crime committed in the last three years. The judge is confident that no one connected with the council read this report and made sense of its undigested facts. She is also confident that such diligence by a council member or staffer would be extremely rare. Moreover, the judge finds no evidence that people in the community worried about crime in the railroad station or that any political official even identified such a problem, much less suggested legislation to remedy it. A judge would not construct a reasonable legislator to adopt legislation to combat a problem that existed but that no one actually perceived. One cannot expect reasonable legislators to rummage through all available social facts and to intend that all legislation be interpreted to best respond to those social facts. The perceptions of a reasonable legislator which

underlie legislation should not be too far removed from the perceptions actual legislators would likely have in similar circumstances. A judge need not estimate what the actual legislators who adopted a law would have perceived; but she at least needs to estimate what most people occupying legislative roles would have perceived as problems needing to be fixed, had they examined the material presented to the actual legislature. Thus, *even if* a judge primarily adopts a normative conception of the reasonable legislator, one who is capable of adopting a better law than would most legislators, she will attribute purposes to a law in accord with the likely perceptions of people and lawmakers.[110]

What I have said in the last paragraph does not answer the possible claim that interpretation of statutes will work best if judges map the statutory language against social realities at the time the statute was adopted, whether or not legislators would have had any awareness of those social realities. The reasonable legislator would perceive all (perceivable?) social facts. On this account, a judge could use the antisleeping ordinance to accomplish the anticrime objective, applying the ordinance to a sleeping passenger, even if the judge was confident that, when the law was adopted, virtually no one was aware of the crime problem that existed in the railroad station. My answer to this position cannot lie only in how actual legislators behave; it rests on a normative view that giving judges such wide latitude to build the purposes of a reasonable legislator would confer too much power on judges. In statutory interpretation, there should be some greater connection between the evils constituents and legislators perceive and the purposes judges ascribe.

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110 In this respect, a reasonable legislator construct for determining intent may differ from a "reasonable person" standard for ordinary actions. It is conceivable that a reasonable person should act in a manner that no one has yet believed is called for. In *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932), Judge Learned Hand concluded that admiralty law required tugs to carry radio receiving sets, despite the absence of any industry practice to that effect. *See id.* at 740. In fact, it was evident that many captains of tugs realized the value of receiving sets to get weather reports, but apparently this fact was not crucial to the decision. *See id.* at 739. Given the low cost of radios and the likely significant benefit of preventing losses at sea from bad weather, "reasonable prudence" required that owners provide them. *Id.* at 740. A judge could reach this conclusion on the basis of the cost and benefits of radios, linked to a general sense of the value of saving lives and property. Judges did not need to know what anyone actually thought about radios, so long as they believed that the relevant people should have been aware of their existence and value. Since legislatures respond selectively to perceived social problems, it would be odd to say that they intended to address problems they have not considered. One expects modern legislators to react to problems brought before them by private persons and the executive branch of government, not to initiate sweeping investigation of whatever legislation might possibly be beneficial.

VI
READER UNDERSTANDING APPROACHES

A major alternative to asking what a speaker or writer intended is asking what a listener or reader would have understood the speaker or writer to be communicating. One approach to the meaning of statutes is thus to ask how readers would understand them. Indeed, any plausible approach to statutory meaning must pay attention to how readers perceive statutory language. This is especially true when statutory language restricts the freedom of people whose objectives differ from those of the legislature. One need not take a position on the debate between "originalists," who, with various qualifications, take original meaning as the overarching standard of interpretation, and "evolutionists," who think statutory texts have an evolving meaning, to conclude that how readers understand the language at the time of enactment often matters. That understanding is highly relevant when a court must interpret a statute shortly after adoption. And, most judges and scholars also think that original reader understanding has *some* relevance for older statutes.[111]

We are primarily interested here in whether such an approach relies on assumptions about mental states and requires judges to make assessments of mental states in particular instances. I identify some complexities about mental states and reader understanding, and conclude that mental state problems with reader approaches resemble those accompanying legislative intent much more than is commonly recoguized. We should not abandon reader understanding approaches, but we must face these troublesome problems.

As indicated earlier, from the judge's standpoint, the meaning of a statutory provision cannot vary with the subjective understanding of each particular reader. A judge who focuses on reader understanding for statutes must choose an understanding that will bind everyone, and she must normally suppose that the reasons leading her to *that understanding* will also lead other judges to the same understanding. The judge might focus on possible actual readers and somehow combine their views into a typical reader, or posit a kind of reasonable reader.

My inquiry into how a judge assesses what a reader would understand omits various complications inherent in our system of legal interpretation. First, judges may consider the crucial reader to be a lawyer or an expert in the field the statute addresses, rather than an ordinary citizen. However, if the reader approach is to vary from all

111 However, as I noted earlier, one might take the position that reader understanding at the time of adoption matters little for interpretation one hundred years later. *See supra* note 36.

legislator approaches, we must assume that the reader is not a lawyer who has the time and ability to digest all the materials of the legislative process. Second, judges may employ strict standards of clarity. They may exonerate a criminal defendant because statutory language does not apply to him clearly enough, even though an ordinary reader would believe that the language, on balance, does apply. Third, judges may distinguish stages of evaluation. They may accept an administrative decision made according to one reasonable understanding, even though the judges themselves would have selected another reasonable understanding as the one that a reader would probably adopt. Thus, my claim that a judge seeks the understanding of typical readers or a reasonable reader is compatible with the judge determining that the relevant reader is an expert and with the judge requiring a special degree of clarity or deferring to a reasonable agency view.

One possibility I do explore here is that a judge may "short-circuit" issues about readers by simply discerning what the language means to her.

At first glance, a reader understanding approach may appear to avoid all the perplexities about mental states and combinations that accompany most assessments of legislative intent. Common conceptions of reader approaches do not do so, however, and models that would avoid those perplexities are not plausible ones. Mental state perplexities may intrude when typical readers, or a reasonable reader, determine legislative purpose and when the judge decides how to construct the reader. One might logically begin with "construction" and move to determinations of purpose, but I reverse the order for the sake of clarity. The problem about purposes tracks very closely concerns about legislative intent we have just reviewed. Although the precise scope of issues about legislative purposes depends on how a judge constructs her reader and on the sources the reader consults, modest assumptions about reader and sources raise the major dimensions of those issues.

A. Discerning Purposes

Proponents of a reader understanding approach assume that the reader has some idea of the broad objectives lying behind legislation. A provision's operative language, any introduction to that language, a statute's preamble, and the force of surrounding provisions may all contribute something to the reader's sense of purpose. But the reader can probably also look at *some* other sources—the law the statute replaces, other statutes dealing with similar problems, and com-

mission reports available to the legislature that indicate the need for legislation.[112]

How would an actual or reasonable reader attribute purposes to a statutory provision? I revert to Fuller's sleeping passenger ordinance.[113] The purposes of identically worded laws forbidding people "to sleep" in a railroad station could be quite different in two communities. In the community where the aim is to prevent crime, the purpose would reach passengers who "nod off"; in the community where the aim is to forestall camping out, the purpose would not reach that behavior. In a third community, whether the purpose includes ordinary passengers who nod off might be debatable.

Readers in the first two communities would understand their ordinances differently, attributing different purposes to their respective city councils. In ordinary communication, including imperative speech, the listener attributes the purpose he supposes that the speaker has.[114] Thus, if *S*, after *L* has entered her office for a private conversation, says, "Please close the door," *L* assumes that the instruction refers to the door that separates the office from a public area, not to a closet door that happens to be ajar. Most scholars and judges who prefer a reader understanding approach to the exclusion of legislative intentions approaches are opposed to (most) judicial use of legislative history,[115] but they commonly do not bar reference to all external indications of purpose.

In order to decide whether a requisite purpose of crime prevention underlies the antisleeping ordinance in our third community, the judge, through the reader she constructs, has three interpretive options: (1) What purpose would most legislators have had? (2) What purpose would a reasonable legislator have had? (3) What purpose should she attribute to the language in some detached sense? Readers may take the approach that what counts is what most legislators thought about purpose. Did most or many legislators credit the "crime worry," or was that dismissed by all but a few alarmists? Did those who credited the worry consider it to be serious enough to warrant making those who nod off guilty of a crime?

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112 One might say that the reader does not look at these external sources, but that a judge's independent determination of purpose can make a difference. If judges directly give weight to legislative purpose based on sources not available to readers, then we have an approach in which legislative intent *of some kind* has significance separate from reader understanding.

113 *See supra* note 108 and accompanying text.

114 However, if speaker and listener are in an oppositional relationship, the listener may believe he is entitled to interpret according to purposes he would endorse, unless the speaker unambignously forecloses that possibility.

115 John Manning, for example, mounts a strong opposition to typical use of legislative history, but accepts its use for limited purposes. *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 731-37 (1997).

If the reader attributes purpose based on what he assumes worried actual legislators, we can easily see that the judge's interpretive endeavor still involves assessments of the mental states of legislators.[116] It follows that the complexities regarding what and whose mental states count and how they combine lie not very far in the wings. For example, if the reader estimates that one-fourth of the legislators were greatly concerned about crime and perceived the ordinance as partly directed at crime, and the rest of the legislators were indifferent about that possibility and lacked conviction about whether the law embodies it, would the reader conclude that the purpose of the ordinance covers the nodding passenger? The reader understanding model does not eliminate judicial questions about which mental states and how many mental states warrant attributing a particular purpose; it merely puts those questions at one remove.

Does the analysis change if the reader, instead of focusing on the likely purposes of actual legislators, asks what purposes a reasonable legislator would have had? To respond to this question, we need to revert to the discussion of reasonable legislators.[117] It matters little whether the judge asks directly about a reasonable legislator or estimates what readers would suppose about a reasonable legislator.[118] I have suggested that any persuasive version of a reasonable legislator relies on some understanding of the likely mental states of actual legislators or those who might occupy that role.

The proponent of a reader understanding approach might retreat to some idea of a "detached" purpose, one not connected to the mental states of legislators. A "detached purpose" is subject to various interpretations. It could mean that the reader relies only on statutory language, without regard to existing social conditions and perceived problems. But that approach proves indefensible in that it strays too far from the assumptions of ordinary communication and would yield social injustice.[119] If the judge's reader considers evident social condi-

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116 The device of the reader may exclude sources not easily available to readers, and the reader's ideas about legislators may emphasize purpose rather than specific intent.

117 *See supra* Part V.B.

118 It is theoretically conceivable that the reasonable legislator might look different if filtered through readers rather than constructed directly by a judge. The judge who asks directly about a reasonable legislator decides what qualities to attribute to the legislator. Perhaps readers would attribute different qualities than the judge. For example, the judge's reasonable legislator might possess all available knowledge; a reader might focus more exclusively on information brought to the attention of the legislature. I shall not pursue this possibility because the idea of a reasonable legislator is itself so artificial that it is unlikely to be employed by typical actual readers. (However, a judge *might* ask what a reader would (hypothetically) think were he to question himself about a reasonable legislator.) It is unlikely that the reasonable legislator will look different if constructed through readers rather than constructed directly by the judge without any imaginary intermediary.

119 Even that approach may depend on what most actual or potential legislators adopting such language (in a variety of conditions) would have in mind.

tions that trigger legislation, what would a "detached" purpose be? Surely, it could not be other than some construct of how an objective person in a legislative role who adopts such language would act. This construct, however, reverts back to asking how most actual people would react and what purposes they would have when they use language in those social circumstances.

A critic might object that reader understanding approaches are less similar to legislative intent approaches than I have suggested. Although questions about mental states regarding purpose may arise under both approaches, the method of answering purpose questions in reader understanding approaches, the critic might argue, differs radically from the method employed by a judge who answers questions about legislators' purposes directly. The judge who directly ascertains the purposes of actual or reasonable legislators estimates their mental states, and implicitly decides what mental states count and how they combine. The latter decisions are normative, or conceptual, not descriptive—judges decide what ought to count. By contrast, when a judge employs a reader understanding approach, she initially posits the reader of a statute and then asks questions about purpose from his perspective. If the judge conceives the reader as an amalgam of real persons, or as a hypothetical person with the characteristics of a real person, her method for answering questions about purpose becomes descriptive, or empirical, in theory. That is, the judge estimates *what the reader would believe* is necessary to constitute a legislative purpose; she does not make her own evaluation about necessary attitudes and combinations.

My response is that this theoretical difference is unlikely to matter in practice. If imagined actual readers are inquiring about purposes a reasonable legislator would have, the whole endeavor is so constructive that the judge's "reader" will probably not reach a conclusion at variance with what the judge would conclude on her own.[120] Even if the judge takes her inquiry as ascertaining what actual readers would estimate about actual legislators, few actual readers will have worked out these matters in any detail. The judge may be relegated to using her own best judgment about how purposes should be assessed. At the very least, she will have to supplement knowledge of how readers might react[121] with her own delicate appraisals.

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120 The more the judge's construction of the reasonable reader adopts ideal elements, the further the questions about purpose are removed from ordinary empirical inquiries.

121 I do not deny that judges might sometimes realize that readers of a different era might have assessed purposes differently from the way modern judges do.

B. Readers' States of Mind

Questions about states of mind and combinations arise not only when a reader assesses legislative purpose; they also infect the judge's construction of the reader. A judge who posits typical readers or a reasonable reader must make implicit judgments about which readers' states of mind count. Just as legislators might have divergent hopes, expectations, and convictions about proper interpretation, a reader of a statutory provision might have hopes, expectations, and convictions about proper interpretation that vary.

Consider the language of some key sections in Title VII of the 1964 Civil Rights Act,[122] providing that employers may not "discriminate" on grounds of race, color, religion, sex, or national origin.[123] One might perceive a difference between a broad, rather neutral, sense of discrimination, as to "categorize in a disadvantageous way," and another sense, to "categorize in a way that harms victims of oppression." Do the relevant sections include a bar on categorization that favors people who have been previously oppressed? In 1964, a reader favoring such affirmative action might have hoped that judges would not understand "discriminate" to bar it, but nonetheless might have expected conservative judges to construe the sections as forbidding all racial and gender classifications. Recognizing both possible meanings of "discriminate," the reader might have been unsure what courts should do. To take a less loaded example, a reader of the earlier railway safety statute might have hoped and expected it not to be taken as demanding compatible coupling, but still believed that the courts should read the language to impose that requirement.

If a person is reasonably informed of the possible applications of statutory language, his hopes about its interpretation will depend largely on the social policies in which he believes; his expectations will reflect his sense of the present judiciary (and other interpreters); and his convictions about proper interpretation will follow his sense of how judges should interpret statutory language. If someone who is relatively naive takes his first look at a problem, his hopes, expectations, and convictions will usually be joined. But as he thinks carefully about the problem's nuances and alternative approaches, the more likely it becomes that his hopes, expectations, and convictions will split apart. A judge employing a reader approach probably cares more about a reader's thoughtful evaluation of language than his first pass at it. If a judge used actual readers as the representative readers, she would have to decide what states of mind of the readers mattered.

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122 *See* 42 U.S.C. §§ 2000e to 2000e-3 (1994); *see also* United Steelworkers v. Weber, 443 U.S. 193 (1979) (applying two of these sections).

123 *See* 42 U.S.C. § 2000e-2(a).

Is this mental states problem avoided if the judge uses an objective reasonable reader? That depends partly on the reader's characteristics. Defenders of reader approaches as the touchstone of interpretation usually ask how readers from the period in which the statute was adopted would have understood statutory language.[124] A reasonable reader, in this conception, may have a good grasp of the language, be relatively well informed, and be unbiased, but we have no reason to suppose that he lacks complex attitudes toward phenomenon. If legislation was adopted to serve narrow interests in a period when judges largely favored those interests, a reasonable reader's hopes and expectations might well have diverged. The reader might have hoped that judges would interpret unclear language to serve broader public interests, but also might have expected judges to construe it to favor special interests. Depending on the framing of the statutory language, the reader's convictions about proper interpretation could have followed either his hopes or his expectations. Constructing a reasonable reader does not relieve the judge from discerning which of these arguably relevant states of mind count.

Some exponents of reader approaches might answer that my analysis misses the point—that the virtue of a reader approach lies in its emphasis on the ordinary meaning of language, not highly subtle views about what courts might and should do. The reader, whether typical or reasonable, asks what the statutory language means to him, not how courts might or should interpret it.

This answer is attractively simple, but not ultimately persuasive. Language can mean different things in different contexts. Readers of laws recognize that they are reading formal prescriptions backed by the coercive power of the state. A great majority of modern statutory language bears little resemblance to the language of ordinary discourse, and even when the language is similar to ordinary discourse, a reader knows that a statutory provision is not the same as a remark made by a next-door neighbor. Parsing the ordinary meaning of ordinary words may work fine when statutory language is clear in application, but most serious interpretive problems arise when language is not clear. The key to interpretation in such instances thus cannot be how readers would understand the crucial language if they somehow managed to forget that the language is legal.

One problem judges who construct readers face is determining how ordinary or excellent the reader's judgment will be. Most simply, the judge decides whether her reader is an expert in the field of regulation, a lawyer, an ordinary person, or an amalgam of these. Theorists agree that statutory language should be read in light of the group

124 Insofar as modern understanding of statutory language is relevant, a judge inquires about how reasonable modern readers would understand particular provisions.

which a law primarily targets,[125] and the judge will construct her reader accordingly. A judge's decision about whose understanding should count will partly determine her reader's information and refinement of judgment. If the judge employs a *typical* or *average* reader of a certain class (i.e., expert, lawyer, or ordinary person), she may not have to make further judgments about capabilities. But she will have to make these judgments if she uses a *reasonable* reader. An actual reader asked to construe authoritative language might conclude that most members of society would read it in a certain way, even though he would find another way more persuasive or desirable. Does the *reasonable reader* represent most ordinary, well-informed, unbiased readers, or does that reader simply give the most just or desirable account of a statute that one could expect from anyone at the time the law was adopted? The answer should depend partly on what would cause the ordinary reader to diverge from some ideal reasonable reader.

Reader understanding approaches are cast as an alternative to the modern judge simply deciding which reading she thinks is best. The approaches are designed to turn the judge into a kind of historian or social scientist discerning how language was understood. If the interpretive problem involves extremely complex language that may be untangled only by a very astute reader (as with some tax provisions), the reasonable reader may achieve this, though most actual readers would fall into confusion. But as to the meaning of common words and phrases, there are no "experts" (except those who understand the usage of others).[126] When such meanings are at issue, a reasonable reader cannot be a person who would have given the socially best reading possible at the time of passage, if virtually no actual readers would then have accepted that reading. Rather, the reasonable reader is meant to embody the way people of the period actually understood language.

This conclusion that the reasonable reader is not some uniquely superior reader does not quite tell us the extent to which he interprets according to enlightened factual and normative judgment. This matter of degree poses the difficult issue about reasonable readers.

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125 *See, e.g.*, Frankfurter, *supra* note 96, at 536.

126 However, in some instances understanding may turn on whether one reads language according to rules of grammar. It is possible that most readers would take some fairly complicated sentence to mean something different from the meaning that corresponds with the rules of English grammar. For a case in which the Supreme Court interpreted a criminal statute in a manner at odds with ordinary rules of grammar, see United States v. X-Citement Video, Inc., 513 U.S. 64, 68-79 (1994); *see also* Kent Greenawalt, *The "Language of Law" and "More Probable Than Not": Some Brief Thoughts*, 73 WASH. U. L.Q. 989, 989 (1995) (defending the Supreme Court's construction in this case although it "did not fit ordinary English grammar").

Suppose that most readers of the railway safety statute would not have realized how costly it would be to save additional lives by requiring compatibility of automatic couplers. The judge concludes that most people who read the statutory language carefully would have understood it to require compatible coupling. Can the judge say, nonetheless, that the reasonable reader would have understood the statute not to impose this requirement, because he would have recognized the prohibitive cost of saving a few additional lives? Should the judge rely on the ordinary understanding of most reasonable readers or give special weight to how the best-informed and most astute reasonable readers perceived social facts? This question closely resembles the one that arises when a judge determines the extent to which a reasonable legislator is representative and ideal.

C. Combinational Problems

Whether a judge imagines some amalgam of actual readers or a single reasonable reader, her effort to constitute a reader introduces combinational problems. Suppose a judge needs to interpret controversial statutory language in accord with the understanding of readers. We may doubt that a judge can easily add up readers or construct a single reasonable reader to resolve some of the hardest issues. Differences of gender, class, race, religion, ethnic origin, self-confidence, and emotional propensity affect how people understand language and conceive background social contexts. With the best effort and will, a typical well-to-do white man might understand language like "discriminate" differently from a typical poor black woman. A railroad worker might understand the coupling section differently from an industrialist. The richer the language a court must divine, the greater the likelihood that different readers, reasonable ones, would interpret it differently. The reality that no one entirely escapes his own experiences and perspectives creates an obvious hurdle if a judge purports to rely on actual readers. Constructing a reasonable reader does not make the problem disappear.

An analogous legal issue illustrates the point forcefully. In some church-state cases, the Supreme Court has asked whether a reasonable person would understand a practice as a state endorsement of a religious view.[127] Justice O'Connor, the Court's main proponent of this approach, has insisted that the reasonable observer has no particular religious view.[128] But a reasonable Jew who sees a crèche on public property joined with more secular symbols of Christmas may experi-

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127 *See* County of Allegheny v. ACLU, 492 U.S. 573, 595 (1989). The Court noted that, "[n]o viewer could reasonably think that [the crèche at issue] occupies this location [in the courthouse] without the support and approval of the government." *Id.* at 599-600.

128 *See* Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

ence the display as an endorsement of Christianity, although reasonable Christians, in a dominantly Christian culture, may hardly notice the crèche and may not perceive an endorsement.[129] Is there any way to squash these differences in religious background and formulate a reasonable observer of no religious view? That seems highly doubtful. Reasonable reader approaches present this kind of problem on a broader scale.

When typical readers from different segments of society would read authoritative rules somewhat differently, what is a judge to do? I can perceive three possibilities. The first is what I call "sticking one's head in the sand," although the approach is more defensible than the metaphor implies. Under this approach, the judge denies or disregards the problem. But her plausible defense might proceed as follows. For most imperative language in a minimally coherent culture, people will agree on what it means or, if they disagree, the split will not fall along lines of gender, race, and the like. For most language, therefore, the judge can proceed as if there is *a* reasonable person. Occasionally, this construct may misfire, but if judges constantly worry about whether multiple reasonable readers might have variant understandings, interpretation will become too cumbersome.

A second approach that a judge might take is to determine what a reasonable reader similar to the judge herself would understand. She recoguizes that her reasonable reader carries all her own baggage; but she sees no profit in undertaking another approach. If pressed, she acknowledges that otherwise perfect judges of various backgrounds would not agree on a single reasonable reader. Each judge's reader will refiect the characteristics of the judge using him.

The third approach is to try to assess what *most* reasonable readers would think, or what some sort of amalgam of various reasonable readers would think. In this exercise, the judge tries to transcend her own perspectives to a degree, listening to other voices and thus arriving at a reasonable reader more culturally representative than the judge herself. We can see that this third approach requires complicated combinational judgments. For example, how much do Native American perspectives count? Native Americans are a minuscule portion of the present population; does it matter that they have arrived at this state largely because their forebearers were unjustly hounded and killed? Should Native American perspectives count more in constitut-

129 In *Lynch v. Donnelly*, the majority placed emphasis on the secular symbols surrounding a crèche, *see id.* at 679-87, as did Justice O'Connor in her concurrence, *see id.* at 691-94 (O'Connor, J., concurring).

ing a reasonable reader if legislation is addressed to their problems, and, if so, how much more should their perspectives then count?[130]

If the meaning of "discriminate" under Title VII is crucial in an affirmative action case, how should judges resolve the issue? One might argue that because Title VII was designed mainly to aid victims of oppression, their understanding should count especially heavily. But the legislators who adopted the law were overwhelmingly white males. Perhaps astute readers should understand terms as they are used by the kinds of people who employ them; but for judges to follow this approach to statutory language would magnify the consequences of inequitable representation.

A similar example drawing on different applications of the same concept rather than different (intensive) definitions is the question of what constitutes "consent" in rape laws. Suppose men and women define consent identically, that is, they use the same words to describe in abstract terms what is necessary for consent. But suppose further that most women think the conditions of female consent are satisfied in fewer circumstances of sexual intercourse than do most men. Imagine that a woman fully expresses her state of mind to a man—she is seriously depressed and unable to say "no" to sexual advances she abhors—and the two then have intercourse at his initiative. The man, clearly perceiving the woman's feelings,[131] thinks they amount to consent; she disagrees. If a judge wants to determine what a standard reader would understand to be covered by "consent," how does she resolve the problem that reasonable men and reasonable women may have variant understandings?[132]

Difficulties inherent in constructing typical readers or a reasonable reader are substantial problems for recent legislation; they are even greater for statutes adopted one hundred years ago. A modern judge does not transparently reflect *any* of the reasonable readers of that age. If she simply asks what reasonable reading she would now give to this language, she is unfaithful to the historical dimension of a reader approach (when the reader is meant to be one from the period of adoption). She *might* ask herself how a reasonable reader from her favorite segment of the earlier culture would have interpreted language, but that approach would be unconscionable. If the judge tran-

130 It is not *obvious* that their perspectives about statutory language should then count more. A judge *might* think their interests count heavily without assuming that their sense of language does.

131 Of course, no one ever fully understands another's state of mind. But I want to make the point that the disagreement is not over how the woman feels, but whether her feelings vitiate consent. Perhaps one could say more precisely that the man does not underestimate the strength of the factors that the woman regards as undermining consent.

132 For the most part, this particular legal issue would be submerged in general instructions to a jury, which would then decide if consent occurred.

scends her own perspective to the point of trying to understand readers from a different historical era, she cannot then pick those readers whose overall view of life happens to most closely resemble her own. As applied to the old statute, the "reader constructed like me" approach loses whatever charm it may possess for contemporary statutes.

This leaves us with the other two approaches. The judge may deny that the problem of different perspectives exists. She then looks for *a* historical perspective and assumes it is adequately representative. If, instead, she takes the perspective problem seriously, she will face the evident combinational issues. She must decide whose perspectives count and for how much. For example, with regard to federal and state statutes adopted before women had the vote, she must consider whether the perspectives of those women should matter if they had no political rights; and she would have to ask the same questions about African Americans and other minorities for periods in which those groups lacked a political voice. She will also have to consider whether to take into account the perspectives of people who were illiterate[133] or spoke only a foreign language—people whose social status might have led them to read English somewhat differently from dominant groups, had they been able to read it.

In summary, the judge constructing a typical or reasonable reader may (at least implicitly) have to make evaluations about what states of mind regarding authoritative language are important and about the attitudes to be assigned to the reader, because reasonable members from different segments of society may have different perspectives. These problems are not insurmountable, but they are difficult. In theory, the problems seem as troublesome as those surrounding legislative intent, although they may arise less often in practice.

VII
ALTERNATIVE APPROACHES: A BRIEF WORD

I have concentrated on reader understanding approaches in comparison with legislative intent approaches. A reader who is persuaded by what I have argued may rightly wonder whether some other approach can avoid all mental state problems.[134] If so, one might pre-

133 Of course, one might ask how an illiterate person would have understood spoken words. But there may be a substantial correlation between literacy and an ability to grasp complex ideas and uses of language.

134 A rather different strategy, suggested by Jeremy Waldron in discussion, is to employ a reader understanding approach (and conceivably a legislative intent approach) until one runs into serious mental state difficulties—that is, until one approach to mental states would point one way and another approach another way. At that stage, one would simply turn away from reader understanding to some different standard for interpretation. This

fer such an approach. This Essay is not the occasion to survey yet other approaches in depth; but my present belief is that the difficulties I have surveyed are hard to avoid altogether. Brief references to an essay by Charles P. Curtis and to Ronald Dworkin's theory of statutory interpretation provide modest support for that conclusion.

Writing in 1950, Curtis strongly criticized intent approaches and rejected plain meaning as a guide to interpretation as well.[135] He wrote, "the courts would do better to try to anticipate the wishes of their present and future masters than divine their past intentions."[136] Curtis conceives of statutes as delegations to future decision makers; courts should usually decide if the person, such as an administrative officer, has exercised a reasonable judgment about meaning.[137] But even in this forward-looking, deferential approach, a judge must decide if someone else's interpretation is reasonable. Inevitably, this will bring us back, in part, to how readers would understand the language, to the range of delegation the adopting legislature intended, to the views of a present legislature about what is a reasonable interpretation, or some combination of these.[138] This approach alters the precise questions about intent and reader understanding, but the questions that remain do not avoid mental states.

Dworkin's judge interprets a statute by choosing the justification for statutory language that best integrates it into the surrounding law.[139] This best-justification approach does not explicitly contain a reader component. However, how readers would most plausibly understand language probably matters to some degree. If two competing readings are reasonable and each fits the surrounding law about equally well, should it not make a difference which understanding most readers would have? In any event, Dworkin does assume that a judge will assess problems that a statute intended to correct, and this assessment could involve the judge in deciding what attitude a reasonable legislator might have when certain problems are brought to his attention. The mental states inquiry concerning the purposes of most (reasonable) legislators would thus present itself. Dworkin also believes that judges, in fairness, should interpret legislation in accor-

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strategy would, of course, require assessment of when mental state difficulties become serious enough for judges to halt reliance on reader understanding.

135 *See* Charles P. Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407 (1950).

136 *Id.* at 415.

137 *See id.* at 422. I do not understand how this approach is supposed to work if a statute covers the rights of equally situated parties and no administrative interpretation precedes a judicial decision.

138 Curtis emphasizes the importance for statutory interpretation of "consistency with the rest of the law." *Id.* at 423.

139 *See* DWORKIN, *supra* note 5, at 313-54.

dance with dominant public attitudes.[140] This inquiry presents questions of how to understand and combine public attitudes of various kinds. Dworkin's approach, like Curtis's, does not avoid all mental state and combination problems. I am presently skeptical that any defensible approach to statutory interpretation can do so.

VIII

THE RESPECTIVE ASPIRATIONS OF JUDGES AND THEORISTS

A fair response to much of this Essay is that it delves into refinements that need not concern judges who are interpreting statutory provisions. But some of the choices I have discussed are ones that judges do need to make. They must have some sense of how representative or ideal the reader is whose understanding matters. Other choices are less important. Judges need not resolve whether conventional weight for legislative materials mainly reflects actual states of mind of important legislators or staffers, or rather mainly represents judicial practice that helps constitute the perceived context of legislative efforts. Still other choices may be ones judges would have to face only in unusual cases.[141]

If judges need not resolve particular issues of interpretation, have theorists any business discussing such issues? Trying to work out possible theories of legislative intent and reader understanding has intrinsic interest. Much work in philosophy, including the philosophy of language, has no practical payoff, and I do not think every question addressed by philosophers of law must yield practical fruit. But even theoretical work about statutory interpretation, engaging refinements that need not trouble judges, can carry practical value. One can best test actual and alternative judicial practices if one follows the possibilities of justification to a level that judges need not reach. Even if judges do not have to choose between one justification and another, critics should understand whether coherent, plausible justifications are available.

CONCLUSION

This Essay does not propose any comprehensive approach to statutory or constitutional interpretation, but it does develop three major themes with important practical implications. One is that approaches that look to reasonable persons or convention, as well as approaches that refer to actual people, generate conceptual difficulties concern-

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140 *See id.* at 340-43.

141 Of course when judges do resolve certain issues, their resolution may be implicit, and even unselfconscious, rather than self-conscious and explicit. An outsider familiar with the facts of the case may or may not be able to discern just what resolution judges have made.

ing requisite states of mind and their combinations. A second theme is that no simple formula can resolve all mental state difficulties; much depends on political culture and the way in which legislation is adopted. A third theme is that, despite the unavailability of simple formulas, mental state difficulties are not insurmountable. We can develop a plausible account in which estimates of actual mental states are qualified by various simplifying conventions. I have worked out such an account most fully for legislative intent, but I do not doubt that something similar can be achieved for reader understanding.

I have suggested that legislative intent can be largely understood as reflective of mental states. The most relevant single mental state is how a legislator thinks language should be interpreted, given interpretive practices he takes as given. In applying this standard, judges should discount legislators' opinions about desirable interpretation insofar as they concern subjects about which judges are more expert. Judges should also be open to the possibility that other states of mind, especially hopes, may matter on occasion. Mental states of dissenting voters *and* mental states of some nonlegislators may also be relevant. In combining mental states, judges should sometimes give weight to opinions held only by a minority; they should accord most weight to the opinions of those who have considered a problem carefully. These practices are partially explicable as a consequence of implicit delegation by silent and ignorant legislators. Although judges may be unable to come up with a formula that specifies just what and whose mental states count, and for how much, people often face similar difficulties about specifying grounds of decision when they engage in practical reasoning. Standards may shift as situations change and may not be subject to verbal precision, but that does not establish the impossibility of sound judgment. Conventions can aid that judgment.

Judges may conceive of legislative intent as reflecting the views of some imaginary reasonable legislator. That construct can shift the way in which issues about mental states arise; but these issues do not magically disappear.

With respect to reader understanding approaches, I have contended that, on close examination, they also do not escape mental state problems. These problems surface both when a "reader" assesses a legal issue against legislative purpose and when the judge constructs the reader for her analysis.

I want to re-emphasize both what the implications of the last sections are and what they are not. Some argne that the difficulty posed by questions as to which and whose mental states count, and how they should be combined, substantially undermines a mental states approach to legislative intent. I have shown that reasonable legislator and reader understanding approaches raise analogous problems.

However, I do not suggest that the problems are exactly the same or that they loom as large as they do for approaches to legislative intent relying directly on mental states.

The analysis reveals, among other things, some partial collapse of reader approaches and writer (or legislator) approaches.[142] Readers of statutes end up making judgments about the aims of legislators. This is not surprising in light of communications theory, which emphasizes the extent to which readers attend to the purposes of writers and writers formulate communications in light of what they perceive will be the understandings of readers. This particular connection of writer and reader is distinctively tight when people in authority instruct others about how to behave. Although legislators (and others in authority) sometimes have reasons to use vague language, they typically use language that will convey what they mean with clarity.

I have concentrated on statutory interpretation, but almost everything I have said applies to the comparison of founders' intent and contemporaneous reader approaches to constitutional interpretation as well. That both adopters and readers will have diverse perspectives is indeed a much more potent problem for the general language of many key constitutional phrases than it is for typical, more technical, statutory language. The problem of "excluded perspectives" is also much greater for the Constitution than for ordinary statutes, because political representation was so limited at the time of the Constitution's adoption.

Finally, I remind the reader that my aim here is not destructive. I have not set out to prove that no coherent approach to interpretation is possible. I have explained that I believe a mental states approach to legislative intent is coherent and viable, although its dimensions are subtle and elusive. What I have shown is that neither reasonable legislator nor reader understanding approaches enjoy favored status because they totally avoid perplexities about mental states. But that does not render these approaches incoherent or indefensible. One basis for choice among possible approaches may be the frequency and difficulty of mental state problems, but the choice must be made mainly on other grounds. I happen to believe that those grounds support some reliance on both reader understandings and legislators' actual intents, as well as responsiveness to changing social conditions.[143]

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142 A total collapse could occur if we assume the relevant readers to be familiar with all the sources that reveal legislators' intentions.

143 For a further development of these views, see GREENAWALT, *supra* note 8.