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Legislative Intent

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A perennial issue in the debate over legislative interpretation concerns what authority, if any, to accord to the proferred intent of the legislature. A fundamental precept of most normative theories of statutory interpretation is that the essential enterprise of the interpreter, be it a judge, an administrative agency, or any citizen potentially subject to the legislation, is to discern what the legislature intended with its enactment of a particular statutory provision (Blackstone, [1765], 1979: 59-62). Such approaches can be labelled "intentionalist" in the sense that they are concerned with implementing the intentions of the framers of the legislation. In its weakest sense, this intentionalist interpreter looks at evidence of one or another legislative meaning in instances in which the text of the statute is ambiguous and, therefore, the interpretive issue cannot be resolved solely by reference to the "plain meaning" of the statute (see Eskridge and Frickey, [1988] 1995: 525-31). Stronger versions of intentionalism are characterized by reliance on expressions of legislative intent in all instances of interpretation. So, even where the text of the statute seems to point clearly in one direction, the interpreter is entitled to look past the statute's words and towards indicia of the legislature's intent (see e.g. *Rector, Holy Trinity Church v. United States*).

Many of the modern controversies about statutory interpretation concern the question

whether and to what extent it is proper to look at legislative intent to discern statutory meaning in either the "weak" or the "strong" senses described above. Moreover, there is substantial disagreement concerning the appropriate methods of discerning legislative intent, supposing that such intent is relevant to legislative interpretation. The economic analysis of law has made important contributions to these spirited debates. In particular, the contributions of public choice theory and positive political theory continue to bring important insights to the literature on legislative interpretation and, also, on the relationship among legislatures, courts, executive officials, and regulatory agencies.

1. Legislative Intent and Statutory Purpose: A Conceptual Framework

1.1. Legislative Intent and its Critics. The key jurisprudential tradition of modern American law is legal positivism. The core insight of our positivistic tradition is, following H.L.A. Hart, that "it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so" (Hart [1961] 1994: 185-86). Instead, what accords legitimacy to law is that it reflects the command of the sovereign as developed through proper, socially acceptable procedures (see Fuller 1964: 106-18). The principal contribution of the legal positivists to the enterprise of legislative interpretation is the following idea: The aspiration of statutory construction must be to discern the will of the law-giver, that is, the legislature. It is only by recovering this will--this *intent*--that we can accord the deference due to that institution whose responsibility it is to create the statutory law which binds individuals and institutions. Many modern legal theorists, most notably Ronald Dworkin, have vigorously criticized this

positivistic premise (Dworkin 1986: 33-43). To them, the ambition of legal interpretation is quite a bit different than that supposed by defenders of the view that law is the command of the sovereign and thus interpretation entails understanding the intent of this sovereign. To critics of legal positivism, then, legislative intent is a conceptual irrelevancy. Even supposing that something like a legislature's intent could be discerned, we ought to reject it, say critics of positivism, for there are other, more superior ambitions for the enterprise of statutory interpretation (Eskridge, 1994; Hurd, 1990; Dworkin, 1986; Moore, 1985).

There is a very different critique of this positivistic insight, however, which does not rest on a non-positivisic jurisprudence. Rather, it rests on an empirical foundation, and one which comes along with its own set of descriptive theories about legislative behaviour and conduct. Critics object that legislative intent is not discernible; it is, for them, a chimerical concept, one which rests on a seriously flawed, and even incoherent, description of legislative decisionmaking. When we consider, in Part II, the contributions of public choice theory to statutory interpretation, we will address this critique in more detail. For now, it is sufficient just to describe the basic elements of the critique:

- Legislative intent supposes that a collective body can have an "intent." This is false, critics argue, for it relies on an analogy between the psychological make-up of an individual, an individual which has some degree of (free) will and can have the capacity to form intentions, purposes, make choices, and the like (Moore, 1985: 348). This is a flawed analogy, however, since the legislature is a collective institution made up of *n* individuals, each with their own matrix of intentions and purposes.

- The conventional expressions of legislative intent relied upon by courts and agencies in the process of interpreting statutes are fundamentally unreliable. To the critics, so-called "legislative history" is a patchwork quilt of incomplete, manufactured, and ambiguous statements of self-selected legislators, each with their own axes to grind (see Scalia, 1997: 32-37; Easterbrook, 1988: 63). Thus, even if there were something like a collective intent of the legislature, we would be unlikely to discern it through the traditional mechanisms of legislative history and its translation through judicial and administrative excavations and interpretations.

- There is a critical failure to distinguish between the meaning of statutory words and phrases as *understood* by legislators when they are considering proposed legislation which is before them and the avowed *hopes* of the legislators with respect to how the legislation will be interpreted in the future (Dworkin, 1985: 321-24). The difficulty of distinguishing between the legislature's understanding of the meaning of legislation and the legislature's hopes and wishes with respect to future interpretations confounds efforts to get at the legislature's *intent*.

Each of these critiques, and others, have been made over a long period of time by scholars and by judges. As evidenced by judicial outcomes, these critiques have had a substantial influence on the use of legislative intent by modern courts (see e.g. *Wisconsin Public Intervenor v. Mortier* (Scalia, J., concurring); *K Mart Corp. v. Cartier*; *Macarthys Ltd. v. Smith*). Moreover, the

leading scholarly perspectives on statutory interpretation are, in their own different ways, powerfully influenced by these empirical critiques of the use of legislative history and legislative intent (Eskridge, 1994; Sunstein, 1990).

1.2. From Intent to Purpose--and Back to Intent

An important effort to reclaim intentionalist interpretation from the critics of legislative history and intent was that of the "Legal Process" theorists of the 1950's and 60's (see Eskridge and Frickey, [1988] 1995: 395-98). Legal process scholars emphasized that the better enterprise of legislative interpretation was the recovery of the *purpose* of the statute, rather than the "true" intent of the founding legislature. To Legal Process theorists, a consideration of purpose would be informed by, but not beholden to, expressions of legislators' individual and collective intentions. Where there were found conflicts between evidence of legislative intentions and statutory purposes, the proper role of the interpreter would be to implement the latter (see e.g, *Moragne v. States Marine Lines, Inc.*).

Critics of this well-known approach objected that the notion of legislative purpose was also incoherent. How can an interpreter discern the purpose of a statute without relying in the end on the words of the statute itself and, where the text fails, the expressions of legislative intent as described in the statute's history? And, moreover, modern regulatory statutes frequently have multiple purposes. It became a commonplace to highlight complicated, ambiguous statutes and to use them to illustrate the descriptive and normative flaws in the "purposive" account. As Cass Sunstein puts it, "in the face of multimember institutions . . . the task of describing legislative 'purpose' becomes as much creation as discovery" (1990: 124).

Yet, still and all, there proved to be something relentlessly appealing about the "purposive" approach. Prominent legal scholars have offered important insights into how contemporary regulatory statutes can be understood and implemented more effectively by close attention to the multifaceted, manifest purposes underlying the regulatory program constructed by the legislature (see Sunstein, 1990: 160-92; Calabresi, 1982). In the end, most contemporary commentators on statutory interpretation, save for those who are concerned with critiquing the basic jurisprudential traditions of American law and in offering a different vision of legal interpretation, are wedded to at least some version of legislative intent (see, e.g., Schachter, 1995: 593-95; Shapiro, 1992: 941-50; Maltz, 1988: 9-13). The *intent* at issue, to be sure, is not solely or perhaps even especially the intent of the collective legislature *qua* legislature; it may be, per these more "purposive" approaches, the intent of the legislation and the regulatory programme constructed by pieces of legislation as they are enacted by different legislatures over a period of time. Nonetheless, the attention is drawn in these views toward legislative intent and toward the ambition of discerning this intent through sophisticated, theoretically informed processes of interpretation (see Farber, 1991, 1989).

There are two key sets of questions which lie at the heart of the spirited scholarly and judicial debate over the role of legislative intent in the interpretation and implementation of legislation. The first set of questions are informed by many of the issues described above: How should we think about legislative intent and its use in light of the serious empirical critiques of the concept? If we are not prepared yet to abandon the use of legislative intent in statutory interpretation, are there more fruitful ways to frame the idea of legislative intent with respect to particular statutes or to the enterprise of statutory interpretation more generally? The second set

of questions concern what role legislative intent plays in shaping decisionmaking by those individuals and institutions responsible for implementing statutes. Whatever the strength of the critiques of legislative intent, those who carry out statutory mandates emphasize the profound pertinence of legislative intent as expressed through legislative history in their own day-to-day operations. Any plausible positive and normative theory of legislative intent must account for the relationship among political institutions--including legislative institutions, agencies, courts, executive officials, business firms, and the like--as structured by the phenomena of expressed legislative intent beyond the four corners of the statute's text (see Pierce, 1989).

As we will see in the remainder of this essay, the economic analysis of law and legal institutions has contributed in important ways to answering both of these sets of questions. Two separate strands of analysis have been especially pertinent to the economic analysis of legislative intent. The first is the application of modern public choice theory to the understanding of legislative decisionmaking and, correlatively, legislative intent. The second is the more recent use of positive political theory to examinate legislative intent both with respect to positive and normative theories of statutory interpretation and also with respect to the political control of agencies and courts.

2. Economic Analysis and Legislative Intent: Public Choice

Work in the political economy tradition has contributed to positive and normative theories of legislative intent. The contributions of public choice, in particular, have reshaped many public law scholars' approaches to considering how legislative intent can be and should be used in interpreting legislation. By "public choice" we mean to include two distinct strands of thinking

about the application of economic theory to the study of political institutions: interest-group theory and social choice theory (see generally Farber and Frickey, 1991; Mueller, 1989).

2.1. Interest group theory. The standard view among legal scholars of the 1950's and 60's of the legislative process was summarized by Professors Henry Hart and Albert Sacks in their classic work on the legal process (1958). They described the legislature as an institution made up of "reasonable persons pursuing reasonable aims reasonably." While this description was intended to communicate an essentially normative point about modern legislatures and their behavior, this rosy view of legislative motivations was taken by legal scholars as a description of how legislators actually behave (see Rodriguez, 1989). This account of legislative account was subject to frank critique, of course, and much of standard pluralist political science of that same era, as exemplified in the work of Dahl (1956), Lindblom (1965), Truman (1957) and others, raised serious objections to this picture of benign, public-regarding lawmakers. Very much opposite to this view was the emerging public choice account offered by economists working within the Chicago-Virginia School tradition. In the writings of leading economists such as Stigler (1971), Becker (1983), Peltzman (1976), Buchanan and Tullock (1962), public choice theory painted a picture of legislators acting with an eye toward re-election and thus carrying out their legislative responsibilities in a private-regarding, calculating fashion (see Stigler (ed.), 1988; Farber and Frickey, 1991). The critical behavioural assumption underlying the public choice theory of legislatures is that legislators are driven relentlessly toward the aim of re-election (see Mueller, 1989: 1). The mechanisms of legislator self-interest are the ordinary sum and substance of legislating, including passage and defeat of legislation, regulatory oversight, appropriations

decisionmaking, and legislative-executive contests. Also critical in the public choice account is the pervasive role of interest groups outside the legislature, groups which each press their own agenda on legislators. These groups have ubiquituous weapons to use on legislators, including the granting and withholding of favours, campaign contributions, information, and other resources, without which legislators would be unable to pursue effectively their aim of re-election. The legislative process, in this public choice account, is essentially a transmission belt for the translation of interest group preferences into public law (see Tollison, 1988: 347-66).

Law and economics scholars building upon these interest group theories have drawn from the account of rent-seeking legislators, descriptions of legislative intent and its proper impact on the enterprise of legislative interpretation (see Farber and Frickey, 1988; Eskridge, 1989). In an early, important paper, William Landes and Richard Posner described the legislative process as a mechanism for supplying goods to interest groups which demanded such goods more or less along the lines described by textbook supply-and-demand principles (Landes and Posner, 1965). The key problem, though, is that the bargains struck among interest groups and legislators, as manifest in statutes and regulations, could be unravelled by subsequent judicial interpretations. In the face of this risk, the costs which interest groups are willing to pay in the form of economic rents to self-regarding legislators are less than what would be expected in a market in which bargains are efficiently and reliably enforced (877-85). The solution to this predicament, argued Landes and Posner, was the commitment of the judiciary to enforcing the legislative bargain (885-87). This commitment was not the product of a benevolent, respectful judiciary but, instead, a result of the continuing dependence of the judiciary on legislative rewards and sanctions. The role played by legislative intent in this account is roughly as follows: The manifestations of legislative

intent communicate to the courts the terms of the interest-group/legislator bargains struck. The intent of the statute makers is exactly like the intent of parties to a contract (see Hadfield, 1992). Moreover, just as contemporary contract law absorbs the principle that contracts ought to be construed to implement drafters' intent, statutory interpretation will be--and perhaps ought to be--concerned with recovering the intent of the framers of the statute. In this account, public choice offers a simple heuristic for viewing the relationship among courts, legislators, and interest groups in the construction and subsequent enforcement of legislative intent (see Farber, 1991; Eskridge, 1991).

Relying upon public choice theory, Jonathan Macey provides an interesting, novel account of the use of legislative history in statutory interpretation (Macey, 1986). Macey relies on public choice theory to describe the essentially private-regarding behaviour of legislators in the statutory enactment process. Rather than concluding, however, that the legislation which gets enacted through this pernicious process is transparently private-regarding, he points out that many modern regulatory statutes speak in public-regarding terms (252-53). The environmental and consumer safety statutes of the 1960's and 70's, for example, reveal to the reader a picture of the benevolent federal government working to ensure clean air and water, safety in the workplace, and on the highways. And civil rights legislation of the past quarter century similarly speaks in terms of the larger public interest, and not in terms of the narrow, factionalist concerns of pressure groups which were critical in securing the passage of these landmark statutes. So what explains this? To Macey, the idea is this: Legislators act self-interestedly, but still persist in maintaining a public-regarding face. To reveal themselves otherwise, that is, to behave as steely-eyed rent-seekers would be to relinquish their public commitment to deliberative decisionmaking and representative

democracy. In economic terms, behaving this way would increase substantially the transaction costs of legislating, in that legislators would have to communicate their private-regarding agendas expressly through statutory provisions and indicia of legislative history (227-33). And this is precisely the aim of Macey's prescriptive analysis. He argues that, on the basis of this public choice account, courts ought to require legislators to put their agendas up front; otherwise, courts should be instructed to interpret legislation in order to further the *expressed* (although, as public choice theory indicates, not real) intent of the legislature, that is, to pursue public-regarding goals (261-66).

Although interest group theory has contributed conspicuously to the analysis of legislative intent, it has rather serious limitations as an analytical source of insight (see Stearns, 1994; Pildes and Anderson, 1990). To begin with, it is empirically problematic to describe the contemporary legislative process as *solely* or even *mostly* characterized by raw wealth-transfers from the public fisc to interest groups (see Kelman, 1988: 205-23). To be sure, if we broaden our definition of interest groups to include clusters of factions and pressure groups who are motivated to overcome collective action problems and participate in influencing the legislative process than the public choice account is more likely to be descriptively accurate, but trivially so. The analytic punch of public choice theory lies in its view of the legislative process as rife with rent-seeking behaviour and economic wealth transfers. The strong view, as exemplified by lawyers and economists working within the traditions set by the Chicago-Virginia School, have added substantial but, in the end, limited contributions to unravelling the conundrum of legislative intent.

2.2. Social Choice Theory.

Social choice theory frames the issue of legislative intent in two opposite ways. First, the standard social choice picture, following Arrow (1951) and Black (1958) reveals the legislature as subject to cycling and thus prone to chaos. Legislative outcomes are, if not entirely random, then not necessarily indicative of the preferences of the collective as made up of *n* legislators at a given point in time (see Austen-Smith and Riker, 1987; McKelvey, 1976). No suitable equilibria are possible in a decisionmaking environment in which legislative decisions come up more or less randomly and in which legislators face multifaceted, interdependent choices among a range of alternatives. Thus, to speak of legislative intent is to chase a chimera; the revealed intent is no more nor less than what happens to emerge at the final stage of the process when legislators are asked to cast a vote for or against the proposal which is currently on the table (Shepsle, 1992; Easterbrook, 1983). To be sure, we can rely on the expression of intent as gleaned from the text of the legislation, but the utility of legislative history in communicating the true intent of the legislature when the statute's text is ambiguous, disappears in the face of the Arrovian characterization of the legislative process as chaotic and unstable.

A very different framing of the issue of legislative intent is provided by the recent efforts of political economists to describe how chaos may be met by institutional structures and procedural rules. Arrow himself, of course, noted ways in which decisionmaking cycles could be corrected by procedural devices under a number of conditions (Arrow, [1951] 1963: 22 et seq.). And much of the work in the vein of structure-induced (SIE) equilibrium theory explains theoretically and empirically how the otherwise chaotic legislative process is addressed deliberately by rational legislators (Tullock, 1981; Shepsle and Weingast, 1987, 1981; Shepsle, 1979). Examples of these structures incude the regulatory power of the US Congress's Rules

committee (Weingast, 1992), the system of bicameralism (Levmore, 1992), and the assorted rules of legislative committee jurisdiction and procedures (Shepsle and Weingast, 1987).

The strand of social choice theory reflected in SIE theory and related work has a more ambivalent relationship to the notion of legislative intent than do other strands of public choice theory. On the one hand, the idea that legislators craft structures and procedures to enable themselves to pursue legislative strategies does undergird the idea that legislators have purposes and even intentions. While these intentions may be more malevolent than benign and are, at any rate, strategic rather than exclusively principled, we might still recover from an economic perspective on the legislative process a theory of the intent of the enacting legislature. What is more problematic, though, is creating from this positive theory of legislative intent any fruitful normative suggestions.

2.3. Public Choice Theory as Normative Theory. The public choice account, and especially Chicago-Virginia-style interest group theory, paints a rather bleak picture of legislative behaviour and statute-making processes. It is no coincidence, surely, that with the rise of public choice theory as an influential analytic framework for understanding legislation and public law, there has been a growing scepticism among legal scholars about the utility of legislative intent in statutory interpretation. As mentioned in Part 1 of this essay, there is hardly anyone among contemporary public law scholars who make use of public choice theory to any degree who defends vigorously the idea of legislative intent as a coherent concept which can be and should be used by agencies and courts in implementing and interpreting legislation.

If public choice theory is swallowed whole as a complete theoretical account of legislative

processes, then it becomes difficult to prescribe the use of legislative intent; and it is correspondingly easier to criticize, as do judges such as Supreme Court Justice Antonin Scalia (1997) and circuit judges Frank Easterbrook (1988, 1983), Kenneth Starr (1987), and Alex Kozinski (*Wallace v. Christensen*) , the still commonplace reliance on legislative history as indicia of legislative intent in statutory interpretation cases. Yet, the more sophisticated political economists have reconsidered in recent years the standard public choice critiques of legislative intent and interpretation and have generated fruitful economic accounts of legislative decisionmaking and court-legislative-agency relationships which, if connected to prescriptive theory in sensible ways, may frame the debate about legislative intent and its (mis)use in much more interesting terms. In the remaining section of this essay, we will consider some of the applications of *positive political theory* to the study of legislative intent.

3. Economic Analysis and Legislative Intent: Positive Political Theory

In recent years, a number of prominent political economists have been exploring, through the lens of game theory and principal-agent theory, the structure and behaviour of political institutions. Following Riker and Ordeshook (1973), these political economists have labelled this cluster of approaches *positive political theory* (PPT), meaning the application of rational choice theory to the study of political institutions (Farber and Frickey, 1992: 462). These contributions differ fundamentally from the public choice enterprise in that they do not presuppose a reelection-maximizing, rent-seeking legislature, nor do they argue that legislation is primarily the product of external interest group influence. Instead, the enterprise of positive political theorists who study legislatures is to consider how rational legislators carry out legislative and regulatory functions

within the structure of political and legal institutions, institutions with sets of *ex ante* rules, norms, and patterns of conduct. One of the key insights of PPT is that legislators must take account of the actions and reactions of other rational political actors each with their own set of incentives and political weapons (see Eskridge and Ferejohn, 1992; Marks, 1988). The elements of game theory, in both very simple and more complicated iterations, have yielded many original and arresting conclusions about the nature of legislative decisionmaking and of court-legislature-executive relationships (see Rodriguez, 1994: 42-110).

One key idea expressed memorably by Kenneth Shepsle is that the legislature "is a 'they' not an 'it'" (Shepsle, 1992). In contrast, to standard median-voter models of legislative behaviour, models with homogenized collective legislative action which thereby undergird the view that the legislature can have, as an individual, an *intent*, Shepsle stresses the fact that the legislature is more accurately described as a nexus of institutions, institutions with cross-cutting responsibilities and functions. Building upon different strands of economic theory, including social choice theory and structure-induced equilibrium theory, Shepsle and his PPT cohort explain that legislative intent will always be difficult to express through the heuristic of individual, quasi-psychological concepts such as *intentions* and *purposes*. Instead, we would do well to understand the multifaceted quality of legislative behaviour by considering inter-institutional relationships organized around the strategies of legislators working within the structures of the lawmaking process, including all of its legislative, executive, and judicial features.

Each of these institutions is situated differently with respect to legislative intent. For example, legislators craft and oversee the progress of legislative proposals through the committee system. Much of the fundamental decisionmaking which goes into the shape of the legislative

proposal which comes to the floor for the consideration of the body proceeds through strategizing by rational legislators at the committee, and even the pre-committee (through self-selection onto committees) stage (Shepsle and Weingast, 1987: 88-90; Weingast and Marshall, 1988: 143-55). Yet, much of what is conventionally labelled pertinent legislative history is constructed post-committee. These include legislator floor statements, conference committee reports, and presidential signing statements (Rodriguez, 1992). It is difficult to draw from a PPT model of legislative bargaining, then, a justification for traditional uses of legislative history.

Another key insight of PPT is the dichotomy stressed between the *enacting* legislative coalition and the *current* coalition. Conventionally, reliance on legislative intent in statutory interpretation means reliance on the intent of the legislature which enacted the statute, even if this legislature is, after all, long gone. At the same time, the superintendence of regulatory policymaking, including the legislative reactions to certain implementations and interpretations of a statute, is carried out not by the framers of the original statute, but by the current legislature. While we might hope, as a normative matter, that the current legislative majority will pay suitable fidelity to the expectations of the enacting majority coalition, a rational, self-interested group of legislators may well have little incentive to so circumscribe their own conduct. Using game-theoretic models of legislature/court/agency action under conditions of perfect information and inconsequential transaction costs, PPT explains how this tension between the will of the enacting legislature and the will of current legislators plays out in single-dimensional and multiple-dimension policy spaces (Ferejohn and Weingast, 1992a).

Schwartz, Spiller, and Urbitzondo (1994) have considered, by means of game theoretic analysis, the role of legislative intent in signalling to courts the preferences of legislators. The

basic idea is that, to the extent that it is costly to legislators to enact specific laws, legislation that is itself ambiguous signals to the couts that it is less important to self-interested legislators. Moreover, one way to communicate these preferences is through use of supplementary materials to indicate the legislators' intent. "To the extent that legislative history and other supplementary materials can provide as informative a signal as can more precise statutory language, these materials may be a preferable source of that signal, as they can be provided at lower cost" (72).

PPT leaves us with a basic normative question, however, to wit: Ought we to pay complete fidelity to the will of the enacting legislature on the theory that it is only this will which should, given our democratic theories, govern us? Or should we, as a matter of *realpolitik*, work to accomodate processes of regulatory decisionmaking to the often competing wills of legislators across periods of time? Recent PPT work has addressed itself to this and related normative questions. McNollgast and others have described the legislative-judicial relationship as an essentially *communicative* activity (1994, 1992). Rational, self-interested legislators are concerned not only with the enacting process, but also with the process of conveying their majority will into implementation through suitable interpretations. They wish to do so not only through careful statutory drafting (an ambition which is not always possible considering the cross-cutting incentives of legislative opponents), but also through the creation of self-serving legislative histories. Much of this constructed history is an elaborate project of spin control; legislators communicate their spin on the meaning of legislative phrases and sections. At the same time, the statute's opponents simultaneously insist upon a different, and frequently more narrow explanation of ambiguous statutory language (McNollgast, 1994: 21-29; Ferejohn and Weingast, 1992b: 570-74).

An interesting feature of this communicative process noted by PPT scholars such as McNollgast is that the legislative coalitions are multiple; there are not only *supporters* and *opponents* of legislation but, rather, ardent supporters, ardent opponents, and pivotal legislators, the latter group consisting of legislators whose support is critical to the enactment of legislation and whose expressions of views concerning the meaning of statutory provisions are, and should be, often decisive in construing the intent and purpose of controversial legislation (McNollgast, 1994: 16-21; but see Jorgensen and Shepsle, 1994). In one study, the authors considered the passage of the Civil Rights Act of 1964 and described the pivotal role of Republican moderates, and especially Senator Everett Dirksen of Illinois, who craftily steered the very liberal House-reported version of the civil rights legislation toward a more moderate course (Rodriguez and Weingast, 1995). Despite the fact that throughout the entire deliberation process, and continuing on into the aftermath, ardent supporters such as Senator Hubert Humphrey trumpeted the Act as a far-reaching, ultra-liberal piece of legislation, the true process reveals a much more complex, ambiguous, and ultimately moderate legislative outcome.

From a normative perspective, this complexity is welcome. The process of communication within and among members of legislative coalitons enables ideological legislators, each pursuing their own interests however constituted, to get things done. McNollgast have suggested a series of *positive canons*, essentially guides to statutory construction which would, if employed, tie the process of statutory interpretation to a more sensible and sophisticated reading of legislative intent (1992). These canons include a closer look at the makeup of the three legislative coalitions described above. Since attention to legislative intent usually means attention to the views expressed by particular legislators at a given point in time, a concern with “where

these legislators are coming from" is a prudent mechanism for recollecting more accurate legislative intent (1992: 718-25). Another valuable positive canon is the attention to the structure and dynamics of intra-legislative institutions such as conference committees; these committees are often the most revealing of the nature and scope of legislative compromise, insofar as the final decisions about legislative content are shaped through communications among these select groups of legislators (1995: 725-27).

Among the avenues of future PPT contributions to our understanding of legislative intent, three stand out: First, more refinements of the notion of legislative communication are called for, especially with regard to empirical studies of specific legislative episodes and events. PPT scholars can gain greater purchase in understanding the interrelationships among legislative coalitions in the process of statute-making and, as well, the relationships among legislators, courts, and agencies in the implementation of legislative bargains, by developing more fully this idea of communicative action. Second, economic theory can be useful in exploring, through the idea of scarcity, the role of transaction costs in the consideration of legislative decisionmaking and the construction of legislative intent. Legislators face ubiquituous transaction costs in the course of statute-making. These costs include monitoring costs, opportunity costs, and error costs. Through the application of PPT, the role of costs ought to be considered more systematically and, in particular, by close attention to the way in which intra-legislative transaction costs can shape legislative and regulatory outcomes (see Rodriguez 1997; Schwartz et al 1994). Finally, PPT can be a useful way to compare and contrast different legislative systems. While much of the focus of PPT work has been on the United States Congress, we can also consider how to evaluate the performance of other legislative institutions (state and local) within the United States, as well as

legislative systems abroad.

4. Conclusion

The mystery of legislative intent has confounded the project of statutory interpretation since the time of Blackstone. Efforts to unravel the intentions and purposes of the heterogenous legislature will always be problematic since collective institutions, by their nature, are filled with complex, inchoate motivations and clusters of preferences. Reducing the legislative "they" to an "it" has left us with a very unsatisfying account of the structure of modern legislation and its meaning. Nonetheless, our commitment to legal positivism requires us to continue to try to give a theoretically sophisticated account of legislative account. Economic analysis, through the contributions of both public choice theory and positive political theory, has provided able assistance to that end.