How to Understand Legislatures: A Comment on Boudreau, Lupia, McCubbins, and Rodriguez

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Much has been written about legal interpretation, and I have serious disagreements with most of it. So it is quite refreshing to read an article on the topic that, from my perspective, gets the topic right from start to finish. As an added bonus, two of the authors are my former colleagues. My enthusiasm for the approach taken by Boudreau, Lupia, McCubbins, and Rodriguez (hereinafter BLMR) has not proven fatal to my task of commenting on the article.[1] I am not reduced to saying "Right on" and then signing off. There are issues to be flagged. Nonetheless, so much of what BLMR have to say is just plain good sense on a topic that is sorely in need of it that my remarks will be mainly promptings to take their basic approach further than they have done.

BLMR take as their axioms that (1) statutes are communications from the legislature, and (2) statutes communicate commands that are constitutionally privileged—commands that, given our constitutional structure, others are obligated to obey. Both of those axioms are correct.[2]

BLMR also argue that, like other communications from humans to each other, statutes "compress" the meaning of their commands into signals—

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1. Cheryl Boudreau, Arthur Lupia, Mathew D. McCubbins & Daniel B. Rodriguez, *What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957 (2007).

2. *Id.* at 958.

the statutory text—and the purpose of interpretation is to decode those signals, or, as they put it, "expand" the signals into their intended meaning.[3] Again, if per axiom (1), statutes are communications, and per axiom (2), interpreters are obligated to obey the commands communicated, then BLMR's model of compression and expansion of intended meaning appears to follow. The task of the interpreter, be she a court or one directly regulated by the statute, is to decode the statutory text—the signal—to ascertain its intended meaning.

We humans do this all the time. Despite the many ways in which we can misunderstand one another, we rather frequently successfully decode signals into their intended meanings. We do so by looking at, among other things, the standard and nonstandard conventional meanings of marks or sounds; what we know about the speaker or author's linguistic skill—is she a native English speaker, and is she a competent one or instead one prone to malapropisms, slips of the tongue, et cetera; what we know about the speaker's purposes in uttering the communication; and so on. Though we are fallible, were we not quite good at such decodings, human life would look quite different and surely much worse than it does.

The main focus of BLMR's article is on whether and which parts of a statute's legislative history will be reliable evidence for decoding its meaning—for expanding the signal that is the statutory text in a way that matches the meaning that was compressed into it—a fancy way of describing discovering the statute's intended meaning. BLMR describe the process by which bills work their way through the House of Representatives and ultimately get passed, as well as the various ways that key operatives within the process deal with statements by various legislators regarding the statute's intended meaning.[4] Some of these statements are reliable evidence of intended meaning, whereas others are not. One purpose of BLMR's article is to point interpreters toward those aspects of legislative history that are reliable guides to legislative intent and away from those that are unreliable.

After they discuss reliable and unreliable evidence of statutory meaning, BLMR conclude with a critique of competing theories of statutory interpretation—textualist, purposivist, Dworkinian, constructivist, dynamic, and others.[5] BLMR find them all wanting, given that unlike BLMR's intentionalism, these theories do not seek a statutory meaning that matches the intended meaning that was compressed into the signal and therefore fail to respect the legislative supremacy established by the

3. *Id.* at 958–59, 971–72.
4. *Id.* at 969–70, 979–81.
5. *Id.* at 981–91.

Constitution. I agree completely with BLMR's criticisms of these theories. Indeed, I have made the same criticisms elsewhere.[6]

There are some issues regarding statutory interpretation that intentionalists like BLMR and me need to grapple with, but which BLMR's piece does not discuss. Intentionalism in statutory interpretation is typically attacked on two bases: evidentiary—that divining the intended meaning of a multimember and perhaps bicameral legislature is beyond the competence of interpreters; and conceptual—that legislative intended meaning is nonexistent. BLMR's article is directed at the evidentiary critique. Their contention is that we can decode legislation into its intended meaning, and that consulting legislative history, if done with their sophisticated understanding of the process and the politics, can be helpful in decoding correctly. They say almost nothing about the conceptual attack, however.

So what is the conceptual problem with their—and my—intentionalist theory of statutory interpretation? Why do opponents deny the existence of any intended meaning that statutes are capable of encoding?

Quite simply, the problem is that of the multiplicity of legislators. Critics of intentionalism argue that however plausible intentionalism would be were the legislature a single individual, Lex, under our Constitution, the legislature is 435 representatives, 100 senators, and, on some theories, the President. Moreover, these 536 individuals are divided among three institutions—the House of Representatives, the Senate, and the Presidency. The single ruler, Lex, just like your spouse when listing your assigned chores, will have intended meanings compressed into his or her code, meanings that you are obligated to replicate in your expansion of the code. However, it is not the case that the Constitution's Lex—its three branches comprised of 536 individual minds—has *an* intended meaning compressed into its code. Statutory interpretation, say the critics, must thus be something other than recovering *the* intended meaning of our Lex, for there is no such thing.

That is the attack. And although I believe it is incorrect, I believe that it must be confronted.

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6. *See, e.g.*, Larry Alexander, *All or Nothing at All? The Intentions of Authorities and the Authority of Intentions*, *in* LAW AND INTERPRETATION 357, 368–69, 393, 395 (Andrei Marmor ed., 1995); Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation is an Impossibility*, 41 SAN DIEGO L. REV. 967 (2004); Larry Alexander, *Practical Reason and Statutory Interpretation*, 12 LAW & PHIL. 319, 320 (1993).

BLMR's piece can be read as attempt to respond to this attack. After all, they are dealing with statements regarding statutory meaning that are made by various legislators at various points in the legislative process, and they are pointing out which statements by whom are reliable.

But reliable in what sense? A legislator's statement about statutory meaning can be reliable *evidence* of that meaning, or it can be reliable because it is *constitutive* of that meaning. As I read BLMR, they are discussing reliability in the first, evidentiary sense. But the conceptual critique of intentionalism goes to how the intended meaning of individual legislators can or cannot *constitute* legislative intent.

In one place BLMR state that "judges should not suppose that legislators necessarily have an intent in the ordinary sense in which we view individuals as having intentions . . . ."[7] That statement suggested to me that perhaps BLMR were going to address the conceptual point by arguing for some kind of Searlian "we intend" that was different from the mere aggregation of individual intended meanings.[8] But immediately after that statement the article reverts to discussing the ordinary way we impute intentions to individual humans. They then state:

> In the context of statutes, the intentional stance requires that judges treat legislators as rational actors with beliefs, desires, and intentions and then interpret their statements in this light. In our reading, the intentional stance recognizes that legislators have the ability to delegate to select colleagues, as well as the ability to communicate a statute's meaning on behalf of the group with constitutionally validated authority.[9]

Note the reference to communicating about a statute's meaning on behalf of other legislators. Such a communication could not be constitutive of the statute's meaning, nor could the spokesperson's intended meaning be so, for then the communication would not be *about* that meaning.

Perhaps BLMR mean to suggest that such key players have the delegated authority to have *their* intended meanings constitute the legislature's intended meaning. In such a case, we would drop the question of credibility because credibility would be an issue only if the spokesperson were discussing a meaning not constituted by his statements. He could, I suppose, be prevaricating about his own intended meaning, but what would be the point of such a self-defeating maneuver?

If we want to figure out how the intended meanings of various legislators constitute *the* intended meaning that statutory interpretation should strive to recover, then we must deal head on with the conceptual problem that the multiplicity of legislators raises. Suppose, then, that we

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7. Boudreau et al., *supra* note 1, at 972.
8. JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 26 (1995).
9. Boudreau et al., *supra* note 1, at 972–73.

have a city council comprised of three members—*A*, *B*, and *C*. Suppose *A* proposes a "No dogs in restaurants" ordinance. *A* and *B* vote for it, and *C* votes against it. *A* assumed that the ordinance did not apply to guide dogs for the blind. He would not have proposed or voted for it had it excluded guide dogs from restaurants. His intended meaning was "dogs other than guide dogs are prohibited."

B, on the other hand, assumed the proposed ordinance *did* include guide dogs, and he voted for it on that assumption. His intended meaning was "all dogs are prohibited." Moreover, had the ordinance not included guide dogs, *B* would have voted against it. He does not believe the blind should be favored over those who for other reasons will forgo eating in restaurants rather than abandon their canine companions.

C, the libertarian on the council, believes restaurants should be free to set their own rules about animals and not be subject to regulation. *C* would have voted against the ordinance whether or not it applied to guide dogs.

The ordinance has been enacted by a two-to-one vote. However, the only two possible intended meanings have each been rejected by two to one. What is the ordinance's meaning? There is no reason to privilege *A*'s intended meaning merely because he proposed the ordinance; things would be no different if some citizen or group had submitted it without clarifying its application to guide dogs. And what is true of *A*'s intended meaning is true of *B*'s. There are no other intended meanings available, as including or excluding guide dogs exhausts the logical possibilities.

Perhaps BLMR have a solution at hand for this problem. Or, more likely, perhaps they believe that such situations could not occur in Congress, given the processes that bills go through before passage. Members of Congress, unlike my hypothetical city council members, will know what page each member is on and will make sure that everyone is on the same page with respect to his or her intended meaning. But notice that this does not involve credibility, but rather transparency. I leave it to others to assess the plausibility of such transparency with respect to intended meanings.

One other point that BLMR might make is that it is possible for members of Congress (*M*) to delegate to key players (*KP*) the authority to have *KP*'s intended meaning *constitute* the intended meaning of *M*. Again, doing so would not make *KP credible*, but rather would make *KP authoritative*.

All this might work to avert the conceptual problem of multiplicity *within* a house of Congress. But would it do so *between* houses of Congress? Suppose, for example, that the Democrats control the House of Representatives and the Republicans control the Senate. Suppose the House passes a bill that encodes the House's intended meaning *A*. Suppose the Senate wishes to use the same text—the same signals—to encode a different intended meaning, *B*. Which meaning—*A* or *B*—does the bill encode? And suppose the President announces—in good faith—that he is signing the bill only because he is intending meaning *C* (or *A* or *B*) through the bill's text. Does the President's meaning count?

I find nothing in BLMR's discussion that deals with the possibility that one house of Congress or the President, especially when a different political party is in control, may infuse the other house's text with a different intended meaning from the original one, without changing that text and thus avoiding a reconciliation conference. But recent presidential signing statements should alert them to this problem, which, as I have indicated, is broader than presidential last actor opportunism.

In conclusion, BLMR's approach to statutory interpretation is one that I endorse. They have pointed out the way toward solving many of the evidentiary problems connected with intended statutory meanings in multimember legislatures. The conceptual problems regarding such intended meanings remain on the agenda, however.

Again, in claiming that BLMR have not solved those conceptual problems, I am not making any criticism from which I, also an endorser of the intended meaning approach to legal interpretation, am exempt. Their conceptual problem is mine as well. Nor do so-called objective intent approaches to statutory (and constitutional) interpretation represent coherent solutions to the multiplicity of authors conceptual problem. For example, the "original public meaning" approach is not a solution because it is parasitic upon the intended meaning approach rather than an alternative to it.[10] That is, the meaning that a contemporaneous hypothetical member of the public would ascribe to a statute would depend upon what that hypothetical person believed the legislature's intended meaning to be, which would in turn depend upon what that person believed were the intended meanings of the various legislators voting "aye," which leads right back to the conceptual problem. Moreover, because a hypothetical member of the public would have to be given some base of information about the statute in addition to its text, constructing that base of information so that it is different from the information now before the present interpreter will be necessary if the hypothetical member of the

10. LARRY ALEXANDER & EMILY SHERWIN, DEMYSTIFYING LEGAL REASONING (forthcoming 2008).

public is to be different from the real interpreter. But I see no way of constructing that base of information that will not be arbitrary—especially because any member of the public will be trying to figure out, using any and all relevant evidence at his disposal, what the legislature's intended meaning is, just as the legislature will be trying to achieve an uptake in the public that matches its intended meaning.

I see no method of interpretation available to BLMR or to me that (1) accepts that the purpose of interpretation is to recover—decode—the intended meaning that has been "compressed" into the legislature's text (its "signal"), and (2) avoids the conceptual problems attendant on the multiplicity of legislators. BLMR's contribution is to provide a template for assessing the credibility of the legislative history by investigating "how bills become laws" in a Congress in which political parties are major players. But credibility of evidence is different from relevance and materiality. More work on the latter score remains to be done by all of us.

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