

IS INTENTIONALIST THEORY INDISPENSABLE TO STATUTORY INTERPRETATION?

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The theory of intentionalism holds that the laws of statutes are determined by the enacting legislators' subjective law-making intentions. The High Court has recently rejected the theory of intentionalism and, as such, has attracted criticisms from some of the theory's most eminent proponents. One of these criticisms contends that, over the course of the 19th and 20th centuries, the truth of intentionalist theory formed a fundamental assumption upon which the existing framework of interpretive principles was constructed. As such, the criticism continues, the Court's rejection of intentionalism today risks, at first, the loss of our ability to justify the existing framework of interpretive principles and, then inevitably, the collapse of that framework. In this article, I will attempt to defend the High Court's position against this criticism. I will firstly argue that the criticism rests upon a false assumption: the assumption that Australia's tradition of referring to 'legislative intentions' can be equated to a tradition of accepting intentionalist theory. I will secondly argue that the established methods of interpretation are able to be adequately accommodated and justified by a non-intentionalist theory, namely textualism, a theory that the High Court has adopted in all but name. The article concludes with reflections on the constitutional underpinnings of the Court's interpretive approach, as described in Zheng v Cai.

I INTRODUCTION

Since the 1990s, High Court decisions on questions of statutory interpretation have included statements of theory that seek to describe and justify the way in which the Australian judiciary interprets statutes. In articulating their theory, the Gleeson and French Courts have granted that the primary object of statutory interpretation is to ascertain that thing traditionally referred to as 'legislative intention', but have concluded that the term 'legislative intention' does not refer to the subjective law-

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making intentions of legislators.¹ Rather, the Court maintains, ‘legislative intention’ is an anthropomorphic metaphor for something else: the meaning communicated by the statutory text. All metaphors aside, then, the law of a statute resides in the meaning of its text, and not in that text’s subjectively intended meaning.² ‘[T]he task of statutory construction must begin with a consideration of the [statutory] text. So must the task of statutory construction end’.³

In taking this Janus-faced position, the Court has involved itself in a contest between two interpretive theories, each of which has its advocates and detractors within the academy. By denying the legal relevance of legislators’ subjective law-making intentions, the Court has dismissed the theory known as intentionalism. By supposing the law to be determined by the statutory text in its context and nothing more, the Court has adopted a theory known as textualism. Before going on, it will be helpful to describe these theories in some more detail.

- 1 *Mills v Meeking* (1990) 169 CLR 214, 234 (Dawson J) (*‘Mills’*); *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 339–40 (Gaudron J), 345–6 (McHugh J) (*‘Yuill’*); *Wik Peoples v Queensland* (1996) 187 CLR 1, 168–9 (Gummow J) (*‘Wik’*); *R v Hughes* (2000) 202 CLR 535, 563 [60] (Kirby J); *Emanuele v Australian Securities Commission* (1997) 188 CLR 114, 146 (Kirby J); *Northern Territory v GPAO* (1999) 196 CLR 553, 644 [236] (Kirby J); *Byrnes v The Queen* (1999) 199 CLR 1, 34 [80] (Kirby J); *Eastman v The Queen* (2000) 203 CLR 1, 46 [146] (McHugh J) (*‘Eastman’*); *Commonwealth v Yarmirr* (2001) 208 CLR 1, 77 [132] (McHugh J); *Pfeiffer v Stevens* (2001) 209 CLR 57, 82 [92] (Kirby J); *Singh v Commonwealth* (2004) 222 CLR 322, 348 [52] (McHugh J); *Al-Kateb v Godwin* (2004) 219 CLR 562, 622 [167] (Kirby J) (*‘Al-Kateb’*); *Wilson v Anderson* (2002) 213 CLR 401, 418–19 [8]–[10] (Gleeson CJ); *Zheng v Cai* (2009) 239 CLR 446, 455–6 [28] (*‘Cai’*), reaffirmed in *Dickson v The Queen* (2010) 241 CLR 491, 506–7 [32] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ) and *Lacey v A-G (Qld)* (2011) 242 CLR 573, 591–2 [43] (French CJ, Gummow, Hayne, Kiefel, Bell and Crennan JJ) (*‘Lacey’*); *Momcilovic v The Queen* (2011) 245 CLR 1, 44–5 [38], 74 [111] (French CJ), 81 [136] (Gummow J), 133–4 [315] (Hayne J), 175–6 [441]–[442] (Heydon J), 235 [638] (Crennan and Kiefel JJ), 250 [684] (Bell J) (*‘Momcilovic’*); *Thiess v Collector of Customs* (2014) 250 CLR 664, 671–2 [22]–[23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ) (*‘Thiess’*); *Sportsbet Pty Ltd v New South Wales* (2012) 249 CLR 298, 320 [23] (French CJ, Gummow, Hayne, Heydon, Kiefel, Bell and Crennan JJ); *Byrnes v Kendle* (2011) 243 CLR 253, 283 [97] (Heydon and Crennan JJ); *Taylor v The Owners — Strata Plan No 11564* (2014) 253 CLR 531, 556–7 [65] (Gageler and Keane JJ) (*‘Taylor’*); *Monis v The Queen* (2013) 249 CLR 92, 147 [125] (Hayne J) (*‘Monis’*); *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 225–6 [45] (French CJ) (*‘Lee’*); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97]; (Gummow, Hayne, Crennan and Bell JJ) (*‘Plaintiff S10’*); *Certain Lloyd’s Underwriters v Cross* (2012) 248 CLR 378, 389–90 [25] (French CJ and Hayne J), 405–6 [70] (Crennan and Bell JJ) (*‘Lloyd’s’*); *Newcrest Mining Limited v Thornton* 248 CLR 555, 581 [70] (Crennan and Kiefel JJ) (*‘Newcrest’*); *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1, 60 [118] (Gummow J) (*‘Plaintiff M47’*); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 649–50 [229] (Nettle and Gordon JJ) (*‘NAAJA’*).
- 2 Throughout the 1990’s, the Court’s view that legislative intention must refer to the statutory text’s objective meaning was expressed as being the mere obverse of the Court’s burgeoning view that legislative intention does not refer to the subjective intentions of legislators. See, eg, *Mills* (1990) 169 CLR 214, 234 (Dawson J); *Yuill* (1991) 172 CLR 319, 339–40 (Gaudron J), 345–6 (McHugh J); *Wik* (1996) 187 CLR 1, 168–9 (Gummow J). With the coming of the French Court, the position has been stated more positively. See, eg, *Lloyd’s* (2012) 248 CLR 378, 405–6 [70] (Crennan and Bell JJ); *Newcrest* 248 CLR 555, 581 [70] (Crennan and Kiefel JJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 266–7 [39] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) (*‘Saeed’*); *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ) (*‘Consolidated Media’*) approved in *Thiess* (2014) 250 CLR 664, 671–2 [22]–[23] (French CJ, Hayne, Kiefel, Gageler and Keane JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46–7 [47] (Hayne, Heydon, Crennan and Kiefel JJ) approved in *Monis* (2013) 249 CLR 92, 147 [125] (Hayne J); *Momcilovic* (2011) 245 CLR 1, 44–5 [38], 74 [111] (French CJ), 81 [136] (Gummow J), 133–4 [315] (Hayne J), 175–6 [441]–[442] (Heydon J), 235 [638] (Crennan and Kiefel JJ), 250 [684] (Bell J); *NAAJA* (2015) 256 CLR 569, 605–6 [81] (Gageler J).
- 3 *Thiess* (2014) 250 CLR 664, 671 [22] (French CJ, Hayne, Kiefel, Gageler and Keane JJ).

Intentionalism — the theory that the Court’s position rejects — is reducible to a sequence of factual and normative claims. First in the sequence is a factual claim about the process by which statutes are made, and it is that legislators have complex law-making intentions which they attempt to communicate through the language of the statutes that they pass. By taking that claim to be true, and by taking for granted that carefully used language *does* communicate the subjective intentions of language users, the intentionalist is then able to make this further factual claim: that the linguistic meaning of a well drafted statute *will* communicate the legislators’ subjective law-making intentions to a reader of the statute. By this last claim the intentionalist does not mean to suggest that the language of the statute *directly presents* the legislators’ subjective intentions to the reader.⁴ Instead, intentionalists make the epistemologically sturdier claim that a reader of a statute may come to defensible conclusions as to what the legislators are *most likely* to have subjectively intended to communicate through the statutory language, having regard to the language adopted by the legislators and the context of the language’s use. To the intentionalist then, ‘legislative intentions’ are objective in the weak sense that they are what an objective reader of a statute would take to have been the legislature’s subjective law-making intentions, given the available evidence. Having made the foregoing factual claims, the intentionalist can finally go on to make a normative claim, and it is that, in interpreting a statute, the judge *should* as far as possible ascertain from the legislators’ utterance what it is that the legislators subjectively willed the law to be and then respect this to be the positive law of the statute, for so much is required by the constitutional guarantee of legislative power and the democratic principles that this guarantee embodies.⁵

Textualism — the theory that seems to describe the court’s modern position — is reducible to an apparently different set of factual and normative claims. The textualist classically argues that contrary to the intentionalist’s factual claims, large groups of legislators cannot be relied upon to have had any singular *cohesive* collective intentions as to the desired legal effects of legislation, let alone intentions so *specific* that they might answer the inevitably particular questions of legislative meaning raised in litigation. In any case, the textualist may argue, even if judges *could* ascertain the law-making intentions of legislators, such intentions *ought not* be treated as legally authoritative because it is only the public meaning of a text, not the private intent behind it, that ought to determine the legal obligations of the public. Usually motivated by one or more of these views, the textualist first goes on to make the factual claim that the law of a statute *may* be determined by the meaning communicated by the language of the statute in its own right, and

4 *Contra* Peter H Nidditch (ed), *The Clarendon Edition of the Works of John Locke: An Essay Concerning Human Understanding* (Oxford University Press, 1975) book III, ch 2. For the reasons that modern philosophers reject Locke’s theory that language directly presents the intentions of the utterer, see William G Lycan, *Philosophy of Language: A Contemporary Introduction* (Routledge, 2nd ed, 2008) 66–8.

5 For some comprehensive accounts of intentionalist theory, see Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012); Andrei Marmor, *The Language of Law* (Oxford University Press, 2014); Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010); Kent Greenawalt, *Statutory and Common Law Interpretation* (Oxford University Press, 2013).

that statutory interpretation may therefore be understood as something other than an attempt to discern the legislature's subjective intentions from the available evidence. To the textualist, then, any legally relevant 'intentions' expressed in the statute are objective in a strong sense: they are intentions that are *merely* apparent in the text, and they are not presumed to reflect or approximate the subjective intentions held by the enacting legislators. From here the textualist's normative claim follows, and it is that judges *should* obey the objective meaning of the statutory text because — for the same reasons of constitutional and democratic principle that intentionalists take to justify their normative claim⁶ — *it* communicates the positive law of the statute.⁷

These two theories — textualism and intentionalism — have gone to war in the journals, and in the process, each has developed well known criticisms of the other. In a recent article entitled 'The Reality and Indispensability of Legislative Intentions' two intentionalist theorists, Ekins and Goldsworthy, did the deed of applying intentionalism's standing criticisms of textualism to the High Court's new textualist position.⁸ As the title of their article intimates, these authors made two overarching criticisms of the Court, one pertaining to legislative intention's 'reality' and the other pertaining to its 'indispensability'.

The authors' argument from 'reality' was simply that intentionalism's factual claims, described above, are true,⁹ and that the High Court's expressed grounds for doubting these factual claims are false.¹⁰ While I will have cause to consider this argument, it is not my principal target. Instead, the focus of this article will be upon Ekins and Goldsworthy's argument from 'indispensability': the argument that statutory interpretation in Australia will become unprincipled and disordered if it does not proceed upon the assumption (true or false) that statutes communicate real legislative intentions that in turn determine the law of the statute. According to this part of Ekins and Goldsworthy's argument, because the reality of legislative intention has long been taken for granted by Australian courts, the ascertainment of putatively real legislative intentions has come to be the singular purpose and

6 'Like classical intentionalists, textualists work within the faithful agency framework': John F Manning, 'Textualism and Legislative Intent' (2005) 91 *Virginia Law Review* 419, 430. Similar observations and admissions are made in Caleb Nelson, 'What is Textualism?' (2005) 91 *Virginia Law Review* 347, 371–2, quoting Justice Frank H Easterbrook, 'Text, History, and Structure in Statutory Interpretation' (1994) 17 *Harvard Journal of Law and Public Policy* 61, 63.

7 The classic account of the textualist's theory is to be found in: Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997). Scalia then went on to state the theory more fully in Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West, 2012). Full textualist theories can also be found in: John F Manning, 'Textualism and the Equity of the Statute' (2001) 101 *Columbia Law Review* 1; Justice Frank H Easterbrook, 'The Role of Original Intent in Statutory Construction' (1988) 11 *Harvard Journal of Law and Public Policy* 59; The textualist's maxim was penned by Oliver Wendell Holmes in 'The Theory of Legal Interpretation' (1899) 12 *Harvard Law Review* 417, 419, quoted in *Wik* (1996) 187 CLR 1, 169 (Gummow J) ('[w]e do not inquire what the legislature meant; we ask only what the statute means').

8 Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36 *Sydney Law Review* 39.

9 *Ibid* pt VI.

10 *Ibid* pt III.

source of reason for the existing framework of interpretive principles.¹¹ That being the case, the High Court's denial of legislative intention's reality 'inverts this traditional understanding' and risks 'calamitous' consequences. Not only will judges be left with a scheme of interpretive principles whose form they would no longer be able to justify. In this new normatively impoverished setting, the interpretive principles themselves will gradually change — through entropy, and through intentional manipulation by judges pursuing private agendas — and be applied to give statutes novel, and constitutionally illegitimate legal effects, or so it was argued.¹²

To me, the striking feature of this argument is that it does not attribute the 'indispensability' of intentionalist theory simply to the theory's being a superior *explanation* for the interpretative outcomes that judges have traditionally reached. The suggestion is, rather, that intentionalist theory has to some extent been the *cause* for the interpretive outcomes traditionally reached by judges, and moreover that a modern judge could only be consistently brought to legitimate interpretive outcomes if they too work on the basis that intentionalist theory is true. These are vital premises for Ekins and Goldsworthy, for nothing less could ground their prediction that significant and illegitimate changes in interpretive outcomes will flow from the theory's rejection.

The primary aim of this article, pursued in Part II, is to challenge these 'vital premises' of Ekins and Goldsworthy's argument, and so to challenge the notion that intentionalist theory is indispensable to statutory interpretation in Australia in any practical sense. In rejecting the first of these premises — that intentionalism has historically been determinative of the legal effects that judges have given to statutes — I will seek to show that, although Australian judges have always settled questions of interpretation by reference to 'legislative intentions', that fact alone does not establish that these judges accepted intentionalist theory. For we can conceive of two broad varieties of 'legislative intention' that these judges may have meant to refer to. What I will call 'subjective legislative intentions' are those intentions that are, as a matter of historical fact, really supposed to have existed in the minds of legislators. What I will call 'objective legislative intentions' are intentions that are not suggested to have ever, as a matter of historical fact, existed in the minds of legislators, but which nonetheless may appear to be communicated by the statute. Ekins and Goldsworthy argue that such a hard distinction between objective and subjective legislative intentions is at best vacuous, and at worst fallacious. However, with the aid of ideas drawn from the philosophy of mind, I will show how the hard distinction holds. I will then explain why the preponderance of references to 'legislative intention' in Australia's judicial history have been references to 'objective legislative intentions', or have otherwise failed to discriminate between subjective and objective legislative

11 The authors consider that '[f]or at least six centuries' the ascertainment of real legislative intentions has been the 'primary object of statutory interpretation': *ibid* 39. They moreover consider that it has become a 'fundamental principle' that courts should ascertain and obey real legislative intentions: at 41–2.

12 *Ibid* 42, 43.

intentions. From this and from a survey of our judiciary's so called 'literalist' interpretive tradition, I will conclude that our history of statutory interpretation does not evince any devotion to intentionalist theory, and resonates most with textualist theory.

In turning to the second premise of Ekins and Goldsworthy's argument — that only an acceptance of intentionalism can bring judges to consistently interpret statutes in a conventional and legitimate way — I will argue that, in any case where a judge must interpret a statute, there will generally be an identity between the interpretive outcomes that are called for by the normative claims of intentionalist and textualist theories. That is to say, roughly, that textualist and intentionalist theory can be depended upon to guide judges to the same interpretive conclusions. While it may be thought that textualism would lead judges to pay less heed to extrinsic materials, or to give more weight to the literal meaning of the statutory language, a survey of the High Court's jurisprudence will show that the Court's textualism has not had these results.

In a brief Part III, the article concludes on a different note. The aim of this Part is simply to raise awareness of a significant and novel normative claim that is couched in the High Court's statements of theory, that is distinct from the Court's choice of textualism over intentionalism, and that, rather than having consequences for the content and usage of the existing principles of interpretation, aspires to vindicate and reaffirm their present content and usage. The normative claim that I refer to is the claim articulated in *Zheng v Cai* ('*Cai*') that the preferred construction of the statute will follow from the application of principles 'accepted by all arms of government'.¹³ For reasons to be explained, I call this claim the Razian ideal.

II INTENTIONALISM, TEXTUALISM AND THE HIGH COURT'S THEORY

A *An Australian Intentionalist Tradition?*

Before I come to consider the positive elements of the High Court's theory — its adoption of textualism and the Razian ideal — I here want to examine Ekins and Goldsworthy's argument that the Court's rejection of intentionalism *in and of itself* represents a 'radical rejection' of the standards by which Australian courts have traditionally measured the legitimacy of their interpretive practices.¹⁴ The success or failure of that argument will clearly depend on whether Australia's judiciary *has had* a significant tradition of accepting intentionalism's factual and normative claims (an 'intentionalist tradition', for short). As such, we can adjudicate the argument by asking: did Australia have an intentionalist tradition?

Ekins and Goldsworthy's belief that there does exist such a tradition is the terminus of a simple line of reasoning. The first premise in the line of reasoning is that a judge necessarily commits herself to the truth of intentionalist theory

¹³ (2009) 239 CLR 446, 455–6.

¹⁴ Ekins and Goldsworthy, above n 8, 51.

when she takes the law of the statute to be determined by legislative intentions (P1). The second premise is that Australia's superior courts *have* traditionally taken the law of statutes to be determined by legislative intentions (P2). And it is from these premises that the authors then apparently deduce that Australia does have an intentionalist tradition (P3 (P1+P2)).¹⁵

This argument does, I think, have its strong points. One strong point is that P2 is undeniably true: for a century now, and into the present day, there has been a strong tradition among Australian judges of taking the law of the statute to be determined by legislative intentions, and this tradition has been expressed both in these judges' interpretive practices, and in their more considered statements of the judiciary's interpretive function.¹⁶ A further strong point of the argument is that, if P1 and P2 are true, then the proposition that Australia has an intentionalist tradition (P3) will plainly be irresistible.

But despite having these strengths, the argument has an incurable problem, and it lies in P1. This first premise — that an interpreting judge's dependence upon a notion of legislative intention will commit that judge to an acceptance of intentionalism — may appear to us to be correct. Yet if it does appear to us that way, I want to suggest that it could only be because we have either not appreciated just how philosophically refined intentionalist theory is, or have not appreciated just how philosophically blunt the term legislative intention can be. All things said and done, the term 'legislative intention' may be, and in Australia historically *has been*, used by judges in such a way that it refers to the law that is linguistically communicated by the statute without committing the judge to an acceptance of either the perceptibility or the legal significance of legislators' subjective intentions.

15 Ekins and Goldsworthy did not spell out this line of reasoning so clearly, however I consider it to be implicit in the authors' expressed belief that historical reliance upon legislative intentions suffices to evidence an intentionalist tradition: *ibid* pt I.

16 The cases and texts cited by Ekins and Goldsworthy put beyond doubt that the tradition of dependence upon 'legislative intention' is an old and venerable one: see *ibid* 39–40. The only observation that I would add to those of Ekins and Goldsworthy is that the tradition in fact persists strongly today. The concept of 'legislative intention' still lies at the heart of the modern High Court's two most axiomatic statements of the judicial interpretive function: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 390–1 [93] ('*Project Blue Sky*'); *Cai* (2009) 239 CLR 446, 455–6. The High Court continues to make practical use of the concept in the more run-of-the mill interpretation cases, too: *NAAJA* (2015) 256 CLR 569, 581–2 [11] (French CJ, Kiefel and Bell JJ), 649–50 [229] (Nettle and Gordon JJ); see generally *Queensland v Congoo* (2015) 256 CLR 239; *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 601–2 [280]–[284] (Kiefel J), 620 [363] (Gageler J), 635 [422], 643–4 [462], 646 [474] (Keane J) ('*CPCF*'). Also of significance is that the concept is continually drawn upon to justify the Court's more innovative interpretive practices, such as the application of the principle of legality, and the subjection of statutory executive powers to conditions imposed by administrative law: see, eg, *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 351 [29] (French CJ), 362 [63] (Hayne, Kiefel and Bell JJ), 370 [88] (Gageler J); *Saeed* (2010) 241 CLR 252, 258–9 [12] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Lacey* (2011) 242 CLR 573, 591–2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Momcilovic* (2011) 245 CLR 1, 44–5 [38], 46 [42] (French CJ); *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 379 [180] (Kiefel and Keane JJ). Reading these judgments of the High Court, the lower courts have taken the modern position to still be one that respects the 'centrality of parliamentary intention': *DPP v Kaba* (2014) 44 VR 526, 565–6 [135]–[138] (Bell J).

1 Does one commit themselves to intentionalist theory if they take ‘legislative intention’ to be the object of interpretation?

To develop this point, we clearly must address the question: what does ‘legislative intention’ mean? As crude as that question may seem, we can take a step towards furnishing a meaningful answer by acknowledging that an ‘intention’ is an ontologically subjective thing, which is to say that it is not a logical truth or a physical property or object out in the world, but that it instead exists only in the sense that, and only insofar as, it is subjectively experienced by a mind.¹⁷ That being so, the semantic meaning of the term ‘legislative intention’ (which is to say, roughly, the meaning that is encoded in the words and syntax of the term ‘legislative intention’, independent of the context in which the term is used; or even more roughly, the term’s dictionary meaning) must indeed be something like ‘the *subjective* intention of a legislature’. To articulate the term’s semantic meaning, as we so easily can, is not however to dispose of our question — ‘what does legislative intention mean?’ — and that is because the semantic meaning of a term is not exhaustive of that term’s possible meanings; after all, a term’s semantic meaning may not be identical to, or even contribute to, the meaning that the term successfully communicates when the term is *uttered and interpreted in the context of background beliefs and presuppositions*.¹⁸ I will call the meaning that a term communicates in such a context the term’s ‘usage meaning’. To see how a term’s usage and semantic meanings may diverge, consider the following silly, intentionally extreme example:

Imagine that you stand behind a table upon which there rests a textbook titled ‘statutory interpretation’. You are told that I will soon come in and ask you to hand me the textbook, but that I will speak in a *very* indirect and oblique way. I then come in and say to you ‘pass me the legislative intention’. In the circumstances, you will probably infer that by ‘legislative intention’ I meant ‘the textbook’. If you do make this inference, and if it was the textbook that I wanted, the term ‘legislative intention’ will have both been intended to communicate, and have successfully communicated, the meaning ‘the textbook’ (the usage meaning in this case), and not ‘the subjective intention of a legislature’ (the semantic meaning).

Now, because the semantic meaning of ‘legislative intention’ is determinate, and because in the judicial context the term is, unlike in our example, used considerably by highly skilled speakers of the English language, Ekins and Goldsworthy express incredulity at the suggestion that, by saying ‘legislative intention’, an Australian judge sitting in the 20th century could have meant something other than what that term literally or semantically means: ‘the *subjective* intention of a legislature’. In that regard, Ekins and Goldsworthy write:

Continued use of the word ‘intention’ implies that *some* kind of intention is being referred to. If not — if, instead, what is being referred to is the output of a process of dealing with statutes, understood just as sets of unintended sentences, that is

17 See John R Searle, *Seeing Things as They Are: A Theory of Perception* (Oxford University Press, 2015) 16. For a famous and compelling defence of the distinction between the objective and subjective realms of existence, see the essays ‘What is it Like to Be a Bat?’ and ‘Subjective and Objective’ in Thomas Nagel, *Mortal Questions* (Cambridge University Press, 1979).

18 For a good introduction to the way in which context contributes to linguistic meaning, see Mira Ariel, *Defining Pragmatics* (Cambridge University Press, 2010).

unconcerned with any intention — then the word ‘intention’ should be replaced by a less misleading label. ‘Thingamajig’ seems to us as good a label as any other. Of course this sounds bizarre ... But that is our point.¹⁹

Forceful though that point may be, it does not obviate the question: might not the term ‘legislative intention’ have been used to refer to something that merely bears some relation or resemblance to the subjective intentions of legislators, but that does not consist in such intentions? Indeed, there are two matters which warrant us persisting with that question. The first is that *as* skilled speakers of the language, many judges and academics have felt the term to be somehow vague: to be a ‘very slippery phrase’,²⁰ ‘queerly amorphous’,²¹ ‘artificial’,²² ‘meaningless’,²³ ‘confusing’,²⁴ that although ‘superficially satisfying ... the more one thinks about [the term] the less it appears to mean’.²⁵ Comments such as these of course do not advert to some indeterminacy in the term’s semantic meaning. They are instead rough expressions of the view that the term ‘legislative intention’ is vague in this other sense: that, when used in its ordinary context — namely the judicial context, in which judges must interpret the contributions to the law that are made by statutes, and publically justify those interpretations — the term will have multiple possible usage meanings, unless the interlocutor further specifies or otherwise makes clear what they mean by the term; we can simply use the term ‘*vague*’, in italics, to express this quite particular set of qualities from hereon. The second matter warranting the investigation of ‘legislative intention’s’ usage meaning follows on from the first, and it is that on the occasions that authors and judges *have* gone on to specify what they mean by the term, they have asserted the term to have a range of meanings, some being classes of subjective legislative intentions,²⁶ but others being other things all together.²⁷

19 Ekins and Goldsworthy, above n 8, 49.

20 *Salomon v Salomon & Co* [1897] AC 22, 38 (Lord Watson) (*‘Salomon’*).

21 Max Radin, ‘Statutory Interpretation’ (1930) 43 *Harvard Law Review* 863, 872.

22 *Salemi v MacKellar* [No 2] (1977) 137 CLR 396, 451 (Jacobs J) (*‘Salemi’*).

23 Randal Graham, ‘Good Intentions’ (2000) 12 *Supreme Court Law Review* 147, 185.

24 James M Landis, ‘A Note on “Statutory Interpretation”’ (1930) 43 *Harvard Law Review* 886, 888.

25 Daniel Greenberg, ‘The Nature of Legislative Intention and its Implications for Legislative Drafting’ (2006) 27 *Statute Law Review* 15, 15.

26 To see what I mean by ‘classes’, compare the very different conceptions of subjective legislative intentions described in Ekins, above n 5, 241, and in Ronald Dworkin, *Law’s Empire* (Hart Publishing, 1998) 335–6. See also the disagreements that exist between Goldsworthy and Ekins themselves on what counts as the legally significant subjective legislative intent: Jeffrey Goldsworthy, ‘Legislative Intention Vindicated?’ (2013) 33 *Oxford Journal of Legal Studies* 821.

27 For example, some consider legislative intention to be a reference to what an ideal, optimally virtuous and just legislature would have wished the law of the statute to be, had it been they that passed the statute in question: T R S Allan, ‘Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority’ (2004) 63 *Cambridge Law Journal* 685. Others consider it to operate as a counterfactual device, whereby by asking what the legislative intention is, we really ask what it would have been had legislators turned their minds to the relevant interpretive question: Win-Chiat Lee, ‘Statutory Interpretation and the Counterfactual Test for Legislative Intention’ (1989) 8 *Law and Philosophy* 383. Others think that it is, plain and simple, ‘an objective construct — an attributed or imputed characteristic’: Justice Stephen Gageler, ‘Legislative Intention’ (2015) 41 *Monash University Law Review* 1, 7.

Upon investigation, the intuition that ‘legislative intention’ is *vague* does, I think, turn out to be veridical, and the scope of the term’s vagueness is such that, coming from the pen of a judge, the term may refer to things *other than subjective legislative intentions*. It is only because this *point of theory* turns out to be good that we can go on to deny that historical usage of the term necessarily stands as evidence of an Australian intentionalist tradition by then establishing a corresponding *point of fact*, which is that Australian judges traditionally *did* use the term ‘legislative intention’ in this *vague* way, and that in the rare cases where they did not, they instead disambiguated the term such that it referred to objective legislative intentions. So if that is to be the course of the argument, we ought to properly make the *point of theory* before we turn to examine any aspect of Australia’s judicial history.

2 Gricean theory and the challenge to the distinction between objective and subjective legislative intentions

How is it, then, that a judge could felicitously use the term ‘legislative intention’ to mean any one of a number of things? The answer I wish to give is that there is an irreducible distinction between objective and subjective legislative intentions and that the term ‘legislative intention’, unelaborated, could refer to either. But the drawing of this distinction faces a serious challenge. Ekins and Goldsworthy argue that ‘objective intentions are *necessarily* dependent on subjective intentions’, and that ‘[t]he existence of a subjective intention is a crucial presupposition of our attribution of an objective intention to the author of a text’.²⁸ Accordingly they say that ‘[a]n “objective” intention amounts to this: what a reasonable audience would conclude was the author’s “subjective” intention, given all the publicly available evidence of it’.²⁹

This claim has been made by a number of intentionalist theorists over the years,³⁰ and it proceeds upon a set of assumptions that are provided by Paul Grice’s psychological theory of linguistic meaning. In order to deal with and understand the challenge, it is therefore necessary to say something about Grice’s theory and its place in intentionalist thought.

As averred in the first pages of this article, one of the core suppositions of intentionalist theory is that language communicates the subjective intentions of language users. It is because Grice’s theory of communication is the preeminent attempt to vindicate that supposition that intentionalism has come to be reliant

28 Ekins and Goldsworthy, above n 8, 46 (emphasis added), 48.

29 Ibid 46.

30 See, eg, Stanley Fish, ‘There is No Textualist Position’ (2005) 42 *San Diego Law Review* 629; Marmor, above n 5, ch 5.

upon the theory.³¹ In a 1975 paper titled ‘Logic and Conversation’,³² Grice made a significant contribution to the field of pragmatics³³ by providing an ingenious solution to the following puzzle: how can we accurately deduce the subjective speaker intentions of a language-user even when the speaker’s intentions are not expressed by the semantic meaning of their words? Significantly, it is the solution that Grice there gave that intentionalists will say secures the interdependence between objective and subjective legislative intentions.

In ‘Logic and Conversation’, the solution that Grice gave was that users of language phrase their sentences and interpret the sentences of others according to certain logical maxims which in turn function to conduct the use of language in accordance with what Grice called ‘the Cooperative Principle’. The maxims postulated by Grice are that participants to a conversation should: make their contributions no more or less informative than is required; not say that which they think is false, or for which they lack adequate evidence; be relevant; avoid ambiguity and prolixity; and Grice admits that there may be other maxims too. The Cooperative Principle, which the maxims are supposed to serve, is that one should make their utterance ‘such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange’.³⁴

To see how the maxims and the cooperative principle might allow us to track another’s intentions through their words and the context in which they are used, let us take an example that we will later be able to transpose into a legislative context. Suppose you are a teacher at a school, and in explaining various rules to me, a particularly dense pupil, you say: ‘all students must wear sunscreen throughout summer’. If you think about it, this utterance is saturated with implied meaning — with things that you have not said, but have communicated. What you meant, and will be taken to have meant, is really something like: ‘all students [*of this school*, as opposed to all students in the universe] must [*as a matter of policy*, not as a matter of physics or anything else] wear [*as in have rubbed onto their skin*, rather than being worn as an accessory or in some other creative way] sunscreen throughout summer [*that is, while the students are outdoors during school hours throughout summer*, as opposed to every hour, night and day, throughout summer]’.

Now let us just take the third implicature identified above, which is as good as any. The reason, Grice would suggest, that I can successfully judge in this case

31 See, eg, the heavy reliance on Gricean theory in Ekins, above n 5, ch 7, and in Marmor, above n 5, ch 2. For non-intentionalists who recognise communicative interpretive theories’ dependence upon Grice’s theory, see Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 128–9; Mark Greenberg, ‘Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication’ in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (Oxford University Press, 2011) 217, 230–3.

32 H P Grice, ‘Logic and Conversation’ in Peter Cole and Jerry L Morgan (eds), *Syntax and Semantics 3: Speech Acts* (1975) 41.

33 Pragmatics is the domain of linguistics concerned with explaining how context determines the meaning of language.

34 Grice, above n 32, 45.

what you intended to communicate (namely: that students should wear [*as in have rubbed onto their skin*] sunscreen throughout summer) is that:

- P1. I know the maxims and the cooperative principle, the semantic meaning of your words, the identity of the things referenced by them, the relevant context of the utterance (including facts such as: that sunscreen, only when applied to skin, protects skin from sunburn), and I suppose that you know all of these things too;
- P2. I presume that you have observed the maxims, and in turn the Cooperative Principle;
- P3. By saying ‘wear’, *so long as I am committed to P2*, I have to assume that you meant ‘have rubbed into their skin’, because you will have breached at least one maxim if you meant anything else. For example, if I instead assume you meant that students must wear sunscreen in just any or some way (have sunscreen packets for earrings and so on) you would have said something that I will — given what I know per P1 — assume that you know to be false. If I instead assume that you meant not to specify the way in which the sunscreen is to be worn, you will have been vague. And so the process of elimination would continue.

Of course, we can easily imagine a statutory provision (call it s 1 of the *Sunscreen Act*) that too provides: ‘all students must wear sunscreen throughout summer’. If a judge had to determine the meaning of this provision, and were to interpret ‘wear’ as ‘have rubbed onto their skin’ on the grounds that this is what the legislators seemed to have intended, it seems that we must at least agree that the judge could only have come to that conclusion through an analysis *like* the analysis above, involving a system of interpretive rules the applicability of which is thought by the judge to have been committed to by the legislature, and whose purpose is to ensure a cooperative exchange of intended meanings through language. The only alternative, it seems, would be that the judge should be taken to profess an ability to experience the intentions of legislators directly, though of course that is something no human judge could do.

Intentionalists such as Ekins and Goldsworthy say that, by accepting what we just have, we will, on pain of logical inconsistency, also have to accept that ‘objective legislative intentions’ are no more than simulacrums of real subjective legislative intentions.³⁵ The authors’ reasoning here is roughly as follows.

If we look again at our *Sunscreen Act* example, what Ekins and Goldsworthy would observe is that any judge, no matter how much they profess *not* to be reliant on subjective legislative intentions of any kind, will interpret ‘wear’ to mean ‘have rubbed onto their skin’ because any other interpretation would be absurd; yet, the only possible explanation for the judge’s coming to that conclusion would be, as we accepted only a few paragraphs ago, that they applied a set of interpretive rules whose *very design* is to track subjectively intended speaker meaning. If they have applied interpretive rules that have *this* function, the

35 Ekins and Goldsworthy, above n 8, 48, 54–8, 60, 66–7.

judge will necessarily have acted on the basis that some thinking, rational agent authored the statute, and — by applying Gricean maxims and similar rules — the judge will have engaged in a process of estimating that author's subjective beliefs and goals. So, Ekins and Goldsworthy would continue, if a judge were to describe the meaning 'have rubbed onto their skin' as being the 'objective meaning' or the 'objective intention' communicated by the word 'wear', that judge will simply and unwittingly have referred to a subjective authorial intention that has been conveyed to them by the statute. The ultimate charge that Ekins and Goldsworthy make against textualists is therefore similar to the charge that Isaiah Berlin famously made against determinist philosophers who live and morally judge others as though free will exists: their practice *necessarily* belies their belief. '[S]ceptics about legislative intention', according to Ekins and Goldsworthy:

cannot avoid resorting to [legislative intention] in practice because it is essential to the sensible interpretation of statutes ... They are naturally and irresistibly drawn back to this traditional mode of analysis, without even noticing its inconsistency with their theoretical scruples.³⁶

There is a significant error in this argument, and those who make the argument could only commit the error because they have underappreciated certain features of the mind's capacity to model the existence of other minds. As such, I will explain something about that capacity before explaining the error in supposing there to be a necessary dependence between objective and subjective intentions.

3 The place of the intentional stance in statutory interpretation, and the irreducibility of the objective/subjective distinction

In 1983, two developmental psychologists, Wimmer and Perner, established that between the ages of three and four years, children undergo an extraordinary change: they acquire the capacity to attribute minds to objects outside of themselves, including other people.³⁷ This capacity, which all healthy adults retain, has been given a number of names by psychologists and philosophers; these include 'theory of mind', 'folk psychology' and 'mentalising'.³⁸ The philosopher Daniel Dennett, however, refers to the same capacity as the taking of the 'intentional stance'. Because the advances in thought made by Dennett have the potential to be of particular relevance to the theorisation of statutory interpretation, it is his jargon which I shall adopt. In a now famous pronouncement, Dennett explained what a person does when they take the intentional stance:

Here is how [the intentional stance] works: first you decide to treat the object whose behavior is to be predicted as a rational agent; then you figure out what beliefs that agent ought to have, given its place in the world and its purpose. Then you figure out what desires it ought to have, on the same considerations, and

36 Ibid 60.

37 Heinz Wimmer and Josef Perner, 'Beliefs about Beliefs: Representation and Constraining Function of Wrong Beliefs in Young Children's Understanding of Deception' (1983) 13 *Cognition* 103.

38 An excellent summary of the field can be found in: Alvin Goldman, 'Theory of Mind' in Margolis et al (eds), *The Oxford Handbook of Philosophy of Cognitive Science* (OUP, 2012).

finally you predict that this rational agent will act to further its goals in the light of its beliefs.³⁹

The result is that you will have attributed to the object a human-like mind.⁴⁰

A person's capacity to take the intentional stance has four features that, for our purposes, are of particular note. Firstly, and as Wittgenstein may have been the first to point out, where a person takes the intentional stance towards a thing, the person does not necessarily commit to that thing having the subjective intentions that the person attributes to the thing;⁴¹ in other words, a person can posit that some object has a mind without accepting that it has a mind. Secondly, the intentional stance can be applied to objects other than individual humans in order to understand and predict the behaviour of those objects. Consider how we are liable to take the stance in trying to understand the behaviour of objects as diverse as chess-playing software ('what move does the computer *want* me to play next'), animals ('my goldfish *likes* to stay near the ornamental reeds') and lightning ('the lightning *wants* to take the shortest route to the ground').⁴² Thirdly, the intentional stance takes on somewhat different functions depending on whether it is taken towards a human with a mind, or an object that is not thought to have a mind. When taken toward humans, the function of the stance is to give a factually correct idea of what a person will be thinking and intending.⁴³ When used on an object without a human-like mind, like a chess playing computer, the stance relinquishes its pretensions to giving a correct description of what causes the object to do what it does. Instead the utility of taking the stance in that circumstance arises because a more factually accurate explanation for the object's behaviour is unknown, or not easily grasped.⁴⁴ Fourthly, the intentional stance comes so naturally to us that we are able to take the stance unconsciously, or with little thought: as Dennett puts it, '[w]e are born with an "agent detection device" ... and it is on a hair trigger'.⁴⁵

Before broaching the matter of how the intentional stance could contribute to the process of statutory interpretation, it is useful to first consider how the stance can more generally allow for the interpreted meaning of linguistic texts to be wholly non-reliant on subjective speaker intentions. The clearest example lies in the way that people will take the intentional stance towards a Turing machine: a machine that *has no* mind and no subjective intentions of the kind that you or I

39 Daniel C Dennett, *The Intentional Stance* (MIT Press, 1987) 17.

40 Ibid 17–22.

41 Ludwig Wittgenstein, *Philosophical Investigations* (G E M Anscombe trans, Basil Blackwell, 1953) 178 ('My attitude towards him is an attitude towards a soul. I am not of the *opinion* that he has a soul.') (emphasis in original).

42 The lightning and computer chess examples come from Dennett, *The Intentional Stance*, above n 39, 22.

43 See generally Jerry A Fodor, *Psychosemantics: The Problem of Meaning in the Philosophy of Mind* (MIT Press, 1987) where Fodor defends the descriptive power of the intentional stance when applied to humans.

44 Ibid 21–3. Here Fodor explains that, in the case of the chess machine, the success of the intentional stance is owed to its picking up on principles of action in the machine's behaviour, rather than its correctly mapping any psychological states (of which the machine has none) that are causing its moves in chess.

45 Daniel C Dennett, *Intuition Pumps and Other Tools for Thinking* (Penguin Books, 2013) 76.

have, but that can nonetheless produce complex sentences whose usage will seem contextually appropriate to humans, such that the machine can engage humans in a decent conversation.⁴⁶ To run with that example, if you were engaged in an online conversation with such a machine, as these days you can be,⁴⁷ and the machine said to you ‘tell me about your week’, although you will know that the utterance was backed by no speaker intentions, you just could, and almost certainly would, take the intentional stance toward the machine (such that you take it to be a machine with a human-like mind) and then posit (though not accept) that the machine made its utterance while having speaker intentions and being committed to the cooperative principle. It is only by doing this that you would then successfully draw implied meanings from the utterance by applying Gricean maxims.

Now, where a person interprets a statute, there is clearly nothing *preventing* them from doing the same thing. An interpreter can suppose that the legislative text does not express any legislator’s subjective intentions, or they may simply not commit to whether or not such intentions lie behind the words of the statute, and yet the interpreter may take the intentional stance toward the legislature as a whole (such that they take the legislature to have had a human-like mind) and then posit, though not accept, the legislature to have intentionally authored the statute; the result will be that the text is fixed with an apparently intended meaning. That much can be put beyond doubt by the thought experiment that I have placed in the coming footnote.⁴⁸

However, more than being possible, for a judge to engage in this practice can be expected as ordinary and probable. On that score, it helps to consider the difficulties that a judge would face if they chose *not to* attribute a hypothetical, human-like mind to the legislature that can be posited to have authored the statute, and instead chose the path commended by Ekins and Goldsworthy, which

46 A M Turing, ‘Computing Machinery and Intelligence’ (1950) 59 *Mind* 433. As for some assurance that today’s Turing machines really do not have ontologically subjective intentions, see John R Searle, ‘Minds, Brains, and Programs’ (1980) 3 *Behavioral and Brain Sciences* 417, which contains Searle’s famous Chinese Room hypothetical.

47 Rob Dubbin, ‘The Rise of Twitter Bots’, *The New Yorker* (online), 14 November 2013 <<http://www.newyorker.com/tech/elements/the-rise-of-twitter-bots>>.

48 Suppose there is a legislature that passes two equally authoritative kinds of legislation. One kind — Voted Legislation — is legislation drafted and voted upon by elected officials. The other kind — Turing Legislation — is drafted and published by an advanced Turing machine. Suppose also that the judiciary is only occasionally informed whether a given statute is Voted or Turing Legislation, and one type cannot otherwise be told apart from the other. Now consider the following cases and the corresponding lessons that they teach. *Case One*: A judge knows that the legislation before her is Turing Legislation. She finds that if she does not think too deeply about the origins of the legislation, or if she simply posits that it was intentionally authored by a human-like mind, that the legislation has an apparently intended meaning. *Lesson One*: Where no subjective intentions lie behind the statute, the intentional stance may yield from the statute an apparently intended meaning. *Case Two*: A judge does not know whether the legislation before her is Voter or Turing Legislation. In fact, it is Voter Legislation, and it was voted upon unanimously by all members of the legislature, and each legislator had an identical and highly textured meaning in mind for each and every word of the statute. Because the judge knows none of this, she simply posits that the statute was intentionally authored by a human-like mind and interprets the statute to have its consequent meaning. *Lesson Two*: Even if a statute does in some sense communicate real legislative intentions, a judge may take the intentional stance toward a merely posited author to yield an objective meaning; Interestingly, Case Two may instantiate what, to epistemologists, is known as a ‘Gettier problem’. See Edmund L Gettier, ‘Is Justified True Belief Knowledge?’ (1963) 23 *Analysis* 121.

is to settle questions of interpretation by reference to what can reasonably be taken to have been the individual, interlocking intentions that legislators actually sought to express through the statute. Ekins and Goldsworthy argue that a judge taking this approach could reasonably expect that the legislators who enacted the relevant statute harboured a common intention to adopt the plan contained in the statute, and for it to be law.⁴⁹ While that could easily be so, for the judge who must determine not whether the statute was intentionally promulgated, but whether *specific words* in the statute were intended to mean one thing rather than another, the supposition that legislators generally intended to adopt the statutory plan as a whole will be of no assistance. Before the judge could conclude that the legislature intended the meaning of a specific word to be one thing and not another, the judge would instead have to be satisfied that the legislators had interlocking intentions specifically with respect to the meaning of the word. In turn, this would require the judge to be reasonably confident that the legislators not only read the provision in which the word appears, but had detailed, shared thoughts as to what the words of the provision meant.⁵⁰

Of course, the reality of the legislating process is such that a judge could almost never be confident that legislators shared such particular thoughts on the words or sentences to be interpreted, not least because legislators cannot be depended upon to have read the statutes.⁵¹ But all this is only a symptom of a deeper issue which the judge, taking Ekins and Goldsworthy's approach, has run up against. The deeper issue here is that, although members of groups can certainly hold shared and coordinated intentions,⁵² groups, unlike individuals, cannot simply utter sentences and intend for them to communicate some particular meaning. As Meijers observes in one of the only investigations into the possibility of attributing speech to groups, '[o]nly individuals can do that'.⁵³ For only individuals have a thinking, perceiving, unitary mind that can generate intentions in the context of a network of beliefs about the world, and only individuals have an apparatus with which to utter a sentence expressing these intentions.⁵⁴ Another significant thinker in this area, Hughes, has for similar reasons argued that, for there to be

49 Ekins and Goldsworthy, above n 8, 65–6.

50 *Contra* *ibid* 67. On the distinction between legislators intending the statute to be law, and intending for the law to be some particular thing, see Justice Kenneth Hayne, 'Statutes, Intentions and the Courts: What Place Does the Notion of Intention (Legislative or Parliamentary) Have in Statutory Construction?' (2013) *Oxford University Commonwealth Law Journal* 271, 274.

51 There is a dearth of empirical research into the legislating process in Australia. However, research of this kind has been undertaken in comparable jurisdictions. In one study of American senators, it was found that 'senators generally [do] not read the *text* of bills': Victoria F Nourse and Jane S Schacter, 'The Politics of Legislative Drafting: A Congressional Case Study' (2002) 77 *New York University Law Review* 575, 608 (emphasis in original). A more recent article brought together the results of surveys of parliamentarians and political journalists in England, Scotland and the US. The outcome of the surveys are reflected in the article's somewhat bombastic title: Brian Christopher Jones, 'Don't Be Silly: Lawmakers "Rarely" Read Legislation and Oftentimes Don't Understand It ... But That's Okay' (2013) 118 *Pennsylvania Statim* 7. For descriptions of the further barriers to *ad idem* among legislators, see Dworkin, above n 26, 335–6.

52 Michael E Bratman, *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge University Press, 1999).

53 Anthonie Meijers, 'Collective Speech Acts' in Savas L Tsohatzidis (ed) *Intentional Acts and Institutional Facts: Essays on John Searle's Social Ontology* (Springer, 2007) 93, 101.

54 On the intrinsic link between these features of the mind and language use, see John R Searle, *Intentionality: An Essay in the Philosophy of Mind* (Cambridge University Press, 1983) chs 6–9.

an utterance with respect to which members of a group have interlocking speaker intentions, a series of conditions must be met in sequence. *First*, some group must have a collective intention that would be expressed by some sentence X. *Second*, an individual must then come to know of that intention, usually through the use of some procedure that records and compiles the group's preferences. *Third*, the individual must then utter the sentence X whilst meaning it to be a statement of the group's intentions.⁵⁵ A feature of legislative drafting, however, is that the process ordinarily occurs the wrong way around for these conditions to be met. Statutes are first written with an intended meaning by a drafter or team of drafters on the advice of government departments. The statute is only *then* presented to the legislature for their approval.

When a judge does speak of the legislatively intended meanings of specific words, the idea that the judge might thereby be attributing a fictional mind to the legislature may appear so sophistic as to be improbable. Yet when one considers the barriers encountered by the intentionalist's attempt to recover the *non-fictional* intentions of legislators, it becomes apparent that any judge would be hard-pressed to attribute intentions to the legislature without the use of some fiction. Of course, it is always possible for a judge to hold and act upon considered theories about the attitudes that legislators had towards the words of the statute under consideration. In these cases, undeniably, the judge will not have relied upon a fiction; at worst they will have relied upon sincerely made, but mistaken conjectures. But whether it be due to a lack of reflection on the matter, or an acknowledgment that the subjective attitudes of legislators cannot be ascertained from the text of a statute, we should expect that many judges who invoke legislative intentions will *not* be committed to considered theories as to how, or in what sense, legislation communicates the speaker intentions of legislators. Because we find these judges reasoning in terms of legislative speaker intentions regardless, we must infer that these judges have presupposed the legislature to have had speaker intentions, even though the judges hold no affirmative account as to why that presupposition might be true. In other words, these judges will necessarily have presupposed the truth of certain facts for the purposes of an exercise, while having not committed to the truth of those facts in reality. Not only does that approximate the very definition of relying upon a fiction;⁵⁶ this act of presupposing, though not positively accepting, that the legislature has a mind capable of generating speaker intentions entails a textbook example of the intentional stance being taken toward an object — an institution really — without a mind. As we have seen, for a judge to do this would not be remarkable, but ordinary, given our natural inclination and aptitude for taking the intentional stance.

With that, we can return to Ekins and Goldsworthy's argument that the textualist's practice necessarily belies the textualist's belief. We can now appreciate that intentionalists cannot foreclose the possibility that textualist judges have engaged in the following 'practice': a practice not of channelling subjective legislative intentions through language, but of taking the intentional stance toward the legislature, positing the legislature to have authored the statute, and then applying

55 Justin Hughes, 'Group Speech Acts' (1984) 7 *Linguistics and Philosophy* 379, 388. Hughes' conditions are also adopted in Meijers, above n 53, 101.

56 Lon Fuller, *Legal Fictions* (Stanford University Press, 1967) 9.

Gricean rules and suppositions to the statutory text and context and taking the result to be the communicated meaning of the statute. But then what if the textualist's impugned belief is contradicted by *this* practice? The textualist's impugned belief is only that the statute can be taken to communicate a usage meaning that is objective in the strong sense that the judge's determination that 'X is the usage meaning of the statute' will not in any way depend upon any legislator having subjectively intended, or being likely to have subjectively intended, to convey the meaning X. The practice identified earlier in this paragraph would not 'believe' this belief, for the practice in no way depends upon assessments of intentions supposed to have been subjectively held by legislators.

So it seems we must eventually accept the distinction between objective and subjective concepts of legislative intention. Subjective legislative intentions are intentions that, on the available evidence, are thought or predicted to have really existed in the minds of legislators. Objective legislative intentions are those speaker intentions that appear to be conveyed when the statutory language is posited, though not accepted, to have been uttered by a legislature with a human-like mind. Objective and subjective legislative intentions are therefore irreducibly different because objective legislative intentions, unlike their subjective counterparts, are not intentions that are supposed to have existed in the minds of real legislators, which is to say that they are not — as philosophers would say — ontologically subjective. If all that is accepted, the question can no longer be 'what are judges necessarily doing when they apply Gricean maxims to statutory text?' Rather it must become: 'to what end do judges apply the maxims?' And that is a question whose answer will depend on the phenomenology of the particular judge in question or, if such a thing happens to exist, the interpretive phenomenology of the prevailing judicial culture to which the judge belongs. It also follows that, where the term 'legislative intention' appears in a judgment without its meaning being elaborated upon by the authoring judge, it will likely be unclear whether the judge meant to refer to subjective or objective legislative intentions, as we have just defined those terms.

4 The point of fact, Part 1: throughout Australian judicial history, the term 'legislative intention' has been used in a vague way

That is enough theory to get us by; now what are the facts of Australia's judicial history? One significant fact is that no judgment in the history of the High Court of Australia has ever parsed the possible meanings of legislative intention and then expressly taken a subjective concept of legislative intention to be the object of interpretation.⁵⁷ A further fact is that no judgment in the High Court's history has ever provided a conception of what a legally relevant subjective legislative

57 I have found no such judgment, and no such judgment was produced by Ekins and Goldsworthy: Ekins and Goldsworthy, above n 8. The only judgments that have parsed the possible meanings of legislative intention have been given in the last three decades, and of course each has concluded that legislative intention is an objective concept. All of those judgments are collected in footnote 1 above.

intention would consist in *if it were* taken to be the object of interpretation.⁵⁸ To the extent that there was any consensus as to the meaning of legislative intention, it seems to have been that the term's meaning *was vague*.⁵⁹

Mason and Wilson JJ's well-known dicta in *Cooper Brookes* was offered by Ekins and Goldsworthy as a 'leading' affirmation of the judge's duty to observe the legislature's subjective intentions,⁶⁰ and so I am inclined to adopt it as a case in point for how the term was traditionally used. In that case their Honours simply said: 'The fundamental object of statutory construction in every case is to ascertain the legislative intention ... The rules [of interpretation] ... are no more than rules of common sense, designed to achieve this object.'⁶¹

Now two observations ought to be made about the usage of 'legislative intention' in a passage such as this. The first is that the judges did not explain what they meant by 'legislative intention', either within the passage or elsewhere in the judgment, nor could they have been deferring to some authoritative precedent for the term's usage meaning given that no such precedent had at that time been set. That being the case, suppose we had interrupted Mason and Wilson JJ mid-sentence — perhaps as they were jointly dictating their judgment to a typist — and suppose we had then identified to them some of the possible meanings of legislative intention that contemporary scholarship would go on to discern. If we had then asked them 'what did you mean by legislative intention?' perhaps they would have surprised us and provided a relatively complete theory of how legislators are able to have collective subjective intentions and are able to express these through the language of statutes. But even were that the case, there are at least two explanations that their Honours (dare I say, more likely) *might have instead given*, each of which would a) not express any acceptance of intentionalist theory on their part and b) be a *valid* explanation for what they meant by the term in that nothing about the metaphysics of interpretation, or the way they used the term, would contradict the explanation. One such explanation would go something like:

58 Again, no such judgment was furnished by Ekins and Goldsworthy, or has showed up in my searches. Of course, I am discounting those more recent judgments that have distinguished between the different conceptions of subjective intentions only in order to reject intentionalism's factual claims as being implausible: see, eg, *Mills* (1990) 169 CLR 214, 234 (Dawson J).

59 Lord Watson's admonition of the term being 'very slippery' in *Salomon* [1897] AC 22 has been relayed over and over by Australian courts, though it has only ever substituted for, and never catalysed, any original analysis as to what the term could mean. See, eg, *Adams v Young* (1897) 18 LR (NSW) 73, 77 (Darley CJ); *Edwards v Hirschman* (1900) 21 LR (NSW) 116, 120 (Darley CJ); *Ex parte Honorah Luke* (1901) 1 SR (NSW) 322, 332 (Simpson J); *Trolly, Draymen and Carters Union of Sydney and Suburbs v The Master Carriers Association of New South Wales* (1905) 2 CLR 509, 521–2 (O'Connor J) ('*Trolly*'); *McKeon v Heywood* (1906) 6 SR (NSW) 215, 218 (Darley CJ); *Ex parte Marks* (1906) 6 SR (NSW) 428, 431 (Pring J); *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1170 (Higgins J) ('*Baxter*'); *The Federated Saw Mill, Timber Yard, and General Woodworkers Employees' Association of Australasia v James Moore & Sons Pty Ltd* (1909) 8 CLR 465, 536–7 (Isaacs J); *Dent v Commissioner of Stamp Duties* (1909) 9 CLR 406, 421–2 (Isaacs J); *Glover v McClintock* (1914) 10 Tas LR 54, 57–8 (Dobbie J); *Re Broken Hill Proprietary Company and Hennessy* (1925) 26 SR (NSW) 67, 83 (Ferguson J); *Lake Beach Estate Ltd v Mitchell* [1939] SASR 209, 231 (Cleland J); *Smith v Knights* [1971] Tas SR 299, 304–5 (Chambers J).

60 Ekins and Goldsworthy, above n 8, 40, quoting *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320 ('*Cooper Brookes*').

61 *Cooper Brookes* (1981) 147 CLR 297, 320 (Mason and Wilson JJ).

Obviously statutes are the products of legislatures. Upon reflection, however, I do not have a sufficiently firm view about the nature of language, knowledge and collective intentionality to say exactly how and what I think statutes communicate per se. Yet when one reads a statute, the words just do convey an apparently intended meaning, usually an obvious meaning, and it is to this that I necessarily refer when I say ‘legislative intention’.

A second answer could be:

By interpreting a statute, I do not see how I could be reading the actual intentions of the legislature, because the legislature does not have a mind. What I call the ‘legislative intention’ must therefore be a kind of construct: it could only be that thing which *appears* to me to be the legislature’s intention.

To carry through on the example, then, because the language of the cited passage does not discount the possibility that Mason and Wilson JJ conceptualised legislative intention in at least either of these ways, and because neither conceptualisation would entail an acceptance of intentionalist theory, the reference to legislative intention in Mason and Wilson JJ’s passage is not only *vague*, but also cannot be relied upon as representing a commitment on the part of Mason and Wilson JJ to intentionalist theory.

The second thing to observe about the passage, then, is that so far as the 19th and 20th centuries are concerned, Mason and Wilson JJ’s failure to disambiguate the term ‘legislative intention’ does not represent the exception, but the rule. Indeed, it is exactly because the references to legislative intention in the earlier judgments were not disambiguated that judges since the Gleeson Court have proven *able* to interpret many of them as references to an objective legislative intention so as to align them with the theory of the day, rightly or wrongly.⁶² As for each and every reference to legislative intention that Ekins and Goldsworthy identified as being a brick in the tower of our intentionalist tradition, all of these too, when inspected,

62 All have been interpreted retrospectively as references to an objective intention. Justice Mason’s passages were so interpreted in *Lee* (2013) 251 CLR 196, 224–6 [43]–[45] (French CJ), citing *Hamilton v Oades* (1989) 166 CLR 486, 495 (Mason J); *Momcilovic* (2011) 245 CLR 1, 175–6 [442] (Heydon J), quoting *Cooper Brookes* (1981) 147 CLR 297, 321 (Mason and Wilson JJ). Justice Dixon’s judgments were interpreted as references to an objective intention in *Momcilovic* (2011) 245 CLR 1, 136–7 [327]–[328] (Hayne J), 175–6 [442] (Heydon J), 234–5 [637]–[638] (Crennan and Kiefel JJ). The Court has reconciled the *Project Blue Sky* principle with legislative intention in its fictional sense in *Lacey* (2011) 242 CLR 573, 591–2 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Lee* (2013) 251 CLR 196, 225–6 [45] (French CJ); *Momcilovic* (2011) 245 CLR 1, 44–5 [38] (French CJ), 175–6 [441]–[442] (Heydon J). As for the older cases, in *Byrnes v Kendle* (2011) 243 CLR 253, 283–4 [97] (‘Byrnes’) Heydon and Crennan JJ read the judgment of O’Connor J in *Tasmania v Commonwealth* (1904) 1 CLR 329 (‘*Tasmania*’) to have meant intention in an objective sense; see also the approval given to the susceptible dicta of Isaacs J in *Public Service Association of South Australia Inc v Industrial Relations Commission of South Australia* (2012) 249 CLR 398, 423 [64] (Gummow, Hayne, Crennan, Kiefel and Bell JJ), quoting *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 180 (Isaacs J). In *Plaintiff M47* (2012) 251 CLR 1, Gummow J even explained that legislative intention ‘has become better understood than it was when McHugh J, in *Al-Kateb*, used the term’ only 10 years ago: at 60 [118] (citations omitted). For analogous retrospective clarifications in the British courts, see, eg, *Regina v Secretary of State for the Environment, Transport and the Regions, Ex parte Spath Holme Ltd* [2001] 2 AC 349, 396–7 (Lord Nicholls); *R (Wilkinson) v Inland Revenue Commissioners* [2006] 1 All ER 529, 535 [18] (Lord Hoffman).

turn out to be afflicted by a want of any explanation for the term's meaning.⁶³ For this reason, the intentionalist tradition that these authors point to is something of a mirage.

5 The point of fact, part 2: Literalism and the 'statute as speaker thesis'

Having said that the term being *vague* was the rule throughout the 19th and 20th centuries, the rule does have its exceptions. These exceptions arise out of the interpretive tradition known as 'literalism', and all involve legislative intention being disambiguated in the direction of it referring to something other than a subjective legislative intention. Together with the literalist tradition more generally, these exceptions are a feature of Australia's judicial history that militate not so much against the possibility of evidencing an Australian intentionalist tradition (as did our *vagueness* objection), but against the possible strength of any such tradition even were it to have ever existed.

What then was literalism? Although it is easily forgotten, the 'movement from "text to context"' in Australian statutory interpretation is an event that only took place in 'recent decades',⁶⁴ and it was before that 'profound change'⁶⁵ that our courts, in the company of the British⁶⁶ and American⁶⁷ judiciaries, endured what are now regarded as 'the dark days of literalism'.⁶⁸ The *raison d'être* of literalism was essentially political: the movement was driven by a 'relish ... in the defeat of the draftsman',⁶⁹ a 'judicial attitude' towards the Parliament⁷⁰ of a kind that is today associated with the textualism of conservatives on the United States Supreme Court: a desire not to cooperate with the legislative arm of government.⁷¹ But if

63 See, eg, *Sussex Peerage Case* (1844) 11 Cl & F 85, 143; 8 ER 1034, 1057 (Tindal CJ); *A-G (Canada) v Hallet & Carey Ltd* [1952] AC 427; *Mills* (1990) 169 CLR 214, 234 (Dawson J); *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161–2 (Higgins J) ('*Engineer's Case*'); *Wilson v Anderson* (2002) 213 CLR 401, 418 (Gleeson CJ) ('*Wilson*').

64 Chief Justice J J Spigelman, 'The Intolerable Wrestle: Developments in Statutory Interpretation' (2010) 84 *Australian Law Journal* 822, 823 (citations omitted); see also *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404, 421–4 (McHugh JA).

65 *Ruhani v Director of Police* (2005) 222 CLR 489, 547 [182] (Kirby J).

66 *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 279–80 (Lord Diplock) ('*Fothergill*'); *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, 617 (Lord Griffiths), 630 (Lord Browne-Wilkinson); Sir John Dyson, 'The Shifting Sands of Statutory Interpretation' (Speech delivered at the Statute Law Society Conference, London, 9 October 2010) 5 <http://www.statutelawsociety.co.uk/wp-content/uploads/2014/01/Sir_John_Dyson.pdf>.

67 See, eg, *Crooks v Harrelson*, 282 US 55, 59–60 (1930); Frederick J de Sloovere, 'The Equity and Reason of a Statute' (1936) 21 *Cornell Law Quarterly* 591.

68 *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109, 145–6 [82] (Kirby J).

69 Garfield Barwick, 'Divining the Legislative Intent' (1961) 35 *Australian Law Journal* 197, 197.

70 *Fothergill* [1981] AC 251, 280 (Lord Diplock).

71 On the conservative motivations of American textualism see: Marmor, above n 5, ch 5. A favourite example of a judgment in which literalism's antagonism toward the legislature was made particularly overt is found in *Inland Revenue Commissioners v Ayrshire Employers Mutual Insurance Association Ltd* [1946] 1 All ER 637. The backdrop to this antagonism is a struggle for power between the common law and statutory law. On that topic, see: Brian Z Tamanaha, 'The Dark Side of the Relationship between the Rule of Law and Liberalism' (2004) 3 *New York University Journal of Law and Liberty* 516, 524–9; Roscoe Pound, 'Common Law and Legislation' (1908) 21 *Harvard Law Review* 383.

the ends were a matter of politics, the means were a matter of linguistics. All in all, the interpretive practice that constituted literalism was nothing more than to eschew Grice's cooperative principle and to determine the meaning of a statute's language in a way that de-emphasised the language's context and emphasised the language's semantic meaning. The result was that literalist interpretations were apt to ignore implied meanings, and this allowed judges to treat the language of the statute as being the thing that communicated the law, rather than as being the thing through which the law had been communicated (because this idea becomes important in itself, I will give it a name: the 'statute-as-speaker thesis').

In Australia, literalism was never so dominant that it was not opposed by approaches to statutory interpretation that did make use of a concept of legislative intention.⁷² Even at literalism's zenith, there were those who saw that 'the proper course' was 'to adopt that sense of the words which harmonizes best with the context'.⁷³ Nonetheless, for some time literalism *was* the dominant interpretive approach. Before the High Court's inception in 1903, literalism's tradition had already been gathering strength in the supreme courts of the colonies.⁷⁴ In the High Court's first years — during the life of the Griffith Court — members of the Court made clear that they would receive and favour the literalist approach. The statement of the judicial interpretive function that the Griffith Court most commonly affirmed was this literalist apothegm formulated by Jervis CJ in *Abley v Dale*:

If the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary sense, even though it do lead, in our view of the case, to an absurdity or manifest injustice. ... we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see, or fancy we see, an absurdity or manifest injustice from an adherence to their literal meaning.⁷⁵

With the coming of the Knox Court in 1920, the *Engineer's Case* was decided, and this, it is thought, 'committed the High Court to a regime of literalism' for some time longer.⁷⁶ In a passage that was indicative of the majority's approach in that case, Higgins J held:

- 72 *Federal Commissioner of Taxation v Westrad Pty Ltd* (1980) 144 CLR 55, 79 [9] (Murphy J). See, eg, the various references to legislative intent in *Scott v Cawsey* (1907) 5 CLR 132 ('Scott').
- 73 *Scott* (1907) 5 CLR 132, 156–7 (Isaacs J), quoting *United States v Winn*, 28 Fed Cas 733, 734 (Story J) (D Mass, 1838).
- 74 The first firm examples are to be found in: *Peacock v King* (1854) 2 Legge 829, 836 (Stephen CJ); *Regina v Alley* (1883) 9 VLR (L) 59, 61–2 (Higinbotham J); *Offler v Bagot* (1884) 18 SALR 1, 2–3 (Way CJ).
- 75 (1851) 11 CB 377, 392; 138 ER 519, 525, quoted in *Tasmania* (1904) 1 CLR 329, 346 (Barton J); *Mooney v Commissioners of Taxation (NSW)* (1905) 3 CLR 221, 243–4 (Barton J); *Marshall v Smith* (1907) 4 CLR 1617, 1637 (Isaacs J); *Sargood Brothers v Commonwealth* (1910) 11 CLR 258, 279–80 (O'Connor J); *Commissioner of Stamp Duties (NSW) v Simpson* (1917) 24 CLR 209, 215 (Barton J). See also *Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290, 294, 302 ('Howe') where Knox CJ, Gavan Duffy and Isaacs JJ approve a similar judgment from Jervis CJ in *Mattison v Hart* (1854) 14 CB 357, 385. See also the dicta of Jessel MR in *North v Tamplin* (1881) 8 QBD 247, 253, quoted with approval by Barton J in *Tasmania* (1904) 1 CLR 329, 347.
- 76 *Eastman* (2000) 203 CLR 1, 47 [149] (McHugh J) (citations omitted).

The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.⁷⁷

For the remainder of the first half of the 20th century, the correctness of that approach came to be considered ‘a canon of construction so well established as to need no citation of authority for its support’.⁷⁸ It was not until the century’s second half that less literal interpretive methods increased in popularity. As part of its decline, literalism’s tradition came to be repackaged as the so called ‘golden rule’ of statutory interpretation which, rather than being axiomatic, represented something more like a prized tool in the interpreting judge’s toolbox.⁷⁹ In 1981, s 15AA was introduced into the *Acts Interpretation Act 1901* (Cth), which required statutes to be interpreted such as to effect the statute’s purpose or object. About a decade after the passage of s 15AA, literalism’s denouement finally came. In *CIC Insurance*, the High Court rejected the approach for good.⁸⁰

Given that literalism was such a long-reaching interpretive tradition, we ought to ask: how does the existence of this tradition square with the claim that Australian courts have, until recently, harboured a strong and continuous intentionalist tradition? Well if one thing is certain, literalist interpretations did not take for granted the truth of intentionalism’s factual claims, nor did they conform to intentionalism’s normative claim. If the statutory word whose meaning was contested were to be ‘resident’, the literalist judge would not ask what the term was intended to mean; they would ask: ‘what is the literal and popular meaning of the noun substantive “resident”?’⁸¹ If the phrase to be interpreted were instead ‘sub-leases’, the question would instead be: ‘[w]hat then is the meaning of the word “sub-leases”?’⁸² The judge would be inclined not to determine the meaning of that word by reference to the context of its use, as would an intentionalist or any

77 *Engineer’s Case* (1920) 28 CLR 129, 162. It is interesting to compare this to the almost *word for word* antithesis given more recently in *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (*‘CIC Insurance’*).

78 *Allchurch v Cooper* [1923] SASR 370, 376 (Poole J); see also *Howe* (1922) 31 CLR 290, 294 (Knox CJ and Gavan Duffy J), 302 (Isaacs J); *Hooper & Harrison Ltd (in liq) v Federal Commissioner of Taxation* (1923) 33 CLR 458, 485–6 (Higgins J); *Western Australian Timber Workers’ Industrial Union of Workers (South West Land Division) v Western Australian Sawmillers’ Association* (1929) 43 CLR 185, 198 (Isaacs J); *Cain v Doyle* (1946) 72 CLR 409, 431–2 (Williams J).

79 See, eg, *Wanganui-Rangitikei Electric Power Board v Australian Mutual Provident Society* (1934) 50 CLR 581, 597 (Gavan Duffy CJ and Starke J); *Royal Victorian Aero Club v Commonwealth* (1954) 92 CLR 236, 242 (Webb J); *R v Foster; Ex parte Eastern & Australian Steamship Co Ltd* (1959) 103 CLR 256, 266–9 (Dixon CJ); *Geraldton Building Co Pty Ltd v May* (1977) 136 CLR 379, 394–5 (Gibbs J); *Yuill* (1991) 172 CLR 319, 339–40 (Gaudron J).

80 *CIC Insurance* (1997) 187 CLR 384, 408.

81 *Howe* (1922) 31 CLR 290, 294 (Knox CJ and Gavan Duffy J).

82 *Bon Marché Pty Ltd v Hoyts Theatres Ltd* [1936] VLR 330, 334 (Lowe J).

judge who takes the intentional stance toward a posited author of the text.⁸³ The literalist judge would tend instead to look to the dictionary.⁸⁴

Because literalism and communicative theories of interpretation are then such different creatures as a matter of practice, we can safely infer that a judge who practiced literalism did not practice intentionalism. Though I will not press the point, there are indications scattered throughout the cases that judges who practiced literalism *rejected* communicative theories of interpretation.⁸⁵ Either way, if literalism was not intentionalism, and if literalism was the dominant, and then co-dominant approach to statutory interpretation over the course of the 19th and much of the 20th centuries, to the extent that Australia could have had any intentionalist tradition, that tradition could never have been more than a tradition that competed for acceptance with limited success.

This brings me to make a final observation that was foreshadowed earlier. It is that, although literalism was challenged and then eventually defeated by an interpretive approach that took the statute to be an act of intentional communication, that latter tradition did agree with, and it seems take influence from, literalism on one matter, and that is the ‘legislation-as-speaker thesis’. A classic instantiation is found in O’Connor J’s judgment in *Tasmania v Commonwealth*, where his Honour warned that ‘the only safe rule is to look at the Statute itself, and to gather from it what is its intention. If we depart from that rule we are apt to run the risk of ... “assum[ing] the province of legislation”’.⁸⁶

Another comes from Kitto J in *Sovar v Henry Lane Pty Ltd* where his Honour held: ‘It is not a question of the actual intention of the legislators, but of the proper inference to be perceived upon a consideration of the document in the light of all its surrounding circumstances.’⁸⁷

Significantly, statements like these were made all throughout the 20th century, perhaps most frequently to justify the stringent common law prohibitions on extrinsic indicators of legislators’ subjective intentions, and these lasted into the

83 Ibid (“‘Sub-lease’ I understand to denote ... What then does “lease” mean?”). The literal meaning of the words was taken to represent the law ‘irrespective of other indications of legislative intent’: *Hegarty v Ellis* (1908) 6 CLR 264, 271 (Barton J); see also *Campbell v Kitchen & Sons Ltd* (1910) 12 CLR 515, 526 (Barton J).

84 See, eg, the use of dictionaries in *Municipal Council of Sydney v Commonwealth* (1904) 1 CLR 208, 241–2 (Barton J); *Thurley v Hayes* (1920) 27 CLR 548, 550 (Knox CJ, Gavan Duffy and Rich JJ); *Turner v York Motors Pty Ltd* (1951) 85 CLR 55, 75 (Dixon J).

85 That hypothesis was floated by Dawson J in *Mills* (1990) 169 CLR 214, 234 (‘[i]n the past [the unreality of legislative intentions] has meant that preference has been given to the literal meaning’) and then reiterated approvingly by Gaudron J in *Yuill* (1991) 172 CLR 319, 339–40. So much was directly admitted to by earlier judges in, eg, *Trolly* (1905) 2 CLR 509, 521–2 (O’Connor J); *Baxter* (1907) 4 CLR 1087, 1170 (Higgins J). Further evidence for Dawson J’s hypothesis lies in the way that literalist era judges themselves distinguished between ‘the literal language of the Act’ and ‘the intention of the Legislature’, only to favour the former: *Re an Appeal of the Federal Bank of Australia Ltd from the Assessment of the Commissioner of Stamps* (1889) 23 SALR 43, 51 (Way CJ); *Renison v Keighran* (1884) 10 VLR (L) 133, 145 (Stawell CJ and Holroyd J); *Baxter* (1907) 4 CLR 1087, 1170 (Higgins J).

86 *Tasmania* (1904) 1 CLR 329, 358–9 (citations omitted) approved in *Byrnes* (2011) 243 CLR 253, 283 [97] (Heydon and Crennan JJ), and in *Eastman* (2000) 203 CLR 1, 41–2 [134] (McHugh J).

87 (1967) 116 CLR 397, 405.

1980s.⁸⁸ Very arguably, the thesis was also subscribed to by Justice Dixon.⁸⁹ The significance of statements like those quoted above is that they are a window onto the phenomenology of judges who depended on a concept of legislative intention and yet overtly did not take themselves to thereby be giving effect to subjective legislative intentions. I do not offer this as grounds to claim that Australia has any significant textualist tradition — however it is grounds to say that the Court's recent commitment to textualism was anticipated by earlier judgments in a way that a turn to intentionalism would not have been.

B The Nature of the Court's Textualism

If my arguments so far have been sound, then we should accept that the High Court's rejection of intentionalism has not amounted to a rejection of any significant prevailing interpretive tradition. Clearly, this is a conclusion that removes much of the urgency and credibility from Ekins and Goldsworthy's prediction that intentionalism's rejection will significantly change the legal consequences that Australian statutes are interpreted to have. Even so, I think all we have said so far leaves one ray of hope for Ekins and Goldsworthy's prediction, and that is because were the devil not to lie in intentionalism's rejection alone, it might instead lie in the Court's positive adoption of textualism. Textualism is after all an interpretive theory that the Court is newly committed to, and so it could therefore be expected to impact upon interpretive outcomes if — and this is the big if — the theory were to introduce new normative claims on how statutes should be interpreted, the satisfaction of which would require statutes to be interpreted in ways that they would not have been interpreted previously. We can call a textualism of that kind a 'malignant' textualism. If instead the Court's textualism were not to introduce normative claims such as these, and were to instead make normative claims that are satisfied by *what have been* the courts' interpretive practices in recent decades, then that textualism will be essentially

88 The 'statute as speaker' thesis is expressed in: *Nolan v Clifford* (1904) 1 CLR 429, 449 (Barton J); *South Australia v Commonwealth* (1942) 65 CLR 373, 410 (Latham CJ); *Bitumen & Oil Refineries (Australia) Ltd v Commissioner for Government Transport* (1955) 92 CLR 200, 212 ('Bitumen'); *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518 ('[i]t is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law'). In the case of *Wik* (1996) 187 CLR 1, Gummow J cited that passage as authority for the Court's ambivalence towards subjective legislative intentions: at 168–9; see also *South Australian Commissioner for Prices and Consumer Affairs v Charles Moore (Aust) Ltd* (1977) 139 CLR 449, 461–2 (Gibbs J) ('*Charles Moore*'); *Salemi* (1977) 137 CLR 396, 451 (Jacobs J).

89 *Momcilovic* (2011) 245 CLR 1, 136 [327] (Hayne J). If, as Hayne J there suggested, legislative intention meant to Dixon J a search for an 'objective intention of the legislation as revealed by its proper construction', this might have reflected in Dixon J's turn of phrase, which frequently had intention being something *of* the statute. What mattered to Justice Dixon was 'the intention of the State legislation, ascertained by interpreting the statute', and that '[the] statute exhibits no intention', that 'the Federal statute shows an intention', or 'that the *Moratorium Act* construed ... according to its natural meaning, intends' certain things, (all emphasis added). These passages are to be found, respectively, in: *Wenn v A-G (Vic)* (1948) 77 CLR 84, 122; *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128, 141, 136; *Ex parte McLean* (1930) 43 CLR 472, 483.

‘benign’: it will be nothing more than a newly favoured justification for how things have for some time already been done.

Ekins and Goldsworthy appear to argue that intentionalism is the only available benign theory — the only theory that *could* justify, and not delegitimise, prevailing interpretive practices — and that the Court’s textualism is necessarily malignant.⁹⁰ Given the infamously malignant nature of American textualism, it is worth considering whether Ekins and Goldsworthy are right. When we do consider the nature of the Court’s textualism, however, we see that it is not malignant, or so I will argue here.

1 A necessary normative difference between Intentionalism and Textualism?

While the dispute between textualists and intentionalists became spectacularly heated in America and Europe around the end of the 20th century, in more recent times the debate has cooled considerably. The reason for this seems not to be that either textualists or intentionalists within the academy have abandoned their positions, but rather that there has been a realisation that there is some essential similarity between what the theories might require of judges in practice. With the benefit of this new perspective, commentators have suggested that, no matter how real and total either theory’s victory over the other could turn out to be, an intentionalist victory might be as ‘[p]yrrhic’⁹¹ as a textualist victory might be ‘vacuous’.⁹² The thinking behind this is that, as we saw earlier, so long as a judge is drawing implicatures from the text as it presents in its context (a practice that is universally endorsed by textualist and intentionalist judges and academics), the judge will necessarily be interpreting the meaning of the statute to be its apparently intended meaning. If both textualism and intentionalism require a judge to institute the statute’s apparently intended meaning, two ‘square-one’ questions are begged: firstly, is there a *necessary* difference between the theories in terms of what they require the judge to actually interpret as being the law of the statute? And, if not, is there nonetheless a *possible* difference between the theories in that same respect?

In answer to the first question, it seems that there is no *necessary* difference.⁹³ In Ekins and Goldsworthy’s article it was suggested that the indispensability of subjective legislative intentions arises because they provide the only possible justification for a list of well-established interpretive practices: the invocation of statutory ‘purposes’, the drawing of implied meanings through an awareness of context, the observance of references to legislative intention within statutes, the use of extrinsic materials such as second-reading speeches, and so on.⁹⁴ Here Ekins and Goldsworthy are on to something, albeit it is only that: because all

90 Ekins and Goldsworthy, above n 8, 43.

91 Neil Duxbury, *Elements of Legislation* (Cambridge University Press, 2012) 101.

92 Marmor, above n 5, 129.

93 See Hayne, above n 50, 275.

94 Ekins and Goldsworthy, above n 8, 51–8.

of these practices take for granted that the statute communicates the intentions of the legislature, a *necessary condition* for there being any sense in the judge's engaging in those practices is that the judge takes for granted that the statute communicates the intentions of the legislature. But if *that* is the condition that needs to be met, no reason can be given as to why the condition could *only* be met where the judge accepts that the statutory language communicates real subjective intentions of legislators. For, as we have seen, a judge may attribute a fictional mind to the legislature and, from there, go on to interpret the statute as though it communicates the intentions of the legislature without having accepted intentionalist theory.

It may seem that one of the aforementioned practices, the use of extrinsic materials, cannot be so easily reconciled with textualist theory, at least where the extrinsic materials are authored by legislators. For example, where a Minister delivers a second reading speech in Parliament stating her intentions for the Bill under consideration, and where a judge later takes account of the Minister's speech when interpreting the statute that became of the Bill, that judge will inescapably have allowed the subjective intentions of at least one legislator to influence the statute's law. But as others have argued in the United States, the use of such extrinsic material does not entail intentionalism, nor is it incompatible with textualism. It does not entail intentionalism because to know and effect the subjective intentions of the extrinsic material's particular author is not to achieve the feat of an intentionalist interpretation, which is to know or effect the intentions of the legislature as a whole.⁹⁵ It is not incompatible with textualism because, to the extent that a judge does take the parochial intentions of the extrinsic material's author to represent the broader 'legislative intention', in doing so the judge might have recognised the real subjective intentions of an individual (the extrinsic material's author) and then attributed those intentions to a hypothetical legislature with a human-like mind.⁹⁶ The reasons a judge may have for synthesising objective and subjective intentions in this way have been addressed elsewhere and are a legitimate subject for debate.⁹⁷ The clear possibility of this synthesis, however, suffices to ground the modest claim I make here, which is that it is not a contradiction in terms to say that a textualist judge may rely upon extrinsic materials.

95 Unless of course the intentions of the extrinsic material's author can reasonably be expected to represent the intentions of the legislature as a whole. Such an expectation generally cannot be reasonably held, however, for the kind of reasons given in pt II(A)(3) above. For an account of how the intentions expressed in extrinsic materials can inform non-intentionalist statutory interpretation, see Victoria Nourse, 'A Decision Theory of Statutory Interpretation: Legislative History by the Rules' (2012) 122 *Yale Law Journal* 70.

96 Only this use of the intentional stance, in my view, could account for the occasions that committed textualists have drawn on extrinsic materials: see, eg, *Green v Bock Laundry Machine Co*, 490 US 504, 527 (1989) (Scalia J); see also James J Brudney, 'Confirmatory Legislative History' (2011) 76 *Brooklyn Law Review* 901.

97 See Nourse, above n 95.

2 A possible normative difference between intentionalism and the Court's textualism?

Even if there is no *necessary* difference between the interpretive outcomes required by textualism and intentionalism, it has been amply demonstrated in the United States that there is a *possible* difference. The reason for this is that textualism's factual and normative claims are compatible with certain interpretive principles that intentionalism's factual and normative claims are relatively less compatible with. Though not required by textualism's factual and normative claims, the interpretive principles in question can therefore come as 'add-ons' to textualist theory. Famously, these 'add-on' principles reflect one side to a '*political controversy*'.⁹⁸ They support 'on moral-political grounds' the view that courts should not strongly cooperate with the legislature in implementing its plans, and should instead 'deal with the legislature at arm's length'.⁹⁹ Between the opinions of Scalia, Manning and Easterbrook, it can be seen that three main 'add-on' textualist principles have developed in the US. The first is that extrinsic materials are generally avoided.¹⁰⁰ The second is that language is interpreted more literally than otherwise.¹⁰¹ And the third is that the 'policy' (i.e. overarching purpose) of the statute is given less weight.¹⁰² I now want to explain how none of these principles have accompanied the High Court's rejection of intentionalism in recent decades. The inference to be drawn is that the Court's turn to textualism is not of the malignant, anti-democratic variety as Ekins and Goldsworthy seem to fear. Quite the contrary. Perhaps with the exception of the Court's strong-willed stance against the exclusion of natural justice,¹⁰³ the Court has become more intensely agential and cooperative toward the legislature over the last three decades — that is, over the very period that intentionalism's veracity has been denied.

With respect to extrinsic materials, the last three decades have seen the High Court significantly widen the permissible usages of legislative history. The Court's post-war starting point was established in *Bitumen & Oil Refineries* where it reaffirmed the 'rigid rules of English law' that allowed reference to parliamentary materials in determining the broader mischief of an Act, but (rather

98 Joseph Raz, *Between Authority and Interpretation* (Oxford University Press, 2009), 265 (emphasis added).

99 Marmor, above n 5, 129.

100 See generally Justice Frank H Easterbrook, 'Text, History and Structure in Statutory Interpretation' (1994) 17 *Harvard Journal of Law and Public Policy* 61; Scalia, above n 7, 29–37.

101 Scalia, above n 7, 23–5; see generally Justice Frank H Easterbrook, 'The Role of Original Intent in Statutory Construction' (1988) 11 *Harvard Journal of Law and Public Policy* 59; Manning, 'Textualism and Legislative Intent' above n 6, 439–41.

102 John F Manning, 'What Divides Textualists from Purposivists?' (2006) 106 *Columbia Law Review* 70, 91–2.

103 See, eg, *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 ('*Miah*'); *Saeed* (2010) 241 CLR 252. Although, this lack of cooperation cannot reasonably be attributed to the Court's textualist thesis, for these cases have involved departures from the text that go against the ideals of textualism as much as they do those of intentionalism. On the Court's attempted justification for interpretive practices that do depart from the meaning of the text, see pt III below.

unhelpfully) not to resolve the meaning of specific provisions.¹⁰⁴ Notwithstanding Murphy J's occasional dissents against this approach,¹⁰⁵ members of the High Court considered the British inherited sanctions to be 'firmly established' as late as 1977.¹⁰⁶ The high watermark for the Court's disuse of parliamentary materials was that year in *Charles Moore*, where members of the Court claimed parliamentary debates and drafting history to never be admissible.¹⁰⁷ After the introduction of s 15AB of the *Acts Interpretation Act 1901* (Cth) in 1984, and state equivalents, a groundswell of federal and state Supreme Court decisions utilised legislative history.¹⁰⁸ Four judges in the 1997 case of *CIC Insurance* declared 'the modern approach to statutory interpretation' to involve a consideration of the language's context 'in the first instance', whereby context is meant 'in its widest sense to include such things as ... the mischief which, by legitimate means such as [consideration of law reform body reports], one may discern the statute was intended to remedy'.¹⁰⁹

Since extrinsic materials were declared part of that grand term, context, the old restraints fell away, and all manners of legislative history 'have been routinely examined'.¹¹⁰ On occasions since *Cai*, the courts have been willing to refer to legislative history in determining not only the mischief of the statute, but the meaning of specific provisions.¹¹¹ The French Court has reaffirmed on multiple occasions that 'context' is referable to extrinsic materials.¹¹²

As for textualism's second 'add-on' principle — that interpretations should lean toward the literal — that too was rejected by the Court at the turn of the 21st century. The above cited 'modern approach to statutory interpretation' signified the High Court's emphatic departure from literalism in exchange for an approach that has context as a universal ingredient in statutory construction.¹¹³ This transition has been lengthily detailed elsewhere,¹¹⁴ and it too has endured

104 *Bitumen* (1955) 92 CLR 200, 211–12, approving *Assam Railways and Trading Co Ltd v Commissioners of Inland Revenue* (1935) AC 445. But see the earlier judgment of Latham CJ in *South Australia v Commonwealth* (1942) 65 CLR 373, 410.

105 *Dillingham Constructions Pty Ltd v Steel Mains Pty Ltd* (1975) 132 CLR 323, 332; *Charles Moore* (1977) 139 CLR 449, 479–81.

106 *Charles Moore* (1977) 139 CLR 449, 462 (Gibbs J).

107 *Ibid* 457 (Barwick CJ), 461–2 (Gibbs J).

108 See D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (Lexis Nexis, 6th ed, 2006), 72–3.

109 *CIC Insurance* (1997) 187 CLR 384, 408 (citations omitted).

110 *Byrnes* (2011) 243 CLR 253, 283–4 [97] (Heydon and Crennan JJ). See also Jacinta Dharmananda, 'Outside the Text: Inside the Use of Extrinsic Materials in Statutory Interpretation' (2014) 42 *Federal Law Review* 333. For recent examples of the use of extrinsic materials to aid construction, see *Maloney v The Queen* (2013) 252 CLR 168; *Lloyd's* (2012) 248 CLR 378, 399–401 [55]–[61], 406–7 [71]–[73] (Crennan and Bell JJ); *Baini v The Queen* (2012) 246 CLR 469, 482 [34]–[35] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Momicilovic* (2011) 245 CLR 1, 166 [418], 171 [430], 178–9 [446] (Heydon J), 209 [541], 210 [545] (Crennan and Kiefel JJ).

111 See generally *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642.

112 *Lacey* (2011) 242 CLR 573, 592 [44]; *Consolidated Media* (2012) 250 CLR 503, 519 [39]; *Thiess* (2014) 250 CLR 664, 671 [22]; *Lee* (2013) 251 CLR 196, 225–6 [45].

113 See *Cooper Brookes* (1981) 147 CLR 297, 321 (Mason and Wilson JJ).

114 See Chief Justice J J Spigelman, 'Statutory Interpretation: Identifying the Linguistic Register' (1999) 4(1) *Newcastle Law Review* 1; D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014).

the Gleeson and French Court's textualism. As Gleeson CJ held in *Wilson*, the Court's rejection of intentionalism:

is not to say that the [interpretive] exercise is formal and literalistic. On the contrary, common law and statutory principles of construction frequently demand consideration of background, purpose and object, surrounding circumstances, and other matters which may throw light on the meaning of unclear language.¹¹⁵

A hefty collection of cases have since affirmed that textualism has not disturbed the 'modern approach' declared in *CIC Insurance*.¹¹⁶

The final 'add-on' textualist principle involves a wilful blindness to the mischief or policy of the statute. It barely needs to be said that the French Court, far from entertaining this principle, has been a champion of purposive constructions.¹¹⁷ Not that Australian judges have a profusion of choice in the matter, given that s 15AA of the *Acts Interpretation Act 1901* (Cth) and that provision's State analogues require that attention be paid to the purposes of statutes.

Having seen that the Court's textualism has not reduced its cooperation with the legislature at the three points where such a reduction might have occurred, we are left to conclude that the Court's textualism goes no further than its core factual and normative claims. We have also seen in pt II(B)(1) above that textualism is able to provide sound justifications for the various canons and mores of interpretation that intentionalists had claimed were incapable of justification other than by resort to intentionalism. We might then return to our original question with a renewed scepticism: what does the Court's textualism matter for interpretive outcomes? At this point, I think only the weakest in Ekins and Goldsworthy's arsenal of answers remains tenable. It is that, simply by conceptualising the object of interpretation as being an objective construct, rather than as commands actually intentionally made by legislators, the very psychology of the judge might be altered — they will lose sight of their limited role as the mere applicators of statutory law, and so will 'be tempted to change the principles [of interpretation]' to exercise increasing dominion over the statute's legal consequences.¹¹⁸

We can conclude this section with a few remarks that bear on that hypothesis. The first is that, if we had accepted Ekins and Goldsworthy's assertion that

115 *Wilson* (2002) 213 CLR 401, 418–19 [9] (citations omitted).

116 In a single passage Gageler and Keane JJ denied that the 'constructional task' is 'to divine unexpressed legislative intention', and affirmed that context is relevant from start to finish such that it may trump literal meaning: *Taylor* (2014) 253 CLR 531, 556 [65]; In *Thiess*, the Court warned not "to make a fortress out of the dictionary": at 672, quoting *Cabell v Markham* 148 F 2d 737, 739 (2d Cir, 1945). The Court also approved a passage from *Consolidated Media*, reiterating that '[t]he statutory text must be considered in its context': at 671, quoting *Consolidated Media* (2012) 250 CLR 503, 519 [39]; *Monis* (2013) 249 CLR 92, 202 [309]; *Commissioner of Taxation v Unit Trend Services Pty Ltd* (2013) 250 CLR 523, 539 [47]; *Travelx Ltd v Commissioner of Taxation* (2010) 241 CLR 510, 531 [82]; *Momcilovic* (2011) 245 CLR 1, 133 [315] (Hayne J), 176 [442] (Heydon J).

117 See *Lacey* (2011) 242 CLR 573, 592 [44], where the Court reconciled the validity of purposive constructions with its textualism ('[t]he purpose of a statute is not something which exists outside the statute') and reaffirmed that statutory interpretation 'will properly involve the identification of a statutory purpose'. In *Thiess*, the Court further affirmed that observance of the statute's overall purpose is a 'general systemic principle' that 'is integral to contextual construction': at 664 [23]. See also *Taylor* (2014) 253 CLR 531, especially at 557 [66] (Gageler and Keane JJ).

118 Ekins and Goldsworthy, above n 8, 43–5.

intentionalism reigned throughout the 20th century, we would also accept that intentionalism was a bystander to ‘dramatic shifts’¹¹⁹ and ‘great windchange[s]’¹²⁰ in the courts’ interpretive practices, and was unable to draw the courts out of their literalism for the better part of the century. On that account, intentionalism has proven anything but a strong check on the interpretive practices of judges.¹²¹ But because we have not accepted Ekins and Goldsworthy’s historical account, we ought to leave that be.

The second remark, then, is that the present Court’s textualist concept of legislative intention remains, first and foremost, a device that, on the one hand, confines judges to their constitutional role of effecting laws whose contents have been determined in the legislature, and that, on the other hand, reserves for Parliament the power to pass statutes whose impacts upon the law will be as predictable as the words of the statute are clear, and as potentially varied as the terms of the constitution will permit. What assurances do we have for this? One is that, for as long as it has been in use, the concept of ‘legislative intention’ has been considered to have this significance,¹²² and members of the French Court have consistently indicated that, in rejecting intentionalism, they have not jumped ship to a different concept that serves a different constitutional function, but rather that they continue to rely on the same concept of legislative intention which only now is ‘better understood’.¹²³ A second assurance is that the constitutional significance of legislative intention has been affirmed by the French and Gleeson Courts themselves on myriad occasions.¹²⁴ And then, perhaps the final assurance is that those principles of interpretation whose application always have, and to this day still are,¹²⁵ thought to yield the constitutionally significant ‘legislative intention’ are themselves well defined, are themselves considered sacrosanct, and, if applied, will themselves guarantee that the meaning of the statute will depend primarily on something that is beyond the control of the judge, and within the control of politicians: the language used in the statute.¹²⁶ Of course the principles that I have in mind here are those requiring ‘examination of the statutory text, its language, context and structure ... identification of the purposes suggested by that text; and ... the use of the statutory history’.¹²⁷

119 Evan Bell, ‘Judicial Perspectives on Statutory Interpretation’ (2013) 39 *Commonwealth Law Bulletin* 245, 249, citing Dyson, above n 66.

120 Paul Finn, ‘Statutes and the Common Law’ (1992) 22 *University of Western Australia Law Review* 7, 10. See also Dyson, above n 66.

121 The point has often been made that a non-objective concept of legislative intention may be especially open to abuse, for it allows the courts to put their own words into the legislature’s mouth, as it were: Landis, above n 24, 891; Scalia, above n 7, 21. See also Spigelman, ‘The Intolerable Wrestle’, above n 64, 826, quoted in *Lloyd’s* (2012) 248 CLR 378, 390 [26] (French CJ and Hayne J).

122 Murray Gleeson, ‘The Meaning of Legislation: Context, Purpose and Respect for Fundamental Rights’ (2009) 20 *Public Law Review* 26, 27.

123 *Plaintiff M47* (2012) 251 CLR 1, 60 [118] (Gummow J). See also each of the pinpoint references in footnote 62.

124 In *Cai* (2009) 239 CLR 446, 455–6 [28] (‘judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government’). The High Court has affirmed this passage on many occasions.

125 *Lacey* (2011) 242 CLR 573, 592 [44]; *Momcilovic* (2011) 245 CLR 1, 85 [146] (Gummow J).

126 See *Yuill* (1991) 172 CLR 319, 322 (Brennan J).

127 *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193, 241 [168] (Kirby J) (citations omitted).

The innate fortitude of these principles should not be underestimated. For all our talk of theory, ‘we often have more confidence in a particular form or practice, rooted in experience, than in an abstract statement of why the form exists’.¹²⁸ If the relatively atheoretical history of statutory interpretation in Australia shows anything, it is that our interpretive practices do draw much of their strength from the bottom up.¹²⁹

III A FORWARD-LOOKING CONCLUSION: ZHENG V CAI AND THE RAZIAN IDEAL

The subject of this article has been the way in which courts derive legal meaning from the language of statutes, and the way in which this central and most fundamentally important interpretive practice has and ought to be described and justified. However, while textualism and intentionalism are prime candidates for the description and justification of that practice, it is important to realise that Australian courts have always engaged in *other* interpretive practices — that is, practices that involve the judge declaring the statute to have meanings that on no view could have been communicated by the language of the statute — that neither textualism or intentionalism can reasonably aspire to describe or justify. Some of these ‘other’ practices (which we can aptly call ‘innovative practices’) do not necessarily *offend* textualism’s or intentionalism’s normative claims: for example, the courts have ‘long been accepted’ to ‘[engage] in a kind of interstitial law-making ... function’ in cases where the language of the statute provides no answer to a question of interpretation, and where the judge is therefore called upon to invent an aspect of the statute’s meaning in order to answer the question of law at hand.¹³⁰

Other innovative interpretive practices, however, do offend the normative claims of the communicative theories because they do lead the judge to depart from meanings communicated by the statute’s language. In a well-known bestiary of the interpretive methods of Australian judges, Paul Finn characterised these innovative practices as subjecting the statute ‘presumptively, to common law doctrines which serve either to protect individual rights, interests, etc ... or to prevent unfairness in dealings’.¹³¹ One example of such a practice lies in the way that Australian courts will interpret legislation not to authorise decisions adversely affecting the rights and interests of individuals in cases where those decisions fail to meet sophisticated conditions that are supplied not by the language of the

128 Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community*, (University of California Press, 1992) 454.

129 In that regard, theorists ought to feel a sense of calm reading the black letters of Pearce and Geddes, *Statutory Interpretation in Australia*, above n 114.

130 Chief Justice Robert French, ‘Bending Words: The Fine Art of Interpretation’ (Speech delivered at The University of Western Australia, 20 March 2014), 9 <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj20Mar14.pdf>>. The effect is that judges serve as ‘finishers, refiners and polishers of legislation’: Bell, above n 119, 279 (citations omitted).

131 Finn, above n 120, 24 (citations omitted).

statute, or by anything in the statute, but by the body of common law known as administrative law.¹³² Another possible example consists in the principle of legality — a common law principle that requires a judge to choose from the available constructions of a statute that construction which best minimises or avoids interference with fundamental rights.¹³³

Because these practices are firmly established and have continued in our courts at least since federation,¹³⁴ the challenge for any theory that seeks to describe and explain, as opposed to delegitimise and alter, the established ways in which the courts interpret statutes is to accommodate these more innovative practices. Because attempts to accommodate innovative practices into communicative theory

132 For a case that is representative of how the principles of administrative law routinely lead the judge to depart from the meaning communicated by the statutory text, consider *Kioa v West* (1985) 159 CLR 550 ('*Kioa*'). In that case, it was accepted that the minister did, as a matter of fact, *order the deportation of a person who is a prohibited immigrant*. It was moreover accepted that this was done pursuant to a statutory provision that, at the time, provided that '[t]he Minister may order the deportation of a person who is a prohibited immigrant': *Migration Act 1958* (Cth) s 18, later amended by *Migration Legislation Amendment Act 1989* (Cth). And yet, it was held that the provision in question did not authorise the Minister to do what they did. Although the relevant statute made no mention of a requirement for there to be a fair hearing before a deportation order was to be made, the Court held that for the Minister to be authorised by the statute to make the order, they first had to provide a fair hearing to the individual who was to be deported. While some judges have sought to justify this interpretive practice as reflecting the legislative intention, judges have also recognised the 'artificiality' of that justification, and that the practice 'more realistically' involves construction of the statute according to common law principles, rather than obedience to linguistically expressed meaning: Justice John Basten, 'The Supervisory Jurisdiction of the Supreme Courts' (2011) 85 *Australian Law Journal* 273, 288. For similar opinions, see Matthew Groves, 'Exclusion of the Rules of Natural Justice' (2013) 39 *Monash University Law Review* 285, 290–1; *Kioa* (1985) 159 CLR 550, 584 (Mason J); Paul Craig, 'Ultra Vires and the Foundations of Judicial Review' (1998) 57 *Cambridge Law Journal* 63. See also Dale Smith, 'Is the High Court Mistaken about the Aim of Statutory Interpretation?' (2016) 44 *Federal Law Review* 227, where the author explains how the linguistic meaning of statutory language fails to account for the interpretive outcomes that judges routinely reach through the application of other legal norms.

133 For the view that the principle of legality is judge made, essentially normative and exists independently of the particular meanings of particular statutes, see generally Chief Justice J J Spigelman, 'Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769; Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449; Dan Meagher, 'The Principle of Legality as Clear Statement Rule: Significance and Problems' (2014) 36 *Sydney Law Review* 413.

134 For the history of the principle of legality, which in Australia began at least as early as the case of *Potter v Minahan* (1908) 7 CLR 277, 303–5 (O'Connor J), see generally Brendan Lim, 'The Normativity of the Principle of Legality' (2013) 37 *Melbourne University Law Review* 372. As for judicial review of administrative action, the doctrine of procedural fairness especially has had a long and venerable history. The doctrine is thoroughly ancient, and was thought by older British courts to be something of a God-given natural law: de Smith, Harry Woolf and Jeffrey Jowell, *Judicial Review of Administrative Action*, (Street & Maxwell, 5th ed, 1995), 378–9, cited by Callinan J in *Re Minister for Immigration and Multicultural Affairs and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 45 [140]; *R v Chancellor, Masters and Scholars of the University of Cambridge* (1723) 1 Str 557, 567; 93 ER 698, 704. The doctrine would span the jurisprudence of the High Court, almost from year one: see Ian Holloway, *Natural Justice and the High Court of Australia: A Study in Common Law Constitutionalism* (Ashgate, 2002). Today, the doctrine is said to be 'deeply embedded in our legal system' and 'indispensable to justice': see respectively *Miah* (2001) 206 CLR 57, 116–17 [192] (Kirby J) (citations omitted) and Chief Justice Robert S French, 'Procedural Fairness - Indispensable to Justice?' (Speech delivered at the Sir Anthony Mason Lecture, The University of Melbourne, 7 October 2010) <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj07oct10.pdf>>.

— and there have been many such attempts — have inevitably been impugned,¹³⁵ the theorist seems to be left with limited options. One option ('option one') would be to hold the courts to their traditionally expressed standards, and to simply accept that the courts engage in practices that are illegitimate by those standards: that is to say, we could accept that '[t]he fundamental object of statutory construction in every case is to ascertain the legislative intention'¹³⁶ while also accepting that it is not in every case that judges do seek to ascertain and observe the legislative intention. A second option — which would avoid the embarrassment of option one, but would require an acceptance that the communicated meaning of the statute should not always be the object of interpretation — would be to view the ultimate justifications for the courts' interpretive practices as being bifurcated: sometimes the courts are most justified in obeying the statute's communicated meaning for reasons of democracy and constitutional principle, but other times they are most justified in disobeying the statute's communicated meaning due to the moral value of individuals, their rights and their liberties. But then there is a third and final option, and that is to search for some single, but then necessarily broad normative principle that would serve as a sufficient justification for both the courts' innovative and non-innovative interpretive practices.

In *Cai*, the Court appears to have hazarded the third of these options. In that case, five justices held that 'the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy'.¹³⁷ This statement has now been marshalled by members of the High Court to justify both the principle of legality,¹³⁸ and the statutory application of the doctrine of procedural fairness.¹³⁹ If the passage is to be taken seriously — and it has now been reaffirmed

135 I can think of three such attempts. One such attempt was made by Brennan J who sought to explain the statutory application of the procedural fairness doctrine on the grounds that it was demanded by the intention of the legislature, an approach which the High Court, ultimately, has disfavoured. See the justifications for the practice made by reference to the common law in: *Plaintiff S10* (2012) 246 CLR 636, 666 [97]; *CPCF* (2015) 255 CLR 514, 622 [367]; see also Groves, above n 132, 287–93. Another such attempt was made by the so called British 'ultra vires theorists' who sought to justify all judicial review of statutory-based decision-making by reference to intentions conveyed by the statutory text, but who were eventually persuaded to relinquish that position, and exchange it for the so called 'modified *ultra vires* doctrine' which recognises 'the reality that the extension of judicial review was a process in which judicial creativity and ingenuity played a prominent role': Christopher Forsyth and Mark Elliott, 'The Legitimacy of Judicial Review' [2003] *Public Law* 286, 287. Finally, a third such attempt is to be found in the way that Australian judges sought to justify the principle of legality by reference to legislative intentions, but gradually have found themselves needing to depart from that justification, or else redefine the meaning of legislative intention: Ekins and Goldsworthy, above, n 8, 44; see generally Lim, above n 134.

136 *Cooper Brookes* (1981) 147 CLR 297, 320.

137 *Cai* (2009) 239 CLR 446, 455–6 (citations omitted).

138 *Lacey* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Kiefel, Bell and Crennan JJ).

139 *Plaintiff S10* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ).

so many times¹⁴⁰ and developed to the extent¹⁴¹ that I think it must — the criterion of validity for any interpretive practice must be that the practice is accepted by the other arms of government in the system of representative democracy.

From the standpoint of legal philosophy, that, very strikingly, would constitute a move towards the theory of legal interpretation and authority propounded by Joseph Raz. For many years, Raz has claimed that while intentionalism, as we have defined it, should be rejected, a much more minimal subjective intention held on the part of legislators may justify the full suite of a judiciary's interpretive practices, no matter how variegated be those practices or the moral or political justifications behind them. This minimal intention is just 'that the text of the bill on which [the legislator] is voting will — when understood as such texts, when promulgated in the circumstances in which this one is promulgated, are understood in the legal culture of this country — be law'.¹⁴² As Raz explains, if this really is the ultimate source of validity for the courts' interpretive practices, then 'it does not matter which way law-making actions will be interpreted', per se. What instead matters is that 'law makers know the ways in which their law is interpreted' so that legislators could, if they wanted to, reasonably predict the legal effects that are to flow from the laws that they vote into existence.¹⁴³ Of course, what also matters on this account is that the legislators broadly *accept* the way in which statutes are interpreted by the courts, for an element of Raz's minimal intention is the intention that the statute *be* subject to the prevailing norms of interpretation.

To me, it is not the rejection of intentionalism but the adoption of this version of the Razian ideal — a version that apparently takes the ideal to be true also of the executive arm of government — which is the most noteworthy aspect of the court's statements of statutory interpretive theory. It is noteworthy for the promise that it holds for the vindication of the court's innovative interpretive practices, which for a century now have gone unjustified for fear of suffering the embarrassment of what we earlier described as 'option one'. The statement in *Cai* is also noteworthy, however, for the questions that it begs and that would need to be answered convincingly before the theory could be accepted as legitimate. I wish to end with some of these questions in the hope of provoking thought on this very important issue.

140 *Dickson v The Queen* (2010) 241 CLR 491, 507 [32]; *Lacey* (2011) 242 CLR 573, 592 [43]; *Momcilovic* (2011) 245 CLR 1, 85 [146], 95–6 [183] (Gummow J), 207 [534], 210 [545], 235 [638] (Crennan and Kiefel JJ); *Plaintiff S10* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ).

141 For the nascent expression of interest in just how the Razian ideal works, see *Momcilovic* (2011) 245 CLR 1, 207 [534], 235 [638] (Crennan and Kiefel JJ); *Plaintiff S10* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ). Also of interest is the development of what appears to be a cousin of the Razian proposition which places primacy on acceptance of the principles by the legislature, rather than by "all arms of government": *Lacey* (2011) 242 CLR 573, 592 [43], quoting *Cai* (2009) 239 CLR 446, 456; *Momcilovic* (2011) 245 CLR 1, 44–5 [38], 74 [111] (French CJ); *Lee* (2013) 251 CLR 196, 225–6 [45] (French CJ); *Lloyd's* (2012) 248 CLR 378, 389–90 [25] (French CJ and Hayne J).

142 Raz, above n 98, 284 (citations omitted).

143 *Ibid* 120–1.

My questions are: why should an acceptance of an interpretive principle by the executive arm of government contribute to the legitimacy of that interpretive principle? Does it offend the separation of powers to pay heed to the executive's opinion in this way? Even if the Razian ideal as expressed in *Cai* is refined such that it is only the legislature's acceptance of an interpretive principle that counts toward the principle's validity, how can we be confident that legislators do *in fact* collectively and subjectively accept a given interpretive principle? Is it desirable to suppose that the legal validity of an interpretive principle is entirely divorced from its more immediate normative justification (to suppose, for example, that the obviously moral motivations for the principle of legality are to have no bearing on its being a valid principle)? Are there principles of interpretation so repugnant to the *Constitution* that their acceptance by all arms of government could never render them legitimate? And if there are such principles, can we ever say that acceptance by the arms of government is the *ultimate* criterion of validity for the principles of statutory interpretation?