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Parliamentary sovereignty and statutory interpretation

I Introduction

How statutes are interpreted is crucial to the implementation of the doctrine of parliamentary sovereignty. The doctrine maintains that every statute that Parliament enacts is legally valid, and therefore that all citizens and officials, including the courts, are legally obligated to obey it.[1] The courts' legal obligation is therefore to interpret and apply every statute in a way that is consistent with Parliament's legal authority to enact it, and their corresponding obligation to obey it.[2] In a small number of cases, what is called 'interpretation' might be tantamount to disobedience under cover of a 'noble lie'. But if that were to become more routine, and generally condoned by the other branches of government, Parliament would no longer be sovereign.

Statutory interpretation is central to debates about many specific issues discussed in the next chapter. The nature and justification of the ultra vires doctrine in administrative law, the protection of common law principles by 'presumptions' of legislative intention, the judicial response to statutes in cases such as *Anisminic*[3] and *Factortame*,[4] all raise questions about the relationship between statutory interpretation and parliamentary sovereignty. But the topic of this chapter is statutory interpretation in general, including in Australia and New Zealand as well as in Britain, and not in cases to which the Human Rights Act 1998 (UK) applies.

There are two possible methods of investigating how the doctrine of parliamentary sovereignty helps determine the way in which statutes should be interpreted. The first is normative and deductive. It involves

[1] I ignore here some complications discussed elsewhere, such as disapplication of statutory provisions inconsistent with laws of the European Community: see Chapter 10, Section III, Part C, below.

[2] R. Ekins, 'The Relevance of the Rule of Recognition' *Australian Journal of Legal Philosophy* 31 (2006) 95 at 103.

[3] *Anisminic Ltd* v. *Foreign Compensation Commission* [1969] 2 AC 147, [1969] 2 WLR 163.

[4] *R* v. *Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1991] 1 AC 603 (HL).

starting from the doctrine of parliamentary sovereignty as an abstract principle, and attempting to deduce from it norms that judges should follow when interpreting statutes. The second method is descriptive and inductive. Given that the doctrine of parliamentary sovereignty has been a fundamental part of the law for a long time, and assuming that most judges have for the most part conscientiously adhered to it, one might simply describe the ways in which they do in fact interpret statutes and, by induction, distil those norms that seem attributable to that doctrine. These two methods should converge on similar conclusions, thereby corroborating one another. If not, either the deductive method has gone astray, or judicial practice has departed from its proclaimed rationale.

In using the second method, and examining actual judicial practices, there is no need to confine one's attention to countries such as Britain and New Zealand, where the doctrine of parliamentary sovereignty has been accepted in its fullest sense. Even in Australia, which has written constitutions, it is commonly said that there are no limits to what a Parliament can do other than those expressly or impliedly imposed by those constitutions. In other words, the legislative authority of Australian Parliaments is not legally constrained by moral rights, common law principles, or natural law. Therefore, within their respective constitutional boundaries, they are as sovereign as the United Kingdom Parliament.[5] It follows that, as long as no question of constitutional invalidity arises, statutory interpretation should be governed by the principle of parliamentary sovereignty in exactly the same ways as in Britain and New Zealand.

Indeed, much the same is also true of statutory interpretation in the United States. Of course, American legislatures are not fully sovereign, because they do not possess legally unlimited legislative authority. But, like Australian Parliaments, their authority is limited only by their national and state constitutions. The judges have no authority to hold a statute void except on the ground that it violates a constitutional provision. In *Calder* v. *Bull*, when Justice Chase suggested that American courts might have authority to hold statutes void for violating extra-constitutional principles, Justice Iredell strongly disagreed.[6] As a leading constitutional

[5] J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford: Clarendon Press, 1999), p. 1.

[6] *Calder* v. *Bull* 3 US (3 Dall.) 385 at 398 (1798) (Iredell J., concurring).

law treatise explains: 'In form, the Supreme Court has adopted the views of Justice Iredell …';[7] 'the philosophy that the Justices would overturn acts of other branches only to protect specific constitutional guarantees has been the formal guideline of the Supreme Court at every stage in its history.'[8]

In his *Commentaries on American Law*, Chancellor Kent wrote: '[T]he principle in the English government, that the Parliament is omnipotent, does not prevail in the United States; though, if there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power, under any other form of government.'[9] After summarising the British doctrine of parliamentary sovereignty, Roscoe Pound wrote, 'Except as constitutional limitations are infringed, the same doctrine obtains in America.'[10] Supreme Court dicta corroborate that proposition:

> The words of the statute being clear, if it unjustly discriminates … or is cruel and inhuman in its results, as forcefully contended, the remedy lies with Congress and not with the courts. Their duty is simply to enforce the law as it is written, unless clearly unconstitutional.[11]

In 1983, the Supreme Court re-affirmed that a statute's 'wisdom is not the concern of the courts; if a challenged action does not violate the Constitution, it must be sustained'.[12] Even Douglas Edlin – a strident critic of this rule of legislative supremacy – concedes that 'almost all American

[7] Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* (3rd edn) (St Paul Minn.: Thomson/West, 1999), § 15.1.

[8] *Ibid*., § 15.5.

[9] James Kent, *Commentaries on American Law* (10th edn) (Boston: Little, Brown & Co., 1860), p.503; see also Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (Boston: Little, Brown & Co., 1868), pp. 87–9 (describing the plenary powers of Congress as bounded only by the Constitution).

[10] Roscoe Pound, 'Common Law and Legislation' *Harvard Law Review* 21 (1908) 383 at 392.

[11] *Chung Fook* v. *White* (1924) 264 US 443 at 446; 44 S Ct 361 at 362; 68 L Ed 781. See also *Common School Dist. No 85* v. *Renville County* (1965) 141 Minn. 300 at 304; 170 NW 216 at 218: '[t]he wisdom or propriety of the statute is not a judicial question … A statute may seem unwise, it may seem unjust … but that view of the law, in the absence of some conflict with the Constitution, cannot be made the basis of a refusal by the courts to enforce it.'

[12] *I.N.S.* v. *Chadha* (1983) 462 US 919 at 944; 103 S Ct 2764 at 2780; 77 L Ed 2nd 317. See also *Tennessee Valley Authority* v. *Hill* (1978) 437 US 153 at 194–5; 98 S Ct 2279 at 2303; 57 L Ed 2nd 117.

judges' accept it.[13] As Kent Greenawalt explains, '[a] constitutional marking of some domains as off limits represents a conscious choice to leave remaining domains to legislative authority'.[14] That is why, according to Robert Summers:

> [American] constitutional law provides that, in matters of valid legislation, the legislature is supreme. That is, the legislature's meaning is supposed to control, not the substantive political views of the judiciary. This principle of legislative supremacy is expressly or implicitly embedded in the federal and state constitutions.[15]

The principle of legislative supremacy has played a pivotal role in recent American debates about statutory interpretation.[16] It is often expressed in terms of courts being 'faithful agents' of the legislature.[17]

It seems likely that something like the principle of legislative supremacy is binding on judges in most legal systems. The very concepts of 'legislature' and 'judiciary' imply that the legislature, as lawmaker, has an authority to make laws – even if it is constitutionally limited – that the judiciary, as mere interpreter and enforcer, is bound to respect and obey. If the judiciary were entitled to rewrite those laws, it would share the legislative power and would be, at least in part, a legislature itself. In other words, a principle of legislative supremacy is virtually entailed by the distinction between legislative and judicial functions, even in legal systems in which a 'separation of powers' is not constitutionally entrenched.[18]

Taking this point one step further – perhaps one step too far – it could be argued that, in this context, the very concept of 'interpretation' requires respect for legislative supremacy; that any judicial method of treating

[13] D. Edlin, *Judges and Unjust Laws* (Ann Arbor: University of Michigan Press, 2008), p. 51.

[14] Kent Greenawalt, *Legislation: Statutory Interpretation – Twenty Questions* (New York: Foundation Press, 1999), p. 23.

[15] Robert S. Summers, 'Statutory Interpretation in the United States', in D. Neil MacCormick and Robert S. Summers (eds.), *Interpreting Statutes: A Comparative Study* (Aldershot: Dartmouth, 1991), 407 at p. 450.

[16] See, for example, W. Eskridge, 'Spinning Legislative Supremacy' *Georgia Law Review* 78 (1989) 319; D. Farber, 'Statutory Interpretation and Legislative Supremacy' *Georgia Law Review* 78 (1989) 281; E.O. Correia, 'A Legislative Conception of Legislative Supremacy' *Case W Res L Rev.* 42 (1992) 1129; E.M. Maltz, 'Rhetoric and Reality in the Theory of Statutory Interpretation: Underenforcement, Overenforcement, and the Problem of Legislative Supremacy' *BUL Rev* 71 (1981) 767.

[17] See, for example, J. Manning, 'Textualism and the Equity of the Statute' *Columbia Law Review* 101 (2001) 1 at 6–7 and 9–22.

[18] In *Duport Steels Ltd* v. *Sirs* [1980] 1 WLR 142 Lord Diplock said: 'the British constitution, though largely unwritten, is firmly based upon the separation of power; Parliament makes the laws, the judiciary interprets them' (at 157B).

statutes that flouts the principle of legislative supremacy could not accurately be called 'interpretation'.[19]

Consider the following example from Germany. In the *Soraya* case, the Federal Constitutional Court had to decide whether or not compensation could be awarded for non-material (such as emotional) injury resulting from violations of the right to personality. The relevant section of the Civil Code allowed such compensation only in cases 'determined by the law', but German Courts had been awarding it in cases not determined by the law. The Constitutional Court upheld this practice by reading an unwritten exception into the Code. It said:

> The law is not identical with the whole of the written statutes. Over and above the positive enactments of the state power there can be 'ein Mehr an Recht' [a surplus of law] which has its source in the constitutional legal order as a holistic unity of meaning, and which can operate as a corrective to the written law … [E]valuative assumptions which are imminent in the constitutional legal order, but are not, or are only incompletely, expressed in the texts of written statutes, [may] be elucidated and realized in [judicial] decisions … It must be understood that the written statute fails to fulfil its function of providing a just solution for a legal problem. The judicial decision then fills this gap …[20]

Even in Germany, this kind of reasoning is controversial.[21] But it would never be found in judgments of courts in the British Commonwealth or the United States. I do not mean that they never perform surgery on statutes; the point is that they rarely openly acknowledge that they are doing so.[22] The difference is that there is no firm commitment to legislative supremacy in German legal practice or theory. There is, instead, 'a fundamental conflict between two conceptions of legal argumentation', namely, 'constitutionalism', which holds that the judiciary should implement constitutional values in this fashion, and 'legalism', which urges much greater judicial restraint and respect for legislative judgments.[23] Moreover, it is significant that the reasoning in cases such as *Soraya* is not

[19] Such a claim is controversial. Joseph Raz, for example, treats 'interpretation' as embracing quite radical judicial 'development' of the law: see J. Goldsworthy, 'Raz on Constitutional Interpretation' *Law and Philosophy* 22 (2003) 167.

[20] *Soraya*, BverfGE 34, 269 (287), quoted in R. Alexy and R. Dreier, 'Statutory Interpretation in the Federal Republic of Germany' in MacCormick and Summers (eds.), *Interpreting Statutes*, p. 80.

[21] Alexy and Drier, 'Statutory Interpretation', pp. 80, 94, 107 and 112–13.

[22] A statute is sometimes 'read down' in order to avoid inconsistency with a constitutional provision, but the reasoning of the German Court appears to go much further than that.

[23] Alexy and Dreier, 'Statutory Interpretation', p. 117.

called 'interpretation', but rather 'gap-filling'. The concept of interpretation is confined to decisions within the lexical meaning of the provision in question, whereas decisions that go beyond or against that meaning are classified as gap-filling. *Soraya* involved what is called gap-filling '*contra legem*' – against the statute.[24] So perhaps this corroborates my suggestion that there is an internal, conceptual relationship between 'interpretation' and respect for legislative supremacy.

It is undeniable that legal interpretation is often partly creative. The word 'interpretation' is used in the common law world to denote two different processes. One involves *revealing* or *clarifying* the meaning of a legal text, a meaning that despite being previously obscured was possessed by the text all along. The other process involves *constructing* the meaning of a text, by modifying it or adding to it meaning that it did not previously possess.[25] To mark this distinction, the second, creative process is sometimes called 'construction' rather than 'interpretation'.[26] It might have assisted analytical clarity had the common law courts, like their German counterparts, used terminology that more clearly distinguished between the clarifying and creative processes. But they have not, and since popular use of the term 'interpretation' encompasses both processes, it might be better to distinguish between 'clarifying interpretation' and 'creative interpretation'.

Extremist theories of legal interpretation acknowledge only one of these processes, and ignore the other. Extreme 'formalist' theories, now disparaged as 'fairy tales', acknowledge only clarifying interpretation, as if legal texts, however poorly drafted, contain at least latent answers to every question, which merely await judicial discovery. Extreme 'realist' theories acknowledge only creative interpretation, as if legal texts possess no meaning at all until an interpreter breathes life into them. Both extremist theories are implausible, especially the second one. A law necessarily means something – nothing meaningless can be a law – and its meaning is part of what it is. A law must therefore have some meaning or (if it is ambiguous) meanings that pre-exist judicial interpretation. Otherwise it could not guide behaviour until judges interpreted it. Indeed, it could not *be law* until they had interpreted it. If meaningful laws could only exist after and as a result of judicial interpretation of texts, then the judges

[24] *Ibid*., 78 f., 81, 93, 97, 98 and 114.

[25] R. Dickerson, *The Interpretation and Application of Statutes* (Boston: Little Brown, 1975), pp. 2–5.

[26] K. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University Press of Kansas, 1999), pp. 5–9.

would be the real and only lawmakers. Law would be like baseball as seen by the umpire who supposedly said 'it ain't nothin' 'til I call it'. Although there are theorists who may have maintained something like this extreme sceptical view, it is absurd. After all, if the texts produced by judges to explain their interpretations can be meaningful, without further interpretation (which they must, to avoid an infinite deferral of meaning), then so can the legal texts the judges start with.[27]

Courts engage in both clarifying and creative interpretation, sometimes in the course of interpreting the same provision. But they rarely acknowledge this, possibly because they prefer to maintain the formalist façade that all interpretation is aimed at clarifying pre-existing meaning. An interpretation can partly reveal or clarify meaning that was there all along, and partly add to or modify it if that is necessary or desirable. Adding meaning might be necessary if the revealed meaning of the provision is insufficiently determinate to dispose of an issue that judges must decide. It might be ambiguous, vague, contradictory, insufficiently explicit, or even silent as to that issue. A court, after all, cannot wash its hands of a dispute that has been properly brought before it, and leave the parties to fight it out in the street. Modifying meaning might also be desirable, in strictly limited circumstances: for example, if the revealed meaning of the provision is plainly inconsistent with or incapable of fulfilling its purpose, due to drafting errors or other mistakes or omissions. 'Judicial statecraft' may then be justified in order to repair or rectify the provision.

But even though interpretation is sometimes partly creative, there may be limits to the kinds of creativity that can be classified as genuinely interpretive rather than legislative. Creativity that infringes the principle of legislative supremacy arguably crosses that conceptual boundary, and becomes what Roscoe Pound called 'spurious interpretation'.[28] The examples of creativity mentioned in the previous paragraph, on the other hand, are both consistent with that principle. However, I do not want to push this point too strongly. The important question is not a conceptual one concerning the meaning of the word 'interpretation'. Rather, it is how courts do or should treat statutes in a legal system that vests authority in

[27] It has often been noted that any assertion that texts do not have meanings is incoherent, because it asserts that it itself is meaninglessness; in other words, it asserts that it does not assert anything. See A. Altman, *Critical Legal Studies, a Liberal Critique* (Princeton: Princeton University Press, 1990), pp. 90–4; F. Schauer, *Playing By the Rules* (Oxford: Clarendon Press, 1991).

[28] R. Pound, 'Spurious Interpretation' *Columbia Law Review* 6 (1907) 379.

the legislature to make laws, which the courts are required faithfully to apply.

II The indispensability of legislative intentions

The doctrine of parliamentary sovereignty does not hold that the will of Parliament is legally binding. It holds that statutes enacted by Parliament are legally binding. The will of Parliament is legally binding only insofar as it is communicated by means of a formally enacted statute. This is vital to the rule of law, since citizens cannot be expected to conform their behaviour to legislative desires that have not been publicly promulgated. But arguably it is equally vital to the successful exercise of legislative sovereignty: in the absence of a generally accepted, well understood and reliable means for a legislature to communicate its will, there would be a much greater risk of subordinate officials and citizens misunderstanding or pretending to misunderstand it.

For these reasons it is sometimes said that the 'words of the statute, and not the intent of the drafters, are the "law"'.[29] But it would be a huge mistake to think that clarifying interpretation is concerned only with the conventional semantic meanings of those words, to the exclusion of all other evidence of legislative intention. That would be to adopt a wooden literal approach, which for all sorts of reasons is simply not viable. The pre-existing meaning of a statute cannot be confined to the conventional meanings of its words: it is necessarily enriched by additional evidence of Parliament's intentions in enacting them. Furthermore, creative interpretation – which, by definition, must operate well beyond the confines of literalism – should in some cases be guided by extra-textual evidence of Parliament's intentions. That is to say, some version of intentionalism is indispensable.

Those who deny that there is any such thing as 'legislative intention', and call it a 'fiction', seldom practise what they preach. When they put theory aside and actually read statutes, they usually revert to some version of intentionalism. Lord Steyn, for example, commences one lecture by announcing that his 'main thesis' is 'that the intent of the framers of a [legal] text is irrelevant to interpretation'.[30] Yet later in the same article, he

[29] F. Easterbrook, 'The Role of Original Intent in Statutory Construction' *Harvard Journal of Law and Public Policy* 11 (1988) 61.

[30] J. Steyn, 'Interpretation: Legal Texts and Their Landscape' in B.S. Markesinis (ed.), *The Clifford Chance Millennium Lectures; The Coming Together of the Common Law and the Civil Law* (Oxford: Hart Publishing, 2000) pp. 79 and 81.

himself relies on the notion of legislative intention: he argues that a court might be justified in regarding the Scotland Act 1998 as 'constitutional in character', on the ground that 'the intention was that there should be a durable settlement in favour of Scotland'.[31]

Self-proclaimed sceptics about the existence or relevance of legislative intentions often insist on the relevance of 'context'. Lord Steyn, for example, explicitly disavows any commitment to literalism, and insists that statutes must be 'construed against the contextual setting in which they come into existence'.[32] 'After all', he adds, 'a statement is only intelligible if one knows under what conditions it was made.'[33] Now, this is indeed undeniable, but why? Surely it is because information about the circumstances in which a statement was made illuminates the intentions or purposes of the speaker or writer. For what other reason could contextual information possibly be relevant? At one point Lord Steyn says that the context may include information concerning the 'major purposes' of the statute.[34] But strictly speaking, statutes like other inanimate objects do not have purposes: only the people who use them do. To attribute a purpose to a statute is to attribute the purpose to the enacting legislature. A purpose is a kind of intention, and it is self-contradictory to dismiss legislative intentions as fictions but to keep talking about statutory purposes.

It is sometimes argued that collective bodies such as legislatures simply cannot have intentions: only individuals or small groups of individuals (such as the sponsors or drafters of statutes) can have intentions, but they cannot be attributed to the legislature as a whole. To see why this is not plausible, it is necessary to take the argument seriously (which those who make it rarely do), and consider what it would be like to attempt to understand a statute without treating it as expressing any intentions. Its meaning would have to be derived solely from the conventional semantic meanings of its words and conventional rules of grammar. It would have to be treated just like a series of numbers, letters, punctuation marks and spaces created by chimpanzees banging randomly on keyboards, which by coincidence form meaningful words and sentences according to those linguistic conventions.[35]

[31] *Ibid*., p. 89. [32] *Ibid*., p. 81. [33] *Ibid*., and also p. 86. [34] *Ibid*., p. 86.

[35] Heidi Hurd is unusually candid in this regard. Having denied that legislatures can have intentions, and concluded that statutes can therefore have only literal meanings (or what philosophers call 'sentence meanings'), she concedes that statutes are 'like the often-hypothesized novel typed by random chance by the thirteen-thousandth monkey chained to a typewriter: meaningful … despite not having been produced as a communication by

Those who deny that a legislature can have intentions might object that this is an unfair caricature of their position, because they fully realise that a statute reflects the intentions of some subset of people involved in the legislative process, such as its sponsors and drafters. The problem is that they deny that these intentions can be attributed to the legislature itself, on the 'constitutional' ground that they cannot be shown to have been adopted or endorsed by the legislature as a whole. It follows that these intentions cannot contribute to the meaning of the statute, since it is an act of the legislature as a whole. The statute must therefore be treated *as if* it expresses no intentions at all.

Consider how bizarre it would be to treat a statute as if it did not give expression to any intentions at all. Take these examples:

(1) Section 8(1) of the Road Traffic Act 1972 (UK) provided that in certain circumstances any person 'driving or attempting to drive' a vehicle could be required to take a breath test. The defendant drove through a red light, stopped, and changed seats with his passenger. He was then asked to take a breath test, although by then he was clearly not 'driving or attempting to drive' the vehicle. (Indeed, that would arguably have been true even if he had remained in the driver's seat.) The court held that he was nevertheless required to take the test.[36]
(2) Section 8(1) of the Food and Drugs Act 1955 prohibited the sale of 'any food intended for, but unfit for, human consumption'. Some children asked for lemonade, were given corrosive caustic soda, and drank some of it. Read literally, s. 8(1) did not apply: the vendor had not sold the children food unfit for human consumption, because caustic soda is not food. But the apparent purpose of the provision was to protect the public from harmful products being sold *as* food, and it was interpreted accordingly.[37]
(3) Rule 14(2) of the Magistrates' Courts Rules 1968 (UK) stated that at the conclusion of the evidence for the complainant, 'the defendant may address the court'. It did not provide that the court must listen to the defendant's address. Nevertheless, this was held to be implied.[38]
(4) An Alberta bylaw required that 'all drug stores shall be closed at 10 p.m. on each and every night of the week'. It would be consistent

anyone for anyone': H. Hurd, 'Sovereignty in Silence' *Yale Law Journal* 99 (1990) 945 at 966.

[36] See F.A.R. Bennion, *Statutory Interpretation* (2nd edn) (London: Butterworths, 1992), pp. 668–9, discussing *Kaye* v. *Tyrrell* (1984) *The Times*, 9 July.

[37] *Meah* v. *Roberts* [1978] 1 All ER 97 at 98–100 and 104–6 (Q.B.); see also Bennion, *Statutory Interpretation*, pp. 611–12 (discussing *Meah*).

[38] Bennion, *Statutory Interpretation*, p. 30.

with a literal interpretation of these words for a drug store to close promptly at 10 p.m., and then reopen a short time later. But the Supreme Court of Alberta properly rejected an argument to that effect on the ground that only a lawyer could have suggested it.[39]

(5) A statute that penalized noncompliance with automatic traffic signals did not include any express exception in cases where the signals had malfunctioned due to mechanical failure. Nevertheless, the court held that such an exception was implied.[40]

As soon as we read these statutory provisions, we know at least something about the intentions that motivated their enactment. That initial knowledge is just simple common sense, based partly on shared cultural understandings, given the assumption that members of Parliament are sensible people trying to achieve rational (even if controversial) objectives.[41] Radical non-intentionalism, which denies that legislatures *ever* have ascertainable intentions (other than to enact statutes), is implausible partly because it entails that common sense cannot play that role. On the other hand, anyone who concedes that common sense can sometimes illuminate a legislature's intentions or purposes would have to concede that other extra-textual evidence might also do so.

Whenever we read statutory provisions, we naturally – irresistibly – understand them as having been designed to achieve some purpose, even if only at an abstract and not very helpful level. This is so even though that purpose may have been initially developed and proposed by the executive government, and the design provided mainly by parliamentary counsel. By virtue of its having enacted the statute, we reasonably take Parliament to have approved both the purpose and the design – perhaps with modifications made by amendments – even if the statute's words fail to give effect to either with perfect clarity and comprehensiveness. We do not, and possibly could not if we tried, divorce our understanding of the enacted words from our understanding of the evident purpose and design that led to their enactment.[42]

[39] *Rex* v. *Liggetts-Findlay Drug Stores Ltd* [1919] 3 WWR 1025 at 1025; see also J. Bell and G. Engle, *Statutory Interpretation* (3rd edn) (London: Butterworths, 1995), pp. 67–8 (discussing *Liggetts-Findlay*).

[40] *Turner* v. *Ciappara* (1969) VR 851; see also Bennion, *Statutory Interpretation*, p. 699 (discussing *Turner*).

[41] See Pound, 'Spurious Interpretation', 381.

[42] This understanding of statutes is proposed and developed by Richard Ekins in his D. Phil Thesis, *The Nature of Legislative Intent* (University of Oxford, 26 March 2009),

Our understanding of statutory meaning would be severely impoverished if all evidence of legislative intention, including common sense, had to be disregarded. It is also much more likely to be absurd. The object of clarifying interpretation cannot be the literal meaning of a statute, because it is much less substantial than the meaning that can be fleshed out by common sense, contextual and other extra-textual evidence of Parliament's intentions. The literal meaning is therefore much more likely to be insufficiently determinate to resolve disputes, and to need fleshing out through the exercise of judicial creativity. Literalism is also not viable as a basis for creative interpretation, which supplements or modifies the meaning of a statute. I will consider clarifying and creative interpretation separately.

A Clarifying interpretation

(1) Ambiguity and ellipsis

Ambiguity, both semantic and syntactic, is one reason why literal meanings are often too thin and indeterminate to be serviceable. The phenomenon is so well known that examples are superfluous. The point is that ambiguities in literal meanings are often resolved by additional evidence of the speaker's intentions, such as evidence supplied by the context in which the words were uttered. Ambiguities proliferate if such evidence is excluded, or the very idea of the speaker having an intention is dismissed as a fiction.

Another reason is what we might loosely call ellipsis. In law, as in everyday life, what we say or write is often elliptical in the sense that we omit details that we expect our audience to know already. If I say 'Everyone has gone to Paris' I expect to be understood as saying that every member of some contextually defined group has gone to Paris, not that everyone who has ever lived has done so. When I ask the bus driver 'Do you go to Blackburn?' I am asking whether he drives the bus to Blackburn as part of its scheduled route, not whether he ever goes there when he is off duty. Many philosophers of language now regard literal meanings as 'typically quite fragmentary and incomplete, and as falling far short of determining a complete proposition even after disambiguation'.[43] Consider a sign next

to be published in the near future. His preliminary views are sketched in 'The Relevance of the Rule of Recognition' *Australian Journal of Legal Philosophy* 31 (2006) 95, esp. at 108–13.

[43] D. Sperber and D. Wilson, 'Pragmatics', in F. Jackson and M. Smith (eds.), *The Oxford Handbook of Contemporary Philosophy* (Oxford: Oxford University Press, 2005), 468 at p. 477. See also A. Marmor, 'The Immorality of Textualism' *Loyola University Law Review* 38 (2005) 2063.

to an escalator that says: 'Dogs must be carried on the escalator'. Read literally, this could be taken to mean that no-one may ride on an escalator without at least two dogs in one's arms, or that no-one may carry dogs anywhere except on an escalator. But those literal meanings are obviously too absurd to have been intended. We therefore understand the sign to mean something much richer, such as this:

> Anyone who is accompanied by a dog, and wishes to travel on the escalator, must pick up the dog and hold it in his or her arms, and not allow it to stand directly on the steps of the escalator.[44]

Although those who draft legal texts attempt to be clear, precise and comprehensive, many ellipses can be found in legal texts if we look closely enough. This is partly because it is so difficult to pack into them everything that is needed to express completely and exactly what is intended. It is also because it is unnecessary and would even be counter-productive: when context supplies the missing ingredients, ellipses contribute to brevity without reducing clarity or precision. Cases (3) and (4), above, are arguably among many examples that could be given.[45]

Ambiguities and ellipses are usually resolved by common sense, contextual or other evidence of the speaker's intended meaning. If all that evidence had to be ignored, indeterminacies and gaps in meaning would have to be filled in by the interpreter. If a statutory provision, read literally, were ambiguous or incomplete, then a literalist approach would require the judges to choose how to resolve the problem. As a result, indeterminacies would greatly increase, as would the need for judicial creativity to resolve them. Literalism would thereby diminish the utility of statutes as authoritative guides for conduct; it would leave many more questions to be answered, and disputes to be resolved, by judicial creativity after expensive and time-consuming litigation. It would accord less authority to legislatures and more to judges. It would allow judges to impose their own preferred meaning on a statute rather than to accept the meaning intended by the legislature, whenever the legislature has failed to enact words whose literal meaning expresses its intended meaning completely and precisely.

This is why literalism has long been a byword for a narrow, formalistic and obstructive approach to interpretation. Legislatures inevitably fail to express themselves with perfect clarity and total comprehensiveness.

[44] N.E. Simmonds, 'Between Positivism and Idealism' *Cambridge Law Journal* 50 (1991) 308 at 311–12.

[45] See text to nn. 38 and 39, above.

Limiting the meaning of legislation to the literal meanings of its words often frustrates their intentions or purposes. It enables the proverbial 'coach-and-four' to be driven through a tax Act, frustrating the public interest it was designed to serve. It enables conservative judges to thwart tax laws, labour laws, or other progressive legislation enacted by a reformist legislature. By the same token, of course, it enables reformist judges to obstruct laws enacted by conservative legislatures. But judges cannot apply principles of interpretation selectively, depending on whether they approve or disapprove of the political complexion of the legislature. Principles of interpretation must be purchased wholesale, not retail.

Ellipsis poses a greater difficulty for literalism than ambiguity, because an ellipsis does not necessarily give rise to any indeterminacy that must be resolved by judicial creativity. If literalists are compelled to understand the statement 'Everyone has gone to Paris' to mean 'Everyone who has ever lived has gone to Paris' – and surely they are – there is no indeterminacy that creativity is required to cure. Instead, there is an absurdity that must stand unless the statement is corrected. Absent a correction by the speaker, it could only be corrected by the interpreter. If an ellipsis in a statutory provision makes its literal meaning absurd, the provision must – in effect – be amended by the judges.

(2) Presuppositions

Another reason why literalism often has absurd consequences is the ubiquitous dependence of meaning on background assumptions. I will dwell on this because it is vital to the subsequent analysis of several important issues.

The words we use usually provide merely the bare bones of what we mean, which can only be properly understood if many background assumptions are grasped. If they are not taken for granted, almost anything we say is open to being misunderstood in unpredictable and bizarre ways. If I order a hamburger in a restaurant, and carefully list all the ingredients that I want, I do not think it important to specify that they should be fresh and edible, and the meat not too cold. If I thought about this at all, I would expect it to be taken for granted. Even if I did specify those conditions, I would not think to add that the hamburger should not be encased in cube of solid lucite plastic that can only be opened by a jackhammer.[46] My order implicitly requires a hamburger that can be immediately eaten without great difficulty. If, on going out at night, I insist

[46] J. Searle, 'Literal Meaning', in his *Expression and Meaning* (Cambridge: Cambridge University Press, 1979), 117 at p. 127.

that my son stay at home and study, I do not think to add that he may leave if the house catches fire, or if he receives a message that I have collapsed and been rushed to hospital. Nor would I later think he had disobeyed me if he did leave in those circumstances. Even if I had no conscious intentions regarding these very unlikely and unanticipated circumstances, I could truly say that I did not intend my instruction to apply to them. That is because our conscious intentions, as well as the words we use to convey them, can only be properly understood in the light of many background assumptions.[47] My instruction is implicitly subject to an indeterminate number of qualifications that I may not even have thought of, let alone expressed.

As the philosopher John Searle has argued, no matter how many of these qualifications I expressly include, there will be others I cannot anticipate. This is because, first, many of the crucial background assumptions are 'submerged in the unconscious and we don't quite know how to dredge [them] up',[48] and secondly, for every assumption spelled out, others would spring up on which the meaning of the expanded utterance would depend.[49] Each assumption depends for its full meaning on others, which together constitute a vast and complex network of beliefs and values that are generally not consciously adverted to, let alone articulated in language. If it were possible to make all of them explicit, the result would be so prolix and convoluted that it would be very difficult even to read, let alone to understand.[50] What Martinich says of conversation is true of communication generally: 'the words the participants utter are merely the surface that simultaneously outlines and conceals the underlying substance of communication and meaning'.[51]

This background network of assumptions may not be consciously adverted to by either the speaker or the hearer of an utterance. It would therefore be inappropriate to say that speakers intend to communicate them, even indirectly. They are presupposed by communications rather than implied by them. But it does not follow that speakers' intentions are

[47] For a fuller analysis, see J. Goldsworthy, 'Implications in Language, Law and the Constitution', in G. Lindell (ed.), *Future Directions in Australian Constitutional Law* (Sydney: Federation Press, 1994), 150 at p. 160–1.

[48] J.R. Searle, *Intentionality* (Cambridge: Cambridge University Press, 1983), p. 142.

[49] Searle, 'Literal Meaning', 126; Searle, *Intentionality*, p. 148; J.R. Searle, 'The Background of Meaning', in J. Searle, F. Keifer and M. Bierwisch (eds.), *Speech Act Theory and Pragmatics* (Holland: Reidel, 1980), p. 228.

[50] See A.P. Martinich, *Communication and Reference* (Berlin: de Gruyter, 1984), p. 45; M. Dascal, *Pragmatics and the Philosophy of Mind I* (Amsterdam: John Benjamins, 1983), p. 86; and Bennion, *Statutory Interpretation*, p. 427.

[51] Martinich, *Communication and Reference*, p. 78.

irrelevant. When we say that something is presupposed by an utterance in the sense that it is taken for granted, we are saying that the speaker took it for granted. Texts considered as objects completely independent of speakers cannot sensibly be said to take anything for granted.[52] Those who reject intentionalism in legal interpretation in effect banish this essential infrastructure of communication from consideration. As Adam Kramer explains:

> [C]ommunication is based upon a process of pragmatic inference. Under this process, one can intend what goes without saying and what does not cross one's mind. A communicator intends the background of social norms and his goals and principles within which he (non-consciously) formulated his utterance. These norms and goals and principles are thus intended to be used to determine issues that are underdetermined by the express utterance. This is not a fiction … it is the way communication and the mind works.[53]

The inevitable dependence of meaning on background assumptions that are taken for granted is true of legal documents, including statutes. Although those who draft such documents usually attempt to be very explicit, some degree of dependence on assumptions is inescapable. Many things must be taken for granted: 'the express words of every Act have the shadowy accompaniment of a host of implicit statements'.[54] These include what courts take to be simple common sense, which is why the 'Golden Rule' requires that provisions sometimes be interpreted non-literally in order to avoid patent absurdities.[55] They may also include pre-existing legal principles. As Francis Bennion explains, it is impossible for a drafter to explicitly restate all the ancillary legal considerations which may be necessary for the proper operation of an Act. Any statute 'relies for its effectiveness on [an] implied importation of surrounding legal principles and rules'.[56] Indeed, he goes so far as to claim that 'virtually the whole

[52] The background assumptions on which communication depends cannot be reduced to social conventions that are universally applicable and independent of particular contexts. See J. Goldsworthy, 'Marmor on Meaning, Interpretation, and Legislative Intention' *Legal Theory* 1 (1995) 439 at 461–3.

[53] A. Kramer, 'Implication in Fact as an Instance of Contractual Interpretation' *Oxford Journal of Legal Studies* 63 (2004) 384 at 385.

[54] Bennion, *Statutory Interpretation*, p. 3; see also *ibid*., pp. 361–2 and 364; see also J. Bell, 'Studying Statutes' *Oxford Journal of Legal Studies* 13 (1993) 130 at 133.

[55] Bennion, *Statutory Interpretation*, p. 407.

[56] *Ibid*., p. 727. See also Dickerson, *The Interpretation and Application of Statutes*, p. 29, and as to the drafting and interpretation of criminal laws, Lord Diplock in *R* v. *Miller* [1983] 2 AC 161 at 174.

body of the law is imported, by one enactment or another, as implied ancillary rules'.[57]

This is why *mens rea* is usually held to be implicit in statutes creating new criminal offences that include no express reference to it. Stephen J. said that it is simply assumed.[58] It is also why Lord Denning once held that the British North America Act 1867 (UK) did not disturb a pre-existing royal proclamation, which was 'an unwritten provision which went without saying'.[59] All the common law presumptions used in statutory interpretation can arguably be justified on this ground, the context provided by the general law implicitly limiting language that, read literally, would be over-inclusive.[60] They include the presumption that statutes are not intended to extend beyond territorial limits, to be retrospective, or to override fundamental common law freedoms. Judges are therefore often justified in claiming that, by interpreting statutory language restrictively, so that it does not disturb common law principles, they are giving effect to Parliament's implicit intention. Even in the case of unusual and unanticipated circumstances that fall within the literal meaning of a provision, and with respect to which the legislature had no conscious intention at all, it can make sense to say that it did not intend the provision to apply to them. As Aileen Kavanagh acknowledges:

> … the orthodox justification for applying the statutory presumptions is the fact that, in general, legislators know, or can be taken to know, that their legislation will be interpreted and understood in light of them. They are part of the known background against which Parliament legislates and of which it should be aware.[61]

This provides one possible explanation of the decision in the celebrated American case of *Riggs* v. *Palmer*, concerning a murderer who claimed the right to inherit under his victim's will.[62] The New York statute dealing with the validity and effect of wills did not expressly exclude murderers from inheriting, but the state's Court of Appeals held that it should be interpreted in the light of the common law principle that no-one may

[57] Bennion, *Statutory Interpretation*, p. 728.

[58] *R* v. *Tolson* (1889) 23 QBD 168 at 187; see also Lord Diplock in *Sweet* v. *Parsley* [1970] AC 132 at 162–3.

[59] *R* v. *Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta* [1982] QB 892 at 914.

[60] For many examples, see Bennion, *Statutory Interpretation*, Parts XVI, XVII, XXIII and XXIV.

[61] A. Kavanagh, *Constitutional Review Under the UK Human Rights Act* (Cambridge: Cambridge University Press, 2009), p. 99.

[62] (1889) 115 NY 506, 22 NE 188.

profit from his own wrong, and therefore as excluding inheritance in the circumstances. The decision is arguably justified by a 'tacit general legal assumption'.[63] In a similar English case, the High Court held that a statutory provision granting widows a pension did not benefit a widow convicted of the manslaughter of her husband. Lord Lane C.J. said that the lack of any specific provision to that effect was 'merely an indication … that the draftsman realised perfectly well that he was drawing this Act against the background of the law as it stood at the time'.[64]

When statutes are 'read down' to have a narrower application than a literal reading would warrant, so that common law freedoms are preserved, the only justification that is consistent with parliamentary sovereignty depends on the presumption that the legislature intended not to interfere with those freedoms or, at least, did not intend to interfere with them. If legislative intentions are really fictions, this justification is a camouflage that conceals judicial amendment. And if judges can legitimately amend statutes to make them consistent with common law freedoms, why should they not amend statutes to make them consistent with other common law principles, or to improve them in other ways? What principled limit to a power of judicial amendment could provide a substitute for rebuttable presumptions of legislative intention? It might be suggested that the common law, rather than Parliament's intention, both justifies and limits the judicial power of amendment. But if that were the case, the common law would be superior to statute law – a reversal of constitutional orthodoxy – and the power would not be effectively limited, because the judges can change the common law.

The literal meaning of a provision is often qualified to give effect to unstated intentions, purposes or values, when these can be reasonably regarded as implicit background assumptions that the legislature took for granted, and would have expected interpreters to take for granted. In such cases we can still regard the judicial interpreter as engaged in a cognitive process, clarifying the true meaning of the statute, which happens to differ from its literal meaning.[65]

The pioneering philosopher H.P. Grice famously attempted to explain the process of reasoning that we use in inferring implications from one another's utterances. Even when implications are grasped intuitively,

[63] Dickerson, *The Interpretation and Application of Statutes*, p. 108, n. 14; Bennion, *Statutory Interpretation*, pp. 532–3.

[64] *R* v. *Chief National Insurance Commissioner, ex parte Connor* [1981] QB 758, 765; see also *Re Sidgworth* [1935] Ch 89 and *Re Royse* [1985] Ch 22 at 27 per Ackner L.J.

[65] See Goldsworthy, 'Implications in Language, Law and the Constitution'.

without any conscious process of reasoning, he argued that the intuition springs from an unconscious reasoning process. He took linguistic communication to be a rational enterprise governed by an overarching Principle of Co-operation, which speakers and hearers must both respect if communication between them is to succeed. The substance of this principle is 'Do whatever is necessary to achieve the purpose of your talk; do not do anything that will frustrate that purpose.' He identified a number of more specific 'maxims of conversation' that help speakers to communicate. These maxims, of 'quantity', 'quality', 'relation' and 'manner', call for (respectively) informativeness (but also brevity), truthfulness, relevance to some supposed interest of the hearer, and clarity.[66]

The phenomenon of background assumptions or presuppositions can be accommodated by Grice's theory. The maxim of quantity requires speakers to say as much as but no more than is required for effective communication. Speakers who say more than that waste their audience's time and effort as well as their own, and risk boring, patronising and confusing their audience, thereby violating the maxim of manner. It follows that no mention should be made of matters that one's audience can be relied on to take for granted. And of course, no mention *can* be made of matters that one takes for granted oneself. Presuppositions are inferred as a consequence of the assumption that speakers have complied with the maxims, and therefore not bothered to state the obvious.

B Creative interpretation

Sir Rupert Cross observed that judges have a 'limited power' in effect to alter statutory words that would otherwise be unintelligible, absurd, or totally incompatible with the rest of the statute.[67] The court must repair or rectify the statute by undertaking some 'embroidery' to supplement or qualify its express provisions. He noted that many judges preferred not to admit that they were engaged in rectification of the statutory words.[68] But it would be more truthful to acknowledge that they do occasionally modify a statute's meaning to correct a legislative mistake or oversight.[69]

[66] H.P. Grice, *Studies in the Way of Words* (Cambridge, Mass: Harvard University Press, 1989), chs. 2 and 3.

[67] Bell and Engle, *Statutory Interpretation*, pp. 49 and 93.

[68] *Ibid*., p. 98.

[69] These observations about 'purpose' and 'mistake' are somewhat loose. Professor Jim Evans has persuasively argued that the Courts should only correct a mismatch between the express provision and the immediate practical judgment or reason underlying it. See J. Evans, 'Reading Down Statutes', in R. Bigwood (ed.), *The Statute, Making and Meaning*

One example is the correction of drafting errors, which can result in the literal meaning of a provision being quite different from its obviously intended meaning, sometimes even absurdly different. When it is obvious that this has happened, and also obvious what the legislature intended to provide, the courts may be prepared to overlook the error and give effect to the intention. The legislature is deemed to have succeeded in communicating its intention despite its clumsy mode of expression. But literalists must have great difficulty justifying the judicial correction of a drafting error. The provision must be understood as if some word or words were either added to or subtracted from it. But how could this be justified, except on the basis that it is necessary to give effect to what the provision was obviously intended to mean? Indeed, how could one even identify a drafting error, except by comparing what the legislature enacted with what it obviously intended to enact? If the concept of legislative intention is discarded, or all extra-textual evidence of intention disregarded, only the words of the provision are left. The idea that the wording is mistaken could then mean only that the interpreter regards it as undesirable. But how could interpreters be allowed to rewrite a provision on the ground that they regard it as undesirable? That would be to confer on them an unbounded power of amendment, because there would be no way to distinguish correcting drafting errors from making other improvements.

Another example of creative interpretation is the correction of omissions in the design of a statute. Legislatures sometimes fail to anticipate and expressly provide for some unusual circumstance or unexpected development; there is no background assumption or presupposition that covers it; and creative interpretation is needed to help the statute achieve its purpose, or avoid damage to other standing commitments of the legislature. Cases (1), (2) and (5) above may be examples, although (5) is arguably an example of an implicit, background assumption.[70]

Consider, for example, the judicial attribution of implications to statutes. The courts usually require that implications be 'necessary' ones. Two different kinds of 'necessity' can be found in the case-law on implications, whether statutory or contractual.[71] One is a kind of 'psychological necessity': it concerns whether or not interpreters are, as it were, compelled to

(Wellington: LexisNexis, 2004), p. 123. This is compatible with my argument, since that practical judgment or reason can be regarded as a kind of purpose.

[70] See text to nn. 36, 37 and 40, above.

[71] Discussed in Goldsworthy, 'Implications in Language, Law and the Constitution', 168–70. See also E. Peden, *Good Faith in the Interpretation of Contracts* (Sydney: LexisNexis Butterworths, 2003), pp. 60–71.

acknowledge a supposed implication because it is so obvious as not to be reasonably deniable. This has been called the 'obviousness test'.[72] Thus, it has sometimes been asked whether the court was 'necessarily driven' to the conclusion that some term was implied;[73] or whether 'the force of the language in its surroundings carries such strength of impression in one direction, that to entertain the opposite view appears wholly unreasonable'.[74] The 'officious bystander' test in contract law seems to be a version of this approach: it requires that an implication must be so obvious that the contracting parties, had they been asked by an officious bystander whether it was included, would have testily replied 'of course!'[75] The second kind is 'practical necessity' (or in contract law, 'business efficacy'): it concerns whether or not an alleged implication is practically necessary to enable some or all of the provisions of a legal instrument to achieve their intended purposes.[76] This might be called the 'practical efficacy' test.

I have argued elsewhere that the obviousness test should be preferred to the practical efficacy test as the test for genuine implications, by which I mean implications that are truly there to be discovered.[77] Since it is possible for a provision that is essential to the practical efficacy of a legal instrument to have been omitted due to any number of possible mistakes by its drafters, its practical efficacy cannot by itself show that it was included by implication. Sometimes, what we have said or written turns out to be deficient: genuine implications do not magically spring up to protect us from our mistakes. In some cases, therefore, the practical efficacy test really serves to justify the judicial repair or rectification of legal instruments, to save them from drafting omissions that would otherwise prove fatal to their efficacy.

This may explain the idiosyncratic legal terminology that describes terms being 'implied into' or 'read into' legal instruments. Terms that are

[72] Goldsworthy, 'Implications in Language, Law and the Constitution', 168; Peden, *Good Faith*, pp. 61–3.

[73] *Hamlyn* v. *Wood* (1891) 2 QB 488 at 494 (Kay L.J.), quoted with approval by Lord Atkinson, speaking for the Judicial Committee of the Privy Council, in *Douglas* v. *Baynes* (1908) AC 477 at 482. See also *Nelson* v. *Walker* (1910) 10 CLR 560 at 586 (Isaacs J.), and H. Lucke, 'Ad Hoc Implications in Written Contracts' *Adelaide Law Review* 5 (1973) 32 at 34.

[74] *Worrall* v. *Commercial Banking Co. of Sydney Ltd* (1917) 24 CLR 28 at 32.

[75] Goldsworthy, 'Implications in Language, Law and the Constitution', 161; Peden, *Good Faith*, pp. 60–1.

[76] The version found in contract law is called the 'business efficacy' test: see Starke, Seddon and Ellinghaus, *Cheshire & Fifoot's Law of Contract* (6th edn) (Sydney: Butterworths, 1992), pp. 212–13. As for statutes, see *Slipper Island Resort Ltd* v. *Minister of Works & Development* [1981] 1 NZLR 136 at 139.

[77] Goldsworthy, 'Implications in Language, Law and the Constitution', 168–70.

genuinely *implied by* a text are *inferred from* it, not *implied into* or *read into* it: the latter are oxymoronic expressions that, in trying to have it both ways, defy ordinary English. They presumably function as euphemisms, by blurring the difference between the discovery of genuine implications, and the insertion of pretended ones. If judges are really inserting terms into an instrument to ensure that it can achieve its purposes, they should say so.[78]

Adding a term to a statute is consistent with constitutional orthodoxy if its intended purpose is obvious, and the added term is necessary for it to fulfil that purpose. If so, no damage is done either to the principle of parliamentary sovereignty, because the court is guided by Parliament's purpose, or to the rule of law, because that purpose is ascertainable by reasonable interpreters. The court exercises the kind of equitable judgment described by Aristotle, who argued that when general laws would operate unjustly in unusual circumstances, they should be corrected according to 'what the legislator himself would have said had he been present and would have put in his law had he known'.[79]

This is not to deny that analytical difficulties remain unresolved. For example, how should we distinguish between background assumptions that are presupposed by an utterance, without having been in the speaker's conscious mind, and matters that the speaker has neglected to address and which are neither expressed nor presupposed by the utterance? If the speaker has not consciously thought of either one, what is the difference? It cannot be that in the former case we know the view he would have taken if he had consciously considered the matter, but in the latter case we do not. It is possible to know what view someone would have formed if he had considered some matter, without it being presupposed by the view he has in fact formed and expressed.

The real difference seems to be that, in the case of presuppositions, it would probably have made no difference if the speaker had consciously thought of the matter: he would still have expressed no view, on the ground that it was too obvious to require expression. That is why 'obviousness' is superior to 'practical efficacy' as the test for genuine implications.

[78] Chief Justice James Spigelman of the New South Wales Supreme Court denies that terms can be legitimately added to statutes, and disapproves of the expression 'reading into' because it suggests the opposite: see the lucid summary of views he has expressed in several cases, in his *Statutory Interpretation and Human Rights* (St Lucia: University of Queensland Press, 2008), ch. 3, esp. pp. 132–4.

[79] Aristotle *Nichomachean Ethics*, vol. 10, 1137b22–24.

Every speaker unconsciously engages in a split-second cost-benefit calculation to determine whether or not some point should be expressly mentioned, based on an assessment of whether – given cultural norms and other knowledge of their intended audience – it is likely to be taken for granted; its importance; whether it is easily inferable from other matters that will be expressly mentioned; the benefits in terms of brevity and efficiency of not expressing the point; and the possible costs of miscommunication if it turns out that it should have been expressed.[80] The audience engages in a similar analysis in deciding whether the speaker is likely to have expected them to take the point for granted.

III Evidence of legislative intention

A statute does not mean whatever Parliament intended it to mean. It is a commonplace that the meaning people intend to communicate can differ from the meaning they succeed in communicating. People can intend to say or imply something but fail to do so, and conversely, they can say or imply something they did not intend. If we are told that we have misunderstood someone's utterance, we often defend ourselves by replying 'I now realise what she meant to say, but that's not what she did say', or 'He may not have intended to say that, but he did'. The object of interpretation is the statute actually enacted, not some other statute that members of Parliament may have mistakenly believed they were enacting.

British and British Commonwealth courts were traditionally reluctant to consult extrinsic evidence of legislative intention, such as official reports of parliamentary debates, partly because a law is supposed to be something that can be readily understood by those who are subject to it, or at least by their legal advisers, rather than something whose meaning depends on esoteric information.[81] The courts' traditional evidential limitations may have been too restrictive, but some limit to evidence of legislative intentions is crucial to the rule of law. The law can only provide a useful framework for social interaction if its meaning is made public, or at least readily ascertainable; moreover, inflicting penalties or other costs for a failure to comply with uncommunicated intentions is obviously unfair.[82] In addition, an evidential limitation reflects a sound principle that we also

[80] Kramer, 'Implication in Fact', 387–8.

[81] This was not the only reason: evidence of what was said in parliamentary debates was also regarded as unreliable, and as unprofitably adding to the time and expense of litigation.

[82] See T.R.S. Allan, 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' *Cambridge Law Journal* 44 (1985) 111 at 117–18 and 122–14.

use in everyday life. The full meaning of what people say to us depends partly on what we know about their intentions; but it does not depend on esoteric information such as what they confide only to their spouses or write in their private diaries. The meaning of an utterance depends partly on what its intended audience knows, or can reasonably be expected to know, about the speaker's intentions, but not on concealed intentions.[83] In the case of statutes, the courts have therefore distinguished between whatever hidden intentions the legislature may have had, and those intentions it has communicated by the statute it has enacted, given readily available knowledge of its context and purpose. While the former are irrelevant, the latter may be crucial. That is why, when interpreting a statute, judges often take into account the circumstances when it was made and what it was intended to achieve, when these are, or were when it was made, matters of common knowledge.[84]

We can summarise all this, somewhat inexactly, by saying that the meaning of a statute is what the legislature appears to have intended it to mean, given evidence of its intention that is readily available to its intended audience. This seems consistent with Lord Hoffmann's dictum that the intention of Parliament normally amounts to 'the interpretation which the reasonable reader would give to the statute read against its background'.[85]

It is not altogether clear who the 'intended audience' of a statute is. The courts have always held that the meaning of statutory provisions may depend on specialised knowledge possessed by lawyers: for example, knowledge of the technical legal meaning of particular words or phrases, or of pre-existing deficiencies in the law that the provisions were intended to remedy. It is not the case, therefore, that they have admitted as evidence of legislative intention only matters known by the general public. It is as if they have treated lawyers as the 'intended audience', or at least lay-people only through the medium of professional legal advice. A law is supposed

[83] See J. Goldsworthy, 'Moderate versus Strong Intentionalism: Knapp and Michaels Revisited' *San Diego Law Review* 42 (2005) 669.

[84] See, e.g., P.B. Maxwell, *On the Interpretation of Statutes* (London: W. Maxwell & Son, 1875), pp. 20–1; P. Langan, *Maxwell on the Interpretation of Statutes* (12th edn) (London: Sweet & Maxwell, 1969), pp. 47–50; E. Driedger, *Construction of Statutes* (2nd edn) (Toronto: Butterworths, 1983), pp. 149–51; J.F. Burrows, 'Statutory Interpretation in New Zealand', reprinted in N.J. Singer, *Sutherland Statutory Construction* (5th edn) (1992) vol. 2A, 647 at 658; Bell and Engle, *Statutory Interpretation,* pp. 143–4; G. Devenish, *Interpretation of Statutes* (South Africa: Juta & Co., 1992), pp. 127–9 and 130–3; D. Gifford, *Statutory Interpretation* (Sydney: Law Book, 1990), pp. 117–19.

[85] *R (Wilkinson)* v. *Inland Revenue Commissioners* [2006] All ER 529 at [18].

to be something that can be readily understood by those who are subject to it, but sometimes it may be necessary to consult a lawyer.

Lord Steyn among others draws a distinction between the 'subjective' intentions or 'individual views' of legislators, on the one hand, and the 'objective meaning' of the statute they enacted, on the other.[86] But legislative intentions are not necessarily individual, private and subjective: they can be shared, publicly ascertainable, and, in that sense, objective. As we have seen, 'objective meaning' is determined partly by context only because context provides evidence of subjective intentions.[87] It is, nevertheless, possible to draw a distinction between objective meaning and subjective intentions, by relying on the requirement that evidence of a speaker's subjective intentions is relevant to the meaning of her utterance only if it is readily available to her intended audience. The intentions themselves are, necessarily, subjective, but relevant evidence of them must be publicly accessible and, in that sense, objective.

Lord Steyn is perfectly right to insist that 'a legal text has a public character, and … it must be read in the light of publicly available evidence'.[88] But a good deal of evidence of legislative intentions is publicly available, so the rule of law is not violated if it is taken into account. As examples of obvious drafting errors show, the evidence often consists of simple common sense and shared cultural understandings. That is why the courts are usually willing to take judicial notice of the circumstances when the statute was passed, and its purpose, insofar as these are or were at the time either commonly known or readily ascertainable by legal advisers.[89] This is evidence that Lord Steyn himself emphasises may be crucial, in establishing the mischief that the statute was intended to cure.[90]

It is beyond the scope of this essay to attempt a detailed account of the methods by which legislative intentions can be determined.[91] As to whether statements made in Parliament should be admissible as evidence of legislative intention or purpose, principled arguments can clearly be made either way. I will not rehearse them here, but merely note that, in principle, both alternatives can be argued to be consistent with legislative

[86] Steyn, 'Interpretation: Legal Texts and Their Landscape', 80, 81 and 85.
[87] See text to nn. 32–34, above.
[88] Steyn, 'Interpretation: Legal Texts and Their Landscape', 89–90.
[89] See n. 84, above.
[90] Steyn, 'Interpretation: Legal Texts and Their Landscape', 81.
[91] Useful discussions can be found in Dickerson, *The Interpretation and Application of Statutes*, ch. 7; K. Greenawalt, *Twenty Questions*, chs. 8–12; and J. Evans, *Statutory Interpretation; Problems of Communication* (Auckland: Oxford University Press, 1988), ch. 12.

supremacy. In that respect, the important question is whether such statements are likely to provide reliable evidence of the intention of Parliament as a whole. This, in turn, depends partly on how the evidence is likely to be used. Statements made in Parliament can be used as evidence of the contemporaneous meanings of words, and of the general purposes of a statute, particularly if they are numerous, rarely contradicted, made by representatives of diverse political interests, and corroborated by other evidence of intention. In the United States, so-called 'purposivists' and 'textualists' are locked in debate about the relevance of what they call legislative history to statutory interpretation. Both sides accept the principle that the courts must act as 'faithful agents' of the legislature – which is the principle of legislative supremacy – but they differ as to how that obligation is best fulfilled. The textualists distrust the reliability of legislative history as evidence of the intent of the legislature as a whole.[92] Any principle of interpretation can, of course, be misapplied or abused. The question is whether courts can be trusted to use legislative history with due sensitivity to the methodological problems involved.

Of course, there are other objections to the use of legislative history, based on the rule of law and on efficiency, rather than legislative supremacy. For example, the relative inaccessibility of legislative history to the general public, and even to many legal advisers, raises doubts about how it can possibly inform the public meaning of a statute. As one who shares these doubts, I am not reassured by the observation that for the general public, Hansard is no more esoteric or inaccessible than the All England Law Reports.[93] For a start, judicial decisions are readily available to legal advisers, and are summarised in many accessible textbooks and other secondary sources. To everything that has already been written about this, one point can be added. The relevance of extrinsic evidence of legislative intention may differ, depending on whether a court is engaged in clarifying or creative interpretation. If the meaning of a statutory provision is indeterminate, and judicial creativity is needed to resolve the indeterminacy, public reliance on the text is a weak objection to legislative history being consulted, because there is no determinate meaning that can be relied on.

It must be acknowledged that, in many cases of prima facie uncertainty about the meaning of statutory provisions, it will not be possible

[92] See J. Manning, 'Textualism and the Equity of the Statute', *Columbia Law Review* 101 (2001) 1 at 6–7 and 9–22.

[93] I. Loveland, 'Redefining Parliamentary Sovereignty? A New Perspective on the Search for Meaning in Law' *Parliamentary Affairs* 46 (1993) 319.

to dispel the uncertainty by establishing Parliament's intention, because there will be insufficient evidence of it. In these cases the uncertainty will have to be resolved by judicial creativity. It must also be acknowledged that, in some other cases, admissible evidence of Parliament's intention may justify attributing an intention to it that (unbeknown to the interpreter) it did not in fact possess. That is an inescapable hazard of the interpretive enterprise. We do not have direct, unmediated access to anyone's intentions – we only have evidence of them, and the evidence can sometimes mislead.

IV Alternatives to intentionalism

We have seen that statutory provisions often cannot be interpreted and applied literally, because the consequences of doing so would be so unreasonable that no legal system could tolerate them. Intentionalist theories offer one way of avoiding these consequences. If that approach is rejected, not many alternatives are available. This can be shown by considering various justifications of the decision in *Riggs* v. *Palmer*,[94] concerning whether a murderer could be prevented from inheriting under his victim's will, despite the relevant statute being silent on the subject.

Intentionalists can offer two different justifications of the decision. One is that, although the legislators had no conscious intention concerning murderers inheriting, it was reasonable to understand the statute in the light of a tacit, background assumption that was taken for granted.[95] The second is that the court engaged in 'equitable' rectification along Aristotelian lines, adding to it a qualification needed to prevent damage to an important principle that the legislature itself would probably have wanted to avoid had it adverted to the matter.[96]

If the very idea of a legislature having ascertainable intentions or purposes is rejected, what alternative justifications are available?

A Judicial override

One is to accept that statutes should be interpreted literally, but deny that they should always be applied accordingly. This would be possible if courts were entitled to amend, override or disobey statutes. Some legal theorists

[94] (1889) 115 NY 506, 22 NE 188, discussed at pp. 241–2, above.
[95] See Section II, Part A(2), above.
[96] See Section II, Part B, above.

have suggested that the courts may, indeed, sometimes do this. The issue has been discussed in the context of the debate between H.L.A. Hart and Lon Fuller, concerning whether the meaning of a statutory rule depends partly on its purpose. Fuller defended the claim that it does, partly by relying on examples in which literal interpretations lead to unreasonable or absurd results.[97] Some of Hart's defenders have replied that Fuller's point goes to the application of rules, rather than to their meaning. There are different versions of this reply.

Andrei Marmor once argued, in effect, that arguments like Fuller's show that judges may sometimes have to disobey the law. He wrote that they confuse 'the question of what *following a rule consists in* (which interested Hart), with that of *whether a rule should be applied in the circumstances*'. Whether a rule should or should not be applied in the circumstances depends on its moral content and that of the legal system in question. According to Marmor, it does not follow that the rule cannot be understood without reference either to its purposes or to moral considerations.[98]

But this exaggerates and aggravates the problem. It turns a humble problem of statutory interpretation into a challenge to judicial fidelity to law. Judicial disobedience of the law is generally thought to be an extreme remedy, to be reserved for truly extraordinary situations in which a law is so morally outrageous that the reasons why judges should almost always obey the law are outweighed or overridden. Run-of-the-mill cases of statutory interpretation in which a literal reading would have unreasonable consequences are problematic, but must they be treated as posing such a grave moral dilemma? Is there really no way that judges can deal with them except by violating their judicial oaths and disobeying the law? A less spectacular solution would surely be preferable.

Frederick Schauer has offered a different version of the same reply, according to which judges have legal authority to decline to apply statutes. Like Marmor, he denies that Fuller's argument shows that the meaning of a rule depends on its purpose; it shows, instead, that judges should sometimes refuse to follow a rule if doing so would be absurd or unjust.[99] Moreover, he claims that the Anglo-American legal tradition authorises

[97] L. Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' *Harvard Law Review* 71 (1958) 630 at 662–9.

[98] Andrei Marmor, *Interpretation and Legal Theory* (Oxford: Clarendon Press, 1992), pp. 136–7.

[99] Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991), pp. 209–10.

judges to do so. For example, he denies that the statutory rules considered in *Riggs* v. *Palmer* were unclear. This was not a hard case in the sense of not being clearly covered by the existing rules: the events in question plainly fell within the scope of the relevant statute.[100] The problem was that the statutory rules provided an answer that was 'socially, politically, or morally hard to swallow'. According to Schauer, American practice, and less pervasively English practice, empowers the judge to override or revise such rules.[101]

Schauer differs from Marmor by describing this judicial power to override or revise statutes as a legal rather than an extralegal power. But this explanation of the decision in *Riggs* is inconsistent with the explanation given by the court itself. As Jeremy Elkins has pointed out, 'the court went out of its way to argue that it was interpreting the Statute of Wills, rather than displacing it'.[102] Ronald Dworkin has also observed that none of the judges denied that if the statute, properly interpreted, gave the inheritance to the murderer, then they were bound to let him have it. 'None said that in that case the law must be reformed in the interests of justice.' The judges' disagreement was about 'what the statute required when properly read'.[103]

In addition, Schauer's explanation of the decision is vulnerable to a constitutional objection. According to the American principle of legislative supremacy, courts are legally required to obey any statute that is constitutionally valid. Statutes are not subordinate to judge-made common law principles; if there is any inconsistency between them, the common law principles rather than the statute must give way. This is certainly the position in Britain, whose constitution is based on the doctrine of parliamentary sovereignty. And we have seen that the principle that statutory law is superior to common law is equally well established in the United States.[104] American statutes are subject to constitutional guarantees, some of which are famously 'open ended' and have been interpreted extremely broadly. But that provides no support for the entirely different proposition that the courts may overturn or amend statutes that are inconsistent with ordinary common law principles, such as that people should not profit from their own wrongs.

[100] *Ibid*., pp. 200 and 209.
[101] *Ibid*., p. 210; on *Riggs* v. *Palmer*, see *ibid*. at pp. 189–90, 200 and 203.
[102] Jeremy Elkins, 'Frederick Schauer on the Force of Rules', in Linda Meyer (ed.), *Rules and Reasoning: Essays in Honour of Fred Schauer* (Oxford: Hart Publishing, 1999), 79 at p. 90.
[103] R. Dworkin, *Law's Empire* (Cambridge Mass.: Harvard University Press, 1986), p. 16.
[104] See Section I, above.

New legislation is sometimes depicted as being enveloped and enmeshed by common law principles, which the courts use to subdue and domesticate it.[105] But that is consistent with constitutional orthodoxy only up to a point. A statute can legitimately be 'read down' to accommodate common law principles as long as it is reasonable to presume that Parliament intended this, or would have intended it if the particular facts had been drawn to its attention. As I have acknowledged, courts may sometimes go so far as to change the meanings of statutory provisions. But that this is consistent with constitutional orthodoxy only if it serves the legislature's purposes in ways that would presumably meet with its approval. The courts thereby remain subordinate to the legislature, acting like agents faithfully carrying out the presumed will of their principal, subject to rule of law requirements.[106]

B Constructivism

A second alternative to intentionalism consists of 'constructivist' theories of interpretation, according to which the purposes and meanings attributed to statutes are, to a substantial extent, constructed by the judges who interpret them. Constructivists agree that the meaning of a statutory provision cannot sensibly be confined to the literal meaning of its words. But since it cannot be enriched by evidence of the legislature's intentions or purposes (which are either non-existent or indiscernible), it must be enriched by something else, such as the moral principles of the community as a whole, or 'true' moral principles.

Ronald Dworkin in *Law's Empire* expounded the most influential version of constructivisim. He rejected what he called 'conversational' interpretation, based on the 'speaker's meaning' theory which holds that the meaning of ordinary speech is determined partly by the speaker's mental state.[107] In the case of statutes and written constitutions, that theory was confounded by 'a catalogue of mysteries', including the identity of 'the speaker' and the mental state that contributes to meaning.[108] Instead, these laws had to be interpreted constructively.

[105] See, e.g., Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994), p. 359.

[106] See text to n. 17, above. Something like this analogy is usefully developed in Richard A. Posner, *The Problems of Jurisprudence* (Cambridge Mass., Harvard University Press, 1990), pp. 269–73. By rule of law requirements, I mean that the will of the legislature must be publicly ascertainable from the words it enacted, understood in the light of contextual evidence that is readily available to its intended audience.

[107] Dworkin, *Law's Empire*, p. 50 and 315.

[108] *Ibid.*, p. 315; see also p. 348.

Constructive interpretation, of art or social practices, for example, is also essentially concerned with purposes, but the relevant purposes are supplied by the interpreter rather than the author. Constructive interpretation is 'a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong'.[109] The law should therefore be interpreted so as to make it 'the best that it can be'. This requires that interpretations of the law give due weight to the principle of integrity, which requires the state or community to act on a single, coherent set of principles.[110] Judges must 'identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness'.[111]

Dworkin attempts to accommodate actual judicial practice, such as the way in which judges 'constantly refer to the various statements congressmen and other legislators make, in committee reports or formal debates, about the purpose of an act'.[112] He claims that his theory of constructive interpretion provides a better account of actual judicial practice than the speaker's meaning theory.[113] The 'doctrine celebrated in judicial rhetoric', that statutory meaning depends partly on the legislature's intentions, is really Dworkin's own principle of adjudicative integrity.[114]

Constructive interpretation does not depend on the actual intentions or mental states of any person or group, not even those of a majority of citizens embodied in the community's conventional or popular morality.[115] Actions, purposes, faults and responsibilities are attributed to corporations and institutions, including the state itself, by 'supposing' or 'assuming' that they are persons who can be committed to principles in something like the way real people can be. The community does not really have an independent metaphysical existence: it is 'a creature of the practices of thought and language in which it figures', treated '*as if* … [it] really were some special kind of entity distinct from the actual people who are its citizens'.[116] Constructive interpretation aims to identify a coherent set of principles that best explains and justifies all the decisions that have been taken in the name of the community. Integrity requires the judge 'to construct, for each statute he is asked to enforce, some justification that fits and flows through that statute and is, if possible, consistent with other

[109] *Ibid*., p. 52. [110] *Ibid*., p. 166. [111] *Ibid*., p. 225. [112] *Ibid*., p. 314.
[113] *Ibid*., p. 316. [114] *Ibid*., p. 337. [115] *Ibid*., pp. 335–6 and 168–9.
[116] *Ibid*., pp. 171 and 168 respectively, emphasis added.

legislation in force'.[117] Such an interpretation, which must embrace other statutes as well, made at different times by legislators with different political convictions, is likely to differ from an interpretation of one statute considered alone.[118]

Conversational interpretation is concerned with speaker's meanings at the time the statute was passed. Only original intentions are pertinent: 'an appeal to changed opinion must be an anachronism, a logically absurd excuse for judicial amendment'.[119] By contrast, Dworkin's constructivism is concerned with the community's present, rather than its past, commitments.[120] The primary aim of the interpreter is to identify a set of principles that justifies, not the statute's original enactment, but its current place within the law as a whole. The object is to identify a coherent conception of justice and fairness that best explains and justifies the contemporary community's commitment to its laws, including that statute.

Thus, in *Riggs* v. *Palmer*, the express provisions of the Statute of Wills are understood to be subject to an implied exclusion of the murderer of a testator from inheriting, not because of the 'speaker's meaning' theory that 'those who adopted the statute did not intend murderers to inherit', but instead, 'because *we* think the case for excluding murderers from a general statute of wills is a strong one, sanctioned by principles elsewhere respected in the law' (that people should not be permitted to profit from their own wrongs).[121]

Michael Moore has also defended a constructivist theory of statutory interpretation. He agrees that literalism is untenable, and that statutes must be interpreted in the light of their purposes. But, like Dworkin, he denies that these can be purposes of the enacting legislature, because it had no mental states that are both useful and discoverable.[122] Determining the purpose or function of a statute requires recourse to 'real values': it involves 'constructing the morally best purpose for a statute, and construing it by reference to that purpose'.[123] 'Purpose' means not 'intent' but 'function': the function that the statute serves in a just society.[124]

[117] *Ibid*., p. 338. [118] *Ibid*., pp. 349–50. [119] *Ibid*., p. 349. [120] *Ibid*., p. 225.
[121] *Ibid*., p. 352, emphasis in original.
[122] *Ibid*., 386. See also Michael S. Moore, 'The Semantics of Judging' *Southern California Law Review* 54 (1980) 151 at 263–5.
[123] Michael S. Moore, 'A Natural Law Theory of Interpretation' *Southern California Law Review* 58 (1985) 277 at 354.
[124] Moore, 'A Natural Law Theory', 397.

Moore's approach is reminiscent of Dworkin's view that judges should strive to make statutes 'the best that they can be'; according to Moore, they should seek the morally best purposes that 'fit' the statute, in the sense that a rational legislature could have enacted it in order to pursue those purposes.[125] But the 'fit' requirement is flexible; if judges are unable to 'fit' a morally acceptable purpose onto the literal meaning of a statute's words, they can stretch or even overrule that meaning in order to achieve their objective. In deciding what a statutory word means, a court 'ought to balance off its linguistic intuitions against its ethical intuitions about what, in rules of this sort, the word *ought to mean*'.[126]

> There may be no set of acceptable purposes for a particular statute that a judge could find intelligibly promoted by it unless he greatly stretches his linguistic intuitions. Only then does he become self-conscious of his necessarily creative role.[127]

Riggs can again be used as an example.[128] When the Statute of Wills is subjected to Moore's 'purposive interpretation', moral values are used to help determine its meaning, by qualifying or modifying its literal meaning to produce a result consistent with the purposes that the judges believe it morally ought to serve. Thus, despite its literal meaning, it is interpreted as not allowing murderers to inherit under their victims' wills.

But are there any limits to the extent to which the meaning of a statute's actual words can be bent, stretched or overridden? According to the orthodox, intentionalist justification of non-literal interpretation, the scope for modifying literal meanings is limited by the presumed intentions and purposes of the legislature. But Moore's purposive interpretation is subject to no such limit. Does his argument permit a court to decide that a statute morally ought to serve some valuable purpose, and then 'interpret' it so that it does, no matter what it actually says?

There are moral reasons – namely, 'rule of law' values – for not straying too far from the literal meaning of a statute.[129] Judges must weigh these values against the moral values that would be promoted by overriding the literal meaning. It would seem to follow that the literal meaning might sometimes prevail, even if it has unjust consequences. On the other hand, Moore says that there is no case 'in which the linguistic intuitions are so

[125] Moore, 'The Semantics of Judging', 259–60 and 293–4.
[126] *Ibid*., 278.
[127] *Ibid*., 294; see also Moore, 'A Natural Law Theory', 385.
[128] Discussed in Moore, 'Semantics of Judging', 277–8.
[129] *Ibid*., 321 and 385; see also *ibid*., 313–20 for a description of the rule of law virtues.

strong that the ethical intuitions might not be determinative the other way'.[130] If it is necessary to avoid extreme injustice, 'a judge may "overrule" the ordinary meaning by acknowledging that this is a term of art in the law, guided by the law's special purposes and not by ordinary meaning'.[131] He also claims that judges must always ask a final, 'safety-valve' question concerning the justice of applying the statute.[132] He acknowledges that this might lead to overruling the statute as enacted.[133] His constructivist approach to interpretation therefore turns into invalidation if this is needed as a last resort in order to achieve justice.

Trevor Allan also defends what he calls 'robust constructivism' involving 'a "constructive" notion of legislative intention'.[134] Unlike Dworkin and Moore, Allan concedes that Parliament does have intentions of relevance to interpretation.[135] But the 'true (or legal) meaning' of a statute is 'constructed in the light of the background values we treat as fundamental'.[136] 'The relevant intention is essentially metaphorical'; it is 'attributed [to Parliament] rather than (in any straight-forward sense) discovered'.[137] It is a product of interpreting the text of the statute and its 'apparent purpose' in the light of settled common law principles of fairness and legality.[138] Even 'purpose' is partly 'constructed': the statute is taken to embody the purposes of the 'ideal legislator'.[139] 'The true or legal meaning of a provision is the sense that best reflects the various requirements of political morality, all fairly taken into account'; 'legal outcomes that would be widely thought unjust or inexpedient will be excluded'.[140] 'A statute ultimately means what the courts decide it ought to mean in particular instances.'[141]

Like Michael Moore, Allan argues that the graver the threat posed by a statute's words to a fundamental right, the more a court is justified in

[130] *Ibid*., 278. [131] Moore, 'A Natural Law Theory', 385.
[132] *Ibid*., 386–7. [133] *Ibid*.
[134] T.R.S. Allan, 'Legislative Supremacy and Legislative Intent: A Reply to Professor Craig' *Oxford Journal of Legal Studies* 24 (2004) 563 at 567–8 and 570 (on Dworkin). He distinguishes his theory from Dworkin's, and acknowledges Dworkin's change of position post-*Law's Empire*, in T.R.S. Allan, 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority' *Cambridge Law Journal* 63 (2004) 685 at 694 (although at 700 he seems to prefers the theory in *Law's Empire*).
[135] Allan, 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority', 694.
[136] *Ibid*., 695. [137] *Ibid*., 693 and 692.
[138] Allan, 'Legislative Supremacy and Legislative Intent: A Reply to Professor Craig', 568.
[139] 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority', 690 and 694.
[140] *Ibid*., 695 and 696. [141] *Ibid*., 690.

adopting a strained interpretation of them: 'a suitably elastic interpretation can, in all the circumstances, properly be accepted'.[142] 'In practice, almost anything is "possible" when the requirements of justice are sufficiently pressing.'[143] Therefore, 'a robust constructivism … can accomplish everything that striking down can achieve'.[144] As for *Riggs* v. *Palmer*, it 'does not matter, for any practical purpose, whether we regard the Statute of Wills as rendered inapplicable by overriding common law principle or whether we treat the statute as containing, on its true construction, an implied exception to its literal terms'.[145]

C Criticism of constructivism

Constructivist theories purport to justify a judicial power to 'construct' statutory meaning that is constitutionally unacceptable. The very idea that judicial interpreters 'construct' meaning shows that it is a power amounting, at minimum, to co-authorship of the statute. It is a power to subordinate the words chosen by the legislature (and, if they exist, its intentions and purposes) to moral values chosen by the judges. The legislature is no longer the sole author of the statute it enacts: no matter what it provides, the content of the statute will be determined partly by values 'read into it' by the judges. The meaning of a statute, Allan declares, is 'the joint responsibility of Parliament and the courts'.[146]

As Richard Ekins has argued, it is difficult to see how constructivism can be reconciled with the fundamental notion that Parliament has authority to make law. The theory treats Parliament as merely providing raw material, in the form of words, which the judges combine with other material to construct law.[147] Putting the same point another way,

> The courts are enjoined to interpret each statute as a purposive communication – but not a communication from real legislators. Instead the statute should be read as though it were a communication from the judge to himself, via the thought experiment of the ideal legislator.[148]

[142] Allan, 'Legislative Supremacy and Legislative Intent: A Reply to Professor Craig', 580.
[143] Allan, 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority', 707.
[144] Allan, 'Legislative Supremacy and Legislative Intent: A Reply to Professor Craig', 581.
[145] Allan, 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority', 699.
[146] *Ibid*., 689, n. 13.
[147] R. Ekins, 'The Relevance of the Rule of Recognition' *Australian J Legal Philosophy* 31 (2006) 95, 100.
[148] *Ibid*., 106.

This is a recipe for frustrating or usurping Parliament's authority, rather than respecting and facilitating it.[149]

Some versions of constructivism may be more extreme than others. Dworkin makes some room for the principle of legislative supremacy; although constructive interpretation tries to satisfy the demands of integrity, by making every statute consistent with the moral principles that underpin the law as a whole, he acknowledges that in some instances this might be impossible. If a particular statute cannot be made consistent with those principles, legislative supremacy requires that it nevertheless be enforced.[150]

But as propounded by Moore and Allan, there are no limits to the ability of constructivist judges to modify or qualify a statute in order to avoid injustice as they see it. Admittedly, Moore concedes that adherence to literal meanings is supported by 'rule of law values', which include 'the principle of democracy' – the principle that '[b]ecause legislatures represent the majority's wishes better than courts do, democracies' legislatures should have their wishes carried out by a judge even if that judge disagrees with the wisdom of such wishes'.[151] This is the principle of legislative supremacy. But the judges have power to weigh the rule of law values against substantive moral values. The difference between constitutional orthodoxy and Moore's position is therefore clear. According to him, the principle of legislative supremacy is merely one of a number of principles that judges are entitled to subordinate to other, substantive moral values that they deem to be of greater weight. The degree of deference to be accorded the legislature is ultimately a matter for them, and no-one else, to decide. That decision will inevitably depend on the weight they attribute to the substantive moral values they would prefer the legislature's enactments to serve. It is not clear whether Dworkin's theory is, ultimately, any different in this respect.

Moore and Allan frankly acknowledge that in extreme cases, constructive interpretation might distort the plain or intended meaning of a statute so severely that the statute as enacted is, in effect, overridden or invalidated.[152] Invalidation is interpretation, as they define it, pushed to the limit. From the co-authorship that is inherent in all constructive interpretation, the judiciary at that point comes out on top. Allan asserts that the judicial practice of interpreting statutes restrictively, in order to

[149] *Ibid*., 103.
[150] R. Dworkin, *Law's Empire*, 268 and 401.
[151] *Ibid*., 315.
[152] Moore, 'A Natural Law Theory', 386–7; Allan, 17.

protect important common law principles, is 'radically inconsistent with a notion of unlimited legislative supremacy'.[153]

It is difficult to imagine a constructivist theory of interpretation that does not dispense with, or severely dilute, legislative supremacy. That must be the consequence of any theory that authorises the judges to change the actually intended meaning of a statute in order to comply with extraneous moral values they regard as paramount.

Constructivism claims to provide the best description, or 'interpretation', of actual judicial practice. This is a dubious claim, given the ubiquity of judicial references to legislative intention. In *Law's Empire*, Dworkin is forced to argue that 'the doctrine celebrated in judicial rhetoric', that statutory meaning depends partly on legislative intentions, is in reality his own principle of adjudicative integrity.[154] If so, it is odd that the judges have concealed that principle behind such misleading rhetoric. He is also compelled to provide a convoluted rationalisation of the common judicial practice of consulting reports of legislative committees, and statements made by legislative sponsors of statutes, when interpreting them. The rationalistaion maintains that these reports and statements are 'themselves acts of the state personified', which the principle of integrity requires to be accommodated by a coherent theory of the community's principled commitments.[155] There is no need for such gymnastics if, as I have argued, Dworkin's scepticism about the existence of legislative intentions is misconceived. Orthodox intentionalism remains the most straight-forward and persuasive account of the judges' actual interpretive practices.

Perhaps this is why, in his more recent work, Dworkin has embraced a version of intentionalism, based on the speaker's meaning theory that he repudiated so emphatically in *Law's Empire*.[156] He now frequently uses 'the familiar model of ordinary speech', and examples of it, to explain and illuminate statutory and constitutional meaning.[157] '[J]ust as our judgment about what friends and strangers say relies on specific information about them and the context in which they speak,' he says, 'so does

[153] T.R.S. Allan, *Law, Liberty and Justice: the Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993), p. 17.

[154] R. Dworkin, *Law's Empire*, 337.

[155] *Ibid*., 342–3. [156] See n. 107, above.

[157] See, e.g., Dworkin, 'Comment on Scalia', 116–17; R. Dworkin, 'Arduous Virtue of Fidelity: Originalism, Scalia, Tribe and Nerve' *Fordham Law Review* 65 (1997) 1249 at 1255–6; and R. Dworkin, *Freedom's Law; The Moral Reading of the American Constitution* (New York: Oxford University Press, 1996), pp. 292–3.

our understanding of what the framers said'.[158] In particular, it relies on our understanding of 'semantic' intentions, as opposed to 'expectation' intentions. Semantic intentions are what people intend to say by uttering certain words on a particular occasion, while expectation intentions are what they intend, expect or hope will be the consequence of uttering them.[159] These two kinds of intentions differ, because people may hold erroneous beliefs about the consequences, including the proper application, of what they say.

> Any reader of anything must attend to semantic intention, because the same sounds or even words can be used with the intention of saying different things. If I tell you … that I admire bays, you would have to decide whether I intended to say that I admire certain horses or certain bodies of water. Until you had, you would have no idea what I had actually said even though you would know what sounds I had uttered … We do not know what Congress actually said [in a statute] … until we have answered the question of what it is reasonable to suppose, in all the circumstances including the rest of the statute, it intended to say in speaking as it did.[160]

'[A] text is not just a series of letters and spaces: It consists of propositions', and '[w]e decide what propositions a text contains by assigning semantic intentions to those who made the text'.[161]

> History is therefore plainly relevant. But only in a particular way. We turn to history to answer the question of what they intended to *say*, not the different question of what *other* intentions they had. We have no need to decide what they expected to happen, or hoped would happen, in consequence of their having said what they did …[162]

Moreover, Dworkin insists that in deciding what law-makers intended to say, an interpreter is not confined to the 'acontextual meaning of the language they used'.[163] He approves of an example, supplied by Michael McConnell, of a constitutional provision in which the framers appear to have used general language to enact a rule much more limited than its acontextual meaning would suggest. The 'ex post facto' clause in Article

[158] Dworkin, *Freedom's Law*, p. 10.
[159] R. Dworkin, 'Comment on Scalia', in A. Scalia, *A Matter of Interpretation; Federal Courts and the Law* (Princeton: Princeton University Press, 1997), 115 at pp. 116 and 119.
[160] Dworkin, 'Comment on Scalia', p. 117.
[161] Dworkin, 'Arduous Virtue of Fidelity', 1260.
[162] Dworkin, *Freedom's Law*, p. 10.
[163] Dworkin, 'Reflections on Fidelity' *Fordham Law Review* 65 (1997) 1799 at 1815–16.

I, section 9 of the United States Constitution, states that 'no … ex post facto law shall be passed'. According to McConnell, the framers were persuaded, after they had adopted those words, that in law – as distinct from everyday usage – the words 'ex post facto law' were restricted to criminal laws, which led them to insert a separate clause prohibiting the retrospective impairment of contractual obligations.[164] Dworkin agrees that, based on what McConnell says, it is much more plausible to interpret the words in a restricted, rather than an unrestricted, way, and that this 'illustrates, therefore, the pertinence of history to the construction of semantic as well as expectation intention'.[165]

That Dworkin's approach has changed since *Law's Empire* is shown by the very different justification of the decision in *Riggs* v. *Palmer* that he now favours. As we have seen, Dworkin in *Law's Empire* rejected the 'speaker's meaning' justification for the decision.[166] But now, Dworkin offers this justification for it:

> I continue to think that the majority reached the right decision, in *Riggs* v. *Palmer*, in holding that, according to the better interpretive reconstruction, those who created the Statute of Wills did not intend to say something that allowed a murderer to inherit from his victim … It is a perfectly familiar speech practice not to include, even in quite specific instructions, all the qualifications one would accept or insist on: all the qualifications, as one might put it, that 'go without saying'.[167]

He adds that this justification of *Riggs* and similar cases is based on 'a convincing explanation for the speech acts in question'.[168] But explaining a speech act in terms of the speaker's intentions is what the speaker's meaning theory is all about![169]

V Conclusion

Statutory interpretation is not as mysterious as some theorists would have us believe. Parliament has legal authority to make laws that the courts are legally obligated to obey. Parliament exercises its authority by using

[164] M. McConnell, 'The Importance of Humility in Judicial Review: a Comment on Ronald Dworkin's "Moral Reading" of the Constitution' *Fordham Law Review* 65 (1997) 1269 at 1280, esp. n. 54.

[165] Dworkin, 'Reflections on Fidelity', 1806.

[166] Dworkin, *Law's Empire*, pp. 351–2; see n. 121, above.

[167] Dworkin, 'Reflections on Fidelity', 1816. [168] *Ibid*., 1816.

[169] For more detailed discussion of the complexities of Dworkin's more recent work on interpretation, see J. Goldsworthy, 'Dworkin as an Originalist' *Constitutional Commentary* 17 (2000) 49.

language to communicate its will in much the same way that language is used in everyday life. The interpretation of statutes is a specialised case of linguistic interpretation in general, and many of the principles developed by the courts are explicitly formulated analogues of principles that we use intuitively in everyday life.[170] As two Australian judges put it, '[t]he fundamental object of statutory construction in every case is to ascertain the legislative intention … The rules [of interpretation] … are no more than rules of common sense, designed to achieve this object.'[171]

For many centuries, the common law has recognised that the object of all interpretation 'is to determine what intention is conveyed either expressly or by implication by the language used', or in other words, 'to give effect to the intention of the [law-maker] as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed'.[172] This has often been said to be 'the *only rule*', or 'the fundamental rule of interpretation, to which all others are subordinate'.[173] This is a rule that leading cases and textbooks on statutory interpretation in Britain, Australia, Canada and the United States have affirmed for a very long time.[174] Indeed, it can be found at least as far back as the fifteenth century: Chrimes reports that it 'was certainly established by the second half of the fifteenth century', and by Henry VII's reign was 'sufficiently established to be clearly stated several times from the bench'.[175]

[170] This thesis is most comprehensively defended in G. Miller, 'Pragmatics and the Maxims of Interpretation' *Wisconsin Law Review* (1990) 1179. For strong support, see D. Pearce and R. Geddes, *Statutory Interpretation in Australia* (3rd edn) (Sydney: Butterworths, 1988), pp. 15 and 63. See also F. Bowers, *Linguistic Aspects of Legislative Expression* (Vancouver: University of British Columbia Press, 1989), pp. 8–9.

[171] *Cooper Brookes (Wollongong) Pty Ltd* v. *F.C.T.* (1981) 35 ALR 151 at 169–70 per Mason and Wilson JJ.

[172] Maxwell, *On the Interpretation of Statutes*, p. 1; *Attorney-General* v. *Carlton Bank* [1899] 2 QB 158 at 164 per Lord Russell.

[173] Respectively, *Sussex Peerage Case* (1844) 8 ER 1034 at 1057 per Tindall C.J.; *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd* (1920) 28 CLR 129 at 161 per Higgins J.

[174] Maxwell, *On the Interpretation of Statutes*, p. 1; *Halsbury's Laws of England* (4th edn) Vol. 44, para. 522; Bennion, *Statutory Interpretation*, pp. 345–7; Langan, *Maxwell on the Interpretation of Statutes*, p. 28; H. Black, *Handbook on the Construction and Interpretation of the Laws* (St. Paul, Minn.: West Pub. Co., 1896), 35ff.; Singer, *Sutherland Statutory Construction*, 22–3; Driedger, *Construction of Statutes*, pp. 105–6; P.A. Cote, *The Interpretation of Legislation in Canada* (2nd edn) (Quebec, 1991) at pp. 4–5.

[175] S.B. Chrimes, *English Constitutional Ideas in the Fifteenth Century* (New York, 1966 reprint), p. 294. See also P. Hamburger, *Law and Judicial Duty* (Cambridge, Mass.: Harvard University Press, 2008), pp. 52–8. Many early authorities which consistently attest to the crucial role of legislative intention in statutory interpretation are

When the fundamental principle of statutory interpretation is ignored, as it too often is, many of the particular maxims and presumptions of interpretation can seem like a jumble, or worse, a series of mutually contradictory directives, able to be selectively marshalled to support whatever interpretation is preferred on policy grounds.[176] But once it is understood that the clarification of a statute's meaning requires taking account of all admissible evidence of legislative intention (that is or was readily available to the legislature's intended audience), then it should be appreciated that there can be a wide variety of evidence, that some items of evidence may contradict others, and that a final judgment requires weighing them against one another. The difficulty of the task should not impugn its authenticity.

It is entirely reasonable to presume that Parliament did not intend to act absurdly or unjustly, or to violate established rights. This, too, has been recognised for centuries.[177] But the presumption is defeasible. William Blackstone said that if a statute would otherwise lead to 'absurd consequences, manifestly contradictory to common reason … the judges are in decency to conclude that this consequence was not foreseen by the Parliament, and therefore they are at liberty to … *quo ad hoc* disregard it'. On the other hand, 'if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it …'[178] More recently, Francis Bennion expressed the same idea:

> If the result of a literal construction appears absurd or mischievous, the court must ask itself whether Parliament really meant it. There is a presumption that Parliament does not intend to do anything that will produce an absurd result. If the court thinks that what it considers to be

cited in R. Berger's excellent collection of early English sources, '"Original Intention" in Historical Perspective' *George Washington Law Review* 54 (1986) 296 at 299–308; see also R. Berger, 'The Founders Views – According to Jefferson Powell' *Texas Law Review* 67 (1989) 1033 at 1059–65.

[176] The classical statement of this view is K. Llewellyn, 'Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed' *Vanderbilt Law Review* 3 (1950) 395. In his list of the canons of interpretation, Llewellyn does not include the principle that statutes should be interpreted according to the intentions of the legislature. This is surprising, given that in the very next article, Charles Curtis reports that '[w]e have, almost all of us, I think, been brought up in the belief that the interpretation of legal documents consists essentially in a search for the intention of the author', and that this 'familiar doctrine is current as well as orthodox': C. Curtis, 'A Better Theory of Legal Interpretation' *Vanderbilt Law Review* 3 (1950) 407 at 407 and 408.

[177] Hamburger, *Law and Judicial Duty*, pp. 54–6.

[178] W. Blackstone, *Commentaries on the Laws of England*, vol. 1, 91 (spelling modernised).

> absurd was really and truly contemplated by Parliament, and was deliberately intended, then the court must defer to that.[179]

The crucial point is that all this turns on the ideas of legislative intention and purpose. When judges interpret provisions non-literally in order to give effect to Parliament's presumed intentions or purposes, they are still acting as Parliament's faithful agents. If we were to jettison the ideas of intention and purpose, it would be much more difficult both to justify and to limit a judicial power to interpret non-literally. All non-literal interpretation would be creative rather than cognitive, guided by the judges' values (including 'common law values') rather than Parliament's. The judges would then have effective supremacy over statute law, and legislative power superior to that of Parliament itself, since they always have the 'last word' at the point of application of the law. That would amount to even more power than the 'dual' or 'bi-polar' sovereignty that some English judges have recently claimed on behalf of the judiciary.[180]

[179] Bennion, *Statutory Interpretation*, p. 338.
[180] See Goldsworthy, *The Sovereignty of Parliament*, p. 2.