

Intentions and Reflections: *The Nature of Legislative Intent* Revisited

I. Introduction

The idea of legislative intent has long been thought to be central to how the legislature exercises its authority to make law and, relatedly, to how those subject to its authority should understand the legal meaning and effect of its enactments. For many judges and scholars, this idea is an illusion that should be set aside. *The Nature of Legislative Intent* argues otherwise, “explaining how and why the institution forms and acts on intention” and showing “intention’s justified centrality in the very idea of having a legislature and recognizing acts of legislating, and in the historic and reasonable practice of statutory interpretation.”¹ Or at least that was what I intended to show. I am grateful to the contributors to this symposium for their careful engagement with the book’s argument and for their many thoughtful comments and criticisms. This reply begins, in section II, with a brief reflection on the methodology that underpins the book and on the choices and judgments made in its deployment. Section III considers the moral foundations of legislation, while section IV examines the social ontology of group action in general and legislative action in particular. The relationship between the legislature and the people is the focus of section V. And section VI responds to scepticism about the relevance of legislative intentions to statutory interpretation.

II. Central questions, central cases

The main ground for scepticism about legislative intent is the apparent difficulty of an institution – a group rather than a single natural person – forming and acting on intentions. My book aims to answer this challenge and thus to vindicate the good sense in taking the legislature to be capable of forming and acting on intentions that anchor the legal meaning and effect of its enactments. In arguing to this end, I reflect on the ontology of social action, the philosophy of language use, and the nature of law, legislation, and legislatures. These reflections take their place in the context of a wider social theory, which recognises the priority of good reasons in explaining stable types of social practice. On this view, the theorist aims to explain a complex set of social facts, which may otherwise seem disordered, by articulating a well-formed case – a central case – which illuminates the set of facts at large by drawing out the features that jointly constitute the practice in its robust, mature and reasonable form. This is not wishful thinking. In adopting the perspective of a reasonable person, the theorist aims to see how participation in a practice might be reasonable and how the practice might fail to be reasonable. The central-case method is prescriptive; but it is also descriptive, for it promises to illuminate the social world in which we live, though it does not follow that the central case will be common, let alone universal.

The book does not dwell at any length on this methodological foundation. The central-case method clearly underpins my study of legislating and legislatures and to the extent that the book contributes to arguments about methodology in social and legal philosophy it does so by showing that method in action and, I hope, showing that it is illuminating. However, the methodological question is very important and many readers, including some contributors to this symposium, are sceptical about the approach I take, so there is clearly more to be said. Ferraro and Zambon argue that I should loosen the moral foundations of my work, in part because they say that a focus on the central case obscures

¹ R Ekins, *The Nature of Legislative Intent* (OUP, 2012), 1

the nature of the legislature.² However, the disjuncture they assert between nature and central case seems to me to beg the question and the fact that many legal philosophers take “nature” to mean “essential properties” is irrelevant to philosophical inquiry.³ The question is whether the theorist should aim to pick out essential properties or whether, as the central case method maintains, this is an obstacle to sound understanding.

Ferraro and Zambon outline three possible meanings of “central case” and say that each presupposes that the nature of the phenomenon has been identified, viz. that one has a set of necessary and sufficient conditions that picks out the cases amongst which one may be said to be central.⁴ This argumentative move has been made by other legal philosophers too.⁵ Its first mistake is to assume that it just must be the case that the social facts are neatly demarcated, or capable of demarcation, without practical reflection and argument. The problem we confront, however, is that this hope is illusory and our predicament is precisely the variety of social facts, constituted as they are by a wide range of human interaction and choice. The question for the general social theorist is what to make of this heap of particulars and how to pick out an order that obtains amongst them. The central case is constituted by the shape of social order that the reasonable person picks out as warranting choice, which he or she should strive to introduce or to maintain. Some theorists attempt to mimic the central case, without engaging in moral argument, by purporting to pick out what is significant and important in the mass of particulars on the basis of indirect evaluative judgments, about what is important to someone else or about the thin epistemic virtues of the resulting theory.⁶ Such attempts are groundless and will result in a distortion of the central case.

The second mistake in Ferraro and Zambon’s argumentative move, in company with many other distinguished legal philosophers, is to take it to be impossible to imagine a practice, or to reflect on what may or should be done, without first being situated within that practice. But practices arise from human choice and in some times and places persons have necessarily had a more open horizon. The theorist of law or legislatures is of course informed and enriched (and misled) by living in a community which has law and legislating, and a history of such, but he or she nonetheless ought to reflect on the reasons, if any, that there are to introduce law or legislating and to recognise such as worth maintaining. In this way, the central case is the rationally stable form of a practice or institution, the articulation of which will help one understand other distorted or unreasonable cases by analogy. The legislature in some place or time might be a voting machine, a public choice nightmare, a tyrant, a rubber stamp, an assembly of all, or a king. There are connections between each institutional form, but the way to understand them – to see what it is that is worth knowing – is to see how they relate to, and perhaps depart from, the central case of the legislature.

Pace Ferraro and Zambon, it is not my aim to identify and to classify borderline cases of law or legislating. Rather, I aim to articulate the central case of legislating in order, and to the extent necessary, to determine the place of intention in the action of a well-formed legislature. I rely on Finnis’s important work in jurisprudential methodology, as my footnotes make clear and as Dolcetti traces with care.⁷ The book’s concern to explain legislative intent leads me to narrow my focus in various ways. I largely bracket the question of constitutional limitations on the legislature and think

² F Ferraro and A Zambon, “Ekins’s Moral Assumptions and their Impact on the Analysis of Legislation” (2019) 64 *American Journal of Jurisprudence* 3-10 [here and throughout, page numbers are from word docs]

³ Ibid. 4

⁴ Ibid. 6

⁵ See for example J Gardner, “Legal Positivism: 5½ Myths” (2001) 46 *American Journal of Jurisprudence* 199

⁶ See for example J Dickson, *Evaluation and Legal Theory* (Hart Publishing, 2001); B Leiter, *Naturalizing Jurisprudence* (OUP, 2007)

⁷ A Dolcetti, “The central case method in *The Nature of Legislative Intent*” (2019) 64 *American Journal of Jurisprudence*

instead about a legislature with plenary authority.⁸ I also say relatively little about the bicameral structure of the assembly, arguing that this is a complication that does not sharply change my analysis.⁹ As Dolcetti and others note, my focus is on the legislature (Parliament, Congress), with other related institutions, like the executive, not taking centre stage. Statutory interpretation is important, of course, and the book considers this but does not run it fully to ground. Finally, my aim is to explain the legislature as a type of institution rather than to explain any particular legislature, although my Anglo-New Zealand background may be clear in the examples I choose to illustrate various points and in my argument for parliamentary over presidential rule.

Legislation is central to any good legal system and the legislature is a central political and legal institution within any good polity. Dolcetti puts these connections under pressure, arguing that one ought to note that they may come apart. In other words, one should think about the nature of the legislature in a badly formed polity, and vice versa. Likewise, one should think about how well-formed legislation takes its place in a problematic legal system and vice versa. He terms this “the gradient problem” and it is interesting and important.¹⁰ The shape and character of the polity bears on the shape the legislature ought to have. This is most obvious in relation to the question of democracy, which Dolcetti rightly raises and which I postpone to section V below. More generally, a legislature with responsibility for the common good of an otherwise vicious and corrupt political community would face obstacles in acting well, which might bear on how it structured itself. An articulation of the central case of legislating in this context would, I say, be analogous to my account but with adjustment for the complications introduced into the frame of analysis. The same holds for the legal system more generally. If the legal profession is moribund and the courts corrupt, this certainly bears on how a well-formed legislature would reason and act, with the legislature being responsible for the common good in strained circumstances, in which it ought to take measures to repair and restore the rule of law itself. And of course the contrary may hold, with a corrupt or dysfunctional legislature marring an otherwise well-formed polity and its legal order. This was not the focus of my work for the simple reason that my aim was to explain legislative intent, to which the central case of legislative action is indispensable. So while I agree with Dolcetti that introducing further complications may prove illuminating, I stand by my decision to bracket such.

My strategy in the book was to ask “what reasons, if any, there are to establish the legislature, serve as a legislator, and follow legislation as a citizen”.¹¹ Dolcetti argues “that these three types of reasons should be distinguished and, possibly, kept separate... because there may well be internal tensions between them”.¹² He gives two examples of such tensions.¹³ The first is that citizens may have reason to obey an unjust enactment but legislators have no good reason to enact it in the first place. The second is that a constitutional rule about the legislative process may, he suggests, generate a tension between the reasons for serving as a legislator and the reasons for establishing the legislature. I agree that citizens sometimes have reasons to follow legislation that ought not to have been enacted, including unjust legislation. But this is a secondary case. More straightforwardly, the reasons that citizens have for following legislation will overlap with the reasons for creating a legislature and for serving as a legislator. As for the second example, I infer that the problem is that the constitutional rule constrains the freedom of the legislators in making law. This may or may not be objectionable – it depends on the rule – but it does not obviously show a disjuncture between the reasons for establishing a legislature and for serving as a legislator.

⁸ Ekins, 120; see also M Köpcke, *Legal Validity: The Fabric of Justice* (Hart Publishing, 2019), 137

⁹ Ibid. 144, 175, 229-230

¹⁰ Dolcetti, 18

¹¹ Ekins, 118

¹² Dolcetti, 20

¹³ Ibid.

Still, it may be that there are some important differences in perspective between constitution-maker, legislator and citizen and there may be tensions between the reasons which bear on each mode of action. But in the central case, these reasons – to establish a legislature, to serve as a legislator, and to recognise and adopt legislation as changing what one should do – will all cohere around the moral need for legislation, which is a subset of the moral need for law. True, there is more to be said about legislatures and the reasons that bear on them and Dolcetti nicely introduces some such questions. But, it is also true that a narrower focus may be illuminating.

The study of legislation, Dolcetti argues, should not be limited to Aquinas's fourth (moral) order.¹⁴ I agree and part of my work considers the third order (technique) in relation to the distinctive craft of legislating.¹⁵ The second order (logic) is clearly relevant also. I have less to say, *pace* Dolcetti's encouragement, about the physical unity of the legislature; like Waldron,¹⁶ I do not intend to follow Bentham and Churchill in musing about the shape and furniture of debating chambers. Dolcetti also argues for proliferation of "why questions", arguing that my focus on why the legislature should change the law, or make a new law, should be extended to include questions about why we have a legislature in the first place, why it should be maintained, why legislators should legislate, and why citizens should follow legislation.¹⁷ However, I think my account of the moral need for legislation, which requires a standing capacity to change the law deliberately, addresses all these questions.

Similarly, while Dolcetti is certainly right that a theory of legislation is incomplete if not grounded in a full theory of law, which includes others institutions and sources of law, it is not obvious how far a study of legislative intent should go in addressing the constitutional regulation of the legislature, or the interpretation, enforcement and reception of legislation.¹⁸ I bracketed the first of these, as noted above, partly because I think there is often a strong moral case for plenary legislative authority but also because it seemed to me an unnecessary complication. Interpretation is no distraction, and the final chapter of my book addresses this directly, if incompletely. Reception and enforcement also matter, and the details will bear on how one should legislate in the first instance and how one should repair one's handiwork over time. That said, I am content not to have said more about enforcement and in relation to reception cannot improve on Aquinas's argument that the law is an ordinance of reason in the mind of the ruler, which is adopted by the ruled as if his own. The aim of my book is to vindicate this picture even when the legislature is an assembly.

III. The morality of legislation

The moral need for law reveals the moral need for legislation. Part of the virtue of law is that the norms that frame social life can be made and unmade deliberately, in response to good reasons for change and in a way that observes the disciplines of the rule of law. This is why I disagree with Raz about the "necessity" of lawmaking institutions.¹⁹ The question should not be logical necessity but practical necessity and in this context the importance of legislation to law is undeniable. I do not follow Dolcetti in saying that this point should necessarily be generalised to other normative systems – much turns on the point of those systems and thus on their need for artificial norm creation and articulation.²⁰ But in relation to law, the capacity to legislate will in most contexts be necessary if the common good is to be secured. This connection is the foundation of my theory of legislative

¹⁴ Ibid. 21

¹⁵ Ekins, 131-133

¹⁶ J Waldron, *Law and Disagreement* (OUP, 1999), 44

¹⁷ Dolcetti, 22

¹⁸ Ibid. 25

¹⁹ Ibid. 22-24; Ekins, 121

²⁰ Ibid. 24

authority and its exercise. I aim to show how a legislature can serve the common good by standing ready to choose to change the law for good reasons. The book sketches the shape of this reasoning, initially bracketing disputes about social ontology to focus on the reasoning of a prince, in order to elucidate the importance of intention in the action that is reasonable legislating. The wider argument is that rational agency is indispensable for reasonable lawmaking and that attempts to rely on the output of a machine or an impersonal process in place of agency are unsuccessful.

Dolcetti says that the legislature may have only a partial grasp of the common good.²¹ Some scholars make a similar claim in defending an institutional division of labour, in which legislatures are concerned with the public good or general welfare and courts with rights and principles. I do not think this is Dolcetti's claim, and if it were I would part company from it, for the legislature is certainly capable of reasoning about rights and choosing responsibly what justice (respect for rights) requires. More interestingly, Dolcetti suggests, I think, that the legislature may only have a partial appreciation because it is "mediated through the partial understanding of the common good proper to the law of the polity".²² This is not entirely clear but may imply that there are limits to law's capacity to contribute to the common good, some aspects of which must be supported by other means. This is certainly true but these limits should be considered by legislators and do bear on the scope of its action. More generally, one could certainly say that any particular legislature may be mistaken in its perception of the common good but that this does not undermine its capacity. Instead, it means that one may repose authority in the legislature, aware that it may be in error in this or that legislative act, but trusting to subsequent legislators to correct those mistakes. And of course, which enactments are mistakes will very often be the subject of understandable controversy, with the legislative and electoral processes providing a fair means to settle who should decide.

One cannot understand the idea of legislating, and the central importance of intention, without reflecting on the moral foundations of law and legislation. Ferraro and Zambon take a different view, contesting the relevance of morality and, especially, my understanding of morality's relevance. The point of legislation, I say, is to secure the common good, which is a complex and far-reaching state of affairs, somewhat specific to some time and place and yet sharing common foundations with the common good specific to other times and places. Those foundations include the goods to which all intelligent human action is a response and the principles of morality – including some exceptionless moral norms – that follow rationally from those goods. Ferraro and Zambon argue, in effect, that my invocation of exceptionless moral norms is in tension with my resistance to the idea that there is an ideal legislative code, which it is the duty of legislators to transcribe.²³ I argue that there are some true, universal moral prohibitions which any reasonable legislator would recognise and protect in law. The specification given to these prohibitions may reasonably vary, within limits. Still, this is only a part of what legislators are called to enact and the structure of morality, with its numerous and demanding affirmative responsibilities, none of them exceptionless, calls for much more wide-ranging legislative specification and choice. That is, it would be a bad mistake to think that legislating centred on inferring and executing an ideal legal code. The absence of any historical consensus about such an ideal legal code does nothing to discredit the idea that legislating should be understood to be a particular means to the common good.

There might be reason for constitution-makers to entrench some propositions, including some that bear close relation to exceptionless moral norms, but this would itself be a mode of legislating, requiring deliberation about the common good and judgments about the future capacities and dispositions of other institutions. Ferraro and Zambon's criticism is unclear. My argument is that legislating involves moral reflection and choice, and that any reasonable course of moral reflection will recognise and affirm some exceptionless moral norms, which will limit the legislature's freedom

²¹ Ibid. 25-26, especially n71

²² Ibid. 25-26

²³ Ferraro and Zambon, 11-14

to choose, but that this scarcely exhausts the legislature's responsibility or freedom. Ferraro and Zambon are wrong to conclude that it follows that a model of the legislature that centres on the common good is descriptively inapt and therefore fails on its own terms.²⁴ They mistake the nature of the common good, its relationship to exceptionless moral norms, and the space that remains for reasoning and choice. Further, the explanatory priority that the well-formed legislature enjoys over corrupted, malformed or distorted iterations does not entail statistical frequency. I have not attempted an historical review of the legislative record, so to speak, over human history. Doubtless many legislative acts, indeed very many, have been vicious, self-serving or mistaken. Nonetheless, the way to explain legislating is to see what legislatures are for and how they may discharge this end.

Ferraro and Zambon quote my reflections, in other work, on the breadth of the common good but in reasoning about what is inconsistent with that good they seem to limit the scope of immorality to acts that do nothing but damage someone's participation in a basic good.²⁵ In truth, such acts form a subset of immoral acts more generally, an analysis that should inform legislative deliberation, which will not always suppress immoral action but will scarcely give it comfort. Legislating is morally laden for it requires reasoning and choice about what ought to be done. When one legislates one acts for the good of a community which includes persons reasonable and unreasonable and knowing, further, that some fraction of the former will disagree with one's choice. *Pace* Ferraro and Zambon,²⁶ I do not take legislators to be confined by the ends that citizens stipulate, although in practice voters have a share in authority too, which legislators must take into account to avoid their lawmaking choices being undone by their successors in office. That is, there is an important role for statesmanship in engaging with the public and in forging legislation that enjoys widespread support, or at least an absence of organised opposition, and is stable. Such political leadership and practice is very important but I can do little more than acknowledge this in my work on legislative intent. My claim is that the moral and political significance of electoral democracy, on which more below in section V, does not undermine the responsibility of the legislature for the common good.

I have referred already to constitutional limitations on legislatures, about which my book says relatively little. It would be odd for constitutional law to prescribe the ends for which the legislature should act, although it might rule out some ends. Constitutional practice should frame legislative deliberation, but any reasonable constitution will have to preserve considerable freedom for legislators to reason and choose over time. The importance of choice deserves note. Ferraro and Zambon attribute to me a one-right legislative answer thesis and argue that I overlook or discount tragic cases.²⁷ I deny the former attribution, for, while legislating is framed by important truths, it is also creative, involving the need to design schemes that could reasonably have been otherwise and to choose freely amongst reasonable alternatives. In relation to tragic cases, I deny that it is ever the case that all choices open to an agent, including inaction, are wrongful. In that specialised sense, there are no tragic cases: the nature of morality provides otherwise. There are of course tragic cases in a less specialised sense, viz. awful predicaments and plights in which there is no way to avoid dreadful consequences and which call for pity and mercy.

Ferraro and Zambon's critique of my moral theory has a juridical counterpoint. They maintain that there is an ill-fit between my account of reasonable legislating and the doctrine of proportionality, which is the centrepiece of modern constitutional rights adjudication.²⁸ So much the worse for the doctrine I say; and indeed I argue elsewhere that some conceptions of the doctrine are impossible to

²⁴ Ibid. 14

²⁵ Ibid. 16-17; cf. the postscript to J Finnis, *Natural Law and Natural Rights* (2nd ed, OUP, 2011), 454

²⁶ Ibid. 21

²⁷ Ibid. 26-28

²⁸ Ibid. 24-28

square with reasonable legislating.²⁹ There is a virtue in proportionality understood as the mean between ineffectiveness and excess.³⁰ But the doctrine as developed in many courts is a free-wheeling license to impeach legislative choices without authentic rational warrant for doing so. Ferraro and Zambon argue that it is a weakness in my account that it lacks value pluralism, that it is inconsistent with the mobile value hierarchies that characterise constitutional adjudication.³¹ There is more than one good thing in life, more than one reasonable way of life, and to that extent I certainly affirm pluralism. I am not quite sure what a mobile hierarchy of value involves, but if, and to the extent that, it amounts to moral scepticism or a Rawls-like refusal to engage with truths about what should be done, I happily abjure it.

The nature of legislating should inform constitutional rights adjudication. For my part, it seems that much of the relevant theory and doctrine takes for granted a cynical, debased theory of legislating, which assumes that the legislature is incapable of and unwilling to engage with principle and to make reasonable lawmaking choices, including choices involving competition between “rights-engaging” interests. In other work, colleagues and I have developed an argument about the capacity of the legislature to specify human rights.³² Ferraro and Zambon object to my theory partly on the grounds that it is too normatively demanding, that it asks too much of individual legislators, and that it entails too capacious an idea of corruption.³³ I think one should demand that legislators use their considerable authority for the common good; and there is nothing wrong with explaining the nature of legislating by taking to be paramount the perspective of someone who does use their authority for the reasons for which it is conferred. In the same way, in explaining adjudication I would privilege the perspective of the judge who aims to do justice according to law, who eschews bribes and partisan hostility, and so on. The point is not the statistical frequency of this action but its explanatory priority in articulating a type of institution or practice. For a legislator to seek private advantage or to neglect the common good for party-political concerns may often be lawful. I term such action corrupt because it is a neglect of duty, a distortion of the institution from its proper ends. I do not aim to outline a doctrine of corruption, but I do maintain that in failing to act for the common good as they see it legislators are abandoning their responsibilities. They need not do so and their failure may be hard to discern or police. But one should not dilute one’s understanding of the idea of legislating better to fit failures to legislate well.

IV. How groups reason and act

Legislating well requires the exercise of rational agency. I argue that the well-formed legislature is a complex purposive group which is structured to exercise such agency. I arrive at this conclusion first by reasoning about group action in general before turning to legislative action in particular.

Tuzet considers some of my reflections on group agency and, more generally, on problems of collective rationality. Noting the division in the literature between premise-based and conclusion-based procedures, Tuzet makes an intriguing pragmatist argument in favour of a focus on conclusions and proposes that groups should adopt a default rule to this end.³⁴ He argues that it is unclear whether I favour a premise or a conclusion-based procedure and quotes two passages which

²⁹ R Ekins, “Legislating Proportionately” in G Huscroft, B Miller and G Webber (eds.), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (CUP, 2014), 343

³⁰ Ibid. 347

³¹ Ferraro and Zambon, 26, 28

³² G Webber et al, *Legislated Rights: Securing Human Rights through Legislation* (CUP, 2018)

³³ Ferraro and Zambon, 31-33

³⁴ G Tuzet, “More Votes, More Irrationality” (2019) 64 *American Journal of Jurisprudence* 12-13

he says point in different directions.³⁵ The first passage rejects an understanding of legislative intent as the aggregate of the intentions of individual legislators, considered each for his or her part only.³⁶ This is not an argument for a conclusion-based procedure. Rather, it is an argument that the joint action of legislators centres on the institution as the relevant agent and does not consist in the mere coincidence – or overlap – of the actions of individual legislators. Tuzet notes that while I discuss at some length the classic doctrinal paradox I do not say how I would solve it.³⁷ He quotes part of my reflection on adjudication which he takes to indicate a preference for the premise-based approach.³⁸ However, this second passage is worth quoting in full (I have italicised the part Tuzet quotes):³⁹

“Further, the secondary point of *adjudicative decisions in the common law world*, to restate legal doctrine and perhaps to change it in relevant part, *cannot be secured if in articulating and applying the law the court itself fails to act on a complete set of reasons*. I do not mean that an incomplete decision unsettles the content of the law, although it may, but rather that it fails to constitute what the common law method of legal change requires, which is reasoned judgment.”

The full quote makes clear that my claim is that the court’s failure to act on a complete set of reasons makes its judgment unsatisfactory – less than ideal – in relation to the secondary point of adjudication, which is its bearing on the law. This implies, and the earlier part of the paragraph, which I have not set out, states expressly that an appellate court that agrees only on the outcome may fairly resolve the dispute that is before it, which is the main point of adjudication.

It is true that I do not say how the doctrinal paradox should be resolved, other than to say that the court should not vote on premises *and* on conclusions for this would be to risk committing the court to the irrational judgment that there is no duty of care and no causation and yet there is liability. It is less than ideal for courts to decide in the midst of a particular dispute whether to let the premises settle the outcome or whether to vote on the outcome alone. This might well be an occasion for hierarchical imposition of a decision procedure, precisely to prevent the unfairness of different courts adopting different procedures. My point, in discussing adjudication, was to stress that given the court’s purpose what is vital is resolution of the dispute. An incomplete judgment might well, as Tuzet says, be tolerable in some circumstances, partly because the lawmaking effect of judgments, again at least in the common law world, is less important than the resolution of disputes. However, for legislatures the position is very different. Here, changing the law is the point of the action and incompleteness in reasons, the absence of collective rationality to this extent, is a problem. Thus, while I agree with Tuzet that a group of friends deciding where to dine certainly need not act on a coherent, complete set of reasons for dining in this particular place,⁴⁰ the same is not true for legislators, who are called to change the law coherently and for reasons. In other words, much turns on the purpose of the group in question and the importance of agency to that purpose.

Tuzet rightly notes that, like Pettit and others, I do not consider hierarchically superior decision rules, which prevent a group from exercising full control over the process by which it decides to act.⁴¹ These rules might indeed prevent a group from realising collective agency. That said, the rules themselves might be chosen with a view to enabling the group in question to exercise agency. I did not consider such rules because my aim was to show how and why a group could form itself into an agent over time, notwithstanding the discursive dilemma. My argument was that when group

³⁵ Ibid. 7-8

³⁶ Ekins, 46

³⁷ Tuzet, 7

³⁸ Ibid. 8

³⁹ Ekins, 69

⁴⁰ Tuzet, 8

⁴¹ Ibid. 8-10

members perceive the importance of reasoned action, of acting like a coherent agent, they would “have good reason to discipline themselves and to attend to the coherence of their joint action”.⁴² Tuzet asks “whether this is more a pious proposition than a workable plan”.⁴³ There is no shame in piety, but I think this disposition does also ground, even if it does not itself fully constitute, workable plans, as Tuzet’s own elaboration goes on to suggest. None of this does away with disagreement or with a need to vote, but it does frame how proposals for action will soundly be developed and understood. There are good reasons to think that the legislative process is structured to form coherent, reasoned proposals, the choice of which will turn in the end on majority vote.⁴⁴

Recall the voting machine model that Waldron outlines to explain the legislative process.⁴⁵ The failure of that model is that it imagines legislators take a view on a series of propositions (provisions, if enacted) considered in isolation, without ever being invited to consider them jointly. I argue, on the contrary, that every mature legislative process of which I am aware is keenly aware of the importance of legislators considering and adopting or rejecting the (whole) proposal in its final form. The voting machine would routinely result in legislation that was incoherent, unworkable and unwanted.⁴⁶ For this reason, legislators do not structure themselves in this way. They make provision for an extended process of deliberation, in which the connections between provisions are considered and in which some legislators have unequal control over the agenda. This encourages the development of proposals that are coherent and reasoned and it makes it rational for legislators to consider proposals on the footing that what is proposed is fit for adoption by a single, rational legislator. Does the procedure required by Art. 72 of the Italian Constitution constitute a counter-example? Tuzet’s discussion leaves me unsure.⁴⁷ If the procedure requires each clause of a Bill to be voted on in turn, with the Bill that results then subject to a final vote, then I think not. For this would still reserve to legislators control over the Bill as developed by way of their sequence of votes. If, however, the procedure results in majorities rejecting the provisions of the Bill and yet also approving the Bill as a whole, one which still includes these rejected provisions, then this is certainly odd. The procedure would invite collective irrationality. However, if the point is only that no Bill should be enacted unless a majority supports each provision *and* a majority supports the set of provisions taken together then this seems unobjectionable.

Roversi and Sardo do not reflect on collective rationality. They have a more fundamental objection to my theory, arguing that I *assume* that legislatures are corporate agents and that this assumption is not justified by the nature of social ontology, for legislatures could be groups that regulate intra-group competition rather than groups that aim to form themselves into rational agents.⁴⁸ They ask:⁴⁹

“What is the socio-ontological reason to locate legislatures in the corporate-structure field (cooperative groups with authority procedures) and not in the chess-player field (groups accepting procedures that regulate competition)? Why shouldn’t we conceive legislatures as groups sharing rules whose institutional outcome (statutes) does not count as the act of a purposive, intentional group agent? Such a model would be similar to Waldron’s voting machine without any need to consider the enactment of a provision as a group agent’s action.”

⁴² Ekins, 85

⁴³ Tuzet, 10

⁴⁴ Ekins, 223-224

⁴⁵ Waldron, 124-129; cf. Ekins, 34-40

⁴⁶ Ekins, 94-107

⁴⁷ Tuzet, 9-10

⁴⁸ C Roversi and A Sardo, “Ekins on Groups and Procedures” (2019) 64 *American Journal of Jurisprudence* 10-11

⁴⁹ *Ibid.* 8

These questions and this criticism mistake the place of social ontology in my argument. I do not *assume* that legislatures are agents. I argue that they have to exercise agency if they are to legislate well, that in fact it is possible for them to act intentionally, and that when one studies mature, developed legislative assemblies one finds they are structured to this end. I do not assert or assume that the legislature cannot be a voting machine. Instead, I deny that it has to this way and argue that legislators have very good reasons to structure the legislature to avoid being such a machine. The voting machine model is inconsistent, I argue, with the internal point of view of a reasonable legislator, who aims to work with others to jointly exercise legislative authority.

In explaining how the legislature acts intentionally, I begin by considering how purposive groups in general form and act on intentions. Roversi and Sardo are sceptical about my attempts to extend Bratman's theory of joint intention to complex groups.⁵⁰ They evaluate my development of Bratman's theory as if each change were a concession designed to fit awkward facts about legislatures rather than development of a theory about complex group action more generally. This is significant. Legislatures are not the only groups – institutions – that face difficulties in discharging their purpose and need to take care to adopt a structure and dispositions to this end. Roversi and Sardo's scepticism about complex groups acting on joint intentions is difficult to square with social facts about corporations, charities, churches, trade unions, armed forces, political parties, and political communities. The legislature is a particularly interesting and complicated group, which is why I consider groups in general before turning to the legislative assembly, and I do not underestimate the difficulties that legislators face in structuring themselves to act jointly. Rather, I consider those difficulties and think through the ways in which legislators discipline themselves to make joint action nonetheless possible.

The foundation for Roversi and Sardo's scepticism about my analysis of legislative action is public choice theory.⁵¹ They take for granted that legislators act for selfish motives and are unable and unwilling to act jointly for the common good. And in consequence they develop an implausible and unappealing theory of legislating as a game. Roversi and Sardo recite some of Dworkin's catalogue of mysteries about legislative intent, noting that non-legislators are involved in legislating and that legislators are split into factions, with legislators often voting with their party.⁵² My book considered and responded to each of these doubts in detail and they do not establish that "the preconditions for shared intentions are simply absent" and that statutes look much more like the product of a machine than the choice of an agent.⁵³ The failure here is to think about what legislatures are for and to think about how a legislator within the institution would reason and act.

Roversi and Sardo go on to outline three scenarios that arguably demonstrate the unreality of thinking about legislative action in terms of joint action or shared intention.⁵⁴ The first is the recent Italian coalition agreement. The example fails because by hypothesis it is not an act of the Parliament as a whole and is divorced from the intentions of the whole. The second is the backbencher who, per Dworkin, is said not to be responsible for his own words and simply votes as instructed. In fact, as I argue at length, the backbencher's reasoning confirms that legislating is an act of the legislature, in which each legislator joins. The division of labour within the legislature means that many legislators will not have full knowledge of the detail of the proposal, although it will be open to them to discover it, which confirms that in legislating they do not choose alone.⁵⁵ The third scenario is the selfish maximiser who aims to enrich himself or to be re-elected, but whose selfish plans are hidden. This legislator takes advantage, I say, of the commitment of other

⁵⁰ Ibid. 12-19

⁵¹ Ibid. 19

⁵² Ibid. 20

⁵³ Ibid. Cf. Ekins, 20-30 and R Ekins, "Legislative Intent in *Law's Empire*" (2011) 24 *Ratio Juris* 435

⁵⁴ Ibid. 20-22

⁵⁵ Ekins, 26, 174-175, 232-234

legislators to the legislature's purpose and adopts to some extent the public plan to maximise his own ends. That is, the legislator intends to join in the legislative act, even if secretly aiming for his own good.

How important is selfish maximisation in a theory of legislative action? How should it be situated in relation to other legislators and to the action and purpose of the legislature as a whole? Roversi and Sardo assert that I purge the central case of the three scenarios they posit and, by implication, of other complications.⁵⁶ They argue that in every paradigmatic legislature there is secret defection, profound disagreement, lack of mutual responsiveness, and lack of knowledge, whether of statutes or of procedural rules. I say that the paradigmatic (in this sense) is not the same as the central case and that the features to which they point should not be run together. Disagreement about what should be enacted and lack of knowledge on the part of some legislators about the detail of statutes are indeed features of well-formed legislatures as my account makes clear. Quite different is a failure to intend to legislate together, to fail to adopt common procedures to decide, in the face of controversy, on particular proposals. This would be non-central and would put the integrity of the legislature, its capacity to legislate over time, in doubt. However, nothing in Roversi and Sardo's analysis suggests that legislators routinely fail to intend to legislate together. The voting majority and minority, like the frontbench and backbench, jointly decide what is to be done. The legislature's intentional act arises from the intentions of the legislators but does not reduce to the knowledge or intention of particular legislators and is not vitiated by secret defection.

It is a mistake to conceive of legislating as a game. Roversi and Sardo misunderstand the relationship between political competition and the means by which the legislature acts to legislate. Taking Congress to be the paradigm of a legislature (a dubious move), they argue that it is the site in which various teams compete, teams characterised by imperfect solidarity and incomplete information, in which weak legislators are forced to vote in this or that way, rather than because they intend to do so, and in which legislators routinely break ranks for selfish reasons.⁵⁷ How does this game culminate in lawmaking? Roversi and Sardo never really say. The closest they get is in noting that legislators bargain over a sequence of policies and may vote for a proposal.⁵⁸ But this is the critical stage. Roversi and Sardo have confused the political dynamics by which support for a proposal is or is not procured with the act of enacting a statute. The former is important, no doubt, but it does not explain what it is that the legislature does in enacting a statute, and neither do vague assertions that the game's institutional rules establish which political moves count as legislating.

V. The legislature and the people

I claim that "[t]he legislature is the pre-eminent lawmaking body in any good polity, as well as the central political institution, the deliberation and action of which is the focus of democratic political life."⁵⁹ Dolcetti asks whether on my view democracy is a feature of every good polity and legislature and asks further how the democratic life of the polity shapes the political and legal role of the legislature, roles that he suggests might be in tension.⁶⁰ I say that the need for government comes before the need for self-government.⁶¹ Whoever can rule for common good should rule and in some

⁵⁶ Roversi and Sardo, 22

⁵⁷ Ibid. 24

⁵⁸ Ibid. 25-26

⁵⁹ Ekins, 9

⁶⁰ Dolcetti, 16

⁶¹ See further R Ekins, "How to be a Free People" (2013) 58 *American Journal of Jurisprudence* 163, 172 and R Ekins, "Self-Government and the Kingdom of Heaven" in N Aroney and I Leigh (eds.), *Christianity and Constitutionalism* (CUP, 2019, forthcoming)

times and places it is reasonable to authorise, or to support, a single person in legislating.⁶² However, there are also very good (defeasible) reasons to authorise an assembly rather than a prince to legislate. The reasons include the extent to which an assembly makes it possible “for persons to participate in politics as equals, to share in government as citizens”.⁶³ Thus, while it may in some circumstances be reasonable for a prince to rule, I do take the central case of a legislature to be an assembly, elected by the people and accountable to them over time. Importantly however, the reasons to authorise an assembly to legislate bear on who it is that legislates, not what it is to legislate – like the prince, the assembly is responsible for changing the law when this will serve the common good.

Valentini argues that the relations between the community and the assembly and the assembly and other institutions largely remain in the background in my work.⁶⁴ She aims to illuminate these relations – the framework within which the assembly acts – by considering my account of representation and deliberation. The relationship between executive and legislature is clearly important and I discuss how an assembly in a parliamentary system empowers a subset of its members to form the government and to frame the assembly’s lawmaking agenda.⁶⁵ The focus of the discussion is on lawmaking and it is important to note the assembly’s wider role in constituting a kind of electoral chamber for the government, forming and maintaining it in office and holding it to account for its policy agenda, lawmaking proposals, and other actions. The analysis differs in a presidential system, of course, where Congress effectively forms only part of a lawmaking body that includes the President, who enjoys his or her own electoral warrant. In Washington, but especially in Westminster, while the assembly exercises legislative authority, terming it “the legislature” risks understating its constitutional responsibility in relation to government more generally.

The executive and the legislature are the political authorities, or representative authorities, for they are subject to political disciplines, including in their relations to one another, and they act on behalf of the political community to whom they are answerable. In a parliamentary system, the government (“executive”) is radically dependent on the confidence of the assembly, but is answerable also to the electorate. The representative character of government, which is often discounted,⁶⁶ facilitates the assembly’s accountability to the electorate, for elections often turn on the government’s performance in office and the credibility of opposition as a government in waiting. The government’s disproportionate control over the assembly’s agenda is not an imposition by a foreign body, but an intelligent way for the assembly to form itself into an agent. The government’s continuing dependence on the assembly makes it possible also for the people’s representatives to exercise control (albeit always at one remove, so to speak) over the machinery of the state. The assembly thus not only takes the place of the prince in lawmaking but also determines who will exercise the other powers of government and (to a considerable degree) on what terms they will be exercised.

The assembly grounds democratic politics in a number of ways. It consists of many persons who are drawn from the polity at large and who represent the polity, as well perhaps as some particular constituency. The assembly is responsible for deciding how or if the law is to change, such that contesting elections and securing a majority in the assembly, and maintaining it over time, determines who makes law. The assembly deliberates in public and its deliberation culminates in decisions, on behalf of the community at large, about how or if the law will be changed.

⁶² Ekins, 144

⁶³ Ibid.

⁶⁴ C Valentini, “The Legislative Assembly and Representative Deliberation” (2019) 64 *American Journal of Jurisprudence* 1

⁶⁵ Ekins, 161-173

⁶⁶ Cf. T Endicott, *The Stubborn Stain Theory of Executive Power: From Magna Carta to Miller* (Policy Exchange, 2017)

Deliberation and decision are informed by, nested within, and subject to a wider public conversation about what is to be done.⁶⁷

Valentini asks how exactly the assembly represents the community and how the deliberation and action of the assembly may be said to be democratic.⁶⁸ I argue that the well-formed assembly is a representative institution not only in the sense that it acts for the good of the community, but also in the sense that it reproduces the community in a form that is capable of reasoning and acting, such that when it acts we recognise its act as in a sense our own. In company with Pettit, Valentini outlines various modes of representation, arguing that my theory mixes indicative representation (standing for those who are represented) with responsive representation (acting for those who are represented), with a constructive edge.⁶⁹ She notes that I prefer a trustee to a delegate model of responsive representation.⁷⁰ There is much truth in this characterisation, although I would add that the delegate model is not entirely empty, for elections may turn on a public evaluation of some salient proposal for action and, more generally, legislators ought to keep their promises, including promises set out in party manifestos.⁷¹ Pace Pettit and Valentini,⁷² I take the trustee conception not to require or involve interpretive representation. That is, the trustee's duty is to act for the common good, not to make the best of what citizens somehow already want.

It is very difficult, Valentini argues, to combine indicative and responsive representation in one institution. She notes Pettit's argument that for a legislature to be indicative it must resemble the community and ought to be disposed to make the choices one would expect the community to make.⁷³ Proportional representation might enable the first but would frustrate the latter. And more generally, those who stand for election are unavoidably atypical. Valentini suggests one way out would be to focus more on selecting representatives than on controlling them after the fact.⁷⁴ Selection and sanction, she argues, are complementary but it is unclear which is central in my theory.⁷⁵ And while I provide an intriguing account of the legislator who is motivated by the common good, the resulting picture of legislative representation looks very demanding.

Election certainly does not guarantee resemblance and indeed part of the appeal of election is that it enables formation of an elite that is well-placed to share in governing. More appealing still, it makes entitlement to form part of this elite turn on the support of ordinary people, which encourages ongoing conversation between representative and represented. In arguing that the assembly may form a microcosm of the community, I do not imagine any neat resemblance. Rather, the selection of hundreds of representatives, rather than a single person, makes it possible for many different persons to take up office, connected to different parts of the country and organised in different parties, oriented around different political principles. There is a tension between selecting legislators by election and the extent to which they resemble the community. That said, the ways in which legislators resemble constituents is complex, with the key resemblance turning on sympathy for shared interests and reasons. While appointment might be tolerable for a weak upper house, election is vital for the central part of an assembly, precisely because it authorises voters to participate in their own self-government by exercising a public power to choose the person, or

⁶⁷ See also, R Ekins, "Constitutional Conversations in Britain (in Europe)" in R Dixon, G Sigalet and G Webber (eds.), *Constitutional Dialogue: Rights, Democracy, Institutions* (CUP, 2019), 436

⁶⁸ Valentini, 2

⁶⁹ Ibid. 9-11, 15-17

⁷⁰ Ibid. 11

⁷¹ Ekins, 152

⁷² Valentini, 15-16 and P Pettit, "Varieties of Public Representation" in I Shapiro et al (eds.), *Political Representation* (CUP, 2010), 65, 76

⁷³ Ibid. 19

⁷⁴ Ibid. 20

⁷⁵ Ibid. 21

persons, who they judge ought to take up office. In making that choice, voters respond to reasons with agency and exercise real political power.

The upshot of an election can be, and should be the return of a diverse cast of legislators, who reproduce many of the salient divisions and differences in the community. These representatives stand in an ongoing relationship with the community and their constituency in particular, a relationship framed by the responsibility of office, exposure to communication from the public, discipline of party affiliation, and inevitability of a subsequent election. Political parties unify candidates and office-holders, making individual legislators more responsive than might otherwise be the case to political competition and to the need to give an account to the public. For the assembly to be the representative body that it ought to be, the elite that an election returns to the assembly should share much with those whom they represent, including experience of a common life and concern for the same common good. The coming apart of a semi-permanent political class, nested within a wider economic and educational elite, from those they nominally serve is a problem, and will compromise the assembly's capacity to be what it should be.

Importantly, the assembly is structured to make possible an ongoing public conversation, which sometimes culminates in lawmaking and other times in judgments on the competence or probity of the government. This conversation, in which those outside the assembly are active participants, exposes representatives to the concerns and criticisms of the public. Lawmaking proposals fall to be defended in the assembly and in the country at large, with the discussion in the assembly anticipating and being informed by that wider public response. Valentini argues that deliberation on my account is constructive *and* receptive,⁷⁶ which raises difficult questions about the nature of the community that is represented and about the democratic character of legislative action. The duty of the legislature is not to implement the will of the people. But this does not mean, as Valentini suggests it might, that the legislature is not a democratic body.⁷⁷ The legislature exercise authority over the people but does so by way of a process which invites the people to share in its deliberation and choice, not only by way of election but also by leading and responding to ongoing public conversation. Legislative choices are subject to criticism and repeal, so while each enactment is the community's choice about what is to be done, the community can and often will change its mind. Thus, lawmaking by assembly over time is self-government in action.

As Valentini says, my book does not address the ontology of the people.⁷⁸ The legislature's capacity to represent the community, to make authoritative lawmaking choices which will be adopted as if our own, does help unify a people in a form capable of acting.⁷⁹ But the people remain active participants in political life apart from this action, individually and by way of intermediary groups. Legislators, political parties and at times the whole assembly answer to the people, not only in elections but also in the ongoing conversation in which they participate about the ends and means of public life. The assembly is responsible for choosing how or if to change the law and is structured to choose by way of a process that integrates public input and facilitates public deliberation. Its enactments are the choices of a self-governing people, which have been contested and can always be reopened.

VI. Intentions and interpretation

⁷⁶ Ibid. 15-17

⁷⁷ Ibid. 22-23

⁷⁸ Ibid. 24

⁷⁹ See further, Ekins, "How to be a Free People", 170-176

There are good reasons, I say, to think that the legislature is a type of institution capable of forming and acting on intentions. In enacting statutes, the legislature forms a complex lawmaking intention, which it aims to convey to the subjects of law by way of the intended meaning of the statutory text it promulgates. This legislative intent should be, and traditionally has been, the object of statutory interpretation, the determinant of the legal meaning and effect of statutes.

Several contributors to this symposium are sceptical about intention's relevance to interpretation. Ferraro and Zambon argue that one unfortunate consequence of my moralised account of lawmaking is that it encourages "constitutionally-oriented interpretation", which wrongly prevents authorities (courts) from using their powers of legal change.⁸⁰ The problematic line of reasoning, they say, is to reason that the Constitution contains fundamental moral norms which form part of the common good, that because the legislature intends to secure the common good it intends to respects these norms, and therefore one should interpret statutes to avoid their breach.⁸¹ I would say that if the Constitution limits the scope of the legislature's lawmaking authority one has reason to presume that the legislature intends to act within power and one should read its enactments accordingly. That said, it always remains possible that the legislature truly intends X and that X is unconstitutional and invalid. The legislature's capacity for agency frames how one receives its enactments but does not entail that each enactment is in fact reasonable.

Why is constitutionally-oriented interpretation a problem? Ferraro and Zambon rely on a case in which the Italian Constitutional Court held back from invalidating a provision because it would mean X, which is not unconstitutional, if one presumes the legislature acted for the common good.⁸² However, officials subsequently read the statute to include Y, which was unconstitutional, which forced the Court to rule that this norm was unlawful. The problem seems to have been the failure of officials to read the statute properly, compounded by the Court's initial reluctance to rule authoritatively on the meaning of the enactment and thus to settle that only this meaning was constitutional. Does this justify the conclusion that one should read statutes without presuming the legislature aims to comply with constitutional limits in order to be better placed to invalidate unreasonable readings? This is scarcely obvious, indeed it seems almost perverse. It is not in the least a reason to read statutes – to take their legal meaning and effect – not to be framed around what a reasonable legislator would be likely to have intended to convey in promulgating them.

Roversi and Sardo come at this question from a different direction, taking issue with the relationship in my work between legislative intent and "systematic interpretation". They argue that I effectively end up making the legal system as a whole the author of statutes, rather than the enacting legislature itself, and thus in practice abandons legislative intent.⁸³ Reflecting on my analysis of *Stradling v Morgan*,⁸⁴ they argue that my attempt to reduce systematic interpretation (not a term I use) to legislative intention amounts to a fiction of legislative omniscience.⁸⁵ They define systematic interpretation to include reference to statutes enacted by previous legislatures, but more generally to any reference to other legal rules. For Roversi and Sardo, it seems obvious that the meaning upheld in *Stradling* was not truly intended and that the court did not construe the statute as an ordinary act of language use. I say that legislating involves highly technical language use within a particular context. And legislating is first and foremost choice, only secondarily communication. Roversi and Sardo are insufficiently attentive to the type of language user the legislature is, viz. one concerned with changing the law for intelligible reasons. In reading the statutory text, one reflects on the reasons the legislature likely had to make this or that change, reflection which arises in part

⁸⁰ Ferraro and Zambon, 34

⁸¹ Ibid. 35

⁸² Ibid. 35-38

⁸³ Roversi and Sardo, 9

⁸⁴ (1560) 1 Plowd 199, 75 ER 305; Ekins, 192-193

⁸⁵ Roversi and Sardo, 10

from and also has to explain the legislature's particular choice of language. The existing state of the law is very clearly relevant to this reflection – part of the context – for it is what the legislature acts in order to change.

The court in *Stradling* rightly understood Parliament to have intended the term in question to have a narrower scope than it literally stated. This is a familiar technique of language use and was consistent with the statute's purpose, which was made clear in part from its title. This inference about Parliament's intentions was supported by its consistency with the scope of an earlier statute on the same topic, which the present statute replaced. Other inferences were inconsistent with the legislature's apparent lawmaking intention and with the meanings it otherwise intended to convey in the other parts of the same statute. The court's reasoning involved no fiction. It was inference about actual legislative intent, with no assumption of legislative omniscience or detachment from the context of enactment. The reality and relevance of legislative intent, which *Stradling* illustrates, is perhaps made even clearer by way of examples of *misinterpretation*. Consider *Sellers*,⁸⁶ which I discuss in some detail,⁸⁷ noting that the court wrongly foisted on the statute a meaning that avoided breach of international law but one which could not be plausibly thought to have been intended by the legislature, precisely because it did not make sense of the legislature's rational language use or lawmaking act.

Canale and Poggi share these doubts about the practical relevance of legislative intent, which they develop into a wider argument that the epistemic difficulties of identifying legislative intent undermine the ontological claim that it exists at all.⁸⁸ Their key move is inventive and powerful, turning on its head my claim that the richness of the context of enactment helps one infer legislative intent.⁸⁹ On the contrary, they say, the richness of context makes it constitutively opaque.⁹⁰ Interestingly, they refer to Mark Greenberg's work to support the point that there are multiple ways to reconstruct legislative intent.⁹¹ This reliance is misplaced, I suggest, for Greenberg's argument is effective only against theories that conceive of legislating as language use, without attending to the significance of legislating as lawmaking. I explore this point at length in other work.⁹² The point is important, for Greenberg's argument – that legislative intent can be conceived in multiple different ways – does not undercut my integrated account of legislating. This is the context in which to evaluate Canale and Poggi's conclusion that I adhere to a conversational model of legislating, in which legislation does not differ significantly from ordinary conversation.⁹³ Again, while I certainly think the structure of ordinary language use is relevant to how legislatures convey intended meanings, what is communicated is a lawmaking choice, and how it is communicated turns on the complexity and structure of legal rules in relation to which the legislature acts.

The fundamental claim that Canale and Poggi make is that "[a]s far as legislation and legal interpretation are concerned, however, the context of communication appears constitutively opaque."⁹⁴ The very richness of context makes it opaque and indeterminate, for each element is indeterminate and can be framed in different ways.⁹⁵ Let me consider, in company with Canale and Poggi, some of these elements in turn. The relevance of past law, including case law, cuts both ways

⁸⁶ *Sellers v Maritime Safety Inspector* [1999] 2 NZLR 44

⁸⁷ Ekins, 265-268

⁸⁸ D Canale and F Poggi, "Pragmatic Aspects of Legislative Intent" (2019) 64 *American Journal of Jurisprudence*

⁸⁹ Ekins, 256-261

⁹⁰ Canale and Poggi, 14

⁹¹ *Ibid.* 3, citing M Greenberg, "Legislation as Communication? Legal Interpretation and the Study of Linguistic Communication" in A Marmor et al (eds.), *Philosophical Foundations of Language in the Law* (OUP, 2011), 217

⁹² R Ekins, "Sentences, Statements, Statutes" [2016] *Analisi & Diritto* 321

⁹³ Canale and Poggi, 9

⁹⁴ *Ibid.* 14

⁹⁵ *Ibid.* 15-16

they say, for it can be something that the legislature intends to change or intends to leave unchanged. There is some truth in this claim, but the detail is decisive, and much turns on the level of generality at which the relevant law is evaluated. Besides, one should never consider these elements in isolation. Instead, they bear on one's overall reflection about the lawmaking choice and rational act of language use in which the statute's enactment likely consists. The same holds for principles that may bear on interpretation of some provision. It is true that a principle's relevance may be difficult to determine and that multiple principles may cut in different directions. In determining their relevance, one aims better to understand the choice the legislature has already made, with their relevance turning on the detail of the statutory text, the wider context of enactment, including the nature of the subject-matter and so forth.

The rest of the statutory text – and the overall statutory scheme – will also often be relevant and helpful, or controlling. Canale and Poggi note that one cannot take its content for granted, for it too falls to be interpreted. True enough but one works up an understanding of the parts of the scheme in relation to one another, which will be straightforward for some parts if not for others, and develops an understanding of the legislative intent on this basis. Reflective equilibrium between construal of each part, and the scheme as a whole, is key, equilibrium that takes in and is sensitive to the context beyond the text too. Finally, they note, plausibly, that the purpose of a statute, or a particular provision, may be unclear or obscure, and very often falls to be inferred from, or alongside, the statute's intended meaning and can be specified at various levels of abstraction. Again, I say one's reflections about the legislature's reasoning are formed alongside, and in relation to or possible tension with, one's reasoning about the rationality of its language use. This is a feature of ordinary language use too – language users act for reasons – but has particular force in relation to legislation where much attention must be paid to elucidating the reasoning on which the legislature acts, the detail of the choice it manifests here and now, and its rational connection to other choices it makes in the same breath, so to speak, and in relation to past law.

Consider another example of misinterpretation, *Yemshaw*,⁹⁶ in which the court departed from the context of enactment, while purporting to act consistently with a highly abstract formulation of the statutory purpose. The failure of the judgment, made clear in a quasi-dissent by Lord Brown, was its failure to hew closely to Parliament's specific choice, which was much more limited than this general purpose, and the rationality of its choice of language.⁹⁷ So, while Canale and Poggi are right that context often points in many directions,⁹⁸ it does not follow that the legislature's intention is standardly unknowable. One does not look to legislative intent to resolve ambiguity in context, rather one infers that intention, knowing what one does about the capacities of the legislature, from that context. The richness and complexity of that context helps one triangulate, to work up inferences about what was intended, which may be more or less plausible. There is space here for disagreement, no doubt, but no warrant for far-reaching scepticism.

The context of enactment helps one infer the legislative intent in uttering the statutory text. I disagree with Canale and Poggi's claim that the sharp separation in law between speaker and hearer, including separation over time, tends to frustrate mutual understanding.⁹⁹ The interpreter aims to understand the statute in the context of enactment, which is publicly salient and can be recovered. Indeed, it is plausible to think that the passage of time may sharpen and clarify our understanding of that context. Further, legislating and statutory interpretation form a complex practice over time, the repetition of which helps forms an interpretive regime that aids the legislature in making clear its intended meaning. *Pace* Canale and Poggi,¹⁰⁰ I do not think I exclude canons of construction, which

⁹⁶ *Yemshaw v London Borough of Hounslow* [2011] UKSC 3, [2011] 1 WLR 433

⁹⁷ Ekins, 265-265; see further R Ekins, "Updating the Meaning of Violence" (2013) 129 *Law Quarterly Review* 17

⁹⁸ Canale and Poggi, 17

⁹⁹ *Ibid.* 17-18

¹⁰⁰ *Ibid.* 18

rightly ground presumptions about intended meaning and default effect. I do exclude legislative history, in the narrow sense of the record of parliamentary proceedings, because it seems to me that its interpretive invocation tends to destabilise lawmaking. But I may well be wrong about this and perhaps reference to legislative history aids inference about intention.¹⁰¹

The only legislative act that Canale and Poggi discuss is Fuller's hypothetical.¹⁰² They outline an intriguing challenge to my use of the hypothetical. They claim first that sleeping is not an intentional act. I am not so sure this is right: that the insomniac cannot sleep at will hardly proves that those who do sleep do so unintentionally. But certainly, *some* who are asleep in the station do not do so intentionally, which is precisely why I would hold they do not flout the statute. Their second claim is that mens rea includes whatever is under agent's control by act of will, such that the passenger who lets himself nod off while waiting for a train is guilty of the offence. This is plausible and its force turns on the relevant legal system's concept of mens rea. Less plausible is their reliance on statutory purpose to suggest one could recast "to sleep" to mean "to have the typical attitude of a sleeping person", which would capture an awake homeless man bedding down for the night. Without more contextual support, this inference strikes me as a distortion of the legislature's intention in order to advance an end it may have sought. The principle of lenity provides a strong reason not to substitute an expansive new formulation in place of what is otherwise conveyed.

There is much to admire in Canale and Poggi's reflections on the intricacies of the context of enactment but to my mind they do not support their stark conclusions that my theory cannot show that any legislative act is anchored in a determinate meaning or that on my view legislative intent effectively turns into a legal fiction.¹⁰³ There is more to be said about the reasonable practice of statutory interpretation but I think chapters 7 and 9 of my book do outline the fundamentals of that practice. The axiom of reasonable legislative agency anchors how one reads enactments, with statutory interpretation being an attempt to understand the choice of that agent, which one cannot do without trying to follow its chain of reasoning, including the rationality of its choice of this particular semantic content in the rich context of enactment.

VII. Conclusion

My argument is that legislative intent is central to lawmaking and interpretation and I thank the contributors to this symposium for their incisive comments on some of the strands of this argument. The way to explain legislative intent, I argue, is to reflect on how and why the well-formed legislature acts. This focus on the central case is grounded in sound philosophy, which recognises the explanatory priority of good reasons over bad. Reflecting on the reasons for legislating helps to articulate the internal point of view of the reasonable legislator, from which perspective the structure of legislative action is made clear. The legislature is a complex group. Legislating well requires the legislators to act jointly, to make reasoned choices together, notwithstanding disagreement about what should be done; and legislatures are, rightly, formed to this end. The assembly represents the political community and carries out its responsibility for lawmaking by leading and giving sharp focus to a wider public conversation about the common good. In enacting statutes, legislators articulate particular lawmaking choices by uttering the statutory text in its context. Inferring the legislature's intentions in its enactments is not always straightforward, but *The Nature of Legislative Intent* should provide some assurance that it is not a fool's errand.

¹⁰¹ Cf. V Nourse, *Misreading Law, Misreading Democracy* (HUP, 2016)

¹⁰² Canale and Poggi, 19-22; cf. Ekins, 261-262

¹⁰³ Ibid. 23