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Statutory Interpretation and the Separation of Powers

I. Introduction

In this paper, I aim to think about statutory interpretation by thinking about the separation of powers. In sections II-IV, I consider the nature of legislative and judicial power. I begin by reflecting on the unity of justified authority before and apart from separation, which helps make clear the reasons for separation. I argue first that the exercise of the legislative power is the making of reasoned choices to change the law and second that the separation of judicial power involves no power of interpretation, properly so-called, but rather is framed by and helps support the exercise of the legislative power. The object of statutory interpretation, which all subjects of the law should aim to identify, is the intention of the legislature. I consider briefly in section V how the location of the executive power bears on the nature of legislative power. I go on in section VI to outline, against the doubts of some scholars, how a legislative assembly is capable of legislating well. This analysis I then extend to Congress in section VII, arguing that notwithstanding some difficulties Congress is capable of exercising the legislative power, such that, per section VIII, interpretive practice ought to centre on inferring its lawmaking intentions. The final substantive part of the paper, sections IX-X, briefly considers the implications of this analysis for the question of updating meaning over time and for the relevance of legislative history.

II. The unity of royal authority

The first principle of constitutional order is that those with capacity should exercise authority.¹ That is, anyone who is capable of directing and coordinating others should direct and coordinate them in order better to secure the common good. The members of some community should stand ready to recognise the person or persons with such a capacity, adopting his choices about what should be done as if their own.² In many times and places, the person with this capacity, and the person duly recognised, has taken up the office of king, exercising authority (as is amongst the first duties of any authority) to settle the subsequent location of authority, by making provision for peaceful succession. The king may serve his community well by acting to secure peace and justice. The king has a duty to defend the realm from foreign raids and from domestic unrest. He has a duty also to stand ready to give justice to all his subjects, restraining and punishing the wicked and rewarding and encouraging the good. The central political act, O'Donovan argues, is the act of judgment, which is an act of moral discrimination, pronouncing on a preceding act or an existing state of affairs and establishing a new public context.³ The king judges well in securing the peace of the realm and in doing justice by his subjects.

¹ J Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford, 1980), 246, 249-50

² R Ekins, 'How to be a Free People' (2013) 58 *American Journal of Jurisprudence* 163, 171-3

³ O'Donovan, *Ways of Judgment* (Eerdmans, 2005), chapter 1 'The Act of Judgment'

The reasonable king sits in judgment in his court, which is open to all. For the king to do justice he must retain and maintain, or establish, the capacity to coordinate, to act decisively to realise his will, not least to ensure that his judgments are not empty. This capacity requires resources under his direct command – loyal servants, funds, lands – but requires also, and more importantly, the continuing recognition of his subjects, especially those who themselves have loyal servants, funds and lands. The wise king is attentive to the majesty of his office, being represented and representing himself to others as the signification of the whole political community, bearing the public person of the realm. And this representation is anchored in oaths of fealty, whereby the king is the apex of chains of secular loyalty.

How is the king to give justice in his court? Like any authority, he should attend to the rationally accessible truths about what should be done, and to what they reveal about what should not be done. These truths will leave much undetermined, but not all, and will make clear the shape (broad, but real) of various wrongs that warrant an answer. The king's judgments will be in part 'applications' of the natural law, but they will be also specifications of that set of propositions, specifications made in the context of some particular state of affairs, in which someone cries out for justice. Any reasonable king will, in giving judgment, not neglect such customs as may exist, which have been taken to settle what is to be done. Such customs may be primary, addressing the price to be paid to the family of one who is killed, or secondary, speaking to the powers of the lord of the manor in determining what is done within his domain. And they may be reasonable or not, which evaluation may reasonably change over time as circumstances change. The king should sometimes apply and affirm the custom in question, at other times set it aside as wicked or redundant and substituting for it some other resolution, and at others apply it in a new and importantly different sense, extending or restricting its reach or content.

In early times, the king will give judgment himself in his court, perhaps with the aid of his counsellors. In later times, the king would do well to make provision for justice to be given, in his courts, by his servants and in his name. That is, he should found courts and stand behind them, personifying them and the justice which they promise, and rarely, if ever, giving judgment himself in his court.⁴ His judges will be his servants, who will do the king's justice, acting in his name and acting as he would, keeping faith with the customs of the realm, in so far as they are fit to be upheld and continued, and with any judgments he has or kings past have made, which judgments have specified what justice demands. The good king will found his courts but will stand ready to correct them, disciplining particular judges, granting mercy to the guilty, and, importantly, judging the laws on which they act. This standing willingness and capacity to correct the law is an act in his court, affirming, modifying or departing from common custom or past judgment.

The king aims to rule with the willing cooperation of his subjects, especially the great men of the realm who might otherwise very easily be his rivals and enemies and whose subjection to his judgments is essential for justice. These great men, together with the king's leading servants, including his judges, will form his council and the king acting with the advice of his council (with their counsel) acts for the realm. The reasonable king will also summon a parliament, if doing so is not ruinously expensive and does not threaten discord or strife (which is not to say the parliament is free from argument). The parliament will consist of the leading men – magnates and barons – and of ordinary men chosen by or drawn from the

⁴ Ibid. chapter 11 'Powers of Government'

various places and groups that make up the realm.⁵ The king should summon a parliament because this helps secure the willing cooperation of all, especially in providing funds but also in the making of decisions of far-reaching significance. The king who recognises the limits of his kingship, that it is political rather than regal,⁶ is much better placed to rule well and, not unrelatedly, to rule effectively.⁷ These limits involve the king's own subjection to some laws and his duty not to tax his subjects without their consent. Summoning a parliament which one consults about what is to be done, and to which one puts proposals for action, is a way to invite one's subjects to act with you. A kingdom of willing subjects is a strong kingdom, able to be ruled well by one who does not stand to his subjects as an equal, yet wisely seeks counsel and is open to reason.

The king stands ready to do justice. He is open to petitions for justice, both particular and general. The former he hears in his courts, by way of his servants the judges, and also in his council, in which he may choose to be merciful or generous. The latter he hears in his other, higher court, so to speak, which is in and with his parliament, hearing petitions for relief from unjust or impractical laws, whether local or general. And in his parliament he may respond to those petitions by changing the law, enacting a statute that grants relief. His subjects may propose some general change in the law, and he may respond, by way of his servants, with a particular statute.⁸ Or his subjects may draft a particular statute, asking the king to agree to its terms, to act, with their consent, to change the law in this way.

In a culture that is not widely literate, and in which it is difficult to maintain a common, standard written record of the decisions of the king in his courts or his parliament, a statute will likely be understood not to be a strict, canonical textual formulation of an authoritative decision, but rather as a loose record of a general decision, to be received as such. Notwithstanding the importance of parliamentary consent, the statute is in a sense the will of the king, especially when framed by the king in his council. In the king's courts, the judges, who will very often be members of that council, receive and deal with the statute on this footing. That is, the statute records the highest mode of royal decision and action, but is not to be approached as if it were worded scrupulously and indeed may be better understood by those who helped frame it, which includes the judges, then by those more distant. In using the statute, the judges receive a general decision, which bears on the existing body of law and yet which is unlikely to precisely state what exactly the law now is. And as the decision is the king's, whom they serve, his will – then and perhaps *now* – is paramount. For these reasons, judges may be willing to qualify, extend or even set aside the ruling that otherwise, or most obviously, seems to be set out in the text of the statute itself.⁹

The king's duty to govern,¹⁰ to secure peace and justice in the realm, requires the exercise of a far-reaching authority that involves a mix of making and remaking laws, of judging particular cases and applying existing laws, and making and carrying out decisions neither required by nor forbidden by law. Thus, reflection on reasonable government before and apart from the separation of powers, in which royal authority is unified, helps suggest the

⁵ FW Maitland, *Constitutional History of England* (1920)

⁶ J Fortescue, *In Praise of the Laws of England*, (S Lockwood, *Sir John Fortescue: On the Laws and Governance of England* (CUP, Cambridge, 1997))

⁷ This is a theme of Martin Loughlin's work: see his, *The Idea of Public Law* (OUP, Oxford, 2003)

⁸ Maitland, 189; see also R Ekins, 'Acts of Parliament and the Parliament Acts' (2007) 123 *Law Quarterly Review* 91, 105

⁹ J Evans, 'A Brief History of Equitable Interpretation in the Common Law System' in T Campbell and J Goldsworthy, *Legal Interpretation in Democratic States* (Ashgate, Aldershot, 2002), 67

¹⁰ L Green, 'The Duty to Govern' (2007) 13 *Legal Theory* 165

shape of the separated powers: the legislative power, the judicial (or adjudicative) power, and the executive power. Or at least one sees why a reasonable king, who otherwise exercises relatively undifferentiated authority to settle what should be done, has good reason to make provision for (1) the settlement of particular disputes according to law and for (2) the discussion and approval by the realm as a whole of taxation or general legal change. This provision is a partial separation, with the powers in question remaining unified by their relation to the person of the king who represents the whole realm. The separation may be unstable if, as in England, the king and his parliament find themselves at odds, for the king may enjoin his servants the judges to do as he (now) wills and he may also purport to dispense with statutes, or act for the good of the realm (as he sees it) without parliamentary agreement. These acts in some sense depart from the wise provision earlier made, yet they have some warrant in the frame of the constitution, in which the king's capacity to act decisively for the good of his subjects is indeed central.

The (tragic) instability of the mixed English constitution resulted in the English civil wars and in a new settlement, affirming the old doctrine that the King-in-Parliament is the supreme authority in the realm, yet overlaying this doctrine with a new political reality, itself constitutional, that the King would yield to his Parliament.¹¹ Well before this time, the insistence of Parliament that it would agree only to the detailed text of some statute, and the increasing exclusion of the judges from the king's council, had changed the way in which statutes were understood, encouraging much closer focus on the precise text and making harder to sustain arguments for extension by analogy and so forth. The shift in the separation of powers over time thus had, and continues to have, implications for the practice of statutory interpretation. The two sections that follow reflect on the legislative power and on the judicial (adjudicative) power. I set out no separate discussion of the executive power, which is not to say I think it irrelevant to statutory interpretation, notwithstanding that this would seem to turn most directly on the relationship between legislative and judicial power. Indeed, the unity of royal authority, and the shape of the early separation of legislative power, suggests powerfully, I say, that the location of the executive power in some polity is highly relevant to how the legislative power is and should be exercised.

¹¹ J Goldsworthy, *The Sovereignty of Parliament* (OUP, Oxford, 1999)

III. The legislative power

The reasonable king separates legislative authority in order to make provision for general lawmaking, when such is required, and also to make it possible for him to make law together with representatives of the realm at large. The origin of the legislative power in English (and other) political history helps make clear that the need for there to be some person or body capable of legislating comes before the question of *who* should legislate. In other words, authorising an assembly to legislate changes who legislates not what it is to legislate. I aim to explain what it is to legislate by reflecting further on the need for legislation.

The reasons to legislate are plainly closely related to the reasons for law, for legislation is a central source of law and in legislating one acts to change the existing law, whether by introducing into the system some entirely new (set of) propositions, or by amending or repealing existing propositions. The point of legislative action is not to give effect to the popular will, to majority preference. The authority of law does not turn on the consent of the governed, even if the legal and political authorities should often maintain this consent. Rather, authority turns on the capacity to secure the common good, which state of affairs is an intelligible reason for those who can to act to coordinate others and for others to accept and support such an exercise in coordination. The object of authoritative action is this common good, not some aggregate of the preferences of members of the community. What is true of government and law in general is true likewise of the subsidiary act of legislating, which is that part of governing involving the deliberate making and changing of the law. The reason to make provision for deliberate lawmaking and legal change is not that it is fair to give effect to what people want, as Dworkin and others maintain. The reason is that the common good requires that such provision be made, which common good is the object of the exercise of legislative authority and makes the act of legislating intelligible.

Why is this provision necessary? Not all law is deliberately made by acts intended to make or change the law: custom is a source of law that lacks this character and so too is case law, at least to the extent that it is made indirectly, in the wake of adjudication. In one (secondary) sense, a political community may have law without legislation. However, as Hart recognised, much of the value of legal order lies in the standing possibility that legal rules may be changed by deliberate, clear and reasoned action. A community would be in bad shape if it had no means to modify – deliberately, clearly – the content of the rules that directed social life. Thus, there is good reason to introduce the particular secondary rule that is a rule of change,¹² which authorises some person or body to repeal rules that are (or which have become) unreasonable, to introduce rules that would help realise some aspect of the common good, or to amend and improve existing rules.

Interestingly, the importance of the rule of change slips out of focus when Hart turns to expound the shape of the modern legal system. As Finnis argues, Hart's account of the internal point of view of the official is strikingly passive – the official is concerned to maintain rules that are taken already to be in force.¹³ What falls out of sight is the truth that in the central case the rules consist in the reasoned choices of some person or body about what should be done. This slip in focus paves the way for Raz's argument that a legal system

¹² HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press, Oxford, 1994) 92-3

¹³ J Finnis, 'On Hart's Ways: Law as Reason and Law as Fact', essay IV.10 in *Collected Essays: Volume IV* (Oxford, OUP, 2011) 230, 240

can exist without norm-creating institutions but not without norm-applying institutions.¹⁴ This arrangement may be logically possible,¹⁵ but the system in question lacks part of what is most valuable about the central case of a legal system and is thus a distorted instance. This jurisprudential neglect of the act of legislating, against which Waldron also rails,¹⁶ suggests that legislative deliberation and action is somehow pre- or extra-legal, implying further that the legislature has a will but does not reason.

The community's need for clear, deliberate legal change provides good reason to institute a body to make law deliberately. It does not follow that the legislature must legislate frequently. It may be that the legislature may not have to act often or that it has to act repeatedly and radically. It may often be reasonable for the legislature to permit secondary forms of legal change, case law and custom, to proceed. The legislature is able to correct or to supplement case law or customary legal rules and the reasonable exercise of legislative authority involves overseeing the law and changing it when need be.

The key advantage of the capacity to make law deliberately is that the lawmaker is able to respond directly to the reasons that bear on changing the law. If there is good reason to repeal a law, that is if it is obsolete, unworkable or pernicious, then one may repeal it; if there is good reason to introduce a new rule, in that it helps restrain wrongful action or opens up valuable new opportunities, then one may act on those reasons to adopt law to that effect. This direct and open responsiveness to all relevant reasons distinguishes legislating from lawmaking by other means. A judge deciding a case responds to that dispute and his decision is limited by the existing legal materials. It is not open to him simply to change the law to be as he thinks it should be if it were open to him to posit the law anew. The judge understands that he is not a legislator and that it is not his task to oversee the content of the law and to act freely to change it as is required to instantiate the common good.

The legislature responds to the reasons to change the law. That is, it decides when there is good reason to act and how, if it acts, the law is to change. The capacity to legislate entails the freedom to settle the content of the law by acting for that end. Freedom does not mean that legislating is arbitrary. Rather, it means that the way in which the legislature acts, including whether it acts and the content of the law it makes, is settled not by rules but by how the person exercising legislative authority chooses to respond to the reasons that he or it perceives. The legislature is thus self-starting and self-directing. It need not wait for a case to adjudicate or a petition to arrive before it acts and within jurisdiction it may legislate as it sees fit. The exercise of legislative authority is under the voluntary control of the institution itself.¹⁷ For the legislature to act in this way it must have the capacity to formulate proposals for legislative action, and to evaluate and revise them in response to the reasons that bear on the common good. To legislate, one must consider the common good, propose a legislative response, reason about its merits and perhaps modify it accordingly, before deciding whether to adopt the response.

An institution free to deliberate and to act as and when it chooses is well placed to make good law. The legislature responds directly to the complexity of the common good in that its

¹⁴ J Raz, *Practical Reason and Norms* (2nd edn Princeton University Press, Princeton, 1990) 129-48; cf. J Waldron, *Law and Disagreement* (OUP, Oxford, 1999), 34-5

¹⁵ Cf. H Sheinman, 'The Priority of Courts in the General Theory of Law' (2007) 52 *American Journal of Jurisprudence* 229

¹⁶ Waldron 34-46

¹⁷ J Raz, 'Intention in interpretation' in R P George, *The Autonomy of Law* (OUP, Oxford, 1996) 293, 299-301

deliberation is open to whatever is relevant to the good of the community. The reasons for change may justify a complex, comprehensive decision as to what shall be done. The legislature is able to act to introduce a detailed set of legal rules that addresses an aspect of the common good in this comprehensive way. Legislation is posited at a certain point in time in a canonical formulation and is prospective in effect. It is a form of law suited to the rule of law. Public promulgation and canonical formulation make the legal change easier to locate and grasp than that found in unwritten custom or in the best understanding of a line of cases. This advantage is contingent, but the structure of the legislative act is directed towards positing law in the best form possible, by way of a public, canonical text, which is the focus of legal reasoning.

The act of legislating is the making of a choice. The legislature's duty is to act to change the law when there is good reason for change, introducing, amending or repealing legal propositions in order to better realise some aspect of the common good. The legislature stands ready to change the law when need be, which calls for legislators – whose joint action is the legislature acting – to think carefully about the adequacy of the law and about whether legal change is warranted. When the legislature acts to enact some statute, it exercises its capacity to change the law for good reasons, which is to say it exercises its will to adopt some reasoned proposal for legal change. The legislative act is the decision as to what should be done. The form of the act is the utterance of the statutory text that promulgates the legislature's reasoned lawmaking choice.

Legislative deliberation is reasoning about how or if to change the law, reasoning which culminates in the working up of proposals for change that are *chosen*. This reasoning is complex. Reflection on the common good may provide reasons to develop a proposal to change the law in some way, which proposal is a complex means to the ends that constitute the relevant aspect(s) of the common good. This proposal the legislators will develop and evaluate, revising it to avoid some (not all) foreseen but unintended consequences and to make it a means capable of securing some other intelligible end(s). The legislators develop this proposal and may choose it, qua legislature, if they conclude that it is fit to be chosen, such that there is good reason for the legal changes it introduces.

The legislative act is a moral choice made in response to reasons. One cannot legislate well without sound moral judgment. However, sound moral reflection does not reveal an ideal legal code, which the legislature may transcribe or translate. Reasonable legislators will perceive that there are many goods, which do not reduce to any one master-value and which may be realised in the lives of the many persons for whose common good they should act. Legislators will recognise further that while some sound intermediary principles and absolute prohibitions frame how persons should live, moral norms alone are insufficient. The legislature's action is framed by general moral truths but its duty is very often to "specify" these truths, choosing in what particular forms they shall be given effect in the law of his community.

Legislative deliberation is informed by empirical reasoning, in which legislators aim to discern the relevant facts about the state of the world, such that they may change the law in a way that introduces the patterns of social life (say, an absence of strife; or fair and thriving commerce), for which they jointly act. Legislating well (or indeed even at all) also requires technical reasoning – about the existing law and about how one's proposed lawmaking act is to work to change the law and the world. The craft of legislating involves developing proposals in a form fit to change the law and the life of the community as intended. The

elaboration of a set of legal rules, which is intended to capture the moral conclusion that a problem ought to be addressed in a certain type of way, may suggest alternative ends for which the legislature should act or may even warrant revising or abandoning that prior moral conclusion.

Part of the craft of legislating is attending to how and why the persons one aims to coordinate are likely to act. The law the legislature enacts will appeal to the reasonable, while often compelling the unreasonable to comply. The legislators may foresee that many persons are likely to fail to comply with the legal rules they introduce and yet rightly refrain from choosing some alternative, more effective means of compliance if, for example, that means is too harsh or too costly. Here, the legislature chooses some particular (complex) means to the end(s) for which it acts, not on the limited grounds of instrumental rationality but rather by considering the range of valuable goods in play.

The reasoning of legislators is an extended reflection on the position of their community, its common good and the opportunities they have to act for that good. The legislature's deliberation involves the formation, refinement and scrutiny of proposals for how to change the law in ways that are supported by good reasons: that is, which support, protect or instantiate some aspect of the common good. Legislators may begin with relatively abstract ends, such as maintaining a clean environment or a social order free from violence, but their reflection on those ends involves their specification, identifying more particular states of affairs that are attractive elaborations of the more abstract ends and which are fit to be chosen.¹⁸ The formation of means to those states of affairs may in turn develop further ends that warrant the legislature's response (or at least its intelligent consideration), and particular means to further ends may constitute partial ends in their own right. The final proposal for legislative action in which deliberation culminates is a complex scheme of means-end relations, which the legislature may choose, in which case it acts intending the means and the ends.

The legislature legislates when it communicates or promulgates its choice that certain propositions shall be law. The legislative act thus adopts a canonical text and authoritatively introduces into the law the propositions the text formulates. However, the legislative act is not first and foremost a communicative act. It is necessarily communicative, because the legislature acts to direct the community, which means that its choices must be made known – communicated.¹⁹ My point is simply that the act of legislating is not a communicative act that has consequences for the content of propositions that direct the community. The act of legislating is the act of settling on those propositions. That is, just as law in general is seen most clearly in the bearing it has on – the meaning and force it has in – the deliberation and action of those it addresses, so too the primary reality of legislating is in the practical reasoning and choice of the legislature. The central aspect of the act of legislating then is the exercise of reason and the response of will, which culminates in choice.

¹⁸ On specification, see H Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (2002), especially 104, 108-10, 127

¹⁹ Cf. N Stoljar, 'Survey Article: Interpretation, Indeterminacy and Authority: Some Recent Controversies in the Philosophy of Law' (2003) 11 *The Journal of Political Philosophy* 470, 476-7 and 'Is Positivism Committed to Intentionalism?' in T Campbell and J Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism* (Ashgate, Aldershot 2000) 169-83; H Hurd, 'Sovereignty in Silence' (1991) 99 *Yale Law Journal* 945.

I noted above that the need for legislating is prior to the question of *who* should legislate. The king is capable of legislating alone, but should invite an assembly to join with him in legislating and in due course to legislate without him. However, the king should only authorise the assembly to legislate alone if it is capable of making and conveying intelligent choices about how to change the law. For an assembly to be a well-formed legislature, to exercise the legislative power as it should, it must have this capacity.

The king summons a parliament that jointly represents the realm, in order the better to secure the willing cooperation of his subjects and to benefit from their counsel and wisdom. This line of reasoning suggests the shape of the good reasons there are to authorise an assembly alone to exercise the legislative power. One way to minimise the prospects of tyrannical government is to require the cooperation of hundreds of legislators, including the support of a majority of those assembled, to change the law. That each legislator is standardly chosen by a great many electors is a further relevant division of power. The sheer number of legislators, who are drawn from throughout the community, makes possible a kind of public participation that is impossible if one person alone legislates. The assembly's public deliberation involves very many legislators, who are well-placed to bring forward and articulate a range of perspectives and interests. The competition amongst legislators and groups of (would-be) legislators helps focus and advance wider public argument about what should be done. Vesting the legislative power in an assembly makes provision for an ongoing, public argument about how or if the law should change, an argument that would have little traction apart from the plurality of the legislators. Further, the size and diversity of the assembly makes possible the articulation and integration, or at least serious consideration, of much information and reasoning that is relevant to how the legislative power ought to be exercised. Sharing the power widely in this way is a means to secure disciplined, informed legislative action consistent with political equality.

IV. Adjudication and interpretation

The reasonable king founds courts to make provision for particular justice, for the resolution of disputes in accordance with the law, whether particular custom, the common law of the realm or statutes of his parliament. There is good reason for this separation of judicial, or adjudicative, power, viz. that it helps make possible fair adjudication, in which the law is faithfully applied to the dispute in question. The particular authority of courts then is to settle disputes about fact and law within their jurisdiction, changing the reasons for action of the parties by their authoritative ruling. The reason for a dispute may be disagreement about what exactly is the law, which disagreement the court must address by way of an authoritative ruling on point. If the legal source in question is a statute, then the court may have to consider and rule on the meaning and effect of the statute.

Scholars and judges often speak of the courts exercising a *power* of interpretation. This line of thought understands the judicial power at least to involve a power to interpret the law, especially statutes enacted by the legislature. This understanding resonates with some more particular explanations of what characterises the practice of statutory interpretation. The judicial power to interpret is, some say, a power to *control* the legal meaning and effect of a statute, which power constitutes an effective judicial veto over unreasonable legislation, subject to the capacity of the legislature to try again (which legislative act is then again, as

ever, subject to judicial interpretation).²⁰ There is no legal change without the compliance of judges, the argument runs, which may be withheld in the course of interpretation, such that judicial power is in a sense a counterpoint to legislative power.

Relatedly, the power to interpret is understood by some scholars to be a judicial lawmaking power, the exercise of which completes or extends the law made, in some sense, by the legislative act.²¹ In radical form, the argument might be that there just is no legal change until the court applies the legislation, but in less radical form, one might say that legislation is standardly opaque and incomplete, requiring the court to make new law in interpreting it. This mode of lawmaking, these scholars maintain, is different to legislating properly so-called, for interpretation is somewhat confined by what has come before and by the material in question. However, the bottom-line is that the judicial power is a power to interpret and the interpretation of statutes is a kind of judicial lawmaking.

My discussion of the nature of the legislative power is in obvious tension with any understanding of the judicial power as a power of interpretation. For: the legislature acts to change the law in some specific ways for some good reason. This authority to change the law is required to secure the common good, which entails that the subjects of law should adopt the legislature's lawmaking choice as if it were their own. Hence, any well-formed practice of statutory interpretation will aim to identify and give effect to the legislature's lawmaking intentions and no person or body will understand himself or itself to be free to choose whether or how to give effect to those intentions. The nature of the legislative power and its exercise provides the object for interpretation.

In a recent paper, Endicott considers Bentham's argument that the interpretive role of judges is an arbitrary power, which ought to be abolished, and argues instead that "the judge's interpretive role gives them substantial power to determine the content of the law",²² which power may but need not be used arbitrarily. For Bentham, interpretation is arbitrary because it involves the judge departing from the lawmaker's clearly expressed intention.²³ Endicott outlines three putative solutions to the Benthamite problem, which he says is in truth insoluble. The first is to direct judges not to go beyond the "literal meaning" of what is enacted, where literal is used by Bentham non-literally to mean "clearly intended". The problem is that the legislature may have made a vague, general choice, which does not and is not intended to settle precisely what is to be done. It would be no good, Endicott continues, to condemn all such lawmaking, for often the legislature should make precisely such choices, which "allow for creative, contested interpretations". (Elsewhere, Endicott argues that neither the application of vague terms nor moral reasoning about what should be done is interpretation, which is an attempt to answer the question about some object's meaning.²⁴) The second putative solution is to refer the question of the law's interpretation back to the lawmaker itself. Endicott notes that the lawmaker may not be continuous over time, but will

²⁰ P Joseph, 'Parliament, the Courts, and the Collaborative Enterprise' (2004) 15 *King's College Law Journal* 321; cf. R Ekins, 'The Authority of Parliament: A Reply to Professor Joseph' (2005) 16 *King's College Law Journal* 51

²¹ TRS Allan, *The Sovereignty of Law* (OUP, Oxford, 2013); A Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP, Cambridge, 2009)

²² T Endicott, 'Arbitrariness' (2014) 27 *Canadian Journal of Law and Jurisprudence* (forthcoming), 1

²³ *Ibid.* 5

²⁴ Endicott, 'Legal Interpretation', chapter 2.2 in A Marmor (ed), *The Routledge Companion to Philosophy of Law* (Routledge, London, 2012)

rather change, and also, and more importantly, that the lawmaker's "interpretation" in such circumstances would itself be likely to be a new lawmaking act.

The third solution, to which Endicott devotes much attention, proposes that the rule of law may be secured if only the judge gives effect to the intention of the lawmaker. He outlines an analogy to show why this is an interesting mistake. Imagine your mother leaves a note saying "you can have half the dessert in the fridge" and when one opens the fridge one finds a piece of cheesecake and a pot of yoghurt.²⁵ Clearly the cheesecake is dessert. If the yoghurt is also dessert then the piece of cheesecake is half the dessert and one may eat the whole piece. One might think one should give the note the effect your mother intended it to have. Endicott argues otherwise: "if you come to a reasonable view as to what counts as dessert in the circumstances, and she wrote that you could eat half of it and you do eat half of it, you have done all that could be asked of you in this respect of your response to her note."²⁶ He goes on to say that when judges talk of giving effect to legislative intent "they are usually just thinking about what would be a reasonable way of dealing with the application of this text in the circumstances", together with the premise that the legislature was reasonable. True, one's parents are an authority (for a child), "[b]ut your task as an interpreter is to work out what they did, and now that they intended."²⁷

Intentions might be relevant, in the fridge example at least, he says, if they provide one with a collateral reason to understand the authority to have one result in mind rather than another. For example, in the fridge example, say one's mother has said to one's sister that "the yoghurt is for breakfast, it is not dessert".²⁸ Endicott reasons that this might well be relevant to what one should do, if one should do as the authority *wishes*, but not if one should do what she *says*. He then argues that whatever the case for parents, "[c]ollateral information about the intention of a lawmaker has no general relevance to *legal* interpretation."²⁹ His example is a constitutional founder's diary entry, which makes clear, let us imagine, that the constitutional assembly understood itself to be enacting a certain rule when it agreed to the text of the enactment. Thus, what the lawmaking assembly said (and meant) matters, but what it intended the effect of its communication to be, which it did not communicate, does not matter, or at least does not bind.

Endicott takes me to be amongst those who disagree with this account of lawmaking and interpretation.³⁰ I disagree in part only. Endicott is right, to my mind, to the extent that his focus is on the question of how the authority's chosen rule applies to some particular case or even class of cases. The legislature intends to introduce some new state of affairs by way of its lawmaking act, but in so doing it does not pick out in advance the particular applications of the rules that it enacts, such that the question to be determined in applying a general term is whether the legislature intends this particular application. However, the sense and scope of the general term, which is the legislative choice, certainly does turn on what it is that the legislature intends to convey (to which our knowledge of its beliefs about particular cases, if any, would be relevant) and/or the reasoned choice it makes.

²⁵ Endicott (2014, forthcoming), 9

²⁶ Ibid. 10

²⁷ Ibid.

²⁸ Ibid. 10-11

²⁹ Ibid. 11

³⁰ Ibid. n26

The argument's application to the fridge example is somewhat problematic. Adopting Endicott's frame, I would say that the interpretive question concerns the intended meaning of "dessert". Answering that question might settle the question of application, insofar as the mother uses "dessert" to refer to a class of sweet food that plainly does not include yoghurt. Or it might not, if yoghurt remains, as Endicott assumes, an arguable instance of the relevant class. However, if the mother knows there is only one pot of yoghurt and one piece of cheesecake in the fridge then she very likely intends either to convey to him (1) the option to eat either the yoghurt or the cheesecake or (2) the option to eat half the cheesecake. In other words, "dessert" here is not so much a general class as a way of expressing one of these two options. (Do a pot of yoghurt and a piece of cheesecake form one whole – dessert – of which one may consume half? I doubt it, but such language use is certainly possible.) The size of the piece of cheesecake, the health of the child, and the needs of others would all be relevant to determining what it is that the mother has decided. Again, it may be that she has decided only that the child should eat half the "dessert", with this choice leaving open the question of whether it is reasonable to count the yoghurt as such.

Endicott's argument is imprecise about what it is that the authority has done and about why what it has done should change the law. The legislature exercises authority to settle how the law should change. It acts by way of a communicative act that aims to make clear its lawmaking intentions – its intended meaning and reasoned choice. The formation of these intentions is what the legislature has done. So too is the promulgation of these intentions. There are very good reasons for limits on how one infers what the legislature intends, limits which require a certain kind of publicity of argument. But if my argument in the previous section is right, what it is that the legislature has done is precisely to form and make known its intentions. (Again, these intentions go most directly to the sense of the rule not the question of particular applications.) One sees the significance of Endicott's imprecision about what is done in his treatment of collateral reasons. Knowing what else one's mother has said, or what else the legislature has said or done, is relevant to how one should understand her or its intended meaning in this particular act of language use. There may be good reasons to limit the use of legislative history. Still, one should certainly be free to argue from the wider pattern of legislative action, from the history of this body of law and the other sections that make up the whole statute that the legislature likely intends to convey this particular meaning rather than that, notwithstanding that the sentences might reasonably be used, in some other context, to convey some other alternative meaning.

In an earlier paper, Endicott argues that many aspects of legal reasoning are wrongly thought to involve interpretation, viz. (1) resolving indeterminacies as to the content of the law, (2) working out the requirements of abstract legal provisions, (3) deciding what is just, (4) equitable interference with legal duties or powers or rights, and (5) understanding the law.³¹ Instead, he takes legal interpretation to be a creative, rational process for arriving at the meaning of some object, which provides a rule for the application of the law. I have criticised this account of the nature of interpretation elsewhere, at least in so far as it concerns the interpretation of statutes.³² The grounds of my criticism were that the stress on creativity and the imprecision about what the object is tend to obscure what is and should be central in statutory interpretation: inferring the lawmaking intention that is the exercise of the legislative authority. Moreover, inferring what was intended is to understand the law in relevant part, as indeed Endicott's own later discussion seems to concede. Finally, I deny

³¹ Endicott (2012)

³² R Ekins, *The Nature of Legislative Intent* (OUP, Oxford, 2012)

that equitable interpretation is just qualification of unconscionable applications of the law. Rather, I say, it is a mode of reasoning that perceives that what the legislature has done may come apart, with the intended meaning the legislature aims to convey not matching the reasoned choice which it made in legislating and which explains that intended meaning.

These criticisms aside, I agree with Endicott, that many aspects of legal reasoning, or at least reasoning according to law, do not involve interpretation. The legislative choice, made out by way of the intended meaning of the statutory text, may introduce a vague rule, or an abstract rule, or a rule that requires the subjects of the law to act morally. In other words, legislating may and often should frame but not exhaust how the subjects of the law should act. Very likely officials other than legislators may have to decide what is to be done. Perhaps there is or should be a general judicial role in supervising these applications or specifications of open legislative choices. The application or specification in question may involve a kind of legislative power, making general rules that further detail what is to be done, or rather the executive power to deal with circumstances as they arise. The judges may sometimes be well placed to apply or specify the legislative choices in question, but at other times should defer to some other body's action to this end. The importance and strategic significance of the court's adjudicative authority should not be thought to entail that this process of application or specification is peculiarly the task of judges.

The distinctive judicial power is not a power to interpret but to adjudicate, which means that courts are capable of settling disputes authoritatively, within jurisdiction. This includes a capacity to state authoritatively the meaning of some disputed provision, but the authority is in settling the dispute, not in constituting legal meaning. That is, aside from settling the particular dispute, the legal effect of the interpretation (better: the judicial understanding) turns on the general effect of precedent, in which the decisions of courts form part of the materials that (somehow, to some extent) constrain later courts. No reasonable judge, I say, may self-consciously set out to exercise his or her power of interpretation. For no such power exists: rather, one should aim to infer the legislature's intentions, which once inferred may call for further modes of legal reasoning, or reasoning according to law.

Separating the legislative and judicial powers helps secure the rule of law. The special virtue of the courts is their capacity to keep faith with past commitments, making it possible for some past act to settle now what is done, and hence for acts taken now to frame what is done in the future. The past act is most obviously an exercise of a legal power, especially of public lawmaking but also of contracting or so forth. The judiciary's disposition to maintain continuity over time secures the advantages of law and mitigates the temptation on the part of rulers (and others) to set aside past choices when their application now prove inconvenient or difficult. Perhaps a wise ruler might at times do better to decide now on the merits rather than to abide by some past act, but we value being able to make and rely on rule that is indeed a rule, not least since justice often requires as much.

The judicial power to adjudicate independently, to determine how some legal rule applies to the case in question, is *not* a power of tacit veto or amendment. Rather, in finding the law the court stands in the position of the law subject, adopting the authoritative (promulgated) choice as if one's own. Inferring what the legislature has chosen very often calls for evaluative reasoning on the part of the law subject: reasoning to make sense of the utterance of this semantic content in this context and, strikingly, to understand the complex means-ends reasoning on which the legislature acts in choosing to change the law. The need for evaluative reasoning is consistent with the truth that it is the legislature's choice that settles

what should be done. The subject of the law, including the judge, is not at liberty to remake the legislative act to better suit one's own dispositions or choices. My point is that subjection to the authority of another is an intelligent act, requiring a sympathetic reflection on the reasoning of the authority, a reflection framed and informed by one's exploration of the rationality of using this form of words to convey some meaning.

One finds an apparently similar, but importantly different, line of argument in TRS Allan's work.³³ Allan's concern is to stress that the legal meaning and effect of a statute is to be found in its principled application to particular cases, in which courts should reflect on what the legislature should have decided in enacting this statute. The legislature is not a single person, which means, Allan maintains, that it should not be approached as a speaker whose communicative intentions settle legal meaning. Rather, the court should reason by way of the heuristic of the (imaginary) reasonable legislator, asking how he or she would adapt the general statutory purposes to the particular question of principle at hand.³⁴ For example, if rape-shield legislation provides that the court shall not grant leave to cross-examine the complainant in a sexual offence case save in three carefully specified circumstances, one's dialogue with the imaginary legislator might warrant the conclusion that the legislation should be taken to be subject to a proviso that the court may grant leave whenever to fail to grant leave would deny the defendant a fair trial.³⁵ Lost here is concern for the authority and reasoned action of the enacting legislature, which clearly chose to impose careful limits on the judicial discretion to permit cross-examination, limits which Allan's reading flatly ignores.³⁶ The legislature acted to specify the right to a fair rape trial and one may readily understand its reasoning and give effect to its choice even if one would do otherwise.

V. Locating the executive power

The reasonable king exercises the power of governing to make provision for securing the common good, including by separating legislative and judicial power. The executive power is what remains of the general power to govern after this separation. What remains is an immense, far-reaching responsibility to act for the common good by exercising public powers, apart from legislation and adjudication, and by deploying public resources within the frame of (that is, subject to the rule of) positive law.

For Locke,³⁷ while the legislature may and should meet only from time to time, the executive is required constantly, standing ready to carry out the laws, which is both to enforce them in particular cases (including giving effect to judicial orders in particular disputes) and to take such action as is permitted or authorised by law and which it thinks required in the public interest. In this way, the executive is the active part of government, constantly taking such actions as it judges the common good requires (including most fundamentally to maintain that peace which is a precondition to decent social life) within the scope of its lawful powers. Or to put the point otherwise, the executive is the institution – itself a complex set of

³³ TRS Allan, *The Sovereignty of Law* (OUP, Oxford, 2013)

³⁴ See further TRS Allan, 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning and Authority' (2004) 63 *Cambridge Law Journal* 685; and for criticism, my 'The Relevance of the Rule of Recognition' (2006) 31 *Australian Journal of Legal Philosophy* 95

³⁵ *R v A (No 2)* [2002] 1 AC 45

³⁶ See further my 'Legislating Proportionately' in G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP, Cambridge 2014, forthcoming)

³⁷ J Locke, *Two Treatises on Government*, II, paras 143-148

institutions – with the legal authority and the practical capacity that makes possible carrying out this set of actions. These actions may be more or less general or particular, ranging from the formulation of grand strategy, to the decision to exercise military force here and now, to the deployment of some particular forces to that end, to the tactics adopted in the course of that deployment by some particular soldiers.

The executive power is at once both the power (authority and capacity) exercised by thousands or millions of officials acting jointly and the power exercised by one or a few preeminent officials to direct, to some extent, the actions of the other officials. In the latter sense, the power might remain in the king, notwithstanding the partial or complete separation of legislative and judicial power, or might be exercised by a president (an elected king) or a government formed from within a legislative assembly. Whatever the number of persons in whom the power is vested, it is characteristic that the power is held and exercised by a person or group that is unified and is capable of decisive action. Thus, the executive is marked by hierarchy in a way that is not true, or not nearly so true, of the legislature or even the judiciary (the Supreme Court does not stand to inferior courts as the king does to his servants). The reason for this hierarchy and unity is obvious: the executive power cannot be exercised properly if its exercise requires the agreement of disputing parties, for the failure to secure such agreement may frustrate the ongoing action that the common good requires. It would be unwise to subdivide the executive in such a way that different institutions had different masters, themselves not subject to a common authority (apart from the legislature *qua* law maker). For this reason, while Locke distinguishes the federative (defence, foreign affairs) from executive powers, he argues both must be exercised by the same set of hands, otherwise one has instituted a standing prospect of civil strife.³⁸

I argued above that there were good reasons for the legislative power to be exercised by an assembly, partly because this divides authority amongst many hands. Does the need for resolute action require the executive power be exercised by one person alone? Hobbes argued forcefully for vesting sovereign power in one person rather than in many for exactly this reason.³⁹ However, I answer that there are good reasons to vest the executive power in many hands to the extent this does not compromise unity. In the British constitution, simplifying only a little, the executive power is held by the Crown, with the Queen acting on the advice of her responsible ministers, or by departments that consist of Crown servants who act on the direction of the Queen's responsible ministers. The Crown personifies the whole, but the constitutional reality is that the executive is headed by cabinet, which is a group consisting of leading ministers who hold the great offices of state. This cabinet jointly sets government policy, with unity being maintained both by the convention of collective cabinet responsibility and shared political interest. The Prime Minister is the Queen's first minister and forms a government, but cabinet does not do his or her will, is not his or her instrument for implementing policy. The advantage of cabinet rule is that no one minister, not even the Prime Minister, enjoys unrestrained freedom. The Opposition in the legislature constitutes a government in waiting, well-placed to present an alternative to the voting public, and in a somewhat similar way leading members of cabinet could succeed or supplant the Prime Minister, which prospect disciplines him or her.

Parliamentary and presidential systems are of course distinguished by the relationship that obtains between the legislature and the executive. In the former, the executive is the leading

³⁸ Ibid.

³⁹ T Hobbes, *Leviathan*, A Martinich (ed) (Broadview Press, Peterborough, 2005), chapter XIX

subset of the majority party, a group of ministers who jointly enjoy the confidence of a majority of the legislature, or at least of the house responsible for supply. The entitlement to form the executive, to direct the great offices of state, turns on securing and maintaining the confidence of other legislators, which if withdrawn ends the government. In the presidential alternative, the executive stands apart from the legislature in that it does not require the continuing confidence of legislators and enjoys its own direct entitlement to rule. That the executive *may* continue apart from majority support in the legislature in turn makes it much more likely that the an executive *will* lack such support, for the legislature does not conceive of itself as forming and maintaining a ministry. The prospects for coordination of legislative and executive power are therefore much poorer in a presidential than a parliamentary system, in which the government is in a sense a committee of the legislature.

Plainly it is possible to some extent to separate the executive and legislative powers. Indeed, for the reasons outlined in section II, there are very good reasons, first, to prevent the king alone from legislating and second, to authorise an assembly alone to legislate. The merit of authorising an assembly to legislate is in part that it does not exercise the executive power, hence is capable of attending directly to the question of whether the law should change without temptation to take the law already to have changed, to better suit its present plans or priorities. Having said this, it is difficult to isolate the executive from the legislative power and it may well be unwise to attempt as much.

The sound exercise of the executive power requires intelligent legislative provision. And one cannot legislate well, often, without the benefit of executive insight. More importantly, the line between executive and legislative power is sometimes very fine, with the formulation and promotion of public policy involving both. Put a different way, good government requires the integrated exercise of the powers. Yet the executive power must be subject to the legislative power in a sense, which in turn has to make provision for continuing executive power. Good government, it seems to me, requires the integrated, coordinated exercise of differentiated powers, with legislative power informed and framed by executive power (say, in proposing a budget for the public education system, which turns on a coherent plan for spending and action, itself understood in relation to other spending commitments) and executive power in some way disciplined by the legislative power. This discipline is twofold. First, it is a matter of subjection to the rule of law, such that statute frames, directs and limits the executive. Second, it is a matter of ongoing financial support, with the legislature choosing to continue to authorise supply. The power to withhold supply was critical in the British Parliament's struggles with the king, when the king's authority to act was not otherwise dependent on legislative confidence. The power remains critical in the United States, I suggest, because the president replaces the king and sometimes cannot be brought to heel save by financial means. Parliamentary control of finance remains of utmost constitutional importance in Britain but financial sanction is more or less unnecessary, for the executive requires legislative confidence. No need then to defund the executive, which would be problematic (putting it mildly) in any case, in view of the scale of the executive and the importance of the ongoing capacity to govern.

Of course, in a presidential system like the United States the formal separation of executive and legislature is complicated by, inter alia, the presidential veto (a sharing of legislative power with the executive) and the role of agencies (institutions that form part of the executive, enjoy wide statutory powers and are directed to some extent by the President and overseen in part by Congress). This mingling of executive and legislative powers rather confirms that whereas the rule of law requires and justifies a fairly strict separation of judicial

power, there is not quite such an obvious way to structure the political authorities, to frame how they are jointly to legislate and act to govern the polity well.

VI. The social reality of well-formed legislative action

Many scholars doubt that a group of many legislators, who disagree with one another about what is to be done, could possibly respond to reason and choose as one. That is, while it seems plausible that the interaction of legislators might produce outcomes, these outcomes (which is to say: statutes) should not be thought to be the *decisions* of any single agent, for no such agent exists. After very briefly outlining and critiquing the main lines of argument in question, I explain, again briefly, how the well-formed legislative assembly is an agent that is capable of exercising rational agency. My strategy, following the classical method of social theory, is to adopt the perspective of the reasonable legislator, whose reasoning and action constitutes the central case of the institution of the legislature, and whose self-understanding explains what it is for the legislature to act.

Amongst the most powerful and important arguments that the modern legislature is incapable of reasoned choice is the argument that the legislative assembly is best understood to be a machine rather than an agent. The legislature generates outcomes from the interaction of the many legislators, but does not respond, *qua* legislature, to reasons. It is not structured, in other words, to make reasoned choices. The machine conception of the legislature finds surprisingly wide support in legal and political theory. Dworkin outlines this conception in stark terms in his early work:

[A]ny political judgment about what makes the community better as a whole must count the impact on each particular person as having the same importance. As Bentham said, ‘Each man [and woman] to count for one and none for more than one’.

The political process in a democracy is meant to translate that requirement into legislation through the institutions of representative democracy. The welfare economists have worked out a theory to how that is achieved. Each individual, through his votes and other political activity, registers or reveals a preference. The political process is a machine which is calculated, though imperfectly, to reach decisions such that, though some individuals suffer and others gain, the *overall* preferences of all the people, considered neutrally with the same consideration for the preferences of each, is improved.⁴⁰

(The passage goes on to argue that the point of judicial review is to correct the excesses of the machine, which is liable to double-count.) Why think the legislature functions thus? Dworkin reasons that legislators seek re-election and hence aim to do as their constituents please and as lobbyists direct. This passive conception of the legislator, in which legislators respond directly and uncritically to the stimuli of constituent and lobbyist pressure, owes much to public choice theory, in which the legislative process is understood to be a ‘transmission belt for the translation of interest-group preferences into public law’.⁴¹ Yet the

⁴⁰ R Dworkin, ‘Social Sciences and Constitutional Rights—the Consequences of Uncertainty’ (1977) 6 *Journal of Law and Education* 3,10

⁴¹ D Rodriguez, ‘Legislative Intent’ in P Newman (ed), *The New Palgrave Dictionary of Economics and the Law* (Macmillan, London, 1998), vol 2, 563, 565 (Rodriguez does not endorse the public choice conception); see R Tollinson, ‘Public Choice and Legislation’ (1988) 74 *Va L Rev* 339–71.

public choice conception of the legislator is absurd for legislators may and often do act for reasons and are not the passive play-things of interest groups.

More interesting is the argument from social choice theory, which explores Arrow's impossibility theorem. Kenneth Shepsle argues that there are no reasons that explain any particular legislative majority's policy choice. Each legislator has reasons, but the majority does not: many legislators make up the winning majority and 'their respective reasons for voting against the status quo may well be as varied as their number.'⁴² The winning majority consists of legislators acting for different reasons, to express different preferences or acting strategically. There is a majority for this bill but the majority does not make a coherent collective choice for reasons in the way that a single person does. The policy that a majority votes to enact is largely the result of what Mashaw terms 'the institutional matrix',⁴³ that is, the internal structure that determines how the legislature votes on various policy proposals. (Many legal scholars adopt this argument.⁴⁴)

Doubts of this kind about the legislature's capacity to act for reasons are very widespread. Strikingly, even Jeremy Waldron, in arguing for the dignity of legislation as a principled source of law, takes the legislature not to be an agent but rather to be a kind of voting machine.⁴⁵ The machine produces a statute by aggregating the result of a series of votes by legislators on particular legislative texts. The sequence of texts (particular sections) that survives the series of majority votes is the statute. The point of the model is to show that the content of the statute was not the preference, and so was not the object of the intention, of any one legislator. Instead, the statute is just the product of a series of majority votes. Legislation produced in this way, Waldron argues, may be a reasonable exercise of authority, such that the community has good reason to take the content of the statute to settle what is to be done. Thus, Waldron's theory of the legislature is similar to Dworkin's, notwithstanding the former concludes that the indirect interaction of the legislators may give rise to legislation that is reasonable, that is in some sense principled.

These theories fail to explain well-formed legislative action, which is to say they do not explain the central case of a legislature. They fail to adopt the internal perspective of the reasonable legislator, whose choice and action constitutes the central case. Hence, they fail to grasp the point of the institution and the capacities that mark it out as a type. Pace Dworkin and Waldron, a legislature that functions as a machine rather than an agent is not capable of acting well, of producing legislation that is and should be authoritative. The machine is incapable of answering the need for legislation, of responding to the reasons for changing the law with some coherent, intelligible choice. The statutes produced by the machine-legislature are likely to be incoherent, contradictory and unreasoned. This prospect, the risk of which is real, is a good reason for legislators to frame their joint action to avoid collective incoherence, to make possible action like a rational agent. Thus, reasonable legislators, whose self-understanding picks out the legislature as a distinct, stable type of institution with a characteristic mode of action, will set out to avoid forming a machine and instead will strive to form a purposive group that exercises agency.

⁴² K Shepsle, 'Congress is a "They," Not an "It": Legislative Intent as Oxymoron' (1992) 12 *International Journal of Law and Economics* 239, 244

⁴³ J Mashaw, 'The Economics of Politics and the Understanding of Public Law' (1989) 65 *Chicago-Kent Law Review* 123, 134

⁴⁴ Ibid. See also F Easterbrook, 'Text, History, and Structure in Statutory Interpretation' (1994) 17 *Harvard Journal of Law & Public Policy* 61

⁴⁵ Waldron 119-146

The legislature is a complex group.⁴⁶ The legislative assembly acts on majority vote. Its members enjoy decision-making equality in voting, but not in agenda-control, and the group structures their interaction in various stages by detailed procedural rules. The purpose of the legislature is to make law deliberately and for good reasons, which is to say for the common good. That is the purpose for which legislators act jointly and it is also the purpose that defines the enduring institution of the legislature, which particular legislators join for a time. The legislature stands ready to change the law, when there is good reason to do so. Again, it may be that it can act well without legislating frequently. The secondary or standing intention of the group, which defines the institution, and which all legislators share, is to stand ready to legislate when need be, acting on particular occasions in accordance with the legislative process. This standing intention is grounded in the unanimous interlocking intention of all legislators, who intend to act jointly to legislate.

The legislature acts to change the law. The act of the legislature, the exercise of its capacity to legislate, is the enactment of this or that statute. The legislature acts on a proposal for legislative action – a bill – the content of which is the particular plan on which the legislature acts, and thus its primary intention (to be distinguished from the secondary intention noted above). The bill is a proposal for legislative action because it is a plan for how to change the law. It is a detailed text setting out how the law will change if it is enacted. One finds legislative intent in the plan that coordinates legislators, which explains their joint action. The detail of the proposal is the focal point for argument and action. It is the proposal that legislators deliberate about and which, if they assent, they will act to introduce. That is, the proposal is what legislators hold in common. They act together by reference to that proposal and the legislature acts when they act to adopt it (a proposal that is rejected is not adopted and so there is no legislative act).

The plans of action that the legislature introduces should be coherent and grounded in an intelligible chain of reasoning. The proposals that legislators form and move and eventually adopt are considered for their suitability to be adopted by the legislature as a whole – that is, by the intelligent agent that the legislators jointly aim to constitute. If the legislative process truly were a machine, say Waldron's voting machine, then it would be extremely difficult for legislators to attend to the shape of the proposal put before them (strictly speaking, no unified proposal for action would be put before them; this would instead arise as a side-effect of their interaction). However, there is good reason instead for the legislative process to be structured otherwise, as indeed it is in most modern legal systems. Proposals for legislative action are developed over time in stages at which the coherence and intelligibility of the whole plan of action is before legislators (whether in committee or in plenary session). A subset of legislators, especially party leaders, the mover of the bill, and committee leaders, enjoy unequal control over the shape and content of the proposal, which helps make it possible for rational plans to be formed notwithstanding the possibly conflicting intentions of the many legislators. These plans of action, which may indeed be no legislator's first choice but which constitute complex, coherent means to intelligible ends, are then adopted by the legislature as a group in the act of enactment.

Far from legislative action being a side-effect, or even the overlap or coincidence, of the individual action of legislators,⁴⁷ legislating by assembly is the joint act of the members of

⁴⁶ Ekins (2006), 112-3

⁴⁷ John Gardner, Joseph Raz, Larry Alexander and Andrei Marmor each conceive of it in this way.

the institution. The particular actions of legislators are unified by the rational order of their standing intention to form an institution that acts rationally and by the rational order of their particular intention to choose to change the law in some specific ways for some specific reasons, which reasoned choice is made out in the proposal open to all. The social reality of the well-formed legislature is thus that it exercises rational agency, being structured to form and adopt reasoned plans and to reflect on their coherence. The axiom that grounds orthodox interpretive practice – that the legislature acts to convey some meaning, which articulates its reasoned lawmaking choice – has sound foundations. Thus, the well-formed assembly stands ready to legislate well and in its particular actions exercises its capacity to respond to reasons for changing the law by making reasoned choices.

For the reasons outlined above, all modern assemblies depart from the legislative state of nature and make provision for an internal hierarchy, in which some legislators enjoy positive or negative agenda power and are thus well-placed to frame joint decision-making. These internal hierarchies turn on the creation and allocation of legislative offices and on the organisation of legislators into political parties. They coordinate the actions of the many legislators into a process that is which capable of supporting and culminating in rational joint action. One assembly differs from another in part by the shape of its internal hierarchy, say on how widely negative agenda power is distributed and so forth.

Elsewhere,⁴⁸ I explore in detail how legislators form a standing intention to legislate, which involves creating and maintaining a complex process for working up and choosing plans of action, within which process internal hierarchy is central. I illustrated this exposition by way of a study of the procedures of the House of Commons. In a recent reflection on the relevance of legislative intent to statutory interpretation, Andrei Marmor cites my work and argues that its relevance is confined to parliamentary systems, in which government bills are introduced and adopted without amendment.⁴⁹ This is an intelligible riposte, explicable in part by my tentative conclusion that legislatures in parliamentary systems are better placed than their presidential equivalents to legislate well. I consider in the next section the important question of how far my present account of well-formed legislative action does hold in relation to Congress. However, I should first stress that it is no part of my argument to maintain that Parliament's capacity to form and act on intentions reduces to the prospect of government bills being introduced and adopted without amendment.

Most government bills do, and should, change significantly across the course of the legislative process, which at times extends across several years and parliamentary sessions.⁵⁰ The minister's understanding – the plan on which he or she acts – is not constitutive of the bill, but rather for good reason the minister enjoys considerable agenda-setting power. This pre-eminence in the development and change of the bill, with the support of cabinet colleagues and expert parliamentary counsel, makes possible coordinated, coherent development of legislative proposals. Thus, while bills change, at each point they are worked up with a view towards their adoption as a single, coherent plan of action, fit for choice by one agent. The subsidiary nature of the House of Lords supports this understanding of the legislative process, with bills originating in one house and being developed as they move between the two, with argument in the Lords very often carrying forward argument in the Commons, in a context lacking the political salience of the latter. The second stage of

⁴⁸ Ekins (2012), chapter 8

⁴⁹ A Marmor, *The Language of Law* (OUP, Oxford, 2014), 113

⁵⁰ S Kalitowski, 'Rubber Stamp or Cockpit? The Impact of Parliament on Government Legislation' (2008) 61 *Parliamentary Affairs* 694

deliberation in the Lords is very helpful in working over the detail of some bill without introducing discordance into the scheme in question. Thus, while parliamentary procedure is characterised by the central place of ministers and government business, this feature does not render deliberation otiose but rather helps the many legislators jointly make coherent, reasoned choices.

VII. The nature of Congress

I turn now to the question of the extent to which Congress is a well-formed legislature, such that there is good reason to understand it to be an agent capable of reasoned choice. As noted above, I have argued elsewhere that legislatures in presidential systems, like Congress, are less well-placed than their counterparts in parliamentary systems to legislate well. The separation of the executive, and the corresponding lack of an imperative to form a stable majority that supports an administration, makes it harder to act coherently. However, I maintained that there was good reason to think Congress an institution that is generally capable of legislating adequately, viz. capable of forming and acting on intentions to change the law in some way for some reasons. My aim in this section is to consider the composition of Congress in somewhat more detail with a view to reconsidering, and perhaps sharpening up, my conclusion concerning the capacities of Congress to legislate. I proceed by way of engagement with the work of Victoria Nourse on point.

Nourse argues that every theory of statutory interpretation carries with it an idea of Congress, which carries with it a theory of the separation of powers.⁵¹ She critically considers the idea of Congress that underpins textualism, purposivism, game theory, arguing that each goes astray in failing to perceive some key features of the institution.⁵² Textualism takes Congress to be incompetent, chaotic, and incapable, yet fails to grasp the reasons there are for members of Congress to act as they do, which action grounds intelligible, if often ambiguous, legislative action. Further, the textualist focus on plain meaning is itself ambiguous, arbitrarily privileging elite, legalist meanings over popular, prototypical meanings. Purposivism on the other hand wrongly assumes that Congress is made up of reasonable persons pursuing reasonable purposes. The assumption is wishful thinking, Nourse suggests, and cannot explain the prevalence of unclear legislation. Game theory is much more sophisticated in its analysis of Congress but goes wrong in overplaying the analogy between contract and legislation and in assuming that legislation is always the outcome of some deal and falls to be understood (interpreted) as such.

The features that distinguish Congress from courts, she argues, are the electoral connection and the super-majoritarian difficulty.⁵³ The first refers to the importance of the relationship between members of Congress and their constituents to whom they are answerable. Legislators care intensely about re-election and are subject to incentives to voice the concerns and opinions of their constituents and to speak and act in ways quite different to judges. The second refers to the difficulty of enacting legislation, in which any proposal must clear a sequence of hurdles, including multiple committees, plenary session, approval of the other chamber (including Senate filibuster), and the presidential veto. These two features give rise to a third, the principle of structure-induced ambiguity, which means that it is rational for

⁵¹ V Nourse, 'Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers' (2011) 99 *Georgetown Law Journal* 1119

⁵² *Ibid.* 1136-64

⁵³ *Ibid.* 1125-34

legislators to be imprecise, not least because they are speaking to the public (especially their own constituents) and to courts (and other officials) at the same time. For, while “there are few electoral costs to ambiguity (no one ever lost an election because of imprecision), ambiguity may yield essential gains in achieving supermajority consensus.”⁵⁴ Nourse takes for granted that legislating is in part a conversation between representatives and citizens, in which what the legislator is able to say about the legislative process (“I voted for X”) is more important than what the legislator has done. Thus, while “[c]ourts prize interpretive virtues” (precision, focus on rules and precedent, and detailed reflection on language), “[l]egislatures... prize collective and representational virtues” (action, agreement, compromise, addressing actual needs of the subjects of the law).⁵⁵

Attention to the structure of the legislature and its action entails that interpreters go wrong in assuming that the expert, legal meaning of statutory terms ought to control. Often, legislative deliberation and action is focused on statutory terms understood in their popular, prototypical sense, for the legislators do not aim for precision and it is these meanings that ground the conversation each legislator has with his or her constituents. It follows, Nourse argues, that the right mode of statutory interpretation, which is consistent with legislative supremacy, is ordinary meaning textualism enriched by legislative history. This is an unusual pairing, but an intelligible one. Nourse argues that studying the conversation amongst legislators may help make clear whether the legislators were using terms in their ordinary, popular sense or in their legal, expert sense, and if the former, will provide further evidence of what exactly is the popular, prototypical meaning.

If an idea of Congress carries with it an idea of the separation of powers, then Nourse’s account of the latter, like the former, focuses on the relationship between the people at large and the various institutions that represent them. She eschews essentialism about the separation of powers, which presupposes a sharp separation amongst branches than the Constitution, a presupposition undermined by, say, the presidential veto or Congress’s power to adjudicate impeachments. Yet shared-power theories are unhelpfully imprecise. Much better, Nourse argues, to focus on relationships of representation. This focus helps make clear what is objectionable about theories of statutory interpretation that call for, or license, extensive judicial lawmaking. Such theories involve a shift in power from an institution with a strong electoral connection to one with none (“the judicial aggrandizement risk”), and a shift in power from a body representing states and localities to one that is a national institution (“the federalism risk”), and the risk that the court will impose the meanings of a legislative minority (“the super-counter-majoritarian risk”).⁵⁶ In different ways, textualism, purposivism and game theory encourage these risks.

In a more recent article, Nourse extends this analysis further.⁵⁷ She argues that the metaphor (or fiction) of ‘intention’ ought to be abandoned as a distraction, and instead that scholars and courts ought to focus on ‘decision’.⁵⁸ It follows that one should understand the rules of procedure by which Congress acts, as this will help reveal its decisions. This line of reasoning Nourse takes to open up an illuminating new way of using legislative history, in which the relevance of various elements of that history at last becomes clear. Nourse argues

⁵⁴ Ibid. 1130

⁵⁵ Ibid.

⁵⁶ Ibid. 1172

⁵⁷ V Nourse, ‘A Decision-Theory of Statutory Interpretation: Legislative History by the Rules’ (2012) 122 *Yale Law Journal* 70

⁵⁸ Ibid. 74, 81-85

further that the close study of the rules broadly supports her account outlined above, although in this later work she perhaps makes clearer that (a) the rules provide incentives to introduce redundant language (surplusage) and (b) legislators are for the most part simply indifferent to later judicial interpretation.⁵⁹ Judicial failure to understand congressional procedure may have very serious consequences, not only in the mishandling (or wrongful setting aside) of legislative history, but also in the adoption of dubious theories about legislative action. For example, the fragmentation of congressional authority, by way of the committee structure, over appropriations and authorization has the consequence, Nourse argues, that it was problematic for the courts to hold that appropriation of funds for the Tellico Dam project did not impliedly repeal the Endangered Species Act in relevant part. The judicial reasoning that if Congress had wanted to repeal the Act in the course of making an appropriation it would have founders, Nourse says, on the impossibility under its own procedure of Congress making any such decision.⁶⁰

Before turning to the substance of Nourse's theory, I interject some doubts about her terminological turn. The distinction she introduces between decision and intention is unsound, for properly understood a decision just is an intention. Nourse hopes by focusing on decision rather than intention to sidestep the philosophical and legal literature concerning group intention, relying on the absence of any widespread scepticism concerning groups making decisions. The mismatch in scepticism, to the extent it holds (I am not so confident: Dworkin for example seems at times to doubt that the legislature is capable of making decisions and certainly the grounds of his argument against legislative intent in *Law's Empire* requires this more general scepticism), is interesting. However, it does rather suggest a confusion concerning joint intention, which is not a shared mental state but is instead the intelligible order that governs and unifies the intentional action of the members of the group, which order is constituted by some pattern of interlocking intentions.

Let me return to Nourse's fascinating study of the legislature. It adopts quite a different focus to my own in stressing the democratic character of the legislative assembly. Nourse justifies her exclusive focus on the electoral connection, super-majoritarian difficulty and principle of structure-induced ambiguity by arguing "[m]y purpose is to describe the minimum *necessary* conditions for an evidence-based theory of legislative process, and through that, statutory interpretation."⁶¹ Specifically, she aims to work from "uncontroversial evidentiary premises" to call into question textualism, purposivism and game theory. There is nothing objectionable about this strategy, save that the resulting idea of Congress is incapable of bearing the weight of a full theory of statutory interpretation and the separation of powers. Also, I am not so sure Nourse's elaboration of those premises is uncontroversial. More importantly, what is missing from the study is not ever more detailed political science analysis, with its eye on predicting policy outcomes,⁶² but rather discussion of the point of legislating and the way in which this point frames how (reasonable) legislators act. Understanding a type of institution or practice requires one to attend to the reasons there are to choose and maintain this institution or practice, reasons which mark out a general type. These reasons are largely absent from Nourse's account.

These reasons matter because they explain the constitutional grant of legislative power and the continuing authority that the legislature exercises. They also explain many of the

⁵⁹ Ibid. 130, 146

⁶⁰ Ibid. 130-133

⁶¹ Nourse (2011), 1134

⁶² Ibid.

procedures that make possible legislative action, as well, crucially, as the understanding of those legislators who do strive to change the law for good reasons. Nourse picks out, and gives explanatory priority to, some possible ways legislators act. Her analysis helps reveal some important truths, about which more below, but also advances a distorted account of legislative action. Like Marmor,⁶³ Nourse takes legislation to be a complex, strategic conversation, in which legislators speak both to judges and to the public. However, for legislators to change the law they must act jointly. Nourse's discussion makes clear that she takes the electoral connection to turn much more on what legislators say (about what they do) than on what they do: hence why there are no votes in precision. Doubtless some, perhaps many, legislators act thus, intending to posture, while remaining quite uninterested in the legal changes actually made. Yet the claim, and the more general distinction between interpretive and legislative virtues, is surely overstated. Some legislators and all good legislators aim to change the law for good reasons. And some voters and all good ones are concerned with what it is that legislators have chosen and will choose.

There may well be good reasons for Congress to be less precise in drafting legislation or in making legislative choices than its Westminster counterpart. The way in which the legislature makes provision for joint action may make it the case that striving for precision in drafting would too often frustrate acting to change the law at all. And the broader constitutional structure, in which the executive power stands apart from and is yet somewhat responsive (especially in the form of agencies) to congressional action apart from legislating, may mean that Congress need not always make precise legislative choices. However, none of this is to say that legislators will not very often act with an eye on securing some particular change, even if somewhat vague, in the law. The division of legislative labour likely entails that in relation to many acts the concern of most legislators is not with the particular detail of the legal change in question, about which they may be ignorant. Yet this detail will and should often be of utmost concern to those legislators who are most closely involved in developing and advancing the proposal, not to mention many other citizens and officials other than legislators. The will of Congress is not settled by the intentions of those active legislators, but the plan of action that is open to all legislators, including others whose proximate interest is grand-standing, will turn on what those active few act to put before others, which falls to be understood within the frame of congressional procedure, itself the means to the exercise of the legislative power.

The concern to legislate well, to act in a way that in fact changes the law in some good way, explains the point of the institution and informs the reasoning of legislators. These good reasons continually inform what the institution is for, what it should be, what it is capable of being. And this entails that these reasons help structure the interaction of legislators, bearing on how legislators reasonably understand what it is that they jointly do. The danger then in trying to work out from uncontroversial premises about legislative motivation is that one loses sight of some reasons that are central to the self-understanding of legislators.

Another very interesting dimension to Nourse's analysis, it seems to me, concerns the structure of representation. Her discussion presupposes that each legislator understands himself, and is understood, to represent his constituency, rather than the whole political community. It follows that he, and thus they, will act together in a particular way, with a view to forming deals that secure mutual advantage. Nourse might reply that if constituents understand themselves to be members of the whole, then their elected representatives will

⁶³ A Marmor, 'The Pragmatics of Legal Language' (2008) 21 *Ratio Juris* 423; cf. Ekins (2012), 238-9

sometimes act on this basis. Perhaps, yet even so if this is how representatives act, then this suggests that Congress is structured much more like Burke's congress of ambassadors rather than a parliament of one nation.⁶⁴ There are good reasons, I think, for a legislature to be the latter, for the former is not apt to legislate well or to make possible intelligent self-government. However, that Congress is structured in the former way matters, for it frames the capacities of the institution, and its likely action, on which interpretive practice centres.

I am not sure whether Congress is better understood to be a congress of ambassadors or a parliament of one nation. In the Westminster model, the legislature represents the whole people, with the executive's authority requiring in part the continuing support of that representative body. This formation of the executive within the legislature provides very strong support for coherent, unified action, which is capable of precise and comprehensive lawmaking change. The Washington legislature's distance from the executive, which itself (also?) represents the whole nation,⁶⁵ dulls the imperative for majority unity and may mean more freedom and incentive to bring the concerns and opinions of constituents into view. It is likely to be less good at integrating such into one reasoned choice. The Washington model may help avoid some of the ills of (royal) government, but at the cost of a reduced capacity to secure the goods of (unified, coherent) government. This might very well be a cost worth paying in relation to a federal legislature that has strictly enumerated powers, when state governments remain robust. It may be less attractive for a legislature with plenary powers and responsibilities, as I take it Congress has more or less become.

VIII. The central axiom of statutory interpretation

What are the implications of this study for statutory interpretation? The two types of legislature are both legislatures, the point of which is to change the law by way of reasoned choices. However, the different composition and self-understanding of these institutions makes for different dispositions. Hence legislative proposals may be made, developed and understood somewhat differently in each. In both cases, I maintain that interpretation must centre on lawmaking intentions, for in both the legislature is a complex group structured to make and promulgate choices: neither legislature is an aggregative machine or so forth. The difference is that legislation enacted by a Washington rather than a Westminster legislature is more likely to be a compromise, less likely to be coherent, and less likely to be precisely drafted. It is harder for a Washington legislature to act well. In either type of system, the subjects of the law should aim to understand authoritative lawmaking intentions, inference about which may be informed by differences in legislative structure.

In other words, Congress is not so well placed as Parliament to act well, but it is still reasonably understood to be a legislature, which aims to make intelligent choices. There are good reasons why one should not be surprised to find relatively less coherence and relatively more surplusage in Acts of Congress than in Acts of Parliament. This will vary from legislative act to legislative act and there are good reasons in both systems for statutory texts to be understood to make out complex, presumptively coherent reasoned choices. The general difference is that Congress is an agent that is standardly in the position of adopting schemes that are framed to appeal in some way to a broader range of agents, whereas

⁶⁴ E Burke, 'Speech to the Electors of Bristol' (1774)

⁶⁵ P Pettit, 'Varieties of Public Representation', in I Shapiro, S Stokes, E Wood and A Kirshner (eds) *Political Representation* (Cambridge UP, 2010), chapter 3

Parliament is an agent that is standardly in the position of choosing schemes that are framed to mark out a unified, coherent, precise choice of what should be done.

This difference in temperament, if you like, between Congress and Parliament follows from differences in internal hierarchy: the wide dispersal of agenda-setting power in the former stands in contrast to the central role of a unified government in the latter. The complex structure of the former may not only confuse the courts, as Nourse makes clear, but may also partly frustrate the exercise of lawmaking authority. Recall the Tellico Dam example. It is true that the court should not expect the impossible when inferring lawmaking intentions. Hence, it is unsound to reason that if Congress had intended to repeal another Act in the course of an appropriations bill it would have said so expressly if congressional procedure makes it impossible to say as much. Having said this, the institutional division that makes the direct expression of an intention to repeal impossible in this context very arguably also makes the formation (and promulgation) of the relevant intention next to impossible. For, save perhaps in exceptional circumstances, a decision as to appropriation of funds is not a decision to authorise whatever changes in the law might obstruct the expenditure of these funds. Those legal changes fall to be made by way of the procedure for making them, even if this means that by virtue of congressional procedure continued work on the project in question might require a complex two-stage lawmaking act.

The differences that obtain between Congress and Parliament go to the character of their respective agency, the way in which they are likely to intend to act, rather than to the question of whether they are agents at all, whether they are capable of intentional action. It seems to me that Acts of both types of legislature ought to be received and understood in the same way, as rational lawmaking acts.

The central axiom of well-formed interpretive practice is that the legislature is an institution that aims to act responsibly for the common good. This axiom is no fiction for it responds to the rationale for legislative authority, giving subjects of the law reason to understand the legislature's act to change what they should do *and* also animating and explaining the structure and operation of the legislature. The legislature is a type of institution that is capable of acting responsibly for the common good and in understanding particular exercises of legislative authority interpreters should presume that the legislature was what it should be and is capable of being: a rational, reasonable lawmaker. It follows that there is an important difference between how a court (or citizen) interprets an authoritative legislative act and how a historian or political scientist explains legislators and their acts and intentions.⁶⁶ The subject of the law should be slow to hypothesize, and even slower to conclude, that the legislative act is vicious, arbitrary or irrational.⁶⁷ For, while possible, any such hypothesis or conclusion is a postulation or judgment that the legislature has failed to do its duty. A mistaken or unjust exercise of legislative authority has intra-systemic validity, yet fails to be a central case of authoritative lawmaking. The relevant lawmaking choice changes the law in the way made clear, but fails fully to bind in conscience.

The legislature is able to act reasonably to change the law because legislators intend jointly to legislate, to change the law in some way for some reasons. Legislators may (and often should) do other things in the course of this joint action, including speaking to the electorate with a view to the next election, but the joint end is vital. Reasonable legislators act thus, and

⁶⁶ J Finnis, 'Priority of Persons', chapter 1 in J Horder (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, Oxford, 2000), 1, 13.

⁶⁷ T Hobbes, *Leviathan*, A Martinich (ed) (Broadview Press, Peterborough, 2005), chapter XXVI.

it is their disposition that provides the rationale for the institution and its operation. Other legislators are likely also to adopt this disposition at least to some extent and in some way, even if only for form, such that it structures the joint action of all legislators. And from outside the legislature, there are good reasons for the subjects of the law (including judges) to take the legislature to be what it is capable of being and should be, viz. an authority that responds to reasons by choosing how the law is to change. That is, there is no reason why the grant of legislative power to an institution requires the subjects of law – in understanding the law the legislature has chosen – to be open to the possibility of corruption or abandonment of duty. Hence, the central axiom noted above has a ground in the structure of the legislature, the explanatory priority of the reasoning of reasonable legislators, and the basic grounds of the legislature’s constitutional authority. My argument may seem similar to the Macy thesis that the reality of legislative action, per public choice theory, is grubby rent-seeking, which the courts should discipline by taking hypocrisy at its word.⁶⁸ My point, however, is that the rationale for legislating, and at least partial realisation in legislative action, provide good reason both to think that the legislative act is indeed what it purports to be – even if some of the legislators are incompetent or corrupt – and that legislative acts in general should indeed be understood to be what they should and may be.

In interpreting a statute, the subjects of law respond to the action of the institution in whom the legislative power has been vested, which presumably has exercised that power, that lawmaking authority, in enacting the statute. The ‘presumably’ matters, for the legislature may have failed to exercise the power in the full sense – neglecting the common good in its deliberations, or failing to focus on the statutory text as a possible candidate for choice. These failures may be more or less radical: from bribery, to electioneering, to exhaustion. The question is to what extent these failures ought to be transparent to the subjects of the law in the course of determining the changes to the law that the legislature’s act has introduced. It is difficult to determine in any particular case whether the legislature has misused its authority, failing properly to exercise its power. The constitution should not make provision for particular acts to be impeached on the grounds that they are, properly understood, no true judgment about reasonable lawmaking at all. For similar reasons, and in addition for charity and comity, the subjects of the law ought to take the legislature to be striving to exercise its capacities and hence ought to take the legislative act to be a presumptively coherent, rational lawmaking act. In other words, the legislature is to be taken to be an agent that makes intelligent choices which may be inferred.

For my part, I think even in relation to an institution as unpopular and problematic as Congress, the axiom is well grounded, capturing a central truth about the stable identity of the institution, which frames how members reason and act, including the rules they adopt and maintain. New members enter an existing institution which, whatever its pathologies, is understood by those who belong to it to be explained and animated by an understanding of the reasonable exercise of the legislative power. In relation to all purposive groups, there is always the possibility for a real, if non-central, kind of joint action notwithstanding private corruption or defection.⁶⁹ And what is held out jointly in public to others and to those for whom one acts partly constitutes the order that is one’s joint intentions. None of this is to say that private corruption or defection are unproblematic, or fail to leave their mark on the content of the lawmaking acts in question. But it is to say that an interpretive axiom that the legislature is a rational agent that acts for reasons and presumptively coherently is no mere

⁶⁸ J Macy, ‘Promoting Public-Regarding Legislation Through Statutory Interpretation’ (1986) 86 *Columbia Law Review* 223

⁶⁹ Ekens (2012), 64-66

fiction. It is grounded first and foremost on the truth about the type of institution the legislature is, of which Congress is recognisably an instance, which truth informs and frames the interactions amongst legislators, and amongst legislators plural and wider world.

IX. Updating interpretation

Interpreters should aim to infer the meaning the legislature intended to convey in uttering the semantic content of the text in the particular context of enactment and the lawmaking intentions promulgated in its enactment. The legislative intent in any particular lawmaking act has this complex character. Thus, inferring the legislature's intended meaning very often calls for one also to infer the legislature's intentions to change the law in some particular way and its intentions thereby to change how subjects of the law reason and act, such that some aspect of the common good is better realised than would otherwise be the case. Intentions are nested within each other in this way and while, save in exceptional cases, one's main concern is with the proximate intention, viz. the legislature's intended meaning, inferring that intention requires inference about the legislature's other, less proximate, intentions. Legislating is the complex, intentional act of an agent, the legislature, and statutory interpretation requires interpreters to understand this action.

It follows that one infers legislative intent from the public context of enactment, not from the context of adjudication. The relevant context thus includes the law at the time of enactment, which there is good reason to think the legislature considered and intended to change in some way. This context may also include the polity's commitments as a matter of international law, and one may presume that the legislature does not intend to place the polity in breach. The set of a state's international legal commitments changes over time. Commitments entered into after the enactment of the statute are not relevant to its interpretation for they cannot inform our inference about what was intended at enactment. The Australian High Court has divided on this point, with the majority taking the view I have just outlined.⁷⁰ Stephen Gageler, formerly Solicitor-General of Australia and now a new High Court Justice, has, if not in so many words, adopted the minority view, suggesting that legislation is interpreted within a context that changes over time.⁷¹ Where legislation is intended to be consistent with or to give effect to some rule of international law, such as the doctrine of diplomatic immunity for example, then the legislation's application may very well turn on subsequent changes in the relevant international legal practice. This is entirely consistent with the priority of the lawmaker's intention.

The Gageler position resonates with the familiar phrase, which has statutory force in a number of jurisdictions, that the statute is to be construed as 'always speaking', or alternatively that an updating construction is to be applied. Much that is done under the name of these formulae seems to me entirely reasonable and indeed to be nothing more than the, often difficult, application of general terms to complex new facts. However, the formulae are also sometimes taken to license the substitution of one rule – chosen by the enacting legislature as its decision as to what is to be done, which then falls to be applied by the subjects of the law, especially courts – for another.

⁷⁰ *Coleman v Power* (2004) 220 CLR 1

⁷¹ S Gageler, 'Common Law Statutes and Judicial Legislation' (2011) 37 *Monash University Law Review* 1

The substitution, which would otherwise look to be an obvious departure from that respect for legislative intention which the legislative power demands, is usually rationalised by reference to the statutory purpose. Reflection about the purpose, or complex set of purposes, for which the legislature acts is obviously relevant to inferring its lawmaking decision. However, respect for legislative authority demands that interpreters refrain from replacing the legislature's chosen set of rules with some other set which in the judgment of the interpreter would better serve the legislature's ends. The legislative choice – the sharp end of the exercise of the legislative power – is some means-ends packages and the subjects of the law are not at liberty to reshape the means to better suit the ends. This remains the case even if, as is often the case, the legislature directs us to prefer such beneficial or purposive constructions as will better suppress the mischief in question. (The special case of equity, briefly discussed above and at length elsewhere, I here set aside as it is best understood to concern a mismatch within the choice of means.)

The argument that courts should update the meaning of statutes seems to be made with more force, or at least much more often, in the US than in the UK. The reason for this may be in part the relatively greater difficulties of securing congressional action to amend legislation, which may result in more statutes that seem to be outdated and that courts may be tempted to fix. (This is not an unknown phenomenon in the UK I hasten to add.) More interesting, however, is Einer Elhauge's argument that courts should strive to interpret legislation consistently with current enactable legislative preferences (rather than the preferences of the enacting legislature) is inconsistent with legislative supremacy.⁷² He reasons that such a focus on current preferences would confer more power on legislators, because it would let them exercise indirect influence over all statutes currently in force rather than just those statutes they enact. The problem with the argument is that the grant of legislative power to Congress means not only that that legislature may act to make the law, but that it must act for the law to change and its lawmaking acts remain good law until repealed. The current preferences of legislators detached from any legislative act (the institution acting to make law by way of the prescribed process, if any) are irrelevant and certainly should not direct the interpretation of statutes.⁷³

Attending to current legislative preferences strikes me, qua Anglo-New Zealand lawyer, as odd. However, I speculate that it may resonate with agency interpretation, in which, if I understand correctly, some agency is required to carry out its empowering statute, much of which is relatively uncertain or vague and hence requires extensive in-filling. The mode of congressional delegation then is not so much express delegation as enactment of vague terms, which require further action to complete or extend. The *Chevron* doctrine protects agency interpretations from judicial challenge save when the agency departs from a clear congressional decision on point, which is another way of saying when the agency adopts an unreasonable interpretation or departs from unambiguous legislative intent. Agencies are subject to presidential direction (by way of appointment and removal powers) and congressional oversight (including budgetary control) and this range of political pressures bears on how they construe their empowering statutes. Thus, agency interpretation is perhaps less a matter of inferring the enacting Congress' choice but rather of adopting the agency's preferred policy from within a range that satisfies its political overseers. Perhaps this speculation is unsound and congressional oversight is carefully attentive to the extent to which agencies aim to and succeed in inferring the intentions of the enacting Congress. That

⁷² E. Elhauge, *Statutory Default Rules: How to Interpret Unclear Legislation* (Cambridge, Harvard University Press, 2008), 23-38

⁷³ F Easterbrook, 'Statutes' Domains' (1983) 50 *University of Chicago Law Review* 533, 538-539

is, each Congress jealously guards the lawmaking supremacy of its forebears rather than directing agencies now to conform to their present preferences.

Let me outline the difference with Westminster. The British Parliament scrutinises government policy, calling ministers to account in relation to general policy and particular detail. But this scrutiny does not standardly bear on how ministers interpret past statutes, including statutes on which they rely to execute policy. Or at least, scrutiny will not often take the form of objecting to an arguable reading of a statute: either the merits of the policy will be considered directly or the minister will be accused of breaking the law. The English courts, in reviewing administrative action, eschew the *Chevron* line, instead taking all errors of law to be a ground for review. The strict position then, relaxed somewhat in practice, is that the judicial interpretation of all statutes is authoritative.

For my part, viewed from a distance, *Chevron* looks to be an intelligent way to understand the lawmaking intentions on which Congress acts and the nature of the statutory powers it creates, thereby avoiding administrative review collapsing to judicial supremacy. However, my cautious, uninformed enthusiasm for the doctrine might pall rather if it gives license to agencies to interpret statutes in a way that does not attend to the intentions of the enacting legislature. Hence, I speculate that the interplay of agencies and Congress may be a dynamic that encourages a type of updating construction, which risks spilling out more widely. Having said all this, it may well be that the legislative choices in question, which are the particular subject of agency interpretation, are such that they positively invite the adoption of different policies over time, the merits of which adoption is rightly an ongoing political question. Here then, one would be dealing with the specification of incomplete legislative choices, where the choice is in part precisely to require as much. The scope for statutory interpretation, properly so-called, would thus be quite limited. Rather, one would be engaged in secondary lawmaking under the aegis of vague legislative choice.

X. Legislative history

The main implication for statutory interpretation of my argument about the legislative power is that there is good reason to read statutes with a view to inferring – at least as one’s primary task—the meaning the legislature acted intending to convey, which was chosen for reasons. This implication says nothing about the use to which legislative history is put. This is unsurprising for legislative history is at best partial evidence of legislative intent, an intent which the interpreter should strive to infer from the legislature’s utterance of this text in this context. The legislative history may form *part* of the context in which the legislature acts. Alternatively, it may not be part of what is relevantly of concern to legislature and community, but may be further, private evidence of the legislature’s intentions – just as the discovery of an author’s personal correspondence may cast light on what he likely intended to mean in publishing some manifesto. In either case, the legislative history records some of the deliberation that culminates in the legislative choice, which is in principle relevant to understanding that choice.

Legislative intent may remain of central importance in statutory interpretation even if interpreters observe a rule excluding reference to legislative history, for the legal meaning

and effect of the statute continues to be settled by inference about intended meaning.⁷⁴ Such inference is made from the text in its context, apart from the legislative history itself. Legislative intent is not discerned only or even primarily (if at all) from some distinct body of evidence, gleaned from the legislative history, which falls to be weighed *alongside* the text, the context, and the statutory purpose. Rather, it is that to which the semantic content and the context are relevant and of which the statutory purpose at best forms part, namely the proposal for legal change on which the legislature acts. The interpreter strives to infer the legislature's choice, of the content of which the text and context are relevant evidence. The interpreter infers this choice from what is salient at the time of enactment, which includes public reports, official advice, and decisions of the superior courts, to which the legislature may have responded in some way. Hence,⁷⁵ it is never safe to read a statute in isolation from the time of enactment, for the exercise of the legislature's authority is to be understood in its relationship to that context, even if the application of its chosen propositions is not exhausted by what is foreseen at enactment.

The distinction between legislative intent and legislative history is made stark by considering two possibilities. Imagine first a king who promulgates statutes but says nothing (outside the preamble, if any) about his prior deliberation. Imagine second a legislative assembly that does not retain a formal record of its proceedings, or which record is only made public years after enactment. In either case, interpreters aim to infer the legislature's intended meaning. The unavailability of the legislative history does not at all frustrate this. Indeed, it would be quite rational for the king to decline to release a record of his deliberation (his notebook or diary or private correspondence), reasoning that the changes to the law that his act makes should turn on what is reasonably inferred from what he has made public. And the point of publishing the assembly's proceedings is centrally to make provision for public scrutiny and criticism of legislators, not to supplement or elaborate the intended meaning otherwise inferred apart from reference to such material. Likewise, it may be feasible to promulgate copies of statutes, but not to make readily available copies of the full legislative record, in which case it is sound to posit a rule that in inferring the legislature's intent in enacting this or that statute no reference is to be made to that record.

That the legislature's intended meaning falls to be inferred only from publicly available evidence entails that the secret diary or private correspondence of the king is irrelevant (even if discovered and published) to the legal meaning and effect of his enactments. The same holds for the legislative assembly. However, one must add that the intention of the assembly is constituted by the proposal for action that is open to the legislators and on which they jointly act. While it is logically possible for the legislators to all agree to a course of action that is defined by a secret proposal, known only to them, which is not intended to be transparent to the community, this is practically impossible not to mention self-defeating, for the proposal (by hypothesis, to change the law in some way) could not succeed unless it is capable of recognition. Hence, the secret diary or private correspondence of any particular legislator is not evidence of legislative intent, for it does not illuminate what was open to legislators at large.

⁷⁴ See also J Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (CUP, Cambridge, 2010), 249-250

⁷⁵ Contrast J Bell and G Engle (eds), *Cross on Statutory Interpretation*, 3rd edn (Butterworths, London, 1995), 52: 'the ordinary legal interpreter of today . . . expects to apply ordinary current meanings to legal texts, rather than to embark on research into linguistic, cultural and political history, unless he is specifically put on notice that the latter approach is required'.

Unlike the king, the legislative assembly standardly deliberates in public and the record of its proceedings captures part (plainly not all) of this deliberation. Where the record of proceedings is readily available (at or about the time of enactment), legislative history is in principle relevant to interpretation. For the record may ground inferences about the proposal that was open to the legislature and on which it acted and this information is publicly available and so distinguishable from private knowledge. However, this proposition requires significant qualification. In the central case of legislative action, one need not refer to the record, because the proposal on which the legislature acts is transparent to the community, which is to say open to be inferred from the utterance of this text in this context, apart from the (partial) record of deliberation that culminated in this enactment. The reason for this is that deliberation and action centre on that which is open to legislators at third reading (or equivalent), which is in turn transparent to the community, members of which may infer the intended meaning without reverting to the record of the legislative deliberation, in which the focus was on that transparent meaning. Further, it is reasonable to presume that enactments are drafted (and considered, adopted) with the specific intention that the legislature's intent in enacting them be sufficiently intelligible to any competent lawyer who reads them, without reference to the deliberative record. That is, if the legislature acts well there is no need to refer to the record and the legislative intent will be what it is reasonable to infer it is—the reasoned choice of the scheme the text in context appears to make out.

It is unsound to assume that what the legislature *truly* intends is best gleaned from the legislative history rather than from the text uttered in context. The legislature is structured, for good reason, to make clear its intended meaning, such that its choice is very likely to be what it is reasonable for interpreters to infer. The legislature may act on a proposal that differs somewhat from that which interpreters reasonably infer it acted on, but this is a non-central instance, where the legislative deliberation has gone astray such that what is open to legislators differs from what is transparent to the community. It follows that legislative history is capable of making a difference only when what is intended is not otherwise clearly promulgated, which is a failure of legislative action. Further, the legislative history is a record of only part of legislative deliberation and does not exhaust the reasoning of the legislators, who reasonably understand their joint action to centre on the open proposal. It is entirely possible then that attending to what is said by particular legislators at various points in the process may distract one from the object of joint legislative action.

The standing risk of using legislative history to understand the legislative act is that the interpreter will fail to reflect carefully on what proposal was open to all legislators, and hence on which they jointly acted, and will instead take what some particular legislator or legislators say, at some point in the process, to constitute the legislative intent. A related risk is that what some legislator or legislators say about the purpose of some enactment or about its likely application will be taken to constitute the legislative intent, despite the truth that what the legislature does in exercising its authority is to choose means to ends, consisting in universal propositions rather than a series of particular applications.

The risks are made clear in *Frucon*, where the majority traced the origin of s 34 to a report recommending extension of solicitor-client privilege to patent attorneys and their clients (and drafting a provision to that end), which recommendation the explanatory note to the bill purported to adopt, while saying that the bill attempted to prescribe the privilege in its own terms. This was at best equivocal, as the minority noted, and it certainly does not stipulate how legislators understood their joint action in enacting the bill. Indeed, the flat inconsistency between the report's recommendation and the text of the bill would have made very clear to

the careful legislator that, notwithstanding the explanatory note, the open proposal was to extend only the first limb of solicitor–client privilege.

For legislative history to be used to help infer what the legislature intended, one must see clearly the structure of legislative action, in which the focus is on the proposal that is open at third reading and in which no particular legislator has authority to stipulate what the legislature is doing. The discussion amongst legislators, and the history of amendments moved and adopted or rejected, may help one infer the shape of the proposal as it develops throughout the process. But what is open to be understood at third reading, which should be transparent to the community at large, is decisive. Hence, one should not refer to the history in search of a statement by some legislator that stipulates what the bill means.

The focus of legislative deliberation and action is on the proposal for lawmaking that is open to legislators and which on third reading they jointly adopt. In the central case of legislative action, the open proposal is transparent to members of the community, which is to say it may be inferred from the statutory text uttered in the context of enactment. There are good reasons for legislators to understand their joint action to be defined in this way. There are also good reasons for the community, including its authoritative adjudicative institutions, to take what the legislature seems to have done to change the law. Hence, there is a standing problem in permitting reference to legislative history, in that it threatens to unsettle what is transparent to the community (for now, citizens and their advisers must refer to the record before concluding how the statute changes the law), which also displaces, or at least changes and complicates, the focus of legislative deliberation (for now, legislators must reflect on how the record of their deliberation is likely to inform inference about what they have done). The problem would be avoided if legislative history were only used when there was no other way to infer what the legislature has decided. It is uncertain whether it is possible to limit the use of legislative history in this way, for after all one may always attempt to infer what was intended. The landmark case of *Pepper v Hart* attempts such a limitation, providing that *Hansard* may only be considered when the legislation is ambiguous, obscure, or leads to an absurdity;⁷⁶ however I doubt this is effective.⁷⁷

The problem is made clear in *Chief Adjudication Officer v Foster*,⁷⁸ a case decided immediately after *Pepper*. The case concerned a challenge to the vires of a regulation made under s 22(4) of the Social Security Act 1986:

Regulations may specify circumstances in which persons are to be treated as being or not being severely disabled.

The relevant regulation set out circumstances not relating to the extent of disablement, but rather to the independence of the claimant. Taken in isolation, the subsection seems ambiguous for it could confer a deeming power to stipulate that some person is or is not ‘severely disabled’ or a defining power to make more precise the conditions under which a disabled person counts as ‘severely disabled’ person. The court referred to *Hansard* and found that the origin of this subsection (and subs (3), on which more below) was in an amendment passed in the Lords making provision for further income support for severely

⁷⁶ [1993] AC 593 at 640, per Lord Browne-Wilkinson.

⁷⁷ Bennion, *BST*, 623–7, s 217, concluding (at 626) that ‘[i]n every case involving the construction of an enactment, there must be a search in *Hansard*. This is because it is rarely if ever possible to be sure, without full knowledge of the background, that the *Pepper v Hart* conditions are not satisfied’.

⁷⁸ [1993] AC 754.

disabled persons living independently. The government moved an amendment, which formed subss (3) and (4), which the minister said was intended to provide a premium for severely disabled persons living independently, that is, with no one else providing support or care for them. The court concluded therefore that s 22(4) was a power to deem persons to be or not be severely disabled (whether in fact severely disabled or not) rather than a power to define more precisely which persons are or are not severely disabled. The problem is that this conclusion is inconsistent with s 22(3):

In relation to income support . . . the applicable amount for a *severely disabled* person shall include an amount in respect of his being a *severely disabled* person.

What does ‘severely disabled’ mean in this subsection? If it means a person deemed to be such by s 22(4), then the provision is redundant or obscure. Further, if the effect of s 22(3) is contingent on the exercise of s 22(4) then a failure to make regulations means the subsection (and the duty to pay the amount in respect of severe disability) is defunct. Read jointly, one has very good reason to infer that s 22(4) is a defining power only. This intended meaning is what it is plausible to infer from the text and context. The court departs from this meaning on the grounds that s 22(4) is ambiguous, which it is not if read in context (this confirms the obscurity of the condition in *Pepper*, as well as the judicial difficulty in applying it).

It is arguable that what was open to legislators was a proposal to make provision for payment of a premium to severely disabled persons living independently, for this is how the discussion about the series of amendments proceeded. However, the careful legislator reading the amended text would be likely to see that the joint effect of the two subsections, understood to form part of a coherent, rational whole, was that all severely disabled persons were entitled to an additional payment, with s 22(4) serving to permit further definition. Perhaps the legislators who spoke in the relevant debate took ‘severely disabled’ to be elliptical for those living independently or perhaps they just assumed that there was power to deem only such to be entitled to the premium.⁷⁹ Either way, this understanding was not transparent to the community, for it did not follow from the joint adoption of the two subsections, and it is arguable that for this reason it was not open to legislators at third reading. In relying on *Hansard* to infer that the legislature acted on this proposal, which was not grounded in the statutory text or the context, the interpreters unravelled what citizens and officials had good reason to think was promulgated and what legislators other than those who spoke in the relevant exchange had good reason to understand themselves to be doing.⁸⁰

I conclude then that there is a principled argument for excluding legislative history. While the use of the record of legislative deliberation is in principle relevant to understanding what legislators intended, the structure of legislative action, with its central focus on what is transparent to the community, militates against such use. Instead, interpreters should infer what the legislature intends from the text uttered in context, apart from the record of deliberation itself, and legislators should accordingly reflect all the more carefully on how they are likely to be understood and should choose their words carefully to that end. The integrity of legislative deliberation and action, in which legislators reflect and act on what is open to all, warrants excluding subsequent reference to that deliberation, for this unsettles what is open. It is sound then to protect reasonable inferences about what, legislative history

⁷⁹ J Evans, ‘Controlling the Use of Parliamentary History’ (1998) 18 NZULR 1, 40–1

⁸⁰ See also J Baker, ‘Statutory Interpretation and Parliamentary Intention’ (1993) 52 CLJ 353, 356–7

aside, the legislature seems to intend, for such inferences are valuable not only to citizens and officials but also to legislators acting jointly in the exercise of their lawmaking authority.

My argument above is not particular to any jurisdiction, but I imagine it resonates most closely with British law, in which the relaxation of the exclusionary rule was controversial and has since been partly wound back. The resonance is warranted also, I suggest, because Parliament is well-placed to develop coherent legislative choices, the intended meaning of which is relatively transparent to subjects of the law from the text in context. Contrast the relative difficulty that Congress encounters in exercising the legislative power, in developing coherent, precisely drafted texts that capture its lawmaking choices. This relative incapacity makes it more likely that legislators may act on a proposal that differs somewhat from that which interpreters reasonably infer it acted on. Thus, Acts of Congress may more often be non-central instances of lawmaking than is the case with Acts of Parliament. In this case, there may be good reason to study the legislative history of the act in question, the better to understand the scheme the legislators understood the legislature to be choosing. While this does not answer the various worries noted above, it does place them in a different perspective, for the challenge in this situation is how best to understand the exercise of legislative power notwithstanding a partial failure of lawmaking.

XI. Conclusion

There is and was good reason to shatter the unity of royal authority. The separation of legislative and judicial power makes provision for clear lawmaking, in which the community at large may join, and for fair adjudication of disputes in accordance with settled law. The exercise of the legislative power is the formation and promulgation of reasoned lawmaking choices, which the subjects of the law, including judges, are to adopt as if their own. The judicial power is a power to adjudicate not to interpret. Statutory interpretation is the exercise of determining, as best one may, the legislature's lawmaking intentions. These conclusions about the separation of powers and the nature of statutory interpretation are consistent with truths about legislative structure. Washington and Westminster legislatures differ in important ways, which are relevant to the intentions each is likely to form but which do not change sharply how the legislative power is exercised or should be understood.

Reflection on the separation of powers helps make clear the central truth about statutory interpretation – that to interpret a statute is to understand the legislature's exercise of the legislative power, which is the making and promulgation of reasoned choices about how to change the law, which choices the subjects of the law ought to adopt as if their own. It also helps make clear some of the ways in which different types of legislature are structured to exercise the legislative power, as well as the ways in which some polity's more particular separation of powers informs how statutes should be understood. And in turn, the study of legislating and statutory interpretation helps make clear the ways in which the making and interpretation of statutes is, the importance of separation notwithstanding, still in a real sense the coordinated act of one governing, but no longer royal, agent.