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What is legislative intent? Its content and structure

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1. Introduction

The traditional wisdom is that the search for legislative intent is central to statutory interpretation. Yet, as a recent editorial in *Statute Law Review* notes, there is no clear consensus as to what legislative intent is or how it bears on interpretation.¹ I suggest that we cannot settle how or if legislative intent should inform and direct interpretation until we determine what it is. In this paper I aim to outline the nature of legislative intent and in so doing to respond to some of the doubts that judges and scholars have voiced about intent and its relevance to interpretation. My argument is that legislative intent should be understood not by aggregating the intentions of individual legislators but by attending to how and by reference to what the legislature acts to legislate. The legislature, I argue, acts on intentions which are the legislative intent. I begin by noting the reasons to doubt that legislative intent is central to interpretation. I then explain how it is possible, and what it is, for the legislature to form and act on intentions. Finally, I explain why the content of the legislature's intention is relevant to interpretation.

2. Reasons for doubt

It is still widely accepted that legislative intent settles the legal meaning and effect of statutes. Deference to legislative intent seems to be entailed by legislative supremacy: the legislature is free to make any law it sees fit and therefore whatever it intends to be law should bind interpreters. This line of argument is not very well developed but it has a straightforward appeal.² Nonetheless, certain judges and academics have argued that legislative intent has no place in interpretation – Justice Scalia of the US Supreme Court, for example, is famously intemperate to counsel who invoke intent. Therefore, judges might be forgiven for harbouring doubts as to whether intent is of central importance.

¹ Editorial, 'Legislative Intention' (2008) 29(2) *Statute Law Review*, iii-iv

² I set out an argument to this effect in R Ekins, 'The Relevance of the Rule of Recognition' (2006) 31 *Australian Journal of Legal Philosophy* 95

The most important reason to doubt that legislative intent settles interpretation is that the modern legislature is a group, rather than an individual, and it seems unclear how a group, especially a group like a legislature, may have intentions. That is, one may doubt that legislative intent exists at all. There are two other reasons to doubt that legislative intent is centrally important. The first is that it may be constitutionally illegitimate for interpreters to accept that intent settles the meaning and effect of statutes. The second is that legislative intent may be practically irrelevant, so that statutes may be and are interpreted soundly without reference to intent. The strength of these two reasons for doubt is likely to turn on how one should understand legislative intent.

2.1 The legislature is a group

The modern legislature is a group rather than an individual person. More precisely, the legislature is a complex group, consisting of more than one group. The two chambers of a bicameral legislature are each groups and the legislature is those two chambers, as well perhaps as the head of state. The US Congress is the Senate and the House of Representatives and the group that is Congress acts when both chambers agree, subject to presidential veto. The Queen-in-Parliament is the Queen, House of Lords and House of Commons and the group that is the Queen-in-Parliament acts when all three agree, save when the Parliament Acts apply, where the assent of Queen and Commons is sufficient for the group (the Queen-in-Parliament, which is Queen, Lords and Commons) to act.³ I will set bicameralism aside for now, concentrating on a single legislative assembly.

It is clear that a one-person legislature, such as a prince or a president, would be capable of forming and acting on intentions. If he were to legislate rationally, he would think about how the law should be changed and he would act to change the law in response to that chain of reasoning, changing the law in the way that he thinks reasonable. Therefore, the enactment of a statute by a sole legislator is an action on an intention. The text of the statute would be the legislator's public communication of his decision as to what the law should be. The interpreter would understand the legislator to have authority to change the law and would respond to his statute by trying to understand the decision that the text expresses. That is, the interpreter would seek to identify the legislator's intention in enacting the statute. However, not all of the legislator's intentions would be relevant. His intentions would be significant to the

³ See R Ekins, "Acts of Parliament and the Parliament Acts" (2007) 123 LQR 91. I argue that the Parliament Acts are a procedure that the group of the King, Lords and Commons adopted to structure their further action, such that action in accordance with that procedure is the act of all three, notwithstanding that the Lords do not assent to the particular measure being enacted (the Hunting Act 2004 for example). The Lords still participate in the legislative act and the enactment of statutes according to the procedure laid down in the Parliament Acts remains an exercise of the constitutionally fundamental authority of the Queen-in-Parliament. For this reason, the Queen and Commons do not exercise delegated lawmaking authority and the legislation that is enacted in this way is not secondary legislation.

extent that they constituted his decision as to what the content of the law should be. Further intentions – to win glory as a great lawmaker or to save his conscience – would be of interest to biographers (and others) but not to the interpreter trying to grasp how his legislative act changed the law.

The obvious objection to importing this model of legislating and interpretation to our own interpretive practice is that the legislature is not an individual person. Many scholars sceptical of legislative intent, including Max Radin,⁴ Ronald Dworkin,⁵ Kenneth Shepsle,⁶ and Jeremy Waldron,⁷ among others, advance this objection. They argue that because the legislature is a group, any reference to its intention had to be an indirect reference to the intentions of the individual legislators. A group does not have a mind, the argument goes, and so it cannot form intentions any more than it can form beliefs or adopt attitudes. Therefore, legislative intent is a species of group intention and cannot truly exist. Radin frames the critique in this way:

The least reflection makes clear that the law maker, *der Gesetzgeber, le législateur*, does not exist, and only worse confusion follows when in his place there are substituted the members of the legislature as a body. A legislature certainly has no intention whatever in connection with the words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.⁸

Dworkin arrives at a similar conclusion:

It seemed a metaphysical mistake to take the “intention” of the legislature itself as primary so long as Hermes⁹ was in the grip of some mental-state version of the speaker’s meaning theory of legislative intent. So long as we think legislative intention is a matter of what someone has in mind and means to communicate by a vote, we must take as primary the mental states of particular people because institutions do not have minds, and then we must worry about how to consolidate individual intentions into a collective, fictitious group intention.¹⁰

These extracts suggest that this argument against legislative intent consists of two distinct claims. The first is that no group, including a legislature, is able to form and act on intentions. The reason for this is that there are no group minds. Radin and Dworkin take intentions to be mental states that exist only in the minds of individual persons and

⁴ M Radin, ‘Statutory Interpretation’ (1930) 43 Harvard L Rev 863

⁵ R Dworkin, *Law’s Empire* (Hart Publishing Oxford 1998)

⁶ K Shepsle, ‘Congress is a ‘They,’ Not an ‘It’: Legislative Intent as Oxymoron’ (1992) 12 Intl J of L and Economics 239

⁷ J Waldron, *Law and Disagreement* (OUP Oxford 1999) chapter six

⁸ Radin (n 4) 869-70

⁹ Hermes is the poor cousin of Hercules J (Dworkin’s famous device to explain law as integrity) and is used by Dworkin to set out the various reasons to reject legislative intent in statutory interpretation.

¹⁰ Dworkin (n 5) 336

as it is uncontroversial that there are no group minds so it is said to follow that groups, including the assembly, cannot form intentions: true intentions are, and may only be, individual.

The second claim is that whatever may be the case with other groups the legislature is a group that is characterised by radical disunity amongst its members and as such is unable to form and act on intentions. It may be unclear why, other than as an alternative argument, anyone would advance this second claim: if the first is made out then the second seems redundant (and indeed absurd). The reason may be that despite the intuitive appeal of the conclusion that group mental states do not exist, we persist in talking of groups choosing and acting and intending. This feature of our discourse requires an explanation. The sceptics' explanation, which is consistent with their denial of group minds and true group intentions, is that the intentions that are said to be (but cannot truly be) those of the group are in truth either individual intentions that have been attributed to the group or individual intentions that have been aggregated.

An individual's intention may be attributed to the group when a rule exists to that effect, as with the intentions of the CEO and a company. This attribution may be useful (if it is known by all that the intentions of certain persons direct and bind all) but requires explicit rules. Individual intentions may also be aggregated, with the aggregation being termed group intent, if there are rules to that effect. Aggregation may also occur in the absence of rules. If a certain set of individuals, who share some common feature and may thus be said to be part of a group, all hold the same intention or belief then it may be convenient to speak of there being a group intention or belief to that effect. What is said to be group intent remains just the sum of individual intentions and is used only as shorthand to refer to the intentions of many individuals. The content of the various individual intentions need not be identical for us to talk of group intent. If the intentions are broadly similar then it will not be misleading either to take one particular person's intention to represent the members of the group or to construct an artificial intention which is similar to most or all individual intentions. Of course, if talk of group intent is just a form of shorthand, it will become less and less useful as the intentions of the relevant individuals diverge and become less similar: the aggregate (or approximation) will be unable to refer to commonly held individual intentions as no such intentions exist.

It should now be clear how the second claim relates to the legislature. While there are rules to enable the legislature to act, namely procedures to introduce and vote on certain texts, there are no rules to authorise the attribution of the intentions of particular legislators to the group or to enable individual legislators' intentions to be aggregated into a corporate intent. This absence of rules is unsurprising as the legislature is characterised by disagreement amongst individual legislators, who, accordingly, do not all hold the same, or even similar, intentions in respect of

legislation.¹¹ Therefore, the sceptics argue, to construct a legislative intent, an interpreter must, as the term 'construct' suggests, fabricate an intention from a set of disparate and incompatible individual intentions. That is, the interpreter must choose whose intentions to count towards the construct and which of their intentions to count.¹² These choices are arbitrary and may not, of course, be constrained by reference to the legislature's true intent, for no such intent exists. Thus, the sceptics conclude, legislative intent does not exist.

The intentions of the legislators plainly diverge in many ways. The legislators have their own private plans, they may act for certain parts of a bill but not for others, and they may vote for a bill not knowing its detail and in part to conform to party discipline or some such. Certain legislators will be much better-informed than others about the detail of the bill and its likely effect, while others may be ignorant or confused about its content. Thus, the intentions of individual legislators are not identical, which is what one might hope for if aggregation was to work. Further, a minority of legislators nearly always votes against a bill, and their intentions are quite different from those of other legislators.

It is tempting to say that the intention of the majority is what counts because the legislature's voting rules give the majority power to settle whether the legislature acts or not. However, it is the assembly that acts to make law, not the majority. The vote of the majority settles, of course, whether the assembly adopts or rejects the text in question, but the vote concerns the action of the assembly. The majority has no authority in its own right to legislate.¹³ It is a mistake to take the importance of majority voting within the legislative process to establish that the majority has legislative authority such that intentions that are shared amongst its members count as the legislative intent.

Further, individual legislators do not have an open choice as to the intentions that they form with respect to statutes, which, if shared by the majority, will be the intent of the legislature. They cooperate to formulate legislation and no one legislator is free to stipulate what the statute shall mean or do. Legislators will cooperate to form and adopt statutes, and their intentions with respect to statutes will be shaped and limited by that cooperation. Dworkin too makes this point: legislators are not like independent novelists but are instead authors of a text they did not choose alone.¹⁴ The majority settles whether the legislature acts but may only change what it enacts by acting formally to amend the proposal. That is, the understanding of legislators in the minority seems to be important to what it is that the legislature does. In a good debate, one

¹¹ Shepsle (n 6) 244-5, 248-9

¹² Dworkin (n 5) 318-27, 329-35

¹³ In this I agree with Waldron: Waldron (n 7) 143-4.

¹⁴ Dworkin (n 5) 322

would hope the minority and majority would broadly agree about how the bill will change the law, but disagree about whether there are good reasons for the change.

It is very difficult to aggregate the intentions of the individual legislators and to conclude that the aggregation is the intention of the legislature. The intentions diverge and there is no non-arbitrary way to combine them. The interpreter cannot aim to combine them in a way that best captures the intention of all the legislators because the whole problem is that the premise of the aggregation is that in the absence of a group mind there is no true group intention. On this account, finding intent really is a kind of make-believe.

2.2 Constitutional legitimacy

A secondary line of argument against the use of legislative intent is that it is constitutionally illegitimate for interpreters to refer to the intentions of legislators to settle the meaning of a statute. The argument is sometimes that primacy for intent would violate the rule of law, because the meaning of statutes would not be evident from the public terms of the statutory text.¹⁵ Thus, while parliament may make any law it chooses, it must do so by adopting a clear text to that effect. It cannot change the law by forming intentions, but must instead enact statutes. Radin and Scalia argue likewise that the legislature's task is to pass statutes and not to form intentions.¹⁶ The legislative task is discharged, they argue, when a statutory text is adopted. At that point, it is the constitutional function of the judiciary to interpret the text and to settle what it means.

This latter line of argument may clearly go awry. The separation of powers between judiciary and legislature does entail that the legislature does not decide particular cases, and that the application of statutes is a task for, or is at least overseen by, judges. However, the content of the law that Parliament enacts is settled by what the legislators did, so that they retain authority to change the law as they see fit. The importance of authoritative adjudication of disputes should not be taken to suggest that interpretation involves authority to make for oneself the choice of what should be done.

More interesting is the claim that legislative authority must be exercised by enacting strict texts, rather than by forming intentions that take priority over the text. Scalia talks of the rule of law rather than the rule of legislators' intentions.¹⁷ This is not a dominant line of argument in the Commonwealth literature, but something of its concern appears in the claim that our interest is only in expressed intent. If legislative intent collapses to the intentions of particular legislators, which differ wildly and have only a weak connection to the statutory text, then the constitutional objection has

¹⁵ T R S Allan, 'Legislative Supremacy and Legislative Intention: Interpretation, Meaning and Authority' (2004) 63 Cambridge Law Journal 685, 696

¹⁶ Radin (n 4) 871 and A Scalia, *A Matter of Interpretation: Federal Courts and the Law* (PUP New Jersey 1997)

¹⁷ *ibid.* 17

force. For interpreters to focus on intentions of this kind would undermine the reliability of the statute book and perhaps also frustrate the legislature from acting to change the law. The legislators, Waldron and McNollgast argue, need to make decisions that may not be unravelled by reference to the particular intentions of any one member of the enacting coalition.

The constitutional objection responds to a particular account of legislative intent, where the intent is that of a particular legislator or is constructed by the interpreter out of the intentions of many legislators. The source of evidence for the intentions of particular legislators is the legislative history. However, a focus on legislative intent does not, in my view, collapse to the use of legislative history. If the use of legislative history were to be strictly limited, much of the sting may be drawn from this line of argument. Legal systems, our own included, seem to limit the scope of evidence to which interpreters may refer to identify legislative intent. For example, testimony from drafters and legislators would be relevant to legislative intent and yet for good reason, and without diminishing the centrality of intent, that evidence is not admissible in the interpretive inquiry.

2.3 Practical relevance

The more important secondary objection is the argument that interpreters need not and do not in practice refer to legislative intent to interpret statutes. If reference to legislative intent adds nothing to interpretive practice, the argument goes, then it is redundant at best, or false at worst.

The legal meaning of a statute, someone doubtful of legislative intent might say, is just the ordinary meaning of the statutory language in context. In this way, one avoids austere literalism, by attending to differences in context which are relevant to what counts as ordinary meaning, while remaining focused on the text itself. The context may be understood quite widely, to include the antecedent state of the law, the practical issues that would be seen to be salient by anyone thinking about that which the statute concerns, and the use of other language in the rest of the statute. Taking context into account focuses the mind on how the reasonable reader of the statute (perhaps a tax specialist, perhaps an ordinary citizen) would respond, which is fair and upholds the rule of law. The question of how and why it is reasonable for the reader to respond as he does is not answered in this analysis; the reader is taken to grasp the meaning of the language by understanding semantics and knowing something of the context.

In addition to semantics and context, the meaning of statutes is likely to be informed by the application of various conventional rules. These rules structure interpretation and direct how interpreters approach statutory texts. The interpreter might also accept that the meaning and effect of the statute may be informed, perhaps heavily, by the purposes that the statute serves. It is not immediately clear how reference to statutory

purpose might be thought to be an alternative to legislative intent. Both would seem to involve what it is that legislators act for. The (apparent) contrast may arise because purpose is thought to be objectively ascertainable, to be derivable from the text in context, without the need to speculate about the mental state of any particular legislators. Again, the model of legislative intent that this contrast assumes is one in which legislative intent is a separate source of evidence, somehow apart from the text and not fully public, which one might ascertain if one perused the legislative history.

The traditional account of legislative intent in statutory interpretation is that one should read the statute to understand the choice that the legislature has made. That is, the focus of interpretation is on the intention that seems to explain the statutory language, or in other words one might say the expressed intent. One understands the intention of the legislature by trying to grasp what a rational language user would have meant in adopting this text in response to this kind of problem. Therefore, the interpreter identifies what appears to be the meaning in context – what the legislature probably meant and what the reader is entitled to assume the legislature meant – informed by what is probably the purpose of the statute. Legislative history, as was the case in most of the common law world until quite recently, has no place, and certainly no central place, in this account.

The natural response of one who doubts legislative intent is to argue that this account of interpretation is redundant. Interpreters already act, and will continue to act, in this way irrespective of whether they mention or conceive of their task by reference to intent. The doubter might concede that it is sometimes appropriate to ask the hypothetical question of what a reasonable author would likely mean in choosing these words. The doubter would insist, however, that this is just a heuristic device, a way of structuring argument.¹⁸ Hence, the argument is that legislative intent is a fiction or a linguistic convenience, a way of framing interpretive arguments that does little work in its own right. The above line of argument is sometimes used to conclude that the only non-trivial form of legislative intent is one which focuses on the views of particular legislators.¹⁹

A further reason to think that legislative intent cannot be central to interpretation is that intent is formed at the time of enactment and yet interpreters seem to update statutes.²⁰ This line of argument has two dimensions. The first is to point out that the

¹⁸ Neil MacCormick comes close to suggesting this at times: N MacCormick, *Rhetoric and the Rule of Law* (OUP Oxford 2005).

¹⁹ Waldron (n 7) 128-9

²⁰ I set aside the argument of some political scientists and legal scholars (for example, W Eskridge, *Dynamic Interpretation* (HUP Harvard 1994)) that the preferences of current legislators are relevant to the interpretation of present statutes. The argument may have some explanatory force in certain cases but it is plainly constitutionally illegitimate. The legislature may only change the law by acting to that effect. A failure to act neither ratifies the status quo nor justifies change to update a statute: it is just the absence of (legislative) legal change.

courts aim to interpret statutes, regardless of when enacted, in light of contemporary circumstances. The second is to point out that the legislators have limited foresight, so that reliance on their intent would inevitably hamstring the statute's continued relevance. That is, the scope of a statute, and the meaning it has in relation to new problems, is not settled by what it was that the legislators meant or had in mind, hence the need for updating and the disregard for, or at least the relative unimportance of, the expectations and assumptions of legislators. A simple form of this argument would limit intention just to the pictures that one has in mind when acting, but that is a very poor account of intention.

All but the strictest textualists are willing to correct what appear to be drafting errors. It appears to be difficult to explain why this is legitimate unless one refers to the intention of the author of the statutory language, whose choice of language was a poor vehicle for communication. For this reason, the one point at which otherwise doubtful interpreters might concede that legislative intent is practically relevant is in grounding the correction of drafting errors. The editorial I noted above argued that intent should be confined to this limited role. It may be difficult to confine the concept in this way and it is notable that this is one feature of interpretation that all agree is difficult to explain without invoking intent. Much the same may be true in relation to avoiding absurdity.

3. Legislative action

The nature of legislative intent may be found in a clear analysis of the structure of legislative action and the place of legislative intentions therein. I first discuss group action in general before turning to the legislature in particular. The key move that I propose is to shift the focus from the aggregate of the intentions of individual legislators and towards the plan of action that is open to all legislators. This shift in focus is not radical, and is, I think, reflected in our tradition's emphasis on expressed intent or the intent of the statute. It is useful, however, to adopt this focus and to explain its point. That way, an account of legislative intent may be well placed to avoid the doubts noted above. This line of argument aims to return the attention of interpreters to the will or intent of the institution itself, and to allay doubts that this intent must be a fiction.

3.1 Group intention

Lawyers often assume that groups of persons are incapable of acting unless there are rules, especially legal rules, which constitute the group and attribute the actions of individual persons to the group. However, groups are able to act, and to form intentions that structure their action, without formal rules. It is helpful to distinguish two types of group. The first is some set of persons, united by their possession of a common feature. The second is an association of persons, united to pursue some common purpose. Only the second type of group is capable of intention or action. All persons over six foot in height in France form a group of the first kind. Two friends out

walking together, a sports team and the British army are all groups of the second kind. Sometimes we refer to the intention or action of a group when we mean to use shorthand to refer to the intentions and actions of each person in a group of the first type. For example, we might say that the working class intends to vote Labour. This is a common usage and is not objectionable so long as it is not taken to relate to a group that actually acts.

It is controversial and difficult to explain how purposive groups act. One discredited approach is to argue that the intention of a group is the sum of the intentions of its members, so that the group has an intention if each member of the group has that intention. This approach plainly fails. Every child in a certain school may intend to buy the latest Harry Potter book but it does not follow that the school children form a group that intends to buy the book. Each person has an intention but the group does not. For other purposes the school children do form a group – they act together on the direction of teachers and they understand themselves to be a group set apart from other schools. Common knowledge makes no difference. We do not act together just because you know that I intend to act in a certain way and I know that you intend the same.

The solution must lie in explaining how it is that we intend to do, and succeed in doing, something together. There are several possible explanations. Michael Bratman, a leading philosopher of social action, argues that group intentions arise out of the interlocking intentions of individuals. That is, the members of the group intend to act with one another, so their reasoning is structured by reference to action by all towards some commonly shared end. The group acts when the members act on this chain of reasoning and so seek that end together. Intentions are plans that persons adopt as a means to ends they seek. The intention of a group is the plan that its members adopt to structure how they are to act to attain some end that they want to reach together.

It follows that group intention does not involve spooky group mental states. The intention of the group is the plan of action that its members adopt, and hold in common, to structure how they are to act if they are jointly to achieve some end. When the members play their part in the plan, and carry it out to completion, the group has acted on its intention. The plan that the members adopt structures the action of the group in the same way as the intention on which any individual person acts. The plan only exists and has any significance because of the interlocking intentions of the individual members but one cannot explain what is going on just by stating their individual intentions. They understand themselves to be acting as part of a group and each of their acts is coordinated by the group plan. Thus, the various individual acts, each of which is intentional, form part of a larger order, which is after all the reason for the individual acts. The plan held in common amongst the members of the group is its intention.

With simple groups all plans are held and known in full by all members of the group. Complex groups are different. The basis for group action is still unanimous, because all

members of the group take the group's plan, to the extent it concerns them, to direct how they are to act. However, complex groups may adopt procedures to settle how plans for group action are to be formed and the plans may not be known in full by all members. The group has, we may say, two types of intention: secondary (standing) intentions, which are plans to form and adopt other plans, and primary intentions, which are plans that directly concern how the group is to act on this or that occasion. For example, the British army is a complex group. The purpose or end that defines the group is, very roughly, to stand ready to wage war (and to attain victory) when need be. The group's secondary intention is its chain of command, which authorises certain persons to structure plans at various levels of generality. The primary intention of the group is the complex, detailed and specific plans on which soldiers act, starting with general strategy, extending all the way down to the adoption of particular tactics on the battlefield. It is this set of complex plans, not all of which are known or open to all members at once, that coordinates the group and thus constitutes the group intention. That is, it is this set of plans on which the group acts and which thus defines and explains its action.

3.2 The structure of legislative action

The legislature is a complex group. The legislative assembly acts on majority vote. Its members enjoy decision-making equality (in voting, not in agenda-control) and the group structures their interaction in various stages, by detailed procedural rules. The institution legislates; the group that is the assembly forms part or the whole of the institution. In a bicameral system, the particular assembly assents to a bill and thus participates in the legislature's act of enactment. The purpose of the legislature is to make law deliberately and for good reasons, which is to say for the public good. That is the purpose for which legislators act jointly and it is also the purpose that defines the enduring institution of the legislature, which particular legislators join for a time. The legislature stands ready to change the law, when there is good reason to do so. It may be that it may fulfil its purpose without often legislating. The secondary intention of the group, which defines the institution, and which all legislators share, is to stand ready to legislate when need be, acting on particular occasions in accordance with the prevailing legislative process. That process is analogous to the chain of command in the military example in that it structures subsequent interaction, and the formation of particular plans.

The legislature acts to change the law. It enacts a statute that changes the content of the law, even if the change is to restate and clarify existing legal rules. The legislature acts in a sense by deliberating about what is to be done and by standing ready to enact statutes if its members judge there to be good reason so to do. However, the particular act of the legislature, the exercise of its capacity to legislate, is the enactment of this or that statute. The legislature acts on a proposal for legislative action which is a bill. My claim is that the content of the proposal is the particular plan on which the legislator acts, and that this is the primary intention of the legislature (to be distinguished from

the secondary intention noted above). The bill is a proposal for legislative action because it is a plan for how to change the law. It is a detailed text that purports to set out how the law will change if it is enacted. The legal rules that the statute introduces are in large part a plan of action for how the community is to be coordinated. For the legislature, the bill is a plan for how it proposes to change the law. Note that it is the legislature that acts to make the law. This is not shorthand for the individual legislators acting. Parliament cannot act unless the legislators act, but the act of the legislature is the joint action of the legislators acting as a group, as an institution.

One finds legislative intent in the plan that coordinates legislators, which explains their joint action. The detail of the proposal is the focal point for argument and action. It is the proposal that legislators deliberate about and which, if they assent, they will act to introduce. That is, the proposal is what legislators hold in common. They act together by reference to that proposal and the legislature acts when they act to adopt it (a proposal that is rejected is not adopted and so there is no legislative act).

The intentions of individual legislators in respect of particular legislative acts are largely irrelevant. My position is that the legislative intent is stated by the plan on which the legislature acts, not by some summation of each legislator's reasoning in voting for or against the particular statutory proposal. It is a misconception that the intention of the legislature just is the intention of the majority.

The legislator who votes in the majority to enact a statutory proposal is likely to act on the particular intention "I intend that we enact this proposal". His intention cannot be "I intend to enact this proposal" because he alone may not legislate and hence an intention to that effect would be irrational. A full analysis of his reasoning may reveal that he takes the ends that define the statutory proposal to be his ends. That is, he votes for the proposal intending that the group enact the proposal and intending thereby to realise the valuable ends to which the proposal purports to be a means. This enthusiastic legislator adopts as his own the chain of reasoning that defines the group's action. His is the simplest case of participation in the legislative act because he votes intending the group to enact the proposal so that the ends that the statute aims for may be realised.

Not all those who vote for an enactment will reason in quite this way, and of course the minority, who vote against enactment, will not do so. The minority legislator plainly does not act on "I intend that we enact this proposal". Instead, he votes "no" intending to defeat the proposal and thus intending the group not enact the proposal. Perhaps surprisingly, a legislator in the majority may also vote intending to defeat the proposal. This is possible if he reasons that his support for the bill may lead others to vote against it. His reasoning is parasitic on the usually sound assumption that legislators vote for a

proposal intending the group to enact it;²¹ however, it is certainly possible. A legislator may also vote to adopt a proposal intending thereby to achieve some tangential aim (to avoid party discipline; to earn his bribe). More interesting, however, is the position of the reluctant member of the majority who may vote for the proposal intending to realise only some of the ends that define the proposal. That is, he does not adopt as his own the chain of reasoning that defines the legislation but is instead prepared to vote to enact the whole proposal in order to introduce the particular provision or provisions he values.

Two common scenarios in legislative practice confirm that legislators often vote for a proposal intending to realise only part of it. The first is the enactment of a proposal that includes a so-called poison pill provision, or wrecking amendment, which is a provision attached to the proposal by its opponents, who hoped that this would ensure the entire proposal would be rendered unattractive and therefore be rejected. The second is just the fact of legislative compromise, where legislators put forward proposals that may partly but not fully satisfy the various factions that form a majority in support of the entire proposal. Where the legislature acts on a proposal that includes a poison pill or that is a compromise then the voting majority is likely to be made up of reluctant legislators.

These scenarios are still consistent with most or all of the legislators in the majority voting on the intention “I intend that we enact this proposal to be law”. The reluctant legislator votes to enact the statutory proposal to attain only certain of the ends that the proposal sets out. However, the necessary means to the ends he seeks is the enactment by the group of the proposal. Therefore, he intends the group enact the proposal but he does not intend, for his part, the full set of ends for which the group act aims. Thus, while the full statement of his reasoning differs from the intention on which the assembly itself acts, which intention will be shared by the enthusiastic legislator, he nevertheless acts intending the group enact the proposal.

The legislature’s intention to enact this proposal follows from the fact of the majority vote understood by reference to the group’s standing intention that the vote shall count as the act of the group. The assembly intends the majority vote to count as enactment. The legislators’ reasons for voting “aye” or “no” – the ends they each seek for their part in the particular act of voting – are irrelevant to the group action.

For my purposes, the majority is not a purposive or acting sub-group at all. Certainly an intention may be common to all members of the majority, such as “I intend that we enact this proposal” or “I intend that we enact this proposal to be a means to the ends that define the proposal”. However, this intention is held by each individual legislator for his part only. There is no coordination amongst the legislators who happen to be in

²¹ J Raz ‘Intention in Interpretation’ in R George (ed), *The Autonomy of Law: Essays on Legal Positivism* (OUP Oxford 1996) 249, 265-6, fn 16

the majority to some shared end. Of course very often legislators in the majority do cooperate to adopt a plan to advance a proposal, to defeat the minority, and convince the public. My claim is just that the standing intention of the assembly to legislate by certain procedures has no place for the action of a purposive sub-group known as the majority.²² And indeed the content of the intentions on which legislators are likely to act confirms that the majority is not conceived to be a purposive group. The legislator is likely to intend that “we” act, where the pronoun refers to the assembly not the majority.

It follows that my account is not troubled by the legislative minority. The legislator in the minority shares the unanimous interlocking intention to legislate in accordance with procedures that include majority voting, from which arises the group’s standing intention to that effect. He votes against the particular proposal intending to defeat that proposal but intending also that the outcome of the vote, whether for or against, shall count as the act of the entire group. Therefore, he will not understand the resulting legislative act to be the act of the majority but will instead insist that it is the act of the legislature to which he belongs. He may object to the legislative act and campaign for its repeal but he will not deny that the legislature has chosen the proposal that he voted against.

3.3 Open proposals

The legislative process focuses on a proposal for legislative action set out in a determinate text that is open to legislators, transparent to others, and capable of being chosen by a sole legislator. The legislative process is structured to bring such proposals to the fore. Individual legislators, acting on their own, or on behalf of their party or the executive, introduce particular proposals. Like all texts they are understood by reference to the intentions of their authors. Thus, the initial meaning of the proposal is the meaning its proposer intended to communicate. I say the initial meaning because the group’s further consideration of a proposal may change its content.

The legislator who advances the proposal determines its content in the same way that a draftsman prepares a text for another person to consider and perhaps adopt as his own. That is, the legislator’s intentions are important but not decisive. Whoever reads the text will understand its meaning by reference to the proposer’s intentions. But the proposer must write a text that is fit for adoption by the person to whom it is submitted and thus the text is written on behalf of that person, with the author attempting to capture the meaning that the text will have if it is adopted by that person. The need to write on behalf arises because any action on the proposal will be that of the group (the legislature that aspires to act like a sole legislator) rather than the author. The legislator who advances a proposal is in the same position as a speechwriter who selects phrases

²² contrast A Marmor, *Interpretation and Legal Theory* (OUP Oxford 1992) 163-5 and P Brest, ‘The Misconceived Quest for the Original Understanding’ (1980) 60 Boston U L Rev 204, 212-3

for his principal knowing that the phrases will have a different meaning by virtue of their adoption by the principal than would be the case were the speechwriter to deliver his own lines. This analysis is consistent with the proposer remaining free to determine the content of the proposal, for the author may propose anything so long as he is very careful in his explication. However, the proposal that is open to the legislators is not necessarily identical to the proposal the particular legislator put forward. The other legislators may know full well that the proposer intended a different meaning, or they may simply assume the text has the meaning it appears to them to have even though that in fact differs from its author's intention. Either way, the group may act on a proposal that is sourced in but is not determined by the intentions of the particular legislator.

The proposal is unlikely to be fully open until the final vote. The legislative deliberation prior to enactment is in large part concerned to shape and settle the content of the proposal that will, in due course, be open to all legislators as a possible plan of action. Thus, there is debate within the assembly and at the committee stage over the purpose and detail of the bill and as to the desirability and effect of introducing various possible amendments. Prior to the final vote, the proposal may continue to be shaped by the intentional contributions of various legislators, all of whom, like the original proposer, introduce amendments or debate the meaning and effect of the proposal as if they were writing on behalf (of the coherent, reasoning authority that the legislature aspires to be), with an eye to how the final proposal, as amended, will appear. Legislative rules of procedure, including the control the government enjoys over the timing and order of deliberation, are structured to enable this array of contributions to come together in a final cohering open proposal rather than as a series of isolated provisions.

The proposal has to be open to the legislators because it is the focus of deliberation and argument. If its meaning and effect were settled by the unknown intentions of particular legislators the content of the proposal on which the legislature might act would be unknowable by legislators. It is a premise of their interaction, which grounds rational legislating, that the content of their lawmaking act is specified by the proposal that is before the assembly. The key question, which I deal with below, is what shape and content that proposal is likely to have. However, the point to note now is that the legislators act by reference to this proposal, which must therefore be set out to be as open and accessible to the legislators as is possible. The legislators also have good reason for their act to be transparent to citizens and officials – as this is more likely to ensure that the law and social life changes in the way that they understood the proposal would do. Therefore, in a well-functioning system one would expect legislators to act on proposals, the content of which is open to them and transparent to the community.

Widespread ignorance of the detail of proposals does not defeat this analysis. Instead, it confirms it. The legislators do not act on their own limited understanding. That is, they do not intend to enact the proposal to the extent they have identified and approved of its detail. They intend as part of the legislature to enact the changes in the

law the proposal sets out. It is vital that the proposal is open to them because it means they may determine precisely what it is on which they act, and the many legislators, working in combination, may scrutinise the whole. Legislative ignorance is not fatal to legislative intent because the intention of the legislature is not the sum of the intentions of each legislator, but the open plan of action (the plan to change the law) which they jointly adopt.

4. Legislative intent

The legislative intent that explains the particular act is the content of the proposal. Thus, the question that arises is what is open to legislators at the time of enactment. The proposal, I suggest, is more than just a series of textual provisions, each of which has conventional semantic meanings. Instead, the proposal has an intended meaning and is a decision, a choice for reasons, that the law shall be changed in a certain way. These are the intentions that a sole legislator – a king or president – would form and they are the intentions that structure action by the group (the legislators organised as the legislature). Interpreters reflect on rational language use and reasonable legislating to understand the content of the legislative act. The various resources that are taken to replace reference to intent are best understood to be useful because they are relevant to what is intended.

4.1 The minimal intention argument

It may seem that my argument is self-defeating, or at least much more limited than I suggest. If the proposal sets out the content of the legislative act then one might think that the legislative intent is just to change the law by enacting the text of the proposal. Therefore, the legislative intent would be very limited. It would be the minimal intention to change the law by enacting this text. This line of argument has been advanced by Joseph Raz and John Gardner.²³ They argue that the legislators retain control over the content of the law because they can always check the text, and determine, per semantic conventions and legal rules of interpretation, what it will mean when enacted. The legislators intend to enact whatever law follows from the text they choose, so their intent is important structurally and constitutionally but it also has no practical relevance because the content of the law is settled by the conventional meaning of the text.

This argument goes wrong in two ways. First, it assumes that intention has a very limited function in communication, with the content of what one communicates being settled not by one's communicative intention but by the conventional meaning of the language one uses. On this analysis, the only rational communicative intention is to

²³ Raz (n 21) and J Gardner, 'Some Types of Law' chapter two in D Edlin (ed), *Common Law Theory* (CUP Cambridge 2008)

communicate the conventional meaning of the language one uses. This assumption about the determinacy of communication, supplemented by allusions to the special resources that legal conventions bring to bear, is necessary for their argument to work. Otherwise, legislators could not retain control over the content of the law. However, as I discuss further below, it is fairly clear that successful communication turns on the formation and recognition of intentions, and not simply the application of conventions.

The second problem with the argument is that it remains focused on the intentions of the individual legislators. This minimal intention account is more sophisticated than the simple summative accounts noted above, but it still understands legislative intent to be the intention that is shared by all legislators. In light of legislative ignorance (but ignoring the problem of the minority) the only plausible intention that all legislators hold is the intention to change the law by enacting this text. However, once one shifts the focus from what each legislator knows and intends to how the legislators intend to coordinate their joint action one sees that what they share is an intention to act by reference to an open proposal, the content of which specifies how the group acts. The content of the proposal need not be exhausted by the bare text. Legislators communicate with one another and then communicate to the community at large.

4.2 The content of legislative intent

The question is how the proposal is and may be understood by legislators. Note that the question is not how they theorise their understanding of the proposal. They may assume that language is highly determinate and that their act is to adopt whatever the language clearly means and yet, I suggest, they are likely to (and should) respond to the language as the expression of a complex decision about what the law shall be.

It would be irrational for the legislature to intend just to adopt a text, without intending to communicate a particular meaning. Word meanings together with semantic operators give us a very wide array of grammatically correct sentences, most of which will never be uttered or identified. Semantics is a formal system, which expands and contracts with changes in word meaning and so on. It is a vast coordination convention in the sense that it structures our attempts to engage with one another. However, it plainly does not exhaust those attempts. Speakers are able to use sentences which have a certain semantic content to convey meanings that go well beyond, or differ wildly from, that semantic content. This is unsurprising if we think that very often what is literally said, what is marked out by semantic conventions alone, is quite limited. Kent Bach argues that what goes on in language use is explained by a difference between what we say (semantics) and what we mean (pragmatics).²⁴ The latter is a matter of what the language user intends to communicate, with a rational and competent language user doing his best to make clear the intended meaning. It is worth noting that we very often underestimate the sheer number of semantically plausible available

²⁴ K Bach, 'Minding the Gap' in C Bianchi (ed) *The Semantics/Pragmatics Distinction* (2004) 27

sentence meanings.²⁵ Bach notes that this gives rise to a sampling problem, where we focus only on sentences that are likely to be used, and assume that our grasp of how they are likely to be used is a function of semantics, thus ignoring the fact that semantics yields us many alternatives, which we quickly and easily discard in understanding a communication.²⁶

Semantic conventions do not stipulate what a language user means. The speaker means what the speaker intends to mean, which is to say the meaning of his communication is what he intended to convey to the audience. The speaker intends further, of course, that the audience recognise this intention (so it is reflexive) and structures his language use to that end. It is common for language users to mean more or less, or something quite apart from, the literal meaning of what they say. Indeed, literal meaning has no priority in communication in that we only conclude it is what is communicated when we judge the speaker intended to convey the literal meaning of what was said.

For the legislature to change the law rationally, the proposed statutory text must be understood to have a certain meaning rather than a range of meanings. The text is drafted to communicate a decision. The legislators debate whether to adopt the text, or whether to change and then adopt it, with an eye to whether the legislature should decide in this way. The legislators read the text of the proposal (or at least it is open to them to read it) as a putative legislative decision. That is, they understand the text to have a particular meaning (rather than a range of possible, semantically plausible literal meanings) and to hang together in a certain way, so that the various parts of the bill inform and support one another. In ordinary circumstances, all those involved in drafting, promoting, scrutinising and amending legislation aim to set out a clear decision, with a meaning that will, so far as is possible, be obvious to other legislators (if they should read it in full) and to the community at large. The proposal on which legislators act is not a series of sentences read per legal convention. The words and sentences that comprise the text are used in certain ways, may be subject to tacit qualifications, and constitute a presumably coherent response to the reasons that bear on how this part of the law should be changed. Thus, the legislature intends to change the law for certain reasons and intends to communicate its decision to that effect in this statutory language.

The objects of legislative reason are universals. The legislature enacts rules that it intends to apply to an indefinite set of particular cases, when the conditions set out in the rules obtain. The scope of a linguistic term that one uses or of a rule that one decides to adopt is not the series of particular cases that one has in mind at the time of use or decision. The reason one adopts the term or rule is in part to capture whatever

²⁵ K Bach 'Context *ex Machina*' in Z Szabó (ed) *Semantics vs. Pragmatics* (2003) 1, 22-24; see also the examples set out in J Evans, 'Questioning the Dogmas of Realism' in R Bigwood (ed) *Legal Method in New Zealand* (2001) 283, especially the multiple literal meanings of "time flies like an arrow".

²⁶ Bach (n 24) 40

cases fall within its scope, not just the particular few that one envisages here and now. It may be that one uses a term elliptically, so that it is not intended to be an open term at all, but rather a way to refer to a series of particulars. While that is possible it is unusual and is unlikely to be the case when a legislature creates a rule. There is no reason why the particular cases that the individual legislators may have had in mind when they voted for the proposal should confine its reach. The legislature's intention is set out in the proposal and the scope of the proposal is not limited in this way. Likewise, the individual legislators may wrongly think that a particular case falls within the rule that their act introduces, but this does not transform the rule's scope. Again, the outcome may be different if the proposal that is open to all is to adopt a rule one instance of which has to be a certain particular. However, this is not the usual case and what makes it the case that the rule has this stipulative content is the open proposal.

4.3 Two objections revisited

It is constitutionally legitimate for the intention of the legislature to settle the legal meaning and effect of the statute, because this intention explains and defines the legislative act. The form of words itself is less central to how and why the legislators act, and what they understand their act to be, than is this open reasoned proposal. It begs the question to assert that the literal or ordinary meaning of the text has to have priority. The central question is how that text is to be understood. The words approached solely by reference to semantics would be open to multiple readings and it would be unclear how various provisions relate to one another and what if any tacit qualifications should inform them. The legislature will not be able to change the law deliberately, in response to reasons, unless its act is recognised to be an action on a reasoned, detailed proposal, which interpreters have a duty to identify and execute.

The priority of legislative intent is consistent with limitations on the scope of evidence. The legislature has good reason to aim for its choices to be transparent to the community. Further, the institution acts within a formal system which rightly limits the scope of evidence that may be marshalled to explain the legal effect of the legislative act. All that the interpreter may do is judge reasonably what appears to have been intended. This is consistent with the legislature's exercise of authority. The interpreter's best judgment of what was intended may come apart from what was in fact intended less often than one might expect. The aggregate of individual intentions would very often depart from the interpreter's judgment but the proposal aims to be transparent. Particular legislators may be surprised and dismayed by how the interpreter reasonably responds to the legislative act but this would be much less common for a careful reader of the proposal.

I take statutory interpretation to centre on legislative intent, which directs the legal meaning and effect of statutes. The features of interpretive practice that one might take to avoid the need to refer to legislative intent are, I argue, relevant to interpretation precisely because they help identify the legislature's intention.

The obvious way to refute the centrality of intention in language use is to point to the importance of context and to argue that while semantics may otherwise leave us unable to judge what is meant (as opposed to what is said), relative to context the problem disappears. It is important to be clear about what is meant by context. The claim that context settles meaning becomes apparently more plausible the more detail it is taken to include. That is, when context is first approached, as pointing simply to features of the situation that are salient to both speaker and audience, it has an important place in outlining the rationality of certain instances of language use, but it leaves room for the open formation of communicative intentions. Understood in this way, context alone is insufficient to explain what persons mean when they use language. However, what is called context is often extended further, so that it incorporates the language already used, the information that both parties have about one another, and indeed every other relevant fact that might point to one or other intended meaning. At this point, context is being used just to capture the best judgment of what the speaker is likely to have intended. It collapses then into the pragmatic intentional account.²⁷

The apparent objectivity of statutory interpretation does not establish that intent is irrelevant. Legal interpretation works with a formal, public body of evidence and protects reasonable judgments of what is intended. An interpreter is unable to do anything other than to judge from the available evidence what was intended. This is not to say that what is meant is what it would be reasonable to mean. We may know, from other relevant language use and the like that the speaker did not intend what another speaker, a more reasonable speaker, would have intended in this context.

It is fair to ask whether the law has special resources which modify the otherwise intentional character of communication. That is, are there legal conventions that stipulate exhaustively the meaning of statutory texts? The first question to ask is whether it would be plausible for such conventions to exist and be so used. I think not. The openness of language is striking. It is possible to stipulate a closed set of meanings by formulating an artificial language – computing, cryptography – but where the means of communication is a natural language, the possibilities for novel communication are not closed because the participants are persons, rather than artificial, limited agents, and the content of the communication is any thought that is capable of articulation.

It would be very unwise to attempt to design a closed set of legal conventions to stipulate meaning. The demands of the common good are complex and the possibilities for legislative action open-ended, and it follows that any attempt to specify strictly the meanings that attach to statutory texts yet to be written would unjustifiably limit and distort the capacity of legislators to make the legal changes they think reasonable. That the legislature may choose any proposition by making clear its intention to choose that proposition is characteristic of its authority. The prospect of having to force that choice

²⁷ *ibid.* 36 and Bach (n 25) 24

through the filter of a closed set of conventions would frustrate the straightforward case of legislative action: deciding that some legal change should be made and using language to manifest the intention that the law is now, by this very act, changed in that way. There might be good reason to cut down this freedom in some respects, but that would be at best a partial exception to the ordinary case of legislative action.

The various legal conventions that are invoked in statutory interpretation, including the so-called canons of construction, operate as defeasible presumptions of legislative intent. That is, they serve either as specifications of the conversational maxims that operate in natural language more generally or as part of what we know about what the legislature is likely to try to achieve. As with maxims in general, there is of course feedback in the sense that the presumptions structure how the legislature forms communicative intentions, which is why they justifiably continue. No known legal system employs an exhaustive set of conventions to stipulate meaning, and for good reason. MacCormick and Summers have investigated interpretive practice across a range of jurisdictions, however, and they note three broad, recurring categories of interpretive argument – linguistic, systemic, and teleological-evaluative – as well as the “trans-categorical” set of arguments relating to the law-maker’s intention.²⁸ Thus, interpretation in all known systems is sensitive to argument about particular intentions.

The meaning of an utterance cannot be “produced” by applying a set of complete conventions. Any such strategy would be hopeless in part because, as Llewellyn’s work indicates,²⁹ if the conventions are understood to be stipulative rules then they contradict one another. However, the conventions are best understood as presumptions that inform what is intended. Again, none of this should prompt scepticism. Instead, it suggests that interpreters employ conventions not to stipulate meaning but to help inform judgments as to the meaning that was intended. It means further, that the legislature need not spell out certain aspects of its communicative intention which otherwise might need to be made more salient. The presumption that this will be the case unless there is some reason to suggest otherwise thus improves the efficiency of communication. The set of presumptions and other institutional facts or peculiarities that pertain to understanding the intentions of a legislature constitute an interpretive regime. That regime is defeasible and assists rather than regiment the articulation of legislative choices.

The practice of purposive interpretation is, to the extent it is legitimate, an aspect of deference to legislative intent. Purposes pertain to persons and do not exist apart from some person who acts. One’s purpose is an aspect of one’s intention, usually an end at a certain level of abstraction. Knowledge of the ends for which the legislature acts may

²⁸ N MacCormick and R Summers (eds), *Interpreting Statutes: A Comparative Study* (1991) chapters 12 and 13; N MacCormick *Rhetoric and the Rule of Law* (2006), Chapter 7

²⁹ K Llewellyn, ‘Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed’ (1950) 3 *Vanderbilt Law Review* 395

help inform identification of the precise choices the legislature has made. Understanding legislative intent in this way is necessary if we are to explain how a statute's purpose is identified and how it may be legitimate to read the text consistently with that purpose. Likewise, reading various sections consistently with one another is a response to the presumptively coherent intention that informs and defines the legislative act. The correction of drafting errors and the qualification of texts to avoid absurdity are also most easily explained by reference to the interpreter's judgment that this reading best captures the intention on which the legislature acted, the proposal that was open to all legislators.

I have noted already that the way courts respond to legislation informs how legislators understand proposals, so that there is good reason to adopt and maintain a stable interpretive approach. The temptation is, I think, to take an interpretive approach to be a set of conventions that stipulates the meaning of texts. I have suggested that various interpretive features are best seen to be responses to rather than replacements of intention. However, I imagine a final response may be that perhaps we have a convention that statutes are to be read as if they had been intentionally adopted by an author. We may have a rule to that effect but the rule follows, I argue, from the reality of legislating, which is that the legislature forms and acts on intentions. The rule enjoins interpreters to understand statutes to be intentional reasoned acts but the content of the intention is to be found in response to each particular legislative act. Therefore, the framing concern of statutory interpretation is to understand the legislature's choice of how to change the law, which it intends to communicate to us by means of this statutory text.

5. Conclusion

The legislature is a complex group that forms and acts on intentions. The intention of the legislature in any particular legislative act is the content of the proposal for action open to the legislators. It is this proposal that is the legislative intent. The proposal is a detailed, reasoned choice of how the law shall be changed, to be communicated to the community at large in the statutory language. This account of legislative intent is grounded in the reality of how legislators act together and avoids the empty, stultifying attempt to aggregate the intentions of particular legislators. The upshot, if the account is sound, is that interpreters should read the statutory text asking what it is intended to mean and what reasoned choice it reflects. This reading aims to capture the proposal open to legislators. The features that characterise interpretive practice are unified by their relevance to the choice that the legislature has made. That is, context, purpose, and conventions inform the interpreter's best judgment of what the legislature intended. Understood in this way, legislative intent warrants its central, constitutionally legitimate place in interpretation.