An Intentionalist Defence of Updating Interpretations of Statutes in the UK

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A thesis submitted for the degree of
Doctor of Philosophy

Declaration

I, Luciana Morón, confirm that the work presented in my thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

Abstract

This thesis analyses rulings in which UK courts adopt an ‘updating’ approach to the interpretation of statutes. This approach involves interpreting those statutes according to circumstances, attitudes, and understandings present at the time of adjudication, rather than those prevalent at the time of enactment. The thesis justifies the legitimacy of those interpretations based on the fact that Parliament normally intends courts to perform this updating task, unless it indicates otherwise. The default presumption that this approach should be adopted is known as the ‘always speaking’ principle in the UK and similar jurisdictions. This thesis examines that presumption in detail, including its historical origin, content, and the techniques that Parliament has available to displace it. It argues that the presumption is not a mere judicial doctrine imposed on Parliament. Instead, it reflects the assumptions on which the law-making process is premised. The thesis also defends the legitimacy of this general legislative reliance on courts and analyses the reasons why this may often be a sensible law-making practice. Thus, the argument advanced here contrasts, on the one hand, with ‘originalist’ positions that are sceptical of judicial updating interpretations and, on the other hand, with ‘living instrument’ theories that are sceptical of the existence or relevance of legislative intentions. The theoretical, doctrinal, and empirical work carried out in this thesis aims to strengthen and develop the intentionalist case in favour of updating approaches to legal interpretation.

Impact Statement

In the current 'age of statutes', statutory interpretation has an ever-growing relevance to academic and legal debates. Rulings in which judges adopt updating approaches to statutory interpretation are a widespread and valuable feature of judicial practices in the UK and several other jurisdictions. They are, however, the target of a number of objections that dismiss them as an illegitimate form of judicial amendment under the guise of interpretation. More work needs to be done to address those objections, whose weight is compounded by the fact that many advocates of updating approaches defend those approaches on bases that sit uncomfortably with the principles of democracy and separation of powers.

This thesis aims to carry out the theoretical, doctrinal, and empirical work needed to explain why updating approaches are legitimate. I argue that their legitimacy is derived from the fact that Parliament normally relies on courts to keep statutes up to date with changes including technological advances, improved scientific understandings, legal reforms, evolving social attitudes, and revised moral standards. This idea is captured in the UK by what is known as the 'always speaking' principle, according to which courts should presume that Parliament intends them to interpret statutes adopting an updating approach (unless it indicates otherwise). Rather than examining this presumption from a doctrinal perspective only, as is often the case, my thesis looks at it from the point of view of Parliament. I argue that the presumption reflects an assumption on which lawmakers, legal advisers, and drafters normally rely, and I explain that there are good reasons for that reliance.

My thesis also offers a systematic and detailed analysis of the evolution, content, operation, and limits of the updating presumption, critically assessing how courts and commentators describe the presumption. This aims to offer greater clarity on the exact default contours of the presumption and the techniques that Parliament can use to displace its application or narrow down its scope. Improving our understanding of these matters is relevant not only to academics but also to the practice of judges and lawmakers.

While the thesis is focused on UK legal practices, certain aspects of it are relevant to other jurisdictions and other kinds of legal instruments. These include my defence of a sound notion of legislative intent that can meet the objections that some scholars and judges raise against the idea that plural law-making bodies can have unified intentions and that these intentions are relevant to courts interpreting statutes. These objections are gaining weight in the UK and elsewhere, and their proliferation threatens to erode the perceived legitimacy of decisions in which courts are, in fact, retrieving choices made by our lawmakers, rather than fabricating new ones. In addition to this, my analysis of the law-making practices and assumptions shared by legislators, drafters, and judges in the UK about the updating role of courts can be helpful in refuting claims, made in other jurisdictions, that it is implausible to think that legislatures would rely on courts to keep statutes up to date.

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A v HM Treasury [2010] UKSC 2, [2010] 2 AC 534.

Ahmad v Secretary of State for the Home Department [2012] UKUT 267 (IAC).

Albon v Naza Motor Trading [2007] EWHC 9 (Ch).

Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147 (HL).

Ash v Ash [1972] Fam 135 (EWHC).

Attorney General of Ontario v Attorney General of Canada [1947] AC 127 (Privy Council).

Attorney General v Edison Telephone Co of London Ltd (1880) 6 QBD 244.

Attorney General v HRH Prince Ernest Augustus of Hanover [1956] Ch 188 (EWCA Civ).

Attorney General v HRH Prince Ernest Augustus of Hanover [1957] AC 436.

Baker v Quantum Clothing Group Limited [2011] UKSC 17, [2011] 4 All ER 223 (UKSC).

Barker v Wilson [1980] 1 WLR 884, [1980] 2 All ER 81 (High Court).

Bellinger v Bellinger [2003] UKHL 21, [2003] 2 AC 467.

Black-Clawson International Ltd v Papierwerke AG [1975] AC 591.

Blackwell v Blackwell [1973] 1 WLUK 96.

Bogdanic v Secretary of State for the Home Department [2014] EWHC 2872 (QB).

C v C [1980] Fam 23.

Campbell College, Belfast (Governors) v Commissioner of Valuation for Northern Ireland [1964] 2 All ER 705; [1964] 1 WLR 912 (House of Lords).

Chapman v Kirke [1948] 2 KB 450.

Chappell & Co Ltd v Associated Radio Co of Australia Ltd [1925] VLR 350.

Cusack v London Borough of Harrow [2013] UKSC 40, [2013] 1 WLR 2022.

Dickenson v Fletcher (1873-74) LR 9 CP 1.

Dyson Holdings Ltd v Fox [1976] QB 503.

Fitzpatrick v Sterling Housing Association Ltd [1998] Ch 304 (EWCA Civ).

Fitzpatrick v Sterling Housing Association Ltd [2001] 1 AC 27 (HL).

Gambart v Ball (1863) 32 LJCP 166.

Gammans v Ekins [1950] 2 KB 328.

General Dynamics United Kingdom Ltd v State of Libya [2021] UKSC 22, [2022] AC 318 (UKSC).

George Morgan v Henry Crawshay (1871-72) LR 5 HL 304 (House of Lords).

Ghaidan v Godin-Mendoza (FC) [2004] UKHL 30, [2004] 2 AC 557.

Glossip v Gross 576 US 863 (2015).

GM (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1630, [2019] 10 WLUK 54.

Goluchowski v District Court in Elblag, Poland [2016] UKSC 36, [2017] 2 All ER 887.

Goodes v East Sussex County Council [2000] UKHL 34, [2000] 3 All ER 603.

Harding v Wealands [2006] UKHL 32, [2007] 2 AC 1.

Hussain v Waltham Forest LBC [2015] EWCA Civ 14.

J v Welsh Ministers [2018] UKSC 66, 2020 AC 757.

Jackson v Attorney General [2005] UKHL 56, [2006] 1 AC 262.

London Steam-Ship Owners' Mutual Insurance Association Ltd v Kingdom of Spain [2020] EWHC 1582 (Comm).

Lord Blantyre v Clyde Navigation Trustees (1871) 9 M (HL) 6 (House of Lords).

McCartan Turkington Breen v Times Newspapers Ltd [2001] 2 AC 277.

Momcilovic v The Queen (2011) 245 CLR 1.

Moohan v The Lord Advocate [2014] UKSC 67, [2015] AC 901.

News Corp UK & Ireland Ltd v Revenue and Customs Commissioners [2023] UKSC 7, [2023] 3 All ER 447.

Oakley v Birmingham City Council [2001] 1 AC 617 (HL).

Owens v Owens [2018] UKSC 41, [2018] AC 899.

Parkyns v Preist (1881) 7 QBD 313.

Pepper (Inspector of Taxes) v Hart [1993] AC 593.

Presbytery of Dundee v Magistrates of Dundee (1858) 20 D 849 (Court of Session, Inner House).

Prestcold (Central) Ltd v Minister of Labour [1969] 1 All ER 69.

Price v Gould (1930) 46 TLR 411.

Priday v Priday [1970] 3 All ER 554.

R (A) v Secretary of State for the Home Department [2021] UKSC 37, [2022] 1 All ER 177.

R (Cart) v Upper Tribunal (Public Law Project intervening) [2012] 1 AC 663.

R (Coughlan) v Minister for the Cabinet Office [2022] UKSC 11, [2022] 4 All ER 351.

R (Hodkin) v Registrar General of Births, Marriages and Deaths [2013] UKSC 77, [2014] AC 610 (UKSC).

R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax [2002] UKHL 21, [2003] 1 AC 563.

R (N) v Walsall MBC [2014] EWHC 1918 (Admin).

R (PACCAR Inc) v Competition Appeal Tribunal [2023] UKSC 28, [2023] 7 WLUK 355.

R (Privacy International) v Investigatory Powers Tribunal [2019] UKSC 22, [2020] AC 491.

R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department [2022] UKSC 3, [2023] AC 255.

R (Quintavalle) v Human Fertilisation and Embryology Authority [2003] UKHL 13, [2003] 2 AC 687.

R (Smeaton) v Secretary of State for Health [2002] EWHC 610 (Admin).

R Secretary of State for the Home Department, Ex p Pierson [1998] AC 539 (House of Lords).

R v Fellows (Alban) [1997] 1 Cr App R 244 (EWCA Crim).

R v G [2003] UKHL 50, [2004] 1 AC 1034.

R v Hammersmith & Fulham London Borough Council (1998) 30 HLR 10 (EWCA Civ).

R v Ireland [1998] AC 147 (HL).

R v Johns (1772) 98 ER 541 (King's Bench).

R v Registrar General, Ex p Segerdal [1970] 2 QB 697 (EWCA Civ).

R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] 2 AC 349.

R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115 (HL).

R v Tolson (1889) 23 QBD 168.

Robinson v Secretary of State for Northern Ireland [2002] UKHL 32, [2002] 7 WLUK 633.

Rodriguez v Minister of Housing of Gibraltar [2009] UKPC 52.

Royal Borough of Kensington & Chelsea v Danesh [2006] EWCA Civ 1404.

Royal College of Nursing of the United Kingdom v Department of Health and Social Security [1981] AC 800.

Secretary of State for Justice v MM [2018] UKSC 60, [2019] AC 712.

T W Logistics Ltd v Essex County Council [2021] UKSC 4, [2021] AC 1050 (UKSC).

The Longford (1889) 14 PD 34.

The Trustees of the Clyde Navigation v Laird & Sons (1883) 8 App Cas 658 (House of Lords).

Thoburn v Sunderland City Council [2001] EWCH Admin 934.

Westminster Bank Ltd v Minister of Housing and Local Government [1971] AC 508.

Wiseman v Borneman [1971] AC 297.

Yemshaw v Hounslow London Borough Council [2009] EWCA Civ 1543 (EWCA Civ).

Yemshaw v Hounslow London Borough Council [2011] UKSC 3, [2011] 1 All ER 912.

CHAPTER 1: Introduction

This thesis looks at ‘updating’ approaches to statutory interpretation, by which courts interpret statutes according to circumstances, attitudes, and understandings present at the time of adjudication, rather than those prevalent at the time of enactment. This means taking into account—among other changes that have taken place since a provision was enacted—technological developments, legal reforms, and improved scientific understandings of certain phenomena, as well as changed social attitudes towards certain conduct or situations, and revised evaluative conceptions and standards. My thesis puts forward the view that whether courts should interpret any given provision adopting an updating approach—as opposed to a historical one—depends, centrally, on the intentions that Parliament had when it enacted the statute at stake. For this reason, I call it an ‘intentionalist’ account of that approach.

The importance of respecting the original intentions of our democratically elected representatives is often invoked as a reason against interpreting statutes taking into account, for example, current social attitudes and moral conceptions and standards that differ from those that were held by the lawmakers or were prevalent in that jurisdiction at the time of enactment. Against this, I will argue that a commitment to respecting those original intentions will usually require courts to do precisely that. This happens in jurisdictions where statutes are drafted and enacted on the assumption that courts will, in principle, adopt an updating approach. Whether this will be the working assumption or not depends on the law-making practices and the interpretive doctrines of the jurisdiction at stake.

The focus of this thesis is on the United Kingdom, where the presumption is that statutes should, as a general rule, be given an updating interpretation. This doctrine is usually referred to as the 'always speaking' principle in the UK and similar legal systems, including Australia, Canada, and New Zealand. This thesis offers a thorough analysis of the nature, content, and operation of the updating presumption and the ways in which Parliament can displace (that is, cancel) or limit its application. It argues that the presumption is not merely a judicial doctrine: it reflects the assumptions that lawmakers (and their advisers and drafters) hold when they draft, debate, and vote upon statutes. The thesis also contends that Parliament's reliance on courts to keep statutes up to date with current circumstances, attitudes, and understandings is a sensible and legitimate law-making practice.

Originality and Contribution

The argument I advance in this thesis is relatively unusual in that defenders of the legitimacy of updating approaches do not generally rely on intentionalist arguments.[1] Some of them are even sceptical of the very idea that legislative intentions are real or relevant to statutory interpretation. Conversely, other scholars often criticise updating interpretations for allegedly going against lawmakers' original intentions and entailing an illegitimate form of judicial amendment under the guise of interpretation. This has been the case, for example, with two of the most prominent and controversial cases in which UK

[1] See, for example, Aileen Kavanagh, 'The Idea of a Living Constitution' (2003) 16 Canadian Journal of Law & Jurisprudence 55; Lord Burrows, 'Statutory Interpretation in the Courts Today' (Sir Christopher Staughton Memorial Lecture 2022, 24 March 2022); William N Eskridge, Jr, 'Dynamic Statutory Interpretation' (1987) 135 University of Pennsylvania Law Review 1479.

courts adopted an updating approach, namely, *Fitzpatrick v Sterling Housing Association Ltd* and *Yemshaw v Hounslow London Borough Council*.[2] In these cases, the Courts held that the terms 'family' and 'domestic violence' in statutes enacted years ago should be interpreted as including, respectively, same-sex cohabiting partners and non-physical forms of abuse, even if people would not have said so at the time of enactment. The proliferation of the view that updating interpretations normally depart from lawmakers' original intentions—or that such intentions are non-existent or irrelevant—threatens to undermine the perceived legitimacy of a routine and valuable feature of statutory interpretation, on which lawmakers normally rely.

In contrast, some scholars believe it is possible to make an intentionalist defence of updating approaches to legal interpretation. A prominent example of this is the work of Jeffrey Goldsworthy.[3] The goal of my thesis is to contribute to

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[2] *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 (HL); *Yemshaw v Hounslow London Borough Council* [2011] UKSC 3, [2011] 1 All ER 912. For critiques of these cases, see, for example, Richard Ekins, 'Updating the Meaning of Violence' (2013) 129 LQR 17; SM Cretney and FMB Reynolds, 'Limits of the Judicial Function' (2000) 116 LQR 181; Chris Bevan, 'Interpreting Statutory Purpose - Lessons from *Yemshaw v Hounslow London Borough Council*' (2013) 76 MLR 742. See, also, Lord Hutton's and Lord Hobhouse's dissenting judgments in *Fitzpatrick v Sterling Housing Association Ltd*.

[3] Jeffrey Goldsworthy, 'The Case for Originalism' in Grant Huscroft and Bradley Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (CUP 2011); Jeffrey Goldsworthy, 'Lord Burrows on Legislative Intention, Statutory Purpose, and the "Always Speaking" Principle' (2022) 43 Statute Law Review 79. See also Lord Hoffmann, 'Judges, Interpretation and Self-Government' in NW Barber and others (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing 2016) 69; Jeff King, 'Three Wrong Turns in Lord Sumption's Conception of Law and Democracy' in NW Barber and others (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing 2016) 143–44; Jack Balkin, *Living Originalism* (Harvard University Press 2011); 'Abortion and Original Meaning' (2007) 24 Constitutional Commentary 291; Jack Balkin, 'Original Meaning and Constitutional Redemption' (2007) 24 Constitutional Commentary 427.

Note that despite having just cited Balkin's work as another example of this position, I will not discuss his theory in this thesis. This is because Balkin's theory

this defence by developing and strengthening its empirical, theoretical, and constitutional premises. One of the main contributions of my research lies in its careful observation of law-making and interpretive practices, aimed at showing that both are premised on the shared assumption that an updating approach will be applicable by default (unless Parliament indicates a contrary intention). Thus, the presumption is not studied in this thesis only as a judicial doctrine but, most importantly, it is analysed from the perspective of lawmakers and drafters. I look at evidence that allows us to say that, as a general rule, Parliament intends courts to carry out this updating task and I discuss the techniques that Parliament has available to convey the opposite intention. My goal is to show that the scenario in which Parliament intends to entrust this updating task to interpreters is so habitual that courts correctly presume it by default.

Another important contribution of my thesis is that it explains how the notion of legislative intent to which courts allude refers to real-world facts about the choices actually made by our democratically elected representatives—choices that courts retrieve rather than fabricate. This is important to justify the legitimacy of courts playing an updating role. I complete this justificatory work by addressing claims that regard this reliance by Parliament on courts as an impermissible delegation or outsourcing of Parliament's exclusive powers.

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is tied to the particularities of the United States Constitution (a very old, and hard to amend instrument), and its focus is not on courts' updating role but on how citizens (acting mainly through social movements and the political branches) have constructed the Constitution over time; see Balkin, *Living Originalism* 279, 328–32. Balkin describes how courts have rationalised and legitimised such constructions, but he does not offer a theory about how judges should decide cases, or analyse the justification and limits of their updating role; see ibid 279, 283, 300–01, 320; David A Strauss, 'Living Originalism by Jack M Balkin' (2013) 32 Law and Philosophy 369, 375.

While the details of my arguments are tied to the characteristics of UK legal practices, some of the more general points I make have relevance to other jurisdictions. These include, centrally, my account of legislative intentions (and of presumptions about such intentions), as well as my discussion about the practical and institutional reasons why it makes sense for lawmakers to rely on courts to play this role in keeping laws up to date.

The Nature and Method of my Arguments

My defence of updating approaches to statutory interpretation rests centrally on empirical or sociological facts about the law-making and interpretive practices of public officials. Therefore, my thesis pays careful attention to those practices. It has, first, a strong doctrinal component, which analyses the relevant caselaw, as it evolved over time, in order to understand what the updating presumption requires courts to do and what tasks are, in contrast, beyond its scope. While my focus is mainly on judgments by the House of Lords and the Supreme Court, I also consider decisions by lower courts that are especially illuminating. This doctrinal study maintains some critical distance when assessing how courts and commentators portray the content, operation, limits, and origin of the presumption. I will suggest that certain unhelpful formulations should be revised because they risk giving the impression that the presumption's scope is broader or narrower than it actually is.

Second, it is crucial to my argument to show that this doctrine is not a unilateral judicial imposition but an assumption that is also shared among Parliamentarians, their advisers, and drafters. To do this, I look at drafting books and guidelines written by Parliamentary Counsel, and at the text and legislative

history of some statutory provisions that are especially illuminating examples. The pre-legislative and legislative materials I consider include, among other things, Hansard statements, committee reports, and government responses and papers.

As a secondary source, I also rely on a series of interviews I conducted with current and former Parliamentary Counsel, current and former legal advisers to the House of Lords Select Committee on the Constitution, and a former member of that Committee. I interviewed a total of seven people. The purpose of these interviews was to make sure that my thesis adequately considered, understood, and described the law-making and drafting context and, in particular, the attitudes towards—and assumptions behind—the provisions that Parliamentarians, advisers, and Parliamentary Counsel draft, debate, and vote upon. My interviewees were specifically chosen based on their experience and knowledge of the law-making process, where they occupy different key roles in the drafting and scrutinising of Bills. My intended sample consisted of double the number of experts (and included members of the Joint Committee on Human Rights), but half of them declined or did not respond to my request for an interview. The difficulty of access to these people, who occupy important positions, was an expected limiting factor.[4] The fact that their insights were only sought as a secondary source, to supplement my observation of legislative and pre-legislative materials,[5] meant that the interviews I managed to obtain were sufficient for the purposes of enhancing my understanding of my primary sources.

[4] See Teresa Odendahl and Aileen M Shaw, 'Interviewing Elites' in Jaber F Gubrium and James A Holstein (eds), *Handbook of Interview Research* (SAGE 2011).

[5] Kathryn Roulston, 'Considering Quality in Qualitative Interviewing' (2010) 10 Qualitative Research 199, 205, 217.

The interviews were especially valuable for my discussions of the techniques that Parliament may use to displace or narrow down the updating presumption, and—most importantly—of the sense in which Parliamentarians can be said to be aware of the existence and content of this presumption. The interviews were semi-structured. Some questions were open and explorative, to see what ideas or examples interviewees considered especially relevant to comment on. Others, in contrast, were based on certain provisions from recent Bills and Acts, and on possible abstract formulations of the updating presumption. These questions were standardised and asked using the same words across all interviews, so that I could compare answers with one another.[6] To make sure my reporting was accurate, all the interviews were recorded, and interviewees were sent the relevant passages of the final thesis draft and had the opportunity to request corrections, deletions, or anonymisation.[7]

In addition to this empirical or sociological aspect, my thesis also argues that it normally makes sense for lawmakers to entrust courts with this updating task. One of the main reasons for this is that, as I will explain, the kinds of changes that the updating presumption refers to are usually slow, gradual, and more or less constant. These characteristics make it virtually impossible for Parliament to keep up with them. In contrast, the piecemeal and revisable nature of judicial adjudication means that courts are especially well positioned to help make sure that statutes stay relevant amidst changing circumstances. As well as defending the logic behind Parliament's reliance on courts to this end, the thesis addresses principled objections that hold that this reliance is an illegitimate outsourcing of

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[6] Svend Brinkmann and Steinar Kvale, *InterViews: Learning the Craft of Qualitative Research Interviewing* (3rd edn, SAGE 2015) 128, 132–33.
[7] Roulston (n 5) 205.

Parliament's responsibilities and an impermissible delegation. To do this, I will analyse how updating interpretations are compatible with the principles of democracy, parliamentary sovereignty, the rule of law, and the separation of powers.

An intentionalist defence of updating interpretations would not be complete without offering, as a starting point, an account of what legislative intentions are, and how presumptions of legislative intent relate to them. This is especially important given that, as I will explain, the claims that a plural body like Parliament can have unified intentions and that these intentions should be relevant to interpreters have been repeatedly subject to attacks by some scholars and judges. This scepticism is a serious worry for my thesis: if intentions are incoherent notions or mere fictions, they cannot do the justificatory work that I rely on them to do.

Attempts to respond to sceptical objections usually take the form of metaphysical analyses of group intentions. I will explain why I believe that this is not the best strategy to address scepticism. I remain agnostic on the details of the ultimate metaphysical truth about legislative intentions and offer, instead, an account of legislative intentions that is focused on the conventions with which lawmakers and courts operate, and on the functional equivalence between individual intentions and this conventional notion of legislative intentions. This conventionalist, functionalist account illuminates how this notion of legislative intent shapes the behaviour of lawmakers and, therefore, cannot be said to be a mere fiction detached from reality.

Jurisprudential Assumptions

The attention that my thesis pays to Parliament's intentions rests on a series of jurisprudential assumptions, which are more or less controversial. My goal in this section is only to make them explicit, so that the theoretical underpinnings of my arguments are clear to the reader. Defending the truth of these underlying assumptions, however, is outside the scope of this thesis.

First, I adopt a positivist conception of the law, according to which the existence and content of the law depend ultimately on social facts alone and not on the law's merits, such as its degree of conformity with morality. More specifically, I follow HLA Hart in thinking that the ultimate criterion of legal validity in a legal system is a social rule (a custom) that exists only because officials follow it—that is, because it is present, as a matter of fact, in their convergent practices and attitudes, which treat it and recognise it as binding.[8] The content of this rule is thus determined by facts about what officials do and psychological facts about what they believe they and their fellow officials should do. This consensus extends to judges, legislators, executive officials, and so on.

The official consensus may recognise different sources of law (or, in other words, different determinants of the content of the law). With regards to UK statutory law, UK official practices recognise that certain officials (those who sit in Parliament) can choose to change our legal rights, obligations, powers, and so on deliberately, by agreeing on a certain change and spelling it out in a text that is promulgated following certain procedures and formalities. Understanding what those people have chosen to do is, therefore, relevant to understanding the legal rights and obligations that we have at any given time. What this choice consists

[8] HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 108–10, 114–15.

in and from what elements it should be inferred are questions I discuss in depth in the next chapter. My answers will rest on facts about certain conventions shared by lawmakers and courts, and certain actions performed by legislators during the passing of a statute. The point for now is only that the legal relevance of those facts is—according to my jurisprudential assumptions—derived from the fact that official practices make them relevant.

To clarify, the central role that these practices recognise for lawmakers' choices as a fundamental determinant of the content of the law does not mean that these choices are unconstrained or the only determinants of the content of the law. While lawmakers' choices will often be decisive, there are different kinds of constraints on them. Some minimal constraints—on which I will not dwell here—are conceptual and related to what law and law-making are.[9] Other constraints are constitutional and derived from values that are recognised as fundamental in a legal system. In the UK, these may limit the ways in which lawmakers can effectively convey their choice to go against those values. (I return to this idea in chapter 3.) There might also be other limits: perhaps, for example, officials would not recognise as binding a proposed rule that is extremely morally repugnant. This raises the problem of whether courts should disapply evil laws, which I will not address in this thesis. The point I am trying to make here is only that, according to the law-making practices in the UK (and many other jurisdictions), ascertaining the legal changes that our legislators intended to introduce is a central task for courts adjudicating cases regulated by statutes, but not the only thing that courts do in such cases.

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[9] See ibid chs 3–4.

The assumption I am making is, thus, relatively thin. The claim that the legislature's intentions are only one determinant of the content of the law (albeit a very important one, and sometimes decisive) leaves room for other determinants. Still, my assumption is not universally accepted. I assume that such intentions are direct or ultimate determinants of the content of the law. This is disputed by non-positivist theories of the law, like Ronald Dworkin's interpretivism.[10] Such theories reject the basic premise of positivism, and hold that social facts (including institutional facts) only determine the content of the law through the mediation of moral principles that explain why such facts should have an effect on the law.[11] Thus, for these theories, social facts are only relevant to the extent dictated by moral principles.

This view about the nature of the law as ultimately grounded in morality is radically different from the one adopted in my thesis, which sees the law as ultimately grounded in social facts alone. Examining and rebutting interpretivist objections to positivism exceeds what this thesis can do.[12] The next chapter will, however, address Dworkin's objections to the idea that Parliament can have unified intentions. I will also argue later on (in chapter 8) that a view like Dworkin's is hard to square with our law-making and judicial practices, which see Acts of

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[10] Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury Publishing 2013); Ronald Dworkin, *Law's Empire* (Hart Publishing 1998). See also Mark Greenberg, 'How Facts Make Law' (2004) 10 Legal Theory 157.

[11] Nicos Stavropoulos, 'Legal Interpretivism', *The Stanford Encyclopedia of Philosophy* (2021).

[12] For examples of attempts at this, see Brian Leiter, 'Explaining Theoretical Disagreement' (2009) 76 University of Chicago Law Review 1215; Brian Leiter, 'Theoretical Disagreements in Law: Another Look' in David Plunkett and others (eds), *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (OUP 2019); Scott J Shapiro, *Legality* (Harvard University Press 2013) 282–306, 381–85.

Parliament as deliberate acts of law-making by a group of people with the power to decide to change our rights and obligations.

If, however, positivism was shown to be mistaken and it turned out that the true nature of the law corresponds to interpretivism's view of it, this would not necessarily render completely irrelevant the arguments and findings of my thesis (concerning legislative intent and, in particular, Parliament's intention to rely on courts to keep statutes up to date). This is because an interpretivist theory could still maintain that legislative intent, as I understand it, is one of the facts that—through the mediation of moral principles—determines the rights and obligations that we have. This would, however, radically alter the ways in which (and the extent to which) the arguments in my thesis may be relevant. I will not explore this any further.

A last point to clarify concerns the role that moral reasoning plays in legal interpretation and adjudication. As I will discuss in future chapters (especially chapters 3 and 5), judges may have to engage in moral reasoning to interpret and apply broadly worded statutory provisions featuring moral terms, as well as to interpret and apply constitutional presumptions. This raises the question of how this judicial resort to moral argument fits with positivism's claim that social facts are the only ultimate determinants of the content of law.

Positivists split themselves into two groups when answering this question. According to one, narrower view—called 'exclusive legal positivism'—in such cases judges are creating new law on the basis of non-legal considerations.[13] This position thus argues that the only possible criteria of legal validity are source-

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[13] Scott J Shapiro, 'On Hart's Way Out' (1998) 4 Legal Theory 469, 493–96; Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (rev ed, Clarendon 1994) 218–20.

based considerations—that is, a legal directive's 'pedigree' (the social rule that creates it) and not its merits. Ultimately, the idea is that legal philosophy is concerned with explaining how source-based considerations (such as Acts of Parliament) can have authority and how they are different from—and can displace—merit-based considerations, and not with explaining why merit-based considerations have authority.[14] 'Inclusive legal positivists', by contrast, have a broader view and understand that conformity with morality can be a criterion of legal validity if it is recognised as such by a social rule.[15] For them, in such cases judges are still engaging in legal reasoning and reaching legally-based decisions. Though jurisprudentially important, this disagreement does not have practical consequences for the way judges should decide cases: both parties agree that judges may be required to resort to moral considerations. While my thesis will make no attempt to address this disagreement, it does not assume the truth of the narrow limitation put forward by exclusive legal positivism and adopts, instead, a broader view of the nature and possible sources of legal reasoning.

Structure

The thesis is divided into three main parts. The first one explains the notion of legislative intentions that I adopt, and defends it from sceptical claims that dismiss such intentions as incoherences or useless myths (chapter 2). It also analyses what courts refer to as 'presumptions of legislative intent' (chapter 3). The second part focuses on one such presumption—that in favour of an updating approach

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[14] Leslie Green and Thomas Adams, 'Legal Positivism', *The Stanford Encyclopedia of Philosophy* (2019).
[15] Hart (n 8) 247–48; WJ Waluchow, 'Authority and the Practical Difference Thesis: A Defense of Inclusive Legal Positivism' (2000) 6 Legal Theory 45, 80–81.

to statutory interpretation. It discusses its historical origin and evolution (chapter 4), its rationale and what it requires courts to do (chapter 5), its limits and how it can be displaced or limited by Parliament (chapter 6), and the sense in which it can be said that Parliament intends to rely on that presumption when it does not displace it (chapter 7). The third and final part considers views that are critical of my account of judges' updating role—especially of its justification and limits. These objections come from opposing camps: those who argue that judges' updating role is narrower than what I have described or non-existent (chapter 8), and those who argue that it is broader (chapter 9). The final chapter provides a conclusion that summarises my main points (chapter 10).

PART I

LEGISLATIVE INTENT AND PRESUMPTIONS

CHAPTER 2: Legislative Intentions

I. Introduction

Judges and commentators in the UK (and similar jurisdictions) have traditionally expressed the view that interpreting statutes involves, centrally, ascertaining and giving effect to 'the intention of Parliament'.[1] This intentionalist language permeates judicial practices. However, scholars have contested both the idea that Parliament can have intentions and the relevance of such intentions (if they exist) to statutory interpretation. More recently, there has been a wave of criticisms by judges and former judges, who dismiss references to legislative intentions as incoherent, superfluous, or misleading.

This scepticism is a problem for a thesis like mine, premised on the idea that what courts should do when they interpret a statute is significantly determined and constrained by Parliament's intentions when it enacted that statute. My thesis makes an intentionalist case for adopting an updating approach, according to which the appropriateness of that approach (and its legitimate scope) depends on Parliament's intention at the time it enacted the statute at stake. Given this, my arguments need to be grounded on a sound notion of legislative intentions than can meet the criticisms made against this idea.

[1] See Sir Rupert Cross and others, *Cross: Statutory Interpretation* (3rd edn, Butterworths 1995) 22; Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36 Sydney Law Review 39, 39–41; Stefan Vogenauer, 'A Retreat from *Pepper v Hart*? A Reply to Lord Steyn' (2005) 25 OJLS 629, 655; and Andrew Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement (The Hamlyn Lectures 2017)* (CUP 2018) 13–14.

I present these criticisms in section II and argue, in section III, that the best way of answering them is by defending a 'conventionalist', 'functionalist' account of legislative intent, which I will develop there. In section IV, I examine existing interpretive conventions in the UK, which establish when Parliament has expressed an intention and from which sources to ascertain it. Finally, in section V, I consider alternative accounts of legislative intent that, unlike my approach, involve a metaphysical analysis of the constitution of group intentions. I argue that this strategy struggles to rebut criticisms, especially those that dismiss legislative intentions as fictions fabricated by judges.

II. Scepticism about Legislative Intent

The main objections to references to legislative intentions are that these are: (1) incoherent; (2) superfluous or irrelevant; or (3) misleading. These claims can be held separately or combined with each other. I will explore them in order.

(1) Incoherence

Some people argue that the very idea that plural bodies, like legislatures, can have a unified intention makes no sense since such bodies are made up of groups of individuals and each of them has different goals, beliefs, desires, hopes, expectations, understandings, values, and so on. Matters are made worse by the fact that legislatures often have to deal with complex and contested matters, about which people sharply differ. Perhaps the most influential formulation of this critique is Ronald Dworkin's. Dworkin argued that interpreters of a statutory (or constitutional) provision face insurmountable difficulties when

attempting to infer the meaning that the authorities who enacted it attempted to communicate through it.[2]

A first problem is defining who counts as the author, since several people are involved in the drafting and enactment of a Bill, and they participate in this with different levels of engagement.[3] In the UK, these include the Minister who promoted the Bill, the Department's policy and legal advisers, and the Parliamentary Counsel who drafted it. They also include the Parliamentarians who were present in the debates and voted for or against it, and the members and legal advisers of parliamentary committees who scrutinised it and may have suggested amendments that were incorporated. Who, among all these people, are those whose intentions interpreters should seek to retrieve? Is it only Parliamentarians (and, if so, all of them or only those who voted for the Bill) or should we also look at other officials who participated in the law-making exercise? And do everyone's intentions count equally, or do we assign different weights to them based on their degree of involvement?

Dworkin identifies further problems. Each individual legislator (or official) often has different hopes, expectations, convictions, and so on in relation to any given matter. Someone may, for example, vote in favour of a Bill hoping that it will be understood by courts as meaning *X*, but expecting that the most likely scenario is that they will interpret it as meaning *Y*.[4] Which mental state matters? Moreover, one can hold mental states with different levels of abstraction and fail

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[2] Ronald Dworkin, *Law's Empire* (Hart Publishing 1998) 313–33, 361; and *A Matter of Principle* (Harvard University Press 1985) 33–50. For earlier formulations of similar critiques, see Gerald C MacCallum Jr, 'Legislative Intent' (1966) 75 Yale Law Journal 754, 763–64 (citing the work of Max Radin and Albert Kocourek, among other scholars).
[3] Dworkin, *Law's Empire* (n 2) 318.
[4] ibid 321–22.

to notice internal inconsistencies between, for example, abstract, general convictions and concrete, specific ones. When lawmakers had such inconsistent mental states, how should interpreters resolve them? Furthermore, on certain matters, lawmakers may have had no relevant intention at all. In such cases, should interpreters try to determine what lawmakers would have intended if they had considered this?[5] Additional difficulties raised by Dworkin include lacking evidence of the relevant mental states (assuming we have identified whose and which mental states matter), and determining exactly how to aggregate them 'into some composite group intention'.[6]

Other scholars have also stressed difficulties similar to those identified by Dworkin.[7] These critiques have also been formulated by judges and former judges. Sir John Laws, for instance, indicated extrajudicially that 'there is no such thing as the intention of Parliament', and the idea that there is has 'all too often … turned the interpretation of statute into a futile quest for this non-existent chimera'.[8] He noted that different legislators voting for a Bill will usually have different views on what it means and what it will achieve, and sometimes no views at all.[9]

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[5] ibid 325–27.
[6] ibid 320–21.
[7] See, among others, Jeremy Waldron, *Law and Disagreement* (OUP 1999) ch 6; David A Strauss, 'Common Law Constitutional Interpretation' (1996) 63 University of Chicago Law Review 877, 927, citing Paul Brest, 'The Misconceived Quest for the Original Understanding' (1980) 60 Boston University Law Review 204, 229–37; William N Eskridge, Jr, 'Dynamic Statutory Interpretation' (1987) 135 University of Pennsylvania Law Review 1479, 1507, 1538–39, 1544.
[8] Sir John Laws, 'Statutory Interpretation – the Myth of Parliamentary Intent' [2017] Renton Lecture 13 November 2017, 1. However, for an example of his references to legislative intentions in his judgments, see *Thoburn v Sunderland City Council* [2001] EWCH Admin 934 [63].
[9] Laws (n 8) 3.

For Dworkin, interpreters have no way of addressing these difficulties without resorting to their judgment on matters of political morality—that is, without abandoning intentionalism and endorsing Dworkin's own interpretivist theory of law.[10] I agree that these difficulties would probably be unsurmountable for anyone trying to perform the kind of psychological aggregation that Dworkin has in mind. However, this is not what judges are or should be doing when they interpret statutes. The account of legislative intentions that I will put forward in this chapter does not attempt to directly retrieve the psychological states of Parliamentarians (and drafters and advisers) and somehow aggregate them. It therefore avoids the difficulties that Dworkin identifies.

(2) **Superfluousness**

Sceptics also argue that what courts call 'legislative intent' is not a choice which precedes the process of interpretation and which that process seeks to discover but the conclusion of that process—a judicial construction that judges impute to Parliament. In a famous passage, Lord Nicholls reasoned in *Spath Holme* that the phrase 'the intention of Parliament' is 'a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used', and does not correspond to the actual ('subjective') intentions of any person involved in the legislative process.[11] Similar views have been expressed, for example, in the High Court of Australia, where some judges have suggested

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[10] Dworkin, *Law's Empire* (n 2) 316, 321.

[11] *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] 2 AC 349. This case has been widely cited; for a recent example of a decision citing it, see *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3, [2023] AC 255 [31].

that ‘legislative intention is not something that exists before judicial interpretation, but instead, is a product or construct of interpretation’ and ‘nothing more’.[12] This would render references to legislative intentions superfluous. As Lord Burrows puts it, ‘once one is focusing on the words, the context and the purpose of the legislative provision, the intention of Parliament is an unnecessary and unhelpful concept. It is a fifth wheel on the coach.’[13]

I reject these views. Legislative intentions are a series of real, interrelated choices that pre-exist judicial decisions and which courts retrieve rather than invent.[14] These are choices for one or more policy goals and a legal scheme designed to achieve them, as well as a linguistic formulation designed to convey this content to the public. This compound choice is initially made by the subset of the legislators working on the Bill (usually, a Minister with her advisers and Parliamentary Counsel). It is then presented to all Parliamentarians, and may be modified during legislative debates in response to contributions made by them or by committees. It is endorsed by Parliament—in its final shape—if a majority of legislators in each chamber says ‘Aye’ on the Bill’s third reading, after which it will receive Royal Assent. The question for an account of legislative intent is how this unified, collective choice can emerge given the difficulties stressed by Dworkin. The goal of this chapter is to address this question. As I will explain, the key lies

[12] Ekins and Goldsworthy (n 1) 41, discussing, among other cases, *Momcilovic v The Queen* (2011) 245 CLR 1, 141 [341], where Hayne J reasoned that ‘“[i]ntention” is a conclusion reached about the proper construction of the law in question and nothing more’.
[13] Lord Burrows, ‘Statutory Interpretation in the Courts Today’ (Sir Christopher Staughton Memorial Lecture 2022, 24 March 2022) 9.
[14] (This is not to say that these choices are unconstrained or that retrieving them is all that courts do.)

in the conventions shared between judges and lawmakers that make possible coordination between lawmakers (and understanding between them and courts).

(3) Potential to Mislead

Critics also say that references to legislative intentions are misleading and may act as a 'fig leaf'.[15] In David Feldman's words, the claim that judges are 'giving effect to the intention of Parliament' is the 'least honest thing … that judges regularly say'.[16] Lord Burrows has written extrajudicially that referring to Parliamentary intent is a 'fiction or mask that should be avoided altogether' because it 'is unhelpful, at best, and has a tendency to mask the true reasoning and power of the courts'.[17] In his view, '[d]ressing a decision up as effecting Parliamentary intention' can 'obscure the power the judges are exercising in their interpretative role', and 'may divert attention away from scrutinising' them.[18] Similar objections have been raised in relation to other kinds of legal instruments, such as constitutions and human rights treaties. Writing about constitutional interpretation, David Strauss has expressed the worry that, when authorial intentions are invoked, '[d]isputes that in fact concern matters of morality or policy'—and which should be directly confronted as such—are, instead, 'masquerad[ing] as hermeneutic disputes about the "meaning" of the text, or historians' disputes about what the Framers did'.[19] In the same vein, discussing how human rights treaties like the European Convention on Human Rights should

[15] Laws (n 8) 15.
[16] David Feldman, 'White Water Rafting: The UK's Constitutions at a Time of Stress' [2022] Sir David Williams Lecture 6 May 2022.
[17] Burrows (n 1) 17–19.
[18] ibid 18.
[19] Strauss (n 7) 928.

be interpreted, Sandra Fredman has praised 'living instrument' approaches for abandoning 'the veneer of legitimacy achieved by referring to … original intent', and thereby laying bare 'the need to justify the source of human rights values'.[20]

I am interested in two specific claims that critics make. The main one is that referring to legislative intentions suggests that we should treat the interpretive role of courts as 'frozen at the time the legislation was enacted', and thus 'favours the law's ossification by inappropriately freezing the law in the past'.[21] This ossification is indeed endorsed by many intentionalists, whose views I discuss and challenge in chapter 8. The main goal of my thesis is precisely to dispute the oft-assumed link between respecting legislative intentions and interpreting the law in an ossified way.

A second claim is that references to legislative intentions obscure the important role played in statutory interpretation by constitutional principles that are imposed on the process of legislation rather than derived from legislative intentions.[22] In chapter 3, I examine presumptions of legislative intent that have a constitutional underpinning and acknowledge that they are not directly derived from legislative intentions. I also argue that, despite this, they are—as they are currently applied—ultimately compatible with respecting such intentions.

In short, far from invoking legislative intentions to mask what courts do when they interpret statutes and adjudicate cases, a central goal of my thesis is to show the extent to which such intentions require courts to engage in value-based, creative reasoning.

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[20] Sandra Fredman, 'Living Trees or Deadwood: The Interpretive Challenge of the European Convention on Human Rights' in NW Barber and others (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing 2016) 56.
[21] Burrows (n 1) 20–21, 31.
[22] Laws (n 8) 11–12.

III. A Conventionalist, Functionalist Account of Legislative Intentions

Scholars tend to defend the existence of legislative intentions by offering philosophical accounts about how such intentions are constituted as a matter of metaphysics.[23] I believe that a more effective way to respond to scepticism is by explaining how lawmakers operate with conventions when they draft, debate, and enact laws. Thus, rather than examining the metaphysical constitution of group intention, I will put forward an account that is 'conventionalist' and 'functionalist'.

I call it 'conventionalist' because it holds that what facts make up legislative intentions is determined by certain kinds of conventions that are shared between lawmakers and interpreters (about what legislative intentions are, and what the sources to convey and discover them are), rather than directly by metaphysical facts alone. These conventions may identify certain actions and states of affairs as relevant to the formation of legislative intentions. (To clarify, I speak of 'lawmakers' to simplify, but I also include here Parliamentary Counsel and legal advisers to the government and to parliamentary committees, who significantly contribute to the law-making exercise. Similarly, I often speak only of judges, but these are not the only interpretive authorities that apply these conventions; executive officials do so as well.)

My account is also 'functionalist' because it endorses functionalism in the philosophy of mind.[24] To understand what any given type of mental state is, functionalism does not enquire into its internal constitution (what it is 'made of').

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[23] See Ekins and Goldsworthy (n 1) 64.

[24] What follows draws on Michael E Bratman, 'Reflection, Planning, and Temporally Extended Agency' in *Structures of Agency: Essays* (OUP 2007); and Michael E Bratman, *Intention, Plans, and Practical Reason* (Harvard University Press 1987) chs 1–2 and 7.

Instead, functionalism looks at how it is connected, by a series of regularities and norms, with other types of mental states, with certain 'inputs' or perceptions (sensory stimulations), and with 'outputs' or behaviours (dispositions to act, think, or reason in certain ways).[25] It makes sense to speak of one type of mental state as distinctive when it cannot be conflated with, or reduced to, other types of mental states it is connected to.[26] This, I believe, is the case with intentions. The intentions of an individual stand in close relation to other mental states like her desires and beliefs, but are not reducible to either.[27] An intention to do a certain action is not just a desire (or even a predominant desire) to do it, or a belief that one will do it. Intentions have a distinctive profile. I explain below some of their distinctive features, following Michael Bratman's work. I will not attempt to give a complete characterisation, since a rough sketch suffices for my purposes.

The gist of a conventionalist, functionalist account of intentions is that psychological facts (as defined by theories of philosophy of mind, including by reference to certain states in people's brains) are not the only thing that can play the functional role that individual intentions play. Certain conventional facts related to a group of people can play this role too. Obviously, groups do not have a mind in which to lodge mental states. Therefore, the composition of individual intentions and group intentions is very different. For a functionalist account, however, what matters is not this but whether group intentions have the same functional profile as individual intentions. In what follows, I will argue that they do. I will look first at individual intentions and discuss how they compare (functionally) to legislative intentions. I will not consider groups more generally, or any group

[25] Bratman, *Intention, Plans, and Practical Reason* (n 24) 9.
[26] ibid 10.
[27] ibid 20, 110.

other than legislatures. I will then discuss the kinds of conventions on which legislative intentions are grounded.

(1) Functional Analogies Between Individual and Legislative Intentions

Individual Intentions

From a mass of different and sometimes conflicting desires and beliefs, intentions decisively settle an individual's course of action.[28] When an individual has a set of desires (some of which may be contradictory with each other) and has to decide how to behave, she will deliberate to form an intention. She will consider these desires, attach different weights to each of them, and settle on treating one of them (or a combination of, or compromise between, them) as providing a reason for action.[29] Relevant to this deliberation are her beliefs about herself and the world (for example, about what courses of action are more likely to result in certain states of affairs), which are the result of sensory 'inputs' or perceptions. In addition to this process of considering and weighing desires, beliefs, and other inputs, individuals forming an intention will reason on any necessary preliminary steps to carry out their intention and on the best means to achieve their ends.[30] They will thus form further, more specific intentions (for example, not just to go to a certain place, but to go via a certain route at a certain time) taking into account their prior, more general intentions as inputs for this further deliberation.[31]

[28] ibid 16; Bratman, 'Reflection, Planning, and Temporally Extended Agency' (n 24) 36.
[29] Bratman, *Intention, Plans, and Practical Reason* (n 24) 23; Bratman, 'Reflection, Planning, and Temporally Extended Agency' (n 24) 39–40.
[30] Bratman, *Intention, Plans, and Practical Reason* (n 24) 23.
[31] ibid 23–24.

Unlike desires, which may merely influence our conduct, intentions control our conduct.[32] They have an element of commitment and constraint that desires lack. Intentions settle how an individual will behave and foreclose further deliberation on the issue (unless and until the individual chooses to revise her intention and form a new one).[33] This characteristic about the 'outputs' of intentions supports the expectation that an individual will behave as she intends. This, in turn, allows intentions to help individuals coordinate their behaviour, both at the intrapersonal level and with other people.[34] Thus, for example, my intention to do something at a certain time and place leads me to not schedule anything at the same time, and lets someone wishing to see me plan to do so then and there.

Intentions can play this settlement and coordination role because they are subject to a series of rational norms which do not apply to all mental states.[35] An individual can rationally desire two contradictory things, but she cannot rationally intend both.[36] This is not to say that human beings never engage in this irrationality.[37] However, realising that my intentions are contradictory would lead me to revise them and abandon one or somehow make them compatible (something I need not do with my desires). Otherwise, they could not play the distinctive role that intentions play in our lives. My intentions must not only be coherent with each other but also with my beliefs. While a rational person can, for example, desire to do something that she believes impossible, she cannot rationally intend to do it. Moreover, desires may be fleeting, whereas intentions

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[32] ibid 16.
[33] ibid 17–18, 24.
[34] ibid 17–18.
[35] Bratman, 'Reflection, Planning, and Temporally Extended Agency' (n 24) 27.
[36] Bratman, *Intention, Plans, and Practical Reason* (n 24) 19.
[37] ibid.

must be stable, with the individual being committed to acting in accordance with them. However, as I said, they are revisable: I may reopen my deliberation to form a new intention.

Legislative Intentions

What officials (including judges) conventionally call 'Parliament's intention behind a statute' plays a role in law-making and law-applying practices that is similar to the role that individual intentions play in our daily lives. The inputs, outputs, and processes described above are analogous. It makes sense, therefore, to call this an 'intention'.

First, just like an individual deliberates on her desires, beliefs, and other inputs, and weighs these against each other to form an intention, so do lawmakers acting together. The settlement function that legislative intentions serve is more complex than that of individual intentions. In the case of individuals, conflicts between different mental states (for example, between two desires, or between a desire and a belief) happen—and are resolved—only within that same person. In the case of Parliament, these take place among different people as well as within each person. Lawmakers will deliberate with each other about their different mental states (including their goals and views), and attempt to make them compatible or reach a compromise to agree on a jointly intended course of action (the set of propositions that Parliament will act to turn into law). Voting on the Bill is one method Parliament uses to aggregate into a unified intention lawmakers' different mental states. Prior to voting, lawmakers may also persuade each other or decide to make reciprocal concessions. Throughout this process, the legislative intention inferable from the Bill (interpreted according to the

doctrines that courts normally apply) serves as a focal point, to which lawmakers' attention and efforts are directed when they deliberate, negotiate, and decide. Anticipating what that intention will be taken to be by interpreters thus allows lawmakers to guide and coordinate their actions and plans, and aggregate their different mental states into a unified joint intention. This role in unifying and coordinating people's mental states, behaviours, and plans towards a single course of action they collectively settle on is, to some extent, analogous to the role played by individual intentions.[38]

Second, the outputs are also analogous. Just like my intentions control my conduct and foreclose further deliberation unless and until I decide to revise them, once Parliament's intentions behind a statute have been discovered by an interpreter, the interpreter will not hold that they have changed unless and until a subsequent enactment amends or repeals the first Act.

Third, both individual and legislative intentions can play these settlement and coordination roles because they are subject to a rational requirement of coherence. Parliament has in place procedures aimed at spotting incoherences and resolving them to avoid situations where individually rational choices lead to a collectively irrational outcome.[39] An example is the fact that a complete proposal is prepared and presented by the Bill's promoter, and legislators vote on it as a whole, rather than clause by clause.[40] Courts, in turn, interpret statutes assuming that Parliament did not intend to enact two contradictory propositions (within the same statute or in related ones).

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[38] See Michael E Bratman, *Faces of Intention* (CUP 1999) 112 (talking of shared intentions more generally, rather than of a conventional notion of legislative intentions).
[39] Richard Ekins, *The Nature of Legislative Intent* (OUP 2012) 72–76.
[40] ibid 72–75, 101, 105–07, 168, 228–29.

Fourth, just like people develop their general intentions into further, more specific ones, lawmakers also reason from Parliament's general intentions (for example, the purpose of a Bill as it is set out in its long title) to its further, more specific ones (the specific legal propositions it establishes).[41] They consider whether the means chosen serve the Bill's purposes or whether there are better alternatives or missing points that still need to be provided for. There is also an inter-temporal dimension to this: the propositions turned into law by a statute will form part of the background against which lawmakers will reason when they enact subsequent statutes (and, consequently, of the background against which courts will interpret those future enactments).

(2) **Conventions of Legislative Intent**

This functionalist account accords with how UK courts conceive and speak of legislative intent. Courts do not, however, use the term 'functionalist' to describe it; instead, they call it 'objective',[42] a label that I will question below. The account is also aligned with how legislative intent is spoken of in the law-making sphere. In Daniel Greenberg's words, '[a]s traditionally understood by the courts', legislative intent 'is capable of being discovered by reference to objective criteria', so such criteria must 'be borne in mind by the draftsman in order to ensure that his draft will be given the meaning that he intends'.[43]

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[41] On the relationship between legislative intent and statutory purpose, see section III(4) below.

[42] See, for example, *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* (n 11) 397 (Lord Nicholls) (opining that the claim that the court's task in statutory interpretation is 'to ascertain the intention of Parliament … is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective').

[43] Daniel Greenberg, 'The Nature of Legislative Intention and Its Implications for Legislative Drafting' (2006) 27 Statute Law Review 15, 28. (Daniel Greenberg

Judges, lawmakers, and other officials conventionally treat certain facts as making up Parliament's intentions. These facts normally include the words featured in an Act, and how they replicate, complement, or contrast with prior statutes or precedents on related matters. They may also include the words featured in pre-legislative and legislative materials produced by certain actors—for example, White Papers published by the government and reports issued by parliamentary committees. What is said in the legislative debates (perhaps only by certain actors in certain circumstances) may also be conventionally designated as relevant. What these elements have in common is that they make up the context in which a statute is enacted. They contain information about the issue (or 'mischief') that the statute was designed to regulate or remedy, and can help us get a better grasp of the strategies and schemes that were chosen by lawmakers to this end. This is an important characteristic of these conventions: the elements they pick are not arbitrary. They direct our attention to the policy reasons, the logic, and the assumptions behind the law-making choices that statutes embody.

Some conventions may be formalised in strict rules, while others exist only in the practices of officials and may have a more flexible content. Exactly which facts are regarded as relevant will vary with the different official practices, beliefs, and discourses of each jurisdiction at any given point in time. Section IV below explores the current conventions in the UK.

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served as Parliamentary Counsel between 1991 and 2010, as Counsel for Domestic Legislation in the House of Commons between 2016 and 2022, and is currently Parliamentary Commissioner for Standards.)

Building, developing, and revising these shared conventions requires a continuing, joint effort by judges and lawmakers (as well as drafters and advisers), between whom a sort of iterative dialogue takes place when legislation is enacted and rulings are issued. This dialogue sometimes features a voiced reflection (for example, in judicial rulings and drafting guidelines) about what each party does and what it understands the other party to be doing. Thus, for instance, UK judges making sense of parliamentary practices have noted that 'statutes are drafted on the basis that the ordinary rules and principles of the common law will apply' to them.[44] Commenting on their own practices, courts have held that they 'will not interpret a statute so as to produce an absurd result, unless clearly constrained to do so by the words Parliament has used'.[45] They have also indicated that they 'will, if reasonably available, always prefer an interpretation of a domestic Act which accords with the United Kingdom's international obligations'.[46]

Rulings in which judges expressly invoke and explain the conventions they apply make it easier for lawmakers to internalise such conventions (if they had not fully done so already) and act in accordance with them. They may also offer Parliament an opportunity to reject or modify them.[47] (I will return to these ideas in the next chapter, when discussing one particular type of convention—namely, so-called 'presumptions of legislative intent'.) Moreover, the government and

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[44] *R Secretary of State for the Home Department, Ex p Pierson* [1998] AC 539 (House of Lords) 573 (Lord Browne-Wilkinson).

[45] *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28, [2023] 7 WLUK 355 [43] (Lord Sales).

[46] *Goluchowski v District Court in Elblag, Poland* [2016] UKSC 36, [2017] 2 All ER 887 [4] (Lord Mance).

[47] See, for example, s 34 of the Crime and Disorder Act 1998 ('Abolition of rebuttable presumption that a child is *doli incapax*'), cited in Daniel Greenberg, *Craies on Legislation* (12th edn, Sweet & Maxwell 2020) 118 (n 18).

Parliament can alter the pre-legislative and legislative materials they publish. Since 1999, for instance, explanatory notes—which explain the purpose of a Bill in simple and neutral language—have been prepared by the government and published alongside the introduction of Bills to Parliament.[48] Their introduction followed a recommendation by the Select Committee on Modernisation of the House of Commons,[49] which had anticipated that courts might use them as guides to Parliament's intentions.[50]

In turn, drafting guidance issued by the Office of the Parliamentary Counsel illustrates how drafters examine the interpretive conventions that courts normally apply and choose their words partly based on that. Guidance documents indicate, for example, how broadly or narrowly certain expressions have been read by courts,[51] and identify concepts that have been interpreted as being entailed by certain terms.[52] They distinguish between well-established implications (where a contrary policy would require clear, express words) and points which are not entirely clear, identifying what appears to be the 'safe course'

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[48] Francis Bennion and others, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020) 750–53.
[49] Christopher Jenkins, 'Helping the Reader of Bills and Acts NLJ 798' (1999) 149 NLJ; *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* (n 11) [60] (Lady Arden).
[50] Modernisation Committee, The Legislative Process (HC 1997-98, 190) para 37.
[51] Office of the Parliamentary Counsel, 'Drafting Guidance' (18 June 2020) s 11.1.29 (indicating that the phrase 'in respect of' 'has been said to have "the widest possible meaning of any expression intended to convey some connection or relation" (*Albon v Naza Motor Trading* [2007] EWHC 9 (Ch) at 27)'); for a similar example, see s 8.1.8.
[52] ibid s 11.1.9 (advising to '[d]raft on the basis that the natural meaning of "function" covers powers and duties', given the reasoning in *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1).

for drafting in the latter case.[53] They also flag the likely effects (given the interpretive default rules applicable in the jurisdiction at stake) of silence regarding a certain issue.[54] These documents also alert drafters to the consequences of including certain elements in a statute. They indicate, for example, that '[t]he main risk of an overview is that it will be given some unintended effect by the courts' and advise 'drafting in a way that makes it clear that it is intended merely as a signpost'.[55] They also note that, unlike overviews, purpose clauses are 'intended to affect the interpretation of other provisions' and will be interpreted as such.[56] This illustrates how Parliamentary Counsel pay close attention to courts, to make sure lawmakers and judges are guided by the same conventions. This reflects a general fact of communication—namely, that the intention to communicate a message is 'interpreted-directed', in that its formation is constrained by what the speaker (or writer) knows about how her intended audience will go about attempting to understand her.[57]

Nothing above should be read as suggesting that, as long as they agree with each other, judges and lawmakers can adopt any conventions whatsoever. Some constraints are derived from the nature of the law-making task, which consists in collectively deciding what the law shall be and making that decision public. This rules out, for example, the possibility of holding that private

[53] Office of the Parliamentary Counsel, 'Common Legislative Solutions: A Guide to Tackling Recurring Policy Issues in Legislation' (March 2021) 53, 55; for more examples, see ibid 79.
[54] Office of the Parliamentary Counsel (n 53) 42.
[55] Office of the Parliamentary Counsel (n 51) s 3.2.6.
[56] ibid s 3.2.2.
[57] Stephen Neale, 'Paul Grice and the Philosophy of Language' (1992) 15 Linguistics and Philosophy 509, 552–53; Stephen Neale, 'Determinations of Meaning' in Ernest Lepore and David Sosa (eds), *Oxford Studies in Philosophy of Language*, vol 2 (OUP 2022) 126.

documents that are not accessible to courts can determine what Parliament intended. In addition to this, there may be constitutional law constraints. Examples of these are the constitutional presumptions examined in the next chapter.

(3) <u>The Reality of Legislative Intentions</u>

The conventionalist, functionalist account I adopt departs from two approaches available in the literature. One—which I will call 'fictionalism'—claims that legislative intentions are not real and are mere fictions or metaphors. According to this view, a plural body simply cannot have 'real' intentions because it does not have a mind. The other position—which I will call 'metaphysical realism'—argues that legislative intentions are real, and purports to defend this claim through a detailed explanation of their metaphysical constitution. I consider examples of this approach at the end of this chapter.[58] My own approach is an alternative way out of this discussion: it defends the reality of legislative intentions without, however, basing that defence on a metaphysical analysis of their existence. Against fictionalism, and together with metaphysical realism, I believe that legislative intentions refer to facts of the real world. However, in contrast to metaphysical realism, I look at what facts make up legislative intentions according to the conventional facts that determine this. I remain agnostic on the different question of what facts could make up legislative intentions understood in a metaphysical—rather than a conventional—sense. Moreover, as I said, the relevant conventions vary across space and time, and this is another contrast with metaphysical realism, which examines the universal metaphysical truth of group intention.

[58] In section V.

I accept fictionalism's claim that, in a sense, legislative intentions can be described as fictional or metaphorical given that, unlike individual intentions, they are not lodged in a mind. When we speak of Parliament's intentions, we are indeed using the word 'intentions' by analogy with individual intentions, given the functional analogies between both kinds of intentions, discussed above. This fits with a common trend in how we explain complex phenomena of which we have only a limited understanding. We often describe these complex phenomena in more familiar terms, since our thought proceeds by analogy and comparison, and is based on our existing experiences and knowledge.[59] This helps us better understand and deal with reality, by simplifying and organising it.[60] The important thing is to not extend analogies beyond their truth,[61] and nothing in the way UK courts and other officials use the expression 'legislative intentions' stretches the analogy too far.

What allows us to say that legislative intentions are real is the very real way in which they shape the actual behaviour of actual people. The attitudes and actions of legislators, advisers, and drafters are what shapes the text of a Bill and the pre-legislative and legislative materials that interpreters conventionally look at. Once these conventions—about what legislative intentions are and where they can be discovered—are well-established, all relevant actors will abide by them. Parliamentarians, government officials, legal advisers, and drafters adjust their behaviour to those conventions, thus acting them out and making them real. They will attempt to design or modify Bills in one way or another, or decide to vote in favour or against them, based on what they anticipate interpreters will conclude

[59] See Lon L Fuller, *Legal Fictions* (Stanford University Press 1967) 113–14.
[60] ibid 113–14, 124.
[61] ibid 115, 121.

given the conventions they normally apply. This is illustrated by the guidance documents issued by the Office of the Parliamentary Counsel cited above, which study judicial interpretive practices and advise drafters on how to convey the intended policy choices and legal schemes given those practices.[62] There is nothing metaphorical or fictional about that.

An example from history helps illustrate how conventions can refer to—and help shape—facts of the real world in which groups are involved. The example involves a set of conventions about group personhood and action developed to explain the status of a series of Italian cities that, in the Late Middle Ages, had become independent city-republics with elective, self-governing arrangements.[63] These cities (which included Milan, Pisa, Genoa, and Florence, among others) had begun appointing officials who sat in councils which were invested with executive and judicial powers.[64] The proliferation of these associations of people who could make and execute decisions acting as a unit generated the need to explain how this was possible.

The explanation put forward by the Commentators on the Roman Law considered that each of the cities was a distinct legal person—that is, a disembodied legal entity that was separate from its individual members and could act through the agency of those individuals who had been, as a matter of fact, invested with the authority to act in the name of the city itself (the elected council officials).[65] This was not a metaphysical theory—it was a purely legal construction, developed to accommodate and make sense of the facts of the

[62] See n 51-56.
[63] Quentin Skinner, 'Classical Rhetoric and the Personation of the State' in *From Humanism to Hobbes* (CUP 2018) 21.
[64] ibid.
[65] ibid 21, 25–26, 30.

political world of that time.[66] Metaphysically, 'according to what really exists', city-republics were regarded as nothing but a multitude of individual persons.[67] While some commentators spoke of a legal 'fiction', others did not employ that term.[68] In either case, it was emphasised that, 'notwithstanding their purely legal existence', these entities were 'capable of acting in the real world' and of exercising power.[69] They could do so 'through the instrumentality' of their individual 'members through a structure of councils and elective representative officers'.[70] When 'such representatives have authority to bear the persona of the state, their actions will count as those of the state itself'.[71]

These conventions stipulated when—for legal purposes—a certain group of people could be considered a 'person' (that is, a bearer of certain rights, powers, and obligations), and when this 'person' could be considered to have acted. The crucial point for my discussion is that establishing the convention that city-republics would be treated as persons—and that certain actions of the appointed council official of each city would be treated as actions of the city itself—gave citizens an effective way of coordinating their actions despite their large number and their different goals, beliefs, and so on. Citizens understood that they should elect officials whom they believed would be most responsive to their needs and interests, and attempt to revoke an official's mandate if they did not agree with the actions he had carried out. They also knew that it was important

[66] Joseph P Canning, 'Ideas of the State in Thirteenth and Fourteenth Century Commentators on the Roman Law' (1983) 33 Transactions of the Royal Historical Society 1, 1–2, 17, 23; Skinner (n 63) 26–30.
[67] Canning (n 66) 23; Skinner (n 63) 26–30.
[68] Skinner (n 63) 26 (n 18); *cf* Canning (n 66) 24.
[69] Skinner (n 63) 26.
[70] Canning (n 66) 24.
[71] Skinner (n 63) 35.

to make their views heard by these officials and attempt to influence them. Conversely, officials understood that they had to become acquainted with citizens' demands and act in a way responsive to them to remain in power, since this power was granted to them only 'on condition that they exercise it … in the name of the community and for the good of the city as a whole'.[72]

Current conventions about legislative intent play an analogous role. They guide lawmakers in their attempts to influence the content of the laws passed by Parliament (to the extent their interests, skills, and power allow). The proponent of a Bill (and her advisers and drafters) will design the Bill according to those conventions. She will mentally carry out the interpretive process that she expects judges will perform (or, more likely, she will get advice on this), thus applying the conventions that courts normally apply. Courts have made reference to this idea of drafters and courts 'retracing the same path in the opposite direction'.[73] Similarly, lawmakers who are concerned about a certain matter and want to check whether the Bill reflects their (or their party's) policy goals will perform the same exercise. Depending on its outcome, they may propose textual amendments, ask questions to the proponent of the Bill, vote for or against it, and so on.

Thus, conventions of legislative intent enable lawmakers to craft together what will be taken to be (and be enforced as) Parliament's law-making intention. Lawmakers can do so despite the uncertainty and disagreements we have about how group intentions are metaphysically constituted. Conventions of legislative intent allow us to cast aside that difficult question because they give us a concrete way of aggregating and coordinating our different views and goals to form a

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[72] ibid 23–24.
[73] *Black-Clawson International Ltd v Papierwerke AG* [1975] AC 591 [645] (Lord Simon).

collective intention. They also allow others to conclude (more or less confidently) that the group has expressed one or another intention.

The deep uncertainty and stark disagreements about the metaphysical constitution of group intentions are reasons for officials to stick to their conventional account of legislative intentions. A great deal is at stake in the claim that Parliament intended to turn one or another proposition into law. This could determine, for example, whether a person is imprisoned or a government decision quashed. We should not wish to make those outcomes contingent on what turns out to be the ultimate metaphysical truth of group intent. Neither should we want to make them contingent on interpreters' ability to carry out the kind of quest or aggregation that this truth may require them to perform in order to discover, from the intentions of the individual members of a group, the content of the group's intention as a matter of metaphysics. Requiring interpreters to engage with this metaphysical question would introduce an intolerable level of uncertainty about what the content of the law is. It would also make the settlement of this difficult philosophical issue an urgent matter, and impose this task on people (public officials, especially judges) who are not appointed to perform it and whom there is no reason to think are especially equipped to make progress on it. (It is an open question whether philosophical progress on this field may, in the future, help us improve our interpretive conventions—thus making communication easier and more reliable among lawmakers, and between these and courts—or whether it would have no practical consequences.)

In short, interpretive conventions are not rules imposed by judges that are detached from lawmakers' goals, beliefs, and so on. Instead, lawmakers rely on these conventions when they attempt to understand and influence proposals for

collective law-making choices. It is thus misleading to speak of legislative intention as 'nothing more' than a 'conclusion' reached by judges or something that they 'impute' to Parliament.[74] If courts interpreting statutes are able to find in them policies and legal schemes designed to achieve them, that is because the people involved in the initial conception and drafting of Bills and their subsequent modifications made a series of substantive and linguistic choices (for which the majority of legislators who voted for the Bill chose to express their support, whatever their knowledge or understanding of its content). The fact that judges adjudicating cases have the last word on what Parliament most likely intended, even when they make a mistake, does not mean that legislative intentions are something they fabricate. It only means that judges' attempts to understand what Parliament intended can go wrong and their answer still be authoritative because they have the power to adjudicate cases.[75]

I am similarly wary of claims that courts adopt an 'objective' notion of legislative intent that is not concerned with lawmakers' 'subjective' intentions.[76] Such claims might give the mistaken impression that legislative intentions are not related to lawmakers' actual (subjective) intentions. As I have argued, this is not true. The label 'objective' should be used to describe not Parliament's intentions themselves but the means that legislators conventionally use to aggregate their goals, beliefs, and so on into a collective intention and convey it to the public.[77]

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[74] See, for example, text accompanying n 11-12.
[75] On the distinction between finality and infallibility, see HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 141–47.
[76] See n 42. Similar claims have been made in other jurisdictions; see, for example, Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Amy Gutmann ed, 2nd edn, Princeton University Press 2018) 17.
[77] I think Goldsworthy's views on this go in a somewhat similar line. See Jeffrey Goldsworthy, 'Response to Contributors' in Lisa Burton Crawford and others (eds), *Law Under a Democratic Constitution: Essays in Honour of Jeffrey*

Conventions matter to interpretation because when legislators (and drafters and advisers) designed, discussed, amended, and voted for (or against) a Bill, they did so on the assumption that they would matter. We look at those conventions because it is through them that the message that the group agreed to convey was created and coded by its members. To discover the collective intention behind a statute, courts should not attempt to figure out what each individual legislator intended for her part and 'somehow assembl[e]' that 'into a collective mental state'.[78] Courts do not have to attempt this assembling (which would be extremely difficult and unreliable) because the group members themselves have already assembled their different mental states in the product that Parliament has collectively crafted and conveyed through these shared conventions.

If there is anything 'fictional' about these conventions when they are first formulated, it is important to see that they are 'self-fulfilling' claims, which become true when everyone starts adjusting their behaviour to them. Once it is well-established that *X* will count as the group's intention (where *X* may be the content inferable from the text of a statute enacted by Parliament, when read alongside a set of external materials and interpretive presumptions), the group's collective decision will find its way to *X*. Each member of the group will attempt to shape *X*

Goldsworthy (Hart Publishing 2019) 269 (indicating that 'objective intentionalism'—which he endorses—maintains that lawmakers' actual, subjective intentions are relevant only to the extent that they were made public in textual and contextual evidence that is reasonably accessible); and Ekins and Goldsworthy (n 1) 48 (stressing the crucial importance of subjective intentions and defining 'objective' intentions as 'whatever a reasonable audience would infer, from the publicly available evidence, was the author's "subjective" intention').

[78] Ekins and Goldsworthy (n 1) 64, citing Chief Justice Robert French, 'The Courts and the Parliament' (2013) 87 Australian Law Journal 820, 825.

to the extent that she is interested in doing so and able to do so (both as a matter of fact and according to the rules that govern the group's functioning). This idea is well expressed in an article by Gerald MacCallum Jr published more than fifty years ago.[79] I believe it is not being exploited as much as it should be in order to reply to the current wave of scepticism about the reality of legislative intentions.

Two clarifications are worth adding. First, I am not claiming that all legislators are necessarily familiar with all existing conventions. Given the high number and complexity of the matters Parliament has to deal with, Parliament could not function without a system of division of expertise and labour, trust, and individual rational ignorance.[80] A detailed knowledge of the relevant interpretive conventions and how to operate with them will normally be held, first and foremost, by Parliamentary Counsel, as well as by government lawyers and legal advisers of parliamentary committees, among other actors. Parliamentarians who promote and vote on legislative proposals rely on this expert advice. This rational ignorance and reliance on others is not exclusive to interpretive conventions. It may extend to the very text of Bills. Many legislators may not be closely familiar with what a Bill they are voting on says, and will rely on party Whips to tell them what to do. This reliance can be due to the legislator's genuine commitment to fulfilling the party's manifesto and her judgment that the best way to do so is trusting the party leaders and Whips or, for example, to a desire to ruthlessly

[79] MacCallum Jr (n 2) 784–85. (Note that, writing in the 1960s in the United States, MacCallum considered that 'judicial and administrative uses of materials and presumptions are not always clear or predictable enough to provide a guide for the legislators', but could become so in the future; see ibid 785. I cannot comment on the US then or now, but I do think that current practices in the UK—which I discuss in the next section—are, for the most part, predictable with a reasonable degree of accuracy, despite being a constant work in progress.)
[80] See Ekins (n 39) 114, 168, 172.

advance her political career whatever it takes. Each legislator will decide how much knowledge of a Bill's text, the relevant interpretive conventions, and the contextual elements to which those conventions refer she needs to have before voting, and how much she can trust the judgment of others.

Second, arguing that legislative intentions are real (that is, that they are the object—rather than the product—of statutory interpretation) does not entail claiming that there will always be an intention for courts to discover in relation to any matter that may arise in litigation, or that this intention will always be specific enough to settle disputes.[81] Some matters may not be dealt with (or not with a sufficient level of precision) in the statutory text or the relevant pre-legislative and legislative materials. There may also be no conclusive solution to derive from the background presumptions regularly applied by courts. Perhaps none covers the matter at hand, or different presumptions point in different directions and it is not clear which one Parliament intended to rely on and which one to displace. This scenario could be due to several reasons. It may be that no one in government or Parliament (and among their advisers and drafters) thought about this matter, that drafters failed to make the collective intention clear, or that legislators simply did not reach an agreement. In these scenarios, courts will unavoidably have to act creatively to settle matters that are underdetermined in the statutory text when read in the light of the applicable conventions.[82] Acknowledging this is important to begin answering the critique, mentioned above, that presenting a judicial decision as 'that which Parliament intended' can mask the role that courts sometimes play in addressing policy and value-based matters.[83] However, that

[81] See Ekins and Goldsworthy (n 1) 45–46.
[82] ibid 61.
[83] See section II(3) above.

legislative intentions on a certain matter may be absent or incomplete (especially in those matters that get litigated—usually the most difficult ones) does not mean that there is never a relevant, discoverable intention that is precise enough to solve disputes, or that this happens only rarely.

(4) Legislative Intent and Statutory Purpose

A last point I would like to clarify is the relationship between the legislative intention behind a statute and the statute's purpose, as the terms are normally used by courts, lawmakers, other officials, and commentators. The statutory purpose is the general policy goal (or set of policy goals) that the specific legal propositions included in the statute are designed to serve. What courts normally identify as the legislative intention behind a statute are those specific propositions—the means chosen to achieve the end that is the statutory purpose.

Thus understood, the legislative intent behind a statute is something different from the statute's purpose. Intent and purpose stand in a means-ends relationship. What is controlling for the solution of a case are the means chosen by Parliament. However, understanding what Parliament was attempting to achieve will usually be relevant to ascertaining what those means are. This is clearly reflected in UK judicial practices: one of the elements that courts take into account when ascertaining the legislative intent behind a statute is the statutory purpose (which can be either expressly set out in the statute, or be implicit and emerge from its provisions).[84] This purpose, together with other facts about the context in which a statute is enacted, can help make sense of the choice of words in the statute. In some cases, taking into account a statute's purpose may even

[84] See, for example, n 56 and accompanying text.

lead courts to adopt a strained reading of its language.[85] (Note that in other jurisdictions with different conventions, such as the United States, the role that the statutory purpose should play in ascertaining the propositions that a statute turns into law is less established and more contested than in the UK.)[86]

In another sense, however, purposes are kinds of intentions. This is true both at the individual level (I may intend to communicate something to someone, intending also that, as a result, some consequence will take place) and in the case of Parliament (Parliament may intend to impose a tax on certain products, intending that, as a result, certain changes in people's spending habits will take place). Because purposes are general, further goals that we intend to achieve through our behaviour, in order for an agent to be capable of having a purpose (and of 'printing' that purpose upon the agent's actions or communications), the agent must be capable of having intentions. Thus, if we cannot predicate intentions of Parliament (or if it is useless or misleading to do so), we cannot think that there are purposes behind its statutes. This chapter has argued that Parliament does have such intentions. In contrast, some scholars and judges who are sceptical of their existence advocate a focus on Parliament's purposes rather than its intentions.[87] However, this position is incoherent because purposes are kinds of intentions.[88]

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[85] (I discuss this and give examples in chapter 5.)
[86] For a helpful summary, see John F Manning, 'What Divides Textualists from Purposivists?' (2006) 106 70.
[87] Laws (n 8) 11; Burrows (n 1) 19.
[88] Ekins and Goldsworthy (n 1) 57–58; Jeffrey Goldsworthy, 'Lord Burrows on Legislative Intention, Statutory Purpose, and the "Always Speaking" Principle' (2022) 43 Statute Law Review 79, 83–88.

IV. Current Conventions in the UK

(1) Statutory text and 'aids to construction'

Perhaps the simplest, easiest-to-follow convention would be to equate legislative intentions with the statutory text and nothing else. This would make it very plain to legislators, advisers, drafters, and courts where to direct their efforts and attention. This, however, is not the reigning convention in the UK (or any jurisdiction I am aware of), and for good reason. As the next chapter will explain in more detail, people communicate with each other content that goes beyond (or is somewhat different from) what their words alone state. They achieve this by relying on contextual information shared between the speaker and her audience, and a set of shared assumptions about how rational communication works. This reliance allows some things to go unsaid. Legal communication uses language in this way too.

Conventions of statutory interpretation in the UK recognise this and, while they give primary attention to the statutory text, they also direct interpreters to take into account a series of elements that make up the context of enactment—so-called 'aids to construction'. In a nutshell, conventions establish that Parliament's intention behind a statutory provision is the content that a sole rational legislator with knowledge of this legal system would, most likely, understand herself to be turning into law given the provision's text, read alongside the admissible aids. Given the number and complexity of the established conventions, it is impossible to exhaustively describe them here. In this chapter, I present only a brief overview.[89] In the next chapters, I incrementally zoom in on

[89] For more detailed expositions, see Cross and others (n 1) chs 5–6; Bennion and others (n 48) chs 16 and 24; Greenberg, *Craies on Legislation* (n 47) chs 26–

a subset of these conventions: chapter 3 looks at presumptions of legislative intent, and the remaining chapters analyse the reigning conventions pertaining to one such presumption (the presumption in favour of an updating approach to statutory interpretation, or 'always speaking' principle).

The convergence between canonical textbooks on statutory interpretation suggests that there is a large degree of official consensus on how courts should ascertain legislative intent. (This does not deny that the application of interpretive conventions can be difficult and controversial in hard cases.) Furthermore, the fact that these works are generally edited by Parliamentary Counsel suggests that the government and Parliament, through the advice of drafters, can form an accurate and detailed picture of current interpretive conventions to the extent that this picture is relevant to any given Bill or provision they are working on.

These works, which closely analyse the caselaw, stress the importance of paying close attention to the statutory language. This refers not only to the text of the specific provision under interpretation, though that is, of course, central. Rather, statutes 'must be construed as a whole', and '[g]uidance with regard to the meaning of a particular word or phrase may be found in other words and phrases in the same section or in other sections'.[90] Parts or components of an Act that may be relevant include its long title (which indicates the legislative purposes), headings, other sections (for example, interpretation sections), schedules, and preamble (whose inclusion is now rare). These are usually called 'internal' aids to construction.

27; VCRAC Crabbe, *Understanding Statutes* (Cavendish 1994) ch 4. This section draws on these works.

[90] Cross and others (n 1) 113.

In contrast, 'external' aids to construction relate to the context in which the Act was conceived, debated, and passed. Only sources that are publicly available can be admitted.[91] They may include articles or reports about the factual historical setting and the 'mischief' that the statute was aimed to remedy, dictionaries and practices from the time of enactment, pre-existing statutes on the same subject, and pre-legislative and legislative materials. Pre-legislative materials include, among other things, reports by committees and commissions (such as the Law Commission) recommending legal reforms, 'Green Papers' (which are consultation documents issued by the government to gather feedback on proposals for future legislation), and 'White Papers' (which are policy documents where the government sets out a proposal for future legislation). In turn, legislative materials include, among other things, the successive amendments made to a Bill throughout its passage through Parliament, committee reports, and—under certain conditions, explored in the next section—statements from legislative debates. Also relevant as part of the pre-existing landscape of the law are rulings where judges interpreted earlier legislation featuring terms that are repeated in the Act being interpreted now.[92] The idea is that these elements, which were before government and Parliament at the time a legislative proposal was crafted, debated, and voted on, can potentially shed light on its intended meaning. (It is only exceptionally that developments that took place *after* the enactment of an Act may be relevant to its interpretation. I am referring to the special case of Acts 'drafted on the basis of a particular interpretation of an earlier

[91] Bennion and others (n 48) 709.
[92] ibid 719–22.

one', where the content of the earlier Act is doubtful and the later Act can be read as containing an implicit interpretive directive in relation to the earlier one.)[93]

In addition to these internal and external aids, interpretive presumptions normally applied by courts are also a crucial part of the context in which statutes are enacted.[94] Because of their relevance to this thesis, presumptions are explored in detail in the next chapter. As I will explain there, some presumptions reflect how legal language is normally used, while others are underpinned by policies or values that Parliament is, in principle, presumed to intend to promote.

It is doubtful that courts ever interpreted statutes looking at their words alone, in complete isolation from their context.[95] There is, however, a 'trend towards an increasingly open, admitted and undisputed reliance upon context' by courts, with the aim of better understanding legislative intent.[96] The importance of the context and purpose of a statutory provision is thus well-established in the so-called 'modern approach' to statutory interpretation.[97] This allows drafters to simplify and shorten legislation, avoiding unnecessary complexity and prolixity without fearing that courts will adopt interpretations that are linguistically possible but 'substantively perverse … in the context … as … demonstrated by various kinds of evidence'.[98] This illustrates, once again, how conventions reflect and

[93] Diggory Bailey, 'The Legal Effects of Uncommenced Legislation' [2022] PL 427, 433–35; Bennion and others (n 48) 769–70.
[94] Cross and others (n 1) chs 5 and 7; Bennion and others (n 48) chs 20–23 and 26; Greenberg, *Craies on Legislation* (n 47) chs 19–20; Crabbe (n 89) ch 5.
[95] Cross and others (n 1) 50.
[96] Daniel Greenberg, 'All Trains Stop at Crewe: The Rise and Rise of Contextual Drafting' (2005) 7 European Journal of Law Reform 31, 42.
[97] *News Corp UK & Ireland Ltd v Revenue and Customs Commissioners* [2023] UKSC 7, [2023] 3 All ER 447 [27]. See also Goldsworthy (n 88) 80–81 (noting the similarities between the modern approach and the 1883 edition of Sir Peter Benson Maxwell's *On the Interpretation of Statutes*).
[98] Greenberg, 'All Trains Stop at Crewe' (n 96) 42.

impact on drafting techniques, and are not unilateral impositions by courts that bear no relation to Parliament's practices.

The UK Supreme Court recently indicated that external aids play a 'secondary role' in statutory interpretation, in contrast to the statutory language's status as 'the primary source by which meaning is ascertained'.[99] The Court stressed, however, that external materials may not only help solve ambiguities or uncertainties but also reveal some that are not apparent.[100] What they cannot do is 'displace the meanings conveyed by the words of a statute that, *after consideration of that context*, are clear and unambiguous and which do not produce absurdity'.[101] (Given these considerations, seeming suggestions in prior rulings that external materials should only be considered when the statutory text is ambiguous or unclear on its face[102] appear to be inaccurate.) In her separate judgment, Lady Arden emphasised further 'the wide role' that pre-legislative materials play in statutory interpretation and how, on occasions, this may 'go further than simply provid[ing] the background or context for the statutory provision in question'—it may, instead, 'influence its meaning'.[103]

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[99] *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* (n 11) [29]–[30] (Lord Hodge, with whom Lord Briggs, Lord Stephens, and Lady Rose agreed).
[100] ibid [30].
[101] ibid (emphasis added).
[102] See, for example, *Black-Clawson International Ltd v Papierwerke AG* (n 73) 613 (Lord Reid) (opining that '[i]n the comparatively few cases where the words of a statutory provision are only capable of having one meaning'—which was not thought to be the case there—'that is an end of the matter and no further inquiry is permissible').
[103] *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* (n 11) [58], [64]–[66]. See also Lady Arden, 'What Makes Good Statute Law: A Judge's View' (2022) 43 Statute Law Review 139, 147.

It is not possible to formulate with full precision and certainty the set of rules or patterns that govern the treatment of admissible aids by courts. Judicial reasoning is not algorithmic and, similarly to what happens in everyday communication, different aspects of the context of enactment are often appreciated in a holistic and sometimes unconscious way.[104] Moreover, the relevance of each aid will depend on the extent to which it reflects the text of the Bill in its final stage. Thus, for example, a proposal may have undergone so many changes in its pre-legislative and legislative stages that Green and White Papers may shed little or no light on its content.[105] It is up to courts to determine, in each case, each aid's relative weight and the specific purpose(s) for which it may be relevant, which may range from simply helping to understand the state of affairs that the statute was intended to remedy (sometimes called the 'mischief') to illuminating the intended meaning of a particular expression.[106]

It is clear that courts place less weight on unamendable parts of an Act, on which Parliament does not vote, such as headings and sidenotes.[107] Likewise, explanatory notes—which do not form part of Acts and are not endorsed by Parliament—are not considered authoritative evidence of Parliament's intent, though they are relevant to understanding what the government was trying to do when it proposed this legislation.[108] (This applies even more strongly to departmental guidance issued after an Act was enacted. Since these materials were not available to Parliamentarians during the debates, they cannot shed light

[104] Cross and others (n 1) 51.
[105] ibid 161.
[106] Bennion and others (n 48) 711–15.
[107] ibid 531; Cross and others (n 1) 131–33; 'Statutes and Legislative Process', *Halsbury's Laws of England* (2018) vol 96, para 277.
[108] Greenberg, *Craies on Legislation* (n 47) 1100–06; Bennion and others (n 48) 750–53.

on the choice that was open to all of them and endorsed by a majority.)[109] Moreover, given time constraints, explanatory notes can sometimes contain inaccuracies, in which case courts will rightly set them aside from their consideration.[110]

Future rulings—and their interaction with statutes subsequently enacted—may gradually provide greater certainty about the content and operation of these interpretive conventions. Knowledge about what matters are uncertain is in itself a kind of certainty for lawmakers, who are thus alerted to the need to clearly express things in the statutory text.[111]

(2) A More Detailed Example: The Use of Legislative Statements

Looking at the evolution of the conventions that regulate judicial recourse to the record of legislative deliberation ('Hansard') for the purposes of statutory interpretation illustrates the complexity of some interpretive conventions, their revisable status, and the kinds of considerations that motivate such revisions. I choose to focus in this section on the conventions regulating the use of Hansard not only because they are contested and have undergone recent changes, but

[109] See Greenberg, *Craies on Legislation* (n 47) 1113–14; and Daniel Greenberg, 'Humpty Dumpty Rides Again: Using Voluntary Guidance to Fill Gaps in Legislation' (2020) 41 Statute Law Review iii, iii–iv. See also Constitution Committee, *Higher Education (Freedom of Speech) Bill* (2022–23, HL 59), paras 8-11 (recommending that further clarifications be made in the Act itself or—failing this—in indicative guidance to be published early, and regretting that, in that case, 'guidance will not be produced before the Bill is enacted').
[110] Bennion and others (n 48) 751; Greenberg, *Craies on Legislation* (n 47) 1101 (n 47).
[111] See text accompanying n 53.

also because they relate to discussions about the very idea of legislative intentions.[112]

The traditional rule in the UK was that Hansard was not an admissible aid to statutory interpretation. This exclusionary rule was relaxed by the House of Lords in *Pepper v Hart*, decided in 1992.[113] The ruling held that recourse to Hansard is admissible if three conditions are met: (1) the Act is obscure or ambiguous, or leads to absurdity; (2) only statements made by a Minister or other promoter of the Bill can be considered, together with material necessary to understand the content and effect of such statements; and (3) such statements must be clear.[114] The fact that these materials are admissible (when the three requirements are met) does not mean that they will always be conclusive.[115]

Over time, these requirements have been interpreted very strictly, thus narrowing down the scope of the rule laid down in *Pepper v Hart*.[116] However, the decision has not been overturned and is still invoked by parties and considered by the courts.[117] It is clear, nonetheless, that relying on Hansard statements alone to support an interpretation would be an unsafe strategy for litigants. This goes

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112 (This is especially apparent in the points raised by Lord Steyn and Aileen Kavanagh that I mention below.)

113 *Pepper (Inspector of Taxes) v Hart* [1993] AC 593.

114 ibid at 634 (Lord Browne-Wilkinson).

115 Vogenauer (n 1) 657–65.

116 See ibid 642–46, 651–54 (describing 'the retreat' from *Pepper v Hart*).

117 See, for example, *Harding v Wealands* [2006] UKHL 32, [2007] 2 AC 1 [5]-[10] (Lord Woolf), [36]-[38] (Lord Hoffmann) (both opining that the statements invoked met the requirements and would have been considered had that been necessary to solve the case), [80]-[83] (Lord Carswell) (reasoning that resort to Hansard was justified in the case 'as a confirmatory aid'). For recent examples where the doctrine was invoked but its requirements were held not to be met, see *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* (n 11) [32]; and *R (Coughlan) v Minister for the Cabinet Office* [2022] UKSC 11, [2022] 4 All ER 351 [14]. Lower courts, in turn, regularly apply *Pepper v Hart*; see Vogenauer (n 1) 639–40.

for lawmakers as well: as Daniel Greenberg puts it, hopes 'that a point might be left at large in the legislation but "Pepper v. Hart-ed" during its passage through Parliament' are 'doomed to failure'.[118] This helps answer concerns that *Pepper v Hart* may cause future statutes to have more ambiguities and obscurities, either due to strategic behaviour or carelessness. The idea behind this concern is that executive officials and Parliamentarians might divert their attention away from the statutory text and focus, instead, on influencing or following what is said in the debates.[119] However, given how strictly courts have interpreted *Pepper v Hart*'s first requirement of admissibility, it is extremely unlikely that this rule may lead to poorer drafting.

Examining this and other objections that have been raised against *Pepper v Hart* illustrates the types of normative and practical considerations that may lead courts to adopt, revise, or discard interpretive conventions. In what follows, I briefly consider some of the main critiques found in the literature. Let me anticipate that I think that the current doctrine, which accepts recourse to Hansard when very strict criteria are met, strikes the right balance. This view, however, is independent from the central line of argument in my thesis—it is not a premise of my analysis of the updating presumption. If *Pepper v Hart* ceased to be law, this would affect how presumptions of legislative intent can be displaced since ministerial statements would cease to have interpretive weight. This would apply to the presumption in favour of updating as well, but there is nothing special about it on this point.

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[118] Greenberg, 'All Trains Stop at Crewe' (n 96) 42.
[119] See Johan Steyn, '*Pepper v Hart*; A Re-Examination' (2001) 21 OJLS 59, 69–70; Aileen Kavanagh, '*Pepper v Hart* and Matters of Constitutional Principle' (2005) 121 LQR 98, 106–07; Ekins (n 39) 272.

One common objection to *Pepper v Hart* is that this rule adds uncertainty and 'threatens to unsettle what is transparent to the community' since, rather than simply looking at the statutory text, now 'citizens and their advisers must refer to the record [of legislative deliberation] before concluding how the statute changes the law'.[120] However, the first requirement of *Pepper v Hart* is that the statutory text be somehow 'defective',[121] which means that it cannot provide the certainty that this objection says recourse to Hansard threatens. It is true that looking at Hansard may reveal defects that are not apparent from the text on its face. However, this may also happen with other aids to construction whose admissibility is uncontroversial. For example, taking into account a definition stipulated in an older statute or a judicial precedent may lead interpreters to consider the possibility that a certain expression may actually be a technical term whose meaning is less straightforward than they initially thought. Such aids help us reflect more carefully on what Parliament probably intended. Courts will have to balance the importance of this with the desirability of citizens being 'able to rely upon what they read in an Act of Parliament'.[122] This balance may look different in different cases, depending on the type of Act, its intended audience, and the applicable presumptions (such as the presumption in favour of a strict construction of criminal legislation).[123]

Another set of objections to *Pepper v Hart* is based on the principle of separation of powers and has been put forward by Lord Steyn and Kavanagh,

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[120] Ekins (n 39) 272.
[121] Vogenauer (n 1) 634.
[122] *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* (n 11) 398–400 (Lord Nicholls).
[123] ibid at 400 (Lord Nicholls).

among others.[124] They say that this rule equates ministerial statements with legislative intentions, and gives the executive the power to put forward an interpretation of a statute that will be binding upon courts. There are, thus, two aspects to this objection: one concerns the relationship between the executive and Parliament; the other, that between the executive and courts.

The first thing to note in response to these concerns is that Hansard statements are not recognised as authoritative but only as one admissible source to clarify doubts about the statutory text.[125] This does not deny, of course, that they may turn out to be decisive in cases in which they are not contradicted or outweighed by the rest of the evidence of Parliament's intent. It is true that Parliament does not control what the promoter of a Bill says and that legislators may not always be able to respond to those statements in a timely manner, so that the record reflects disagreement with them. Admittedly, statements are sometimes made before almost empty floors. Nonetheless, judicial recourse to Hansard does not diminish the central relevance of the statutory text or the level of control that Parliament has over that. Someone might argue that the reason why the statements of the promoter of a Bill were not contradicted in the debates may have been that other legislators trusted that the court would favour a different interpretation, which they preferred. Therefore, they may strategically have chosen not to say anything that could have led the executive to modifying the statutory text to rule this interpretation out.[126] I think our interpretive conventions should not promote this kind of strategic behaviour that seeks to exploit

[124] Steyn (n 119) 68; Kavanagh (n 119) 102–03.
[125] Vogenauer (n 1) 661.
[126] See Kavanagh (n 119) 105; William N Eskridge, Jr, *Dynamic Statutory Interpretation* (Harvard University Press 1994) 16–20.

misunderstandings among legislators. I believe, instead, that it is positive that our conventions give everyone incentives to be open and clear about what they understand, so that the 'message' they issue is, insofar as possible, a truly collective product.

The last objection to recourse to Hansard that I will consider is one on which I cannot give a definitive answer here. It concerns the balance between, on the one hand, the practical difficulties and costs of examining Hansard and, on the other hand, its usefulness, which may be limited to a relatively small number of cases. The claim is that the benefits do not justify the increased litigation expenses.[127] Without meaning to downplay the importance of this critique, it is worth noting that looking at other external aids (for example, old statutes on similar matters and rulings interpreting them) can create similar issues. Moreover, recourse to Hansard is easier with our current level of digitalisation. Finally, one reason why we can hope to find, on occasions, further clarity on the intended meaning of an expression in Hansard is that, in legislative debates, people can resort to repetitions, alternative formulations, and examples, techniques which would be out of place and potentially misleading if included in the statutory text.[128]

(3) Is Legislative Intent a 'Fifth Wheel on the Coach'?

After this succinct exposition of current interpretive conventions in the UK, let me address the view that we should abandon the idea of legislative intent and

[127] Steyn (n 119) 63–64.
[128] Greenberg, 'All Trains Stop at Crewe' (n 96) 41–42. See also Jenkins (n 49) (making similar points, but about explanatory notes).

concern ourselves only with these conventions.[129] According to this position, speaking of legislative intent adds nothing, since this abstract idea plays no practical role in statutory drafting and interpretation. This is misguided. Without a sound understanding of legislative intent, we would fail to understand why conventions matter, why we should have the conventions that we have, which ones we should revise or abandon because they are leading us astray, and which new ones we should incorporate to improve understanding among lawmakers and between lawmakers and courts.[130] Conventions are not fixed—they can be contested and improved. If we did not understand what they are supposed to help legislators arrive at (and, afterwards, help courts discover), we would lack the grounds to criticise them or suggest improvements.

A further issue that we would struggle to make sense of are situations where two conventions point to different interpretations.[131] In such cases, courts have to pay attention to any signs indicating which is the convention that Parliament seems to have relied on and which one it appears to have displaced. To understand this, we need to have a notion of legislative intent. Ultimately, what courts do when they interpret statutes would seem mysterious and arbitrary if we abandoned the idea of legislative intent—that is, the idea that the statutory text and the aids to its interpretation are the conventional vehicles through which lawmakers collectively settle on a series of policy and legal matters, and convey their joint choice.

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[129] See section II(2) above.
[130] Caleb Nelson, 'What is Textualism' (2005) 91 Virginia Law Review 347, 362; Goldsworthy (n 88) 90–91; Ekins and Goldsworthy (n 1) 42.
[131] Ekins and Goldsworthy (n 1) 43.

Moreover, speaking of legislative intentions and the importance of respecting them may contribute to keeping courts within the boundaries of their role. Once we refute sceptical claims, these boundaries no longer appear to be at the service of a fictional construction whose relevance seems mysterious since it is not even clear exactly what it is that we are talking about.[132] Abandoning the idea of legislative intent—or thinking of it as a judicial fabrication—risks obscuring the fact that courts are constitutionally obliged to attempt to discover and respect the law-making choices made by our democratically elected representatives.[133]

V. Existing Constitutive Accounts of Legislative Intent

This chapter has adopted a conventionalist, functionalist account of legislative intentions, and analysed the relevant conventions in place in the UK. I have cast aside the question of how legislative intentions are metaphysically constituted, to which different answers have been given. If pressed on this, I would tentatively say that group intentions are—as a matter of metaphysics—probably constituted, at least in part, by a structure of interrelated mental states of a certain kind held by the individual members of the group and certain actions performed by them.[134] However, as I said earlier, this thesis will not engage with the metaphysical questions of exactly what mental states and actions are relevant, and how they

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[132] ibid.

[133] See Philip Sales, 'In Defence of Legislative Intention' (2019) 48 Australian Bar Review 6, 17; Philip Sales, 'Legislative Intention, Interpretation, and the Principle of Legality' (2019) 40 Statute Law Review 53, 61; Dan Meagher, 'The "Always Speaking" Approach to Statutes (and the Significance of Its Misapplication in *Aubrey v the Queen*)' (2020) 43 University of New South Wales Law Journal 191, 211.

[134] Michael Bratman has put forward an account in this direction. For an introduction and a discussion of competing accounts, see Abraham Sesshu Roth, 'Shared Agency', *The Stanford Encyclopedia of Philosophy* (2017).

are combined or meshed. I will remain agnostic on this and will not assume or defend the truth of any single metaphysical account of group intent. Philosophers starkly disagree on this,[135] and matters may be even more difficult with complex groups like Parliament. In this context, it is a virtue of a conventionalist, functionalist account of legislative intent that it can avoid this thorny issue and focus, instead, on explaining how legislators can work together to decide what the law shall be.

In what follows, I will, however, briefly consider four metaphysical accounts of legislative intent that have been put forward and argue that none of them helps us answer the sceptical claims with which this chapter began. My own approach is more promising to this end.

(1) The 'Majority Model'[136]

One theory claims that legislative intentions are constituted by the coinciding individual intentions of the majority of legislators voting for a Bill. This takes us back to the problems stressed by Dworkin.[137] These include the epistemic difficulty (or impossibility) of accessing everyone's intentions and knowing how to aggregate conflicting ones, and the fact that often many (perhaps most or all) legislators will not have had any intention on a matter. We could rarely be confident in our conclusion about what the legislative intention was and, in many cases, we would have to say that there was no intention.[138]

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[135] See ibid.
[136] I take the name from MacCallum Jr (n 2) 777–78.
[137] Discussed in section II(1) above.
[138] MacCallum Jr (n 2) 778.

With good reason, administrative and judicial practices do not support the majority model.[139] Courts (and other officials) do not search for an overlap in the individual intentions of legislators. They do not, for example, go legislator-by-legislator trying to find statements by each on the point under dispute (either in legislative debates or any relevant documents), and then add them up to see what most of them thought. Both the reasoning behind *Pepper v Hart* and its detractors' arguments flatly dismiss this path as unacceptable.

In contrast, my account reflects what courts and other interpreters do, and it can deal with Dworkin's objections. I have argued that conventions can allow lawmakers (who are attempting to make a collective decision) and courts (who are attempting to retrieve it) to work around the difficult aggregation problems that Dworkin stresses. It is possible to develop conventions that attempt to direct everyone's attention to the same content (that inferable from the text of the Bill, when read in the light of the contextual sources and reasoning principles and processes conventionally designated as relevant). Conventions aim to do so at the drafting, debating, voting, and interpretive stages. They thus help frame collective deliberation to arrive at a joint law-making choice, and guide judges' attempts to discover what that choice was.

(2) <u>Raz's 'Minimal Intention to Legislate'</u>

Raz's theory of what he calls the minimal intention to legislate can be seen as a variety of the majority model. However, his theory avoids the difficulties just discussed because it is based on an intention that is so thin that we can expect

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[139] ibid.

to find it in all or most legislators who vote in the majority.[140] Thus, the problems of accessing mental states and aggregating conflicting ones do not arise. According to Raz, 'the minimal intent required for an act to be a legislative act' is the intention held by each legislator 'that the text of the Bill on which he is voting will—when understood as such texts, when promulgated in the circumstances in which this one is promulgated, are understood in the legal culture of this country—be law'.[141] The legislature's intention is made up of these coinciding individual intentions, which Raz describes as 'very minimal' because, while they 'identify the law being enacted', they need not do so 'through a comprehensive statement of its content'.[142] Rather, the intentions merely point to the statutory text and the interpretive conventions prevailing in the time and place of its enactment.[143]

This account has been criticised for being so minimalist that it has no relevance to statutory interpretation.[144] When courts, other officials, lawyers, and commentators speak of the legislative intention behind an Act, they are not referring to the mere intention to pass a statute (to be interpreted like those kinds of instruments are) but to the policies and legal propositions that the statute enacts.[145] Raz readily acknowledges this and notes that his account 'is not itself a method of interpretation. Rather, it refers the courts to the conventions of

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[140] Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 281, 284.
[141] ibid 284–85 (footnote omitted).
[142] ibid 284.
[143] ibid 286, 298.
[144] Aharon Barak, *Purposive Interpretation in Law* (Sari Bashi tr, Princeton University Press 2005) 263; Brian Bix, 'Questions in Legal Interpretation' in Andrei Marmor (ed), *Law and Interpretation: Essays in Legal Philosophy* (Clarendon Press 1997) 143.
[145] Barak (n 144) 263; Neil Duxbury, *Elements of Legislation* (CUP 2013) 108.

interpretation prevailing at the time of legislation'.[146] As he succinctly puts it, according to his theory, '[i]ntention legitimates, but conventions interpret'.[147]

Raz is concerned with a prior matter. He is explaining the necessary connection—denied or doubted by some—between recognising legislation as a source of law and interpreting legislation in accordance with the intentions of its authors.[148] For him, '[i]t makes no sense to give any person or body law-making power unless it is assumed that the law they make is the law they intended to make'.[149] He is contesting theories of interpretation that fail to recognise this.[150] The notion of intent that he needs for this is one that ensures that legislators make the law they intend to make and know how to discover its content if they want to.[151] The minimal intention to legislate, despite its thinness, is enough for these purposes.

Raz's notion does not seem enough, however, to refute the claim that what courts identify as the legislative intention behind a statute (which is thicker than the minimal intention and includes concrete legal propositions designed to fulfil one or more purposes) is a judicial fabrication. His account does not explain how that intention and the conventions it points to relate to the substantive policy and legal choices made by lawmakers. Neither does it answer the claim that the idea of legislative intent is superfluous because interpretive conventions are all that matter to statutory interpretation—in fact, Raz appears to encourage that view.

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[146] Raz (n 140) 288.
[147] ibid 298.
[148] ibid 288; Bix (n 144) 143.
[149] Raz (n 140) 274.
[150] ibid 288.
[151] ibid 284–85.

As Ekins notes, 'Raz's "conventions-settle-all" account is very thinly made out' and he offers no examples of interpretive conventions.[152] In his theory, which conventions happen to be in place appears to be an entirely contingent fact. This does not sound right. Raz appears to 'assum[e] that the conventions do not refer to the intention of the language user' but the other way around.[153] Consider Raz's hypothetical example of a lawmaker who wants to turn a religious sect's mystic code for the interpretation of sacred texts into the method of statutory interpretation applicable in that jurisdiction.[154] Perhaps because Raz's scope is universal and his theory tries to be relevant to all legal systems (possibly including systems where legislators act more like oracles than policy-makers), Raz does not speak of the inadequacy of this move. Unlike the aids to construction I discussed above, the mystic code is in no way related to the set of policy, legal, and linguistic choices that lawmakers make when they craft and enact a statute. Raz's account fails to explain this. It appears to treat interpretive conventions as something that officials are free to change in any direction, rather than as vehicles that allow legislators to aggregate their individual goals, beliefs, and so on into a set of collective choices (substantive and linguistic ones), and that allow courts to retrieve such choices. If the conventions designate as relevant objects that bear no relation to—and, therefore, cannot shed light on—the policies, strategies, and assumptions behind the statutory text, they cannot do their job properly. Note that Raz's theory is not necessarily incompatible with this understanding of conventions; rather, its problem is that it is underdeveloped.

[152] Ekins (n 39) 187.
[153] ibid 188.
[154] Raz (n 140) 286.

A related issue that Raz does not address is what happens when conventions fail to give a single, clear, and precise conclusion, perhaps because different conventions of the same hierarchy point to different conclusions about what Parliament is likely to have intended.[155] In such cases, conventions alone do not settle which conventions displace others. Instead, interpreters have to reflect on what it appears that Parliament chose to do with such conventions—namely, relying on, or casting aside, one or more of them.

On the other hand, I will not examine here whether Raz's metaphysical and empirical assumptions are correct—that is, whether the legislature's intentions are made up (as a matter of metaphysics) of the aggregation of each legislator's minimal intention to legislate, and whether (as a matter of fact) all legislators who vote for a Bill hold that intention. My thesis does not make these assumptions, but neither does it seek to refute them.

(3) The 'Agency Model'[156]

A third theory argues that legislatures delegate specific responsibilities to certain individuals (such as drafters) and that these individuals' intentions (on the specific matters delegated to them) make up the legislature's intentions.[157] This adopts a principal-agent model, according to which when the principal intends to rely on the judgment and understanding of an agent, the agent's mental states count as those of the principal because the principal decided to stand behind them (and intended interpreters to discover and follow them).

[155] See Ekins (n 39) 187–88.
[156] The name is taken from MacCallum Jr (n 2) 780.
[157] ibid 780–82.

An obvious drawback of this approach is that it does not solve the problem but only pushes it back. In order to conclude that the legislature intended to delegate a matter to someone, we need a theory of legislative intentions, so we are back where we started.[158]

Furthermore, these delegations would presumably take different forms at different times (even within the same statute or provision, regarding different aspects of it), so we would need multiple accounts to explain the legislative intention behind each statute or provision.[159] The resulting explanation (assuming one could be put forward at all) would be remarkably complex and context-sensitive.

I think this last point extends beyond the agency model. It is a general obstacle for any attempt to offer an account of the metaphysical constitution of legislative intent. It seems unlikely that there is a single answer that works in all cases of law-making and for all provisions, unless it is pitched at such a high level of abstraction that it does not help us much. Parliament is a very complex group, with different people who perform different tasks and have different responsibilities. Moreover, it does not treat all Bills and all clauses equally—that is, those tasks and responsibilities are carried out differently in different cases. The answer to the metaphysical question may well vary depending on how the particular provision at stake was enacted. For example, a core clause in a high-profile Bill may have been carefully read and discussed by all legislators, and—after the debates—most of them may have arrived at the same understanding of what it communicates (whether they voted for or against the Bill). In contrast,

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[158] ibid 782; Duxbury (n 145) 104.
[159] MacCallum Jr (n 2) 783.

minor clauses of less prominent Bills may not even have been read by the Minister promoting them—they might have been left entirely to the drafter's judgment. I am only speculating here, but it might be that, in the former situation, the mental states metaphysically relevant to the constitution of Parliament's intention will be the intention held by most legislators to turn a particular set of propositions into law. In contrast, in the latter situation we will have to look elsewhere. There, the relevant mental states might be those of the drafter on whose judgment most legislators relied when they acted on a thinner, Razian intention.

(4) Ekins' Group-Based Account

Ekins' account of legislative intent draws on Bratman's metaphysical account of shared intentions. For Bratman, shared intentions are made up of certain attitudes held by individual participants—more specifically, their intentions to act together with the rest—which are related to each other in a certain way.[160] These individual intentions do not merely coincide—they 'interlock', in the sense that they are partly dependent on each other (*A*'s intention that she and *B* do *X* together is partly explained by *B*'s intention with the same content).[161] For Bratman, the intention to act together with others entails the intention to mesh our respective subplans and revise them if necessary.[162]

This analysis (focused on simple groups that, unlike Parliament, do not have institutional structures or authority relations) is Ekins' point of departure.[163]

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[160] Bratman, *Faces of Intention* (n 38) 111–12, 115.
[161] ibid 118–19.
[162] ibid 120–21.
[163] ibid 120.

With Bratman, Ekins understands group intentions not as ‘a mental state existing in any one mind’ but as ‘a state of affairs that arises when two or more persons hold a particular set of interlocking intentions’.[164] This is the intention held by each member to adopt and act on the common ‘plan of action that coordinates and structures the joint action of the members of the group’.[165] In the case of the legislature, this is the intention held by each legislator to legislate together with the other legislators according to the established procedures—that is, the intention ‘to act on the proposal’ set out in the Bill ‘when a majority votes for it’.[166] In Ekins’ view, this intention is held by all legislators and not just those who vote for a Bill with the majority.[167]

According to him, from these interlocking individual intentions arises Parliament’s (group) intention ‘to choose to adopt proposals that are put before it and for which a majority of its members vote’.[168] This is a ‘standing intention’—it is the ‘general intention to use certain procedures to determine … particular intentions: that is, the group’s general plan to select particular plans’.[169]

In turn, a group’s particular intention on any given occasion is the plan (or ‘means-end package’) that it adopts on that occasion, following its procedures.[170] In the case of the legislature, its particular intention when enacting a statute is ‘the plan that the statute … is to set out for the community’, which consists of ‘a set of propositions adopted for reasons as a coherent means to the end of certain

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[164] Ekins (n 39) 54, citing Bratman, *Faces of Intention* (n 38) 111.
[165] Ekins (n 39) 47; see also ibid 52–53.
[166] Ekins (n 39) 13, 220–22.
[167] ibid 13, 51–52, 110.
[168] ibid 230.
[169] ibid 58.
[170] ibid.

valuable states of affairs'.[171] This, according to Ekins, is what courts commonly refer to as the 'legislative intent' behind an Act.[172]

Thus, unlike Raz, Ekins does not equate legislative intent to the individual intentions of legislators. He dismisses as 'unsound' Raz's 'assumption that the legislature's intention must be an intention held by each legislator … in the majority'.[173] Ekins claims, instead, that '[t]he legislature acts on intentions that are formed in part by, but also do not reduce to' the intentions held by (all) legislators.[174] The legislature is thus 'capable of acting on an intention that is much more detailed and specific than that held by most individual legislators'.[175] This is the intention 'to change the law in the specific ways and for the specific reasons that the bill proposes'.[176] Thus, in contrast to Raz's thin account, the legislature's action is, for Ekins, 'intentional under a means-end description'.[177]

People have criticised Ekins' account for focusing on an idea that is so abstract that it has no practical relevance for courts interpreting statutes.[178] As I said above, I think this is to be expected of metaphysical accounts of legislative intent. This does not mean that such accounts have no value but only that they are not helpful in answering some of the objections raised against judicial references to legislative intentions.

Nothing in the conventionalist, functionalist account I adopt is necessarily incompatible with Ekins' explanation of the underlying metaphysical truth of group

[171] ibid 230.
[172] ibid.
[173] ibid 114.
[174] ibid 56, 114.
[175] ibid 13.
[176] ibid 230.
[177] ibid 136.
[178] Laws (n 8) 4; Sir John Laws, 'Publication Review' (2016) 132 LQR 159; Burrows (n 1) 19.

intent in general or of legislative intent in particular.[179] However, my goal is not to contribute towards such an explanation but to develop an account that can meet the objections raised at the beginning of this chapter. Therefore, as with Raz's account, I will not attempt to examine whether Ekins' account is philosophically sound. Nonetheless, it is interesting to note that Ekins himself is also, to a significant extent, agnostic about the ultimate metaphysical details of group intent. He indicates that he finds Bratman's approach more persuasive than alternative ones like John Searle's and Margaret Gilbert's, according to whom group intentions cannot be explained in terms of individual intentions.[180] However, he acknowledges that he has not proven the truth of Bratman's theory and states that, even if further analysis showed it to be mistaken, he does 'not think [his own] account of the structure of group action would require radical revision' since the disagreement occurs at a foundational level.[181]

While I will not attempt to argue that Ekins' account is incorrect from a metaphysical perspective, I do think that it struggles to bring home the reality of legislative intent against sceptical objections that dismiss it as a 'non-existent chimera' or a 'fig-leaf' that tends to 'mask the true reasoning and power of the courts'.[182] His portrayal of Parliament's intention behind each statute as something fully reasoned, detailed, and specific risks encouraging this perception. Critics have argued that his account turns the legislature into 'a sort of omniscient Leviathan'—it is not 'the group agent of a peculiar legislature, but

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[179] Moreover, I have drawn—when building my own conventionalist account—on important insights contained in the work of Ekins, for example on the division of expertise and labour within Parliament, and the mechanisms to avoid collectively irrational outcomes (on which see n 39 and 80 and accompanying text).
[180] Ekins (n 39) 53–54.
[181] ibid 57.
[182] Laws (n 8) 1; Burrows (n 1) 17–19.

rather … the fiction of an omniscient legislature behind the whole of the legal system: one who knows everything in the law'.[183] This, in turn, may lead us to underestimate the degree of discretion and creativity that judges exercise when they interpret statutes. In the following chapters, I emphasise aspects of this discretion and creativity, and part ways with Ekins' views about the presumption that is at the centre of this thesis (that in favour of an updating approach). The robustness of Ekins' notion of legislative intent is caused by his demanding standard of what it means to legislate well, and his questionable claim that a theory of legislative action and intent must be able to explain how a legislature can exercise legitimate authority.[184]

VI. Conclusion

This chapter explained how, through the development of a set of conventions shared with courts, lawmakers can act together to make a unified legal and policy choice that will be conveyed on behalf of Parliament as a whole if the Bill is passed. Interpreters will attempt to retrieve this choice following those same conventions. The idea of legislative intentions is sometimes described as a 'fiction', but there is nothing fictional about the way these conventions guide the behaviour of lawmakers and interpreters.

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[183] Corrado Roversi and Alessio Sardo, 'Ekins on Groups and Procedures' (2019) 64 The American Journal of Jurisprudence 79, 85–86.
[184] See Ekins (n 39) 112.

CHAPTER 3: Presumptions of Legislative Intent

I. Introduction

This chapter looks at one subset of the conventions discussed in the previous chapter. This is made up of what are commonly referred to as 'presumptions of legislative intent'. The following quote, taken from the discussion of presumptions in *Cross on Statutory Interpretation*, is a helpful point of departure: 'Statutes often go into considerable detail, but even so allowance must be made for the fact that they are not enacted in a vacuum. A great deal inevitably remains unsaid. Legislators and drafters assume that the courts will continue to act in accordance with well-recognised rules'.[1] This passage stresses that a significant part of the content conveyed by a statute is left 'unsaid'. It also highlights the role that the context in which the statute is enacted plays in this phenomenon and, in particular, the importance of 'well-recognised rules' that are shared (and known or assumed to be shared) between legislators (or, more likely, drafters and legal advisers) and courts.

In this chapter, I draw on the work of linguists to present a very basic framework within which to understand these ideas (section II). I then examine how what courts and commentators commonly refer to as 'presumptions of legislative intent' fit within that framework (section III). In doing so, I distinguish between two kinds of presumptions: mere canons of construction and presumptions based on constitutional principles. Finally, I argue that despite the

[1] Sir Rupert Cross and others, *Cross: Statutory Interpretation* (3rd edn, Butterworths 1995) 165.

important differences between these two, both are compatible with respecting Parliament's intentions (section IV). This means that an interpreter relying on either kind of presumption (provided that it is well-established) can be said to be genuinely trying to ascertain what Parliament intended to convey, rather than trying to impose a different content.

I should note from the onset that the presumption that is the central focus of this thesis—that Parliament intends statutory provisions to be interpreted in an 'updating' way, unless it indicates otherwise—is a canon of construction in the distinction drawn above. To understand the nature and operation of that presumption (which I analyse in the following chapters), it is helpful to have a general picture of what presumptions of legislative intent are, as well as clarity on the differences and similarities between canons of construction and constitutional presumptions. Any disagreements that readers may have with my account of constitutional presumptions should not, however, affect their response to the main line of argument in my thesis, since the updating presumption is not of the constitutional kind. For this reason, this chapter does not attempt to offer a full analysis and defence of how courts treat constitutional presumptions, but only touch on aspects that are relevant to understanding, by contrast, the updating presumption.

II. Semantics, Pragmatics, and Maxims of Conversation

Philosophers of language draw a distinction between what a speaker says, which is the content that is encoded in the meaning of the words she utters, and what

she means by saying it, which is the content that she intends to communicate.[2] This distinction was first introduced by Paul Grice.[3] The field of linguistics called 'semantics' is concerned with understanding what speakers say, whereas 'pragmatics' studies how a speaker can convey content that is narrower, broader, or somewhat different from what her words alone state. For example, a professor who says that 'some of the students did well in the exam' usually means that not all of her students did well, despite the fact that, as a matter of logic, the claim that some students did well is perfectly compatible with all of them having done well.[4] Similarly, someone who says 'I am ready' intends to communicate something that goes beyond the (incomplete) meaning of her words, which fail to state what she is ready for.[5]

The meaning semantically encoded in an utterance has been described as a 'template'[6] or a 'blueprint'[7] which the speaker exploits in order to convey her intended meaning. The semantically encoded meaning (or, rather, the speaker's grasp of that meaning, and her knowledge of the hearer's grasp of it) constrains but does not fully determine what speakers can intend to communicate when using these words. In the examples above, an important part of the content that the speaker intends to communicate can only be accessed by her audience

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[2] For the sake of simplicity, I will refer only to speakers and hearers, but everything I will explain is extensible to writers and readers.

[3] Paul Grice, 'Logic and Conversation' in Peter Cole and Jerry Morgan (eds), *Syntax and Semantics*, vol 3 (Academic Press 1975), reprinted in Paul Grice, *Studies in the Way of Words* (Harvard University Press 1991) ch 2.

[4] Robyn Carston, 'Legal Texts and Canons of Construction: A View from Current Pragmatic Theory' in Michael Freeman and Fiona Smith (eds), *Law and Language: Current Legal Issues*, vol 15 (OUP 2013) 9.

[5] ibid 10.

[6] ibid 13.

[7] Stephen Neale, 'The Intentionalism of Textualism' (unpublished manuscript, 2009) 31.

through an inferential process. This process may consist in inferring a proposition that is somewhat different from the one uttered (in the professor's example, 'not all' rather than 'some'). In other cases, the process is one of enriching or adjusting the meaning of the words or expressions uttered—that is, fleshing out, narrowing down, or broadening the linguistically encoded meaning after having decoded it (in the 'I am ready' example, inferring what the speaker is ready for).[8]

What makes this inferential process possible? Linguists working in the field of pragmatics argue, following Grice, that this is achieved because speakers and hearers exploit so-called 'maxims of conversation'. These maxims are principles that are thought to govern rational communicative behaviour, and to be knowingly shared between speakers and hearers (unless the speaker overtly indicates a departure from them). As Carston puts it, 'Grice's maxims are framed as injunctions to the speaker to produce utterances which meet certain standards of informativeness, relevance, truthfulness, and orderliness'.[9] How many of these maxims exist and what their content is remain disputed facts, which will not be examined here because these are empirical question addressed to linguists. Current neo-Gricean pragmatics, for instance, presents two maxims as the two fundamental ones (based on Grice's original formulation): 'say as much as you (truthfully and relevantly) can' and 'say no more than you must'.[10] In turn, a rival view called 'Relevance Theory' argues that there is only one fundamental principle, of which the neo-Gricean maxims described above are but superficial manifestations.[11]

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[8] Carston (n 4) 13.
[9] ibid 24.
[10] ibid 13–14.
[11] ibid 16. For an account of this theory, see ibid 27–32 and the sources quoted there.

Regardless of which taxonomy and formulation of the conversational maxims is to be preferred, an essential characteristic of such maxims is that they capture 'standards of communicative behavior that we are entitled to expect from rational agents'.[12] Suppose, in the 'I am ready' example, that the speaker and the hearer are dressing up for a party that is to begin shortly. Assuming the speaker to be rational will lead the hearer to conclude that the speaker meant that she is ready to go to the party (as opposed to, for example, being ready to submit a paper about which they had talked three days ago). In other words, the hearer assumes that the speaker probably intended to exploit background information shared between the hearer and the speaker—that is, that she intended to let the scene 'speak for itself', saving her the trouble of having to add more words to her utterance in order to make her intended meaning clear. Following the maxims would have led the speaker to have added such words if they had been necessary. Therefore, the hearer concludes that they were not, and that the scene does indeed speak for itself.

Another important characteristic of these maxims is that some of them are regarded as fundamental.[13] Other, more specific ones are derived from them. Examples of derivative maxims include 'do not say what you believe to be false' and 'express information in an orderly way'.[14] In some cases, the derivation of specific maxims from fundamental ones is done taking into account contextual facts about a certain communicative situation (or type of situation) and about specific speakers and audiences (or types of them). In the legal setting, courts

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[12] Carston (n 4) 13.
[13] (As I said above, according to Relevance Theory only one of them is fundamental.)
[14] Grice, *Studies in the Way of Words* (n 3) 27.

have derived a series of specific, 'local' maxims—which they call 'presumptions' or 'canons of construction'—from fundamental conversational maxims and facts about legal practices. Well-known examples of these presumptions or canons—which are sometimes given Latin names—include *ejusdem generis* (according to which general words following a list of specific things or matters are restricted to things or matters of the same kind as those listed), and the presumption that 'a word has the same meaning throughout an Act, and that where different words are used in an Act they have different meanings'.[15] These are the kinds of presumptions I examine in more detail in section III(1) below. In turn, I will argue later on that constitutional presumptions (which I consider in section III(2)) have a different origin, but—once they become well-established—also act as conversational maxims, though maxims that are particularly difficult to displace.

I do not mean to suggest that when courts derive canons of construction they do so using Gricean terms explicitly. They do, however, infer these canons by reflecting on what a rational lawmaker would have intended to convey given the words and structure that she chose in the statute she enacted, in the context in which she enacted it. They also reflect, conversely, on what other words she would have chosen if she had intended to convey something different. Robyn Carston has shown how, for example, the canon *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of the other) can be seen as a subclause of the two neo-Gricean fundamental maxims.[16]

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[15] Cross and others (n 1) 134–37; Francis Bennion and others, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020) s 21.3, 23.2-23.9.
[16] Carston (n 4) 17–18.

The attention that this chapter pays to presumptions should not be read as suggesting that all, or most, judicial statutory interpretation is based on their application. To the contrary, a great deal of cases (probably, a significant majority of them) are dealt with without judges' invoking specific formulations of these maxims. When analysing statutory texts, judges usually only ask themselves what a rational and reasonable lawmaker would intend to communicate given the enacted words and the public context of enactment (for example, the pre-existing state of the law that this enactment modifies or complements). Looking at the text and the aids to construction, judges discard interpretations that fail to make sense of the words chosen in the context in which they were chosen. Even in this situation, however, there still is at work a reliance on the most fundamental conversational maxims, in the sense that courts assume Parliament to have acted like a rational agent who exploits context to convey more than (or something somewhat different from what) its words alone say. In contrast, the reliance on the more specific formulations of maxims that have become crystallised over time is less common, but by no means rare.

Before moving on, I should note that the claim that Parliament relies on the pragmatic context of its enactments to convey meanings that are somewhat different from what the enacted words alone would suggest (together with the more specific claim that Parliament follows the maxims of conversation described above) is not universally accepted. Andrei Marmor, for one, believes that scenarios in which 'it is quite obvious that the content the legislature prescribes is not exactly what it says … would be very rare.'[17] He argues that the maxims of

[17] Andrei Marmor, 'The Pragmatics of Legal Language' (2008) 41 Ratio Juris 423, 429.

conversation apply only to situations 'where the purpose of the participants is the cooperative exchange of information', and stresses that the legislative context features 'a non-cooperative form of communication'.[18] In his view, law is 'typically a form of strategic behavior', in the sense that '[l]egislators may wish to create the impression that they are doing one thing—e.g., seriously restricting campaign finance contributions—while actually trying to do the opposite—allowing such contributions to flow freely but less transparently'.[19] It follows from this, according to Marmor, that it is doubtful that Gricean maxims of conversation are applicable to legislation.[20]

A preliminary problem with this view is that it focuses on certain kinds of mental states held by individual legislators—such as their personal ulterior motives or the impressions they hoped to give—which are irrelevant to the question of what Parliament intended when it enacted a statute. This should be clear from my discussion in the previous chapter. Conventions of statutory interpretation place no weight on those kinds of mental states, which are not relevant to the unified choice that legislators collectively made and conveyed (even though they may explain why each individual legislator acted like she did).

More directly relevant to this chapter is what follows from that—namely, Marmor's doubtful claim that the enactment of legislation (including its promulgation, so that citizens and officials can know its content, and abide by and apply it) is not a 'cooperative' kind of communicative situation. As Carston points out, Grice adopts a thin notion of 'cooperation', and his maxims are meant to be applicable even to situations where, for example, someone is trying to influence

[18] ibid 435, 438.
[19] ibid.
[20] ibid.

others or people are quarrelling.[21] The reason why these scenarios (as well as the law-making one) are cooperative forms of communication (though 'in a perhaps somewhat attenuated sense') is that 'the producer of the language wants to get a certain meaning across to an audience and the audience wants to grasp that meaning'.[22] Of course, if the interpretive task is seen from the perspective of two warring litigants making their cases, each will have an interest in construing and defending interpretations (however strained) that serve her purposes. This, however, does not mean that Parliament and its intended audience do not have reciprocal communicative goals. It only means that hearers will sometimes have incentives to try to distort the message that the speaker has conveyed to them, to advance their interests.

Finally, works on statutory drafting and interpretation are full of examples of the extent to which Parliament relies on the context of its enactments to convey its law-making intentions, as I discussed in the previous chapter when examining what elements make up that context. This context includes the presumptions that I analyse next.

III. Two Kinds of Presumptions of Legislative Intent

Courts and commentators sometimes use the expressions 'presumptions of legislative intent', or 'canons', 'rules', or 'principles' of interpretation or construction in a general manner, to refer to what are in reality two different kinds of things.[23] For the sake of clarity, I will use the labels 'canons of construction'

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[21] Carston (n 4) 17, citing Grice, 'Logic and conversation' (n 3) 45.
[22] Carston (n 4) 17.
[23] See, for example, *J v Welsh Ministers* [2018] UKSC 66, 2020 AC 757 [24] (referring to the principle of legality—which is a 'constitutional presumption' in my distinction, as discussed below—as 'a fundamental principle of statutory

and ‘constitutional presumptions’ to draw this distinction, rather than use the former as an umbrella term that includes the latter. On the other hand, I will use the expression ‘presumptions of legislative intent’ (or just ‘presumptions’) to refer to both kinds of presumptions together.

These two kinds of presumptions differ from one another in relation to three main variables: (i) their origin; (ii) their rationale and purpose; and (iii) their weight and defeasibility. These variables are sketched in the following table and developed in more detail throughout this chapter.[24] A fourth aspect in relation to which these two kinds of presumptions can be contrasted is by looking at their relationship to legislative intent—in particular, the reasons why each kind of presumption can be said to be compatible with Parliament’s intentions and, ultimately, with parliamentary sovereignty. This will be analysed in section IV below.

In drawing this distinction, I do not mean to suggest that the boundaries between these two kinds of presumptions are always clear and fixed. Moreover, presumptions can become stronger or weaker over time, as I will illustrate below when discussing some recent cases.[25]

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construction’); and Philip Sales, ‘A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998’ (2009) 125 LQR 598, 601 (using the expression ‘established principle[s] of construction’ to refer to presumptions based on constitutional principles, such as ‘that general words in a statute do not serve to bind the Crown’).

[24] For a brief conceptualisation of the distinction, see Luciana Morón, ‘Presumptions of Legislative Intent in *R (Coughlan) v Minister for the Cabinet Office*’ (2023) 86 MLR 801.

[25] In section III(3).

	Canons of Construction	**Constitutional Presumptions**
Origin	Communicative: they are derived by courts from the assumption that Parliament uses language rationally.	Extra-communicative: they are derived by courts from common law values that they identify as fundamental and as normally respected by Parliament.
Rationale and Purpose	They allow Parliament to communicate its intended meaning without the need to expressly state every aspect of it.	They aspire to help to make sure that lawmakers do not inadvertently legislate against values protected by constitutional principles.
Weight and Defeasibility	They are easily displaceable by textual or contextual evidence of a contrary intention. Their application does not usually lead to straining the statutory words.	They are hard to displace. In absence of clear and specific words (or necessary implication), they may lead interpreters to strain the statutory text.

(1) Canons of Construction

(i) Origin

I have already mentioned that courts infer canons of construction by taking into account the way rational agents generally use language (which linguists have tried to crystalise in maxims), as well as facts about parliamentary practices and past enactments. These canons correspond to 'habits of composition … acquired by Parliamentary draftsmen which are familiar to professional lawyers and to the courts'.[26] Judges have observed that drafters are unlikely to depart from these

[26] *Prestcold (Central) Ltd v Minister of Labour* [1969] 1 All ER 69 [96], cited in Daniel Greenberg, *Craies on Legislation* (12th edn, Sweet & Maxwell 2020) 930–31.

habits, many of which correspond to 'general rules of composition which any writer seeking clarity of expression is likely to follow, such as *expressio unius exclusio alterius*' (the expression of one thing is the exclusion of the other).[27] In contrast, other habits of composition are peculiar to legal drafters and 'less widely shared by other kinds of writers or not shared by them at all'.[28] An example of this is 'the habit of a legal draftsman … to eschew synonyms', from which courts have derived the presumption that if legal drafters use different words, they are referring to different things or concepts.[29] This does not normally happen in ordinary speech, where hearers are likely to not even notice when a speaker uses a synonym rather than the exact word she had used in previous occasions.

Some canons have a more substantive component, which takes into account law-making choices that Parliament has made in the past as well as other pre-existing legal rules, such as those established by precedents. These canons are inferred from general patterns observable from these pre-existing rules, and are based on the assumption that a rational speaker normally intends any new communicated content to be coherent with what has been said or assumed in the past, unless she disavows (either expressly or implicitly) that past content. Based on this reasoning, we may assume that pre-existing legal propositions that are not repealed or amended (either expressly or implicitly) remain in place and are taken for granted by Parliament. For example, courts have noted from very early on that 'it is the general—… [one] might … say, the inevitable—practice of the legislature to leave unexpressed some of the mental elements of crime'.[30] In

[27] *Prestcold (Central) Ltd v Minister of Labour* (n 26) [96]–[97].
[28] ibid [96].
[29] ibid.
[30] Cross and others (n 1) 165, citing Stephen J's judgment in *R v Tolson* (1889) 23 QBD 168, 187.

particular, 'competent age, sanity and some degree of freedom from some kinds of coercion are assumed to be essential to criminality', but they are not normally 'introduced into any statute by which any particular crime is defined'.[31] Another example is the presumption that a statute does not remove property rights without compensation (unless it clearly indicates otherwise). According to courts, this principle 'flows from the fact that Parliament seldom intends to do that and therefore before attributing such an intention to Parliament we should be sure that that was really intended'.[32]

As the quotes in the previous paragraphs illustrate, courts often explicitly point out that these presumptions are part of the background in which Parliament does its job. They are thus understood and presented by courts as already at work during the law-making process. They are not meant to constrain or regulate that process, or to impose external values on it, but only to help to understand its functioning and outcomes. The idea is that Parliament works with these assumptions in the background and expects courts to notice and respect that, and that courts apply them because they know this. The significance of the fact that these presumptions were first announced by courts rather than by Parliament itself will be analysed in section IV below.

To the extent that these presumptions track the way legislation is drafted, they may change over time with parliamentary practices. Drafters note that 'drafting conventions change over time, partly due to developments in the use of language and in the law'.[33] It has been observed, for example, that '[t]he old

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[31] Cross and others (n 1) 165.
[32] Lord Reid's judgment in *Westminster Bank Ltd v Minister of Housing and Local Government* [1971] AC 508, 529, cited in Greenberg (n 26) 895.
[33] Diggory Bailey, 'Bridging the Gap: Legislative Drafting Practice and Statutory Interpretation' [2020] PL 220, 228

doctrine of construing legislation by proceeding upon the "equity of the statute" was common and appropriate for the manner in which earlier Acts were framed … but is no longer used'.[34]

(ii) Rationale and Purpose

Interpretive presumptions have been described as 'a safety net' against which drafters and judges do their jobs.[35] They are the background or default rules that new Acts complement, modify, repeal, or leave untouched. The previous chapter examined the role that these and other conventions play in the formation of unified parliamentary intentions. In turn, from the perspective of interpreters (including citizens, lawyers, executive officials, and—ultimately—courts), canons of construction serve as rules of thumb or guides to ascertain what Parliament probably intended.[36] Canons that are mainly concerned with formal aspects of linguistic usage are 'specifically directed to the understanding or interpretation of the language comprising legal texts'.[37] They will orient interpreters as to, for example, whether a list of items should be treated as closed or as merely illustrative, or whether two expressions should be regarded as synonyms or as designating slightly different concepts. In turn, more substantive canons serve a gap-filling function and allow interpreters to identify the legal propositions that the words of the statute fail to state but that Parliament appears to have taken for

[34] Greenberg (n 26) 123; see also sources quoted there.
[35] Helen Xanthaki, *Drafting Legislation* (Hart Publishing 2014) 327.
[36] Bennion and others (n 15) 627–28, citing Lord Neuberger's judgment in *Cusack v London Borough of Harrow* [2013] UKSC 40, [2013] 1 WLR 2022; and Greenberg (n 26) 929.
[37] Carston (n 4) 17.

granted. An example of this mentioned above are the preconditions of criminal liability, which are usually implied in statutes creating crimes.

From the point of view of lawmakers and drafters, the value of canons of construction is that they help to make decisions and use language more efficiently, minimising the risk of misunderstandings. Not having to spell out in the statutory text propositions that are already captured by established canons of construction helps to avoid excessive prolixity and complexity. This does not only simplify the text of statutes but also the discussions involved in the drafting of a Bill and its approval, since it is not necessary to even bring up matters which can safely be taken for granted when they do not raise any special reasons for concern in the particular case. For example, the presumption that a statute is only applied within a country's territory enables lawmakers to not spend time considering or discussing this matter (or providing for it in the text), except in relation to statutes that raise territorial issues. As future chapters will discuss, the same is true of the presumption in favour of updating.

In short, canons of construction make the formation, expression, and interpretation of law-making intentions easier. To clarify, I am not suggesting that Parliament has the burden of expressly spelling out everything that is not captured by a specific canon of construction. As I said, courts will usually infer propositions looking more generally at the context of enactment and assuming that Parliament uses language rationally. My point is only that specific, well-established canons of construction are a particularly reliable mechanism to convey content by implication.

(iii) Weight and Defeasibility

From the interpreter's perspective, canons of construction purport to do no more than help to elucidate Parliament's intention in cases of doubt and, therefore, they are not applicable when that intention is 'clear on its face'.[38] Their application normally does not lead interpreters to strain or push back against the most natural or straightforward reading of a provision in order to prefer, instead, a more contrived interpretation that respects the presumption at stake but sits uncomfortably with the provision's language.

This does not deny the fact that it is normally assumed that courts will—within certain constraints—rectify obvious drafting mistakes, when the context of enactment makes it clear that the language chosen does not reflect Parliament's intention.[39] In such cases, courts may strain the statutory language even though no constitutional principle is at stake. Later chapters will argue that something more or less similar occurs in cases in which new circumstances subvert the rationale of a statute that was drafted under assumptions that no longer hold true.[40]

One important characteristic of maxims of conversation is that speakers may intentionally and overtly violate them at any time.[41] This characteristic is inherited by the legal canons of construction derived from them. This raises the question of how Parliament may signal that a canon should not be applied to the interpretation of a certain expression or provision, or that it should be abandoned altogether because it no longer reflects Parliament's assumptions. Canons of

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[38] Greenberg (n 26) 929–30.
[39] Bennion and others (n 15) ch 15.
[40] I discuss this in chapter 5.
[41] Stephen Neale, 'Textualism with Intent' (unpublished manuscript, 2008) 37.

construction are easily defeasible by evidence of a contrary intention derived from either the statutory text (in the specific provision at stake or other sections of the Act) or the admissible aids to construction, discussed in the previous chapter.

Two examples should suffice to illustrate Parliament's ability to displace canons of construction and the different forms this displacement may adopt. One involves Parliament abolishing a substantive canon of construction using express words in the statutory text, while the other shows how Parliament may rely on aids to construction to indicate that a linguistic canon of construction should not be applied to one particular provision (without rejecting the presumption in general for the future, as in the first case). The first example is section 34 of the Crime and Disorder Act 1998 ('Abolition of rebuttable presumption that a child is doli incapax'), which provides that 'The rebuttable presumption of criminal law that a child aged 10 or over is incapable of committing an offence is hereby abolished'.[42] The second example is a Minister's statement made during the committee stage of the Nationality, Immigration and Asylum Bill, explaining that two words ('clearly' and 'manifestly') were to be understood as synonyms.[43] The presumption that the Minister was casting aside in this case is that a choice for a different term, departing from the one used in existing legislation, is presumed to signal a change in meaning. The Minister explained that the choice of 'clearly' over 'manifestly' did not reflect an intention to convey a different meaning but only a preference for a word that was thought to be clearer. He also rejected the suggestion of adding an additional paragraph stating that both terms should be

[42] Cited in Greenberg (n 26) 118 (n 18).
[43] ibid 481 (n 36), citing HL Deb 23 July 2002, vol 638, col 342.

read as synonyms, which he dismissed as an 'unnecessary and pompous way to deal with the matter or a greater unnecessary lengthening of a statute'.[44]

When I say that canons of construction are easily defeasible, I mean that when Parliament wishes to depart from them it does not need to use clear and express words (or a necessary implication) to do so—it can make its intention known in other, less strict ways. This contrasts with what Parliament needs to do to displace a constitutional presumption, as explored in the next sections. However, a canon of construction that does not require any strict forms to be displaced may still be very hard to cast aside in practice. This may happen when lawmakers and drafters have difficulty to anticipate whether the presumption may, in the future, become relevant in relation to a certain provision, or what the consequences of its application (or of its not being applied) will be. In such a scenario, they may not realise in advance that their intended policy would be better served by excluding the application of the presumption. I will return to this idea later on in the thesis, because the presumption in favour of an updating interpretation fits this description.[45] It will often be very difficult—or downright impossible—for Parliamentarians (and their legal advisers and drafters) to confidently predict which of the assumptions that they hold to be true will be challenged and revised in the coming years, as well as what directions these changes will take.

[44] HL Deb 23 July 2002, vol 638, col 342.
[45] See chapter 6.

(2) Constitutional Presumptions

(i) Origin

Unlike the canons examined in the previous section, constitutional presumptions are not inferred merely by observing the way people in general (or legal drafters in particular) tend to use language and the set of pre-existing legal rules against which Parliament legislates. Instead, constitutional presumptions are related to certain values which courts identify as fundamental and which they generally expect Parliament to respect. Thus, these presumptions originate in the common law. Of course, these values will normally be instantiated in concrete, pre-existing legal rules, including previous Acts of Parliament. However, by contrast to canons of construction with a substantive component, the rationale behind constitutional presumptions is not simply that Parliament is expected to be coherent with the propositions that it does not somehow, explicitly or implicitly, change when it enacts a new statute. Constitutional presumptions have a special weight, derived from the importance, within a legal system, of the values they involve.

Examples include the long-standing principle of doubtful penalisation, according to which 'a person should not be penalised except under clear law'.[46] Another example is the presumption against legislative interferences with fundamental rights (known as 'the principle of legality'), which can be seen as a broader and stronger formulation of a similar idea to that underlying the principle of doubtful penalisation.[47] In Lord Hoffmann's words, when UK courts presume that statutory words 'were intended to be subject to the basic rights of the individual', they are, 'though acknowledging the sovereignty of Parliament,

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[46] Bennion and others (n 15) 830.
[47] *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115 (HL) 131.

apply[ing] principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document'.[48] A further example is the principle of procedural fairness. Lord Reid has said about it that '[n]atural justice requires that the procedure before any tribunal which is acting judicially shall be fair in all the circumstances', and noted that '[f]or a long time the courts have, without objection from Parliament, supplemented procedure laid down in legislation where they have found that to be necessary for this purpose'.[49]

As the above quotes suggest, judges normally present these presumptions as commitments which perhaps Parliament did not expressly voice but which it nonetheless held and took for granted. However, the fact remains that in order to identify these commitments judges need to look beyond the maxims that govern rational conversation, and beyond what Parliament has said and done in the past. When they invoke constitutional principles, judges are invoking common law values, which are binding of their own accord and not because Parliament has made them so. In Lord Sales' words, 'constitutional understandings … mould statutory interpretation'.[50] This is a well-established feature of legal practices in the UK. As Lord Wilberforce has noted, stressing the relevance and primacy of Parliament's intentions should not lead us to neglecting the importance, for judicial interpretation, of matters including 'intelligibility to the citizen, constitutional propriety, considerations of history, comity of nations, reasonable and non-retroactive effect', and so on.[51]

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[48] ibid.
[49] *Wiseman v Borneman* [1971] AC 297, 308, cited in Bennion and others (n 15) 833.
[50] Sales (n 23) 601.
[51] *Black-Clawson International Ltd v Papierwerke AG* [1975] AC 591, 629–30.

(ii) Rationale and Purpose

It is an established feature of UK legal practices to recognise additional hurdles or requirements on how Parliament is to announce its intention to turn into law propositions that go against certain values that courts deem of fundamental importance, in order for that intention to be understood as such. Courts interpret that, in order to be effective, infringements of those values must be clearly signalled as Parliament's unequivocal intention. (The next section explains what exactly is required.) These presumptions thus work like a safety valve. By requiring that such infringements be clearly signalled, courts help to make sure that lawmakers do not inadvertently or lightly legislate against principles and rights that have fundamental weight in a legal system.[52] As Lord Sales has said (extrajudicially) about the principle of legality, the concern is 'to ensure that legislation that overrides fundamental common law principles or rights can clearly be appreciated as such at the time of its passage, so that Parliament's intention to achieve that result is properly established'.[53] The idea—extensible to other constitutional principles—is that making it harder for legislators to go against certain principles and rights will lead them to reflect carefully on the magnitude and implications of the proposed legal change, and give the values at stake due consideration and weight.

Constitutional presumptions also contribute to making sure that statutory interferences with fundamental principles and rights are transparent and salient to everyone. This makes it easier for Parliamentarians and their legal advisers—

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[52] See, on the principle of legality, *Secretary of State for Justice v MM* [2018] UKSC 60, [2019] AC 712 [31]; *A v HM Treasury* [2010] UKSC 2, [2010] 2 AC 534 [186], both citing *R v Secretary of State for the Home Department, Ex p Simms* (n 47) 131.

[53] Sales (n 23) 604–05.

as well as external critics—to scrutinise and criticise proposed and enacted legislation, which, in turn, helps the electorate to hold Parliament and the government politically accountable for their decisions. This is well reflected in Lord Hoffmann's account of the principle of legality. Borrowing his words—which, once again, may be extended beyond that principle—the idea is to make sure 'that Parliament … squarely confront[s] what it is doing and accept[s] the political cost'.[54]

The existence of these presumptions also allows lawmakers to remain confident that interferences with fundamental principles and rights will not be lightly inferred by courts from a very broad reading of general words which were never intended to have that effect. By being able to rely on the application of these presumptions, Parliament can remain confident that when it uses broad language that could be taken to allow (or forbid) virtually anything if read literally, courts will not adopt such an interpretation and will, instead, read those broad words as implicitly subject to certain limits. Thus, for example, lawmakers may use 'the widest of terms' when 'conferring a discretion on a public body …, knowing that certain limitations will automatically be implied'.[55] This makes the drafting and scrutiny of Bills easier, and will normally lead to simpler and shorter Acts that are well aligned with the central values of the legal system at stake.

It follows from the points above that constitutional presumptions have a 'democracy-enhancing' or 'deliberation-enhancing' aspiration.[56] These presumptions have the potential to improve the democratic process by bringing

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[54] *R v Secretary of State for the Home Department, Ex p Simms* (n 47) 131.
[55] Greenberg (n 26) 867.
[56] I am borrowing these expressions, respectively, from William N Eskridge, Jr, *Dynamic Statutory Interpretation* (Harvard University Press 1994) 289, and Adrian Vermeule, *Mechanisms of Democracy* (OUP 2007) 230.

to the fore values or interests that may otherwise be overlooked. This is especially important when the matter at stake falls within potential legislative ‘blind spots’, such as the interests of unpopular or politically powerless groups, and the need for checks to curb majoritarian abuses of power.[57] The principle of legality and the presumption against ousting judicial jurisdiction (on which I say more below) illustrate these two categories, respectively. It is important to stress that this aspiration may not be realised in practice. Its fulfilment presupposes that Parliament retains the final say on a matter, after having received and considered the judiciary’s input on it. However, Parliament’s ability to push back against an unwanted judicial interpretation—by amending that piece of legislation or enacting a new one—cannot be taken for granted. I will return to this idea below, when considering the relationship between presumptions of legislative intent, on the one hand, and parliamentary sovereignty and democracy, on the other hand.[58]

(iii) Weight and Defeasibility

Applying a constitutional presumption may often lead interpreters to strain the language of a statutory provision, opting for a reading that is less natural or straightforward than an alternative one. Courts may depart from what would otherwise (in the absence of that presumption) be the clear meaning of the statutory text by ‘reading down’ broad terms, or ‘reading into’ a provision

[57] See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) ch 5 and 6; Rosalind Dixon, ‘Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited’ (2007) 5 International Journal of Constitutional Law 391, 402.
[58] See section IV.

exceptions or qualifications that are not suggested by its text or aids to construction such as pre-legislative and legislative materials.

Constitutional presumptions are also hard to displace. They raise the bar of what Parliament must do in order to be interpreted by courts as intending to depart from the principles or rights they refer to. They can thus be described as expressing 'policies of clear statement' and issuing 'warnings to the drafter', according to which, as Cross puts it, 'If you do not express yourself clearly, … the courts will hold that your words have not effected the changes in the law intended by those instructing you'.[59] While this is also true to some extent of mere canons of construction (applicable in cases of doubt), the 'warning' is much stronger in relation to constitutional presumptions.

Considering, for example, the principle of legality, courts have established that there is 'a high threshold for rebutting this presumption'.[60] This point is extensible to constitutional presumptions in general, which can only be rebutted through express language or necessary implication.[61] As the Supreme Court has stressed, 'the test for a necessary implication is a strict one', and a 'necessary implication is not the same as a reasonable implication'.[62] The distinction between reasonable and necessary implications is (respectively) one between, on the one hand, 'what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably

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[59] Cross and others (n 1) 167.
[60] Bennion and others (n 15) 848, citing *GM (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1630, [2019] 10 WLUK 54 [27].
[61] *R v Secretary of State for the Home Department, Ex p Simms* (n 47) 131. See also Sales (n 23) 601–02, 606–07 and sources quoted there.
[62] *J v Welsh Ministers* (n 23) [25], citing *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax* [2002] UKHL 21, [2003] 1 AC 563 [45] (Lord Hobhouse).

have included', and, on the other hand, 'what it is clear that the express language of the statute shows that the statute must have included'.[63] Thus, for instance, courts have held about the presumption against doubtful penalisation that 'Those who contend that a penalty may be inflicted must show that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty.'[64] This demanding standard makes sense given the rationale of these presumptions. As Lord Hoffmann put it, allowing general or vague words to override fundamental principles and rights creates 'too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process'.[65]

The House of Lords' decision in *Anisminic* involves a particularly strong application of a constitutional presumption, namely, the 'well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly'.[66] The case revolved around section 4(4) of the Foreign Compensation Act 1950, which provides that 'The determination by the [Foreign Compensation] [C]ommission of any application made to them under this Act shall not be called in question in any court of law'. Applications for compensations under this scheme referred to property owned in Egypt that had been sequestrated in 1956, at the time of the Suez crisis, by the Egyptian authorities. A British company brought a judicial action against a provisional determination made by the commission that

[63] *R (Morgan Grenfell & Co Ltd) v Special Commissioners of Income Tax* (n 62) [45] (Lord Hobhouse).
[64] *Dickenson v Fletcher* (1873-74) LR 9 CP 1, 7 (Brett J), cited in Bennion and others (n 15) 831.
[65] *R v Secretary of State for the Home Department, Ex p Simms* (n 47) 131.
[66] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL) 170.

had rejected the company's claim for compensation. The commission had reasoned that the company (who was the original owner of the property) had a successor in title (to whom it had sold the property) who was not a British national and, as such, was not entitled to compensation. The plaintiffs claimed that this determination was a nullity, for reasons that I will explain below.

The House of Lords reasoned that the principle in favour of a strict construction of ouster provisions meant that if 'such a provision is reasonably capable of having two meanings', the meaning 'which preserves the ordinary jurisdiction of the court' shall be preferred.[67] The majority opined that while it might be possible for Parliament to enact an ouster provision protecting a nullity (that is, a decision made outside the tribunal's jurisdiction as conferred by statute), Parliament had not done that so far.[68] The Court stressed that it would have expected a formulation 'much more specific' and 'clear' than that of section 4(4) if Parliament's intention had been to create a new type of ouster provision to that effect (that is, one that—contrary to how similar clauses had been interpreted for decades—ousted the courts even where there was an absence or an excess of jurisdiction).[69] Thus, as Lord Reid put it, it was not 'necessary or even reasonable to construe the word "determination" as including everything which purports to be a determination but which is in fact no determination at all',[70] or which, in Lord Pearce's words, is only 'a purported determination which has no jurisdiction'.[71] On that basis, the Court concluded that judges were 'not prevented

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[67] ibid (Lord Reid).
[68] ibid at 170–71 (Lord Reid), 200 (Lord Pearce), 207 (Lord Wilberforce).
[69] ibid at 170 (Lord Reid), 200 (Lord Pearce). In the following section, I will consider a case where Parliament did arguably use a 'much more specific' and 'clear' formulation.
[70] ibid.
[71] ibid at 199.

from inquiring whether the order of the commission was a nullity',[72] for example—as it was held in the case—on the basis that the commission had 'inquired into and decided a matter which they had no right to consider' and therefore acted outside its jurisdiction.[73] (That matter was whether the claimant had a successor in title of British nationality, a question that, according to the Court, was beside the point when the claimant was the original owner of the property.)

It is important to stress that, as traditionally understood and applied, constitutional presumptions are always defeasible, even though the threshold for displacing them is high. Regarding, for example, the principle of doubtful penalisation, courts have held that while it 'is a long-standing one, of recognised constitutional importance', 'it is not an absolute principle'.[74] As such, it 'is capable of being outweighed by other objective indications of legislative intention, albeit it is itself an indicator of great weight'.[75] In turn, considering the 'fundamental general principle' of procedural fairness, Lord Reid reasoned that before courts can supplement a procedure laid down by Parliament in a statute, 'it must be clear that … to require additional steps would not frustrate the apparent purpose of the legislation.'[76] Constitutional presumptions thus stand in clear contrast with what some judges have tentatively identified in *obiter dicta* as possible hard (or non-negotiable) limits that might exist on what Parliament can do.[77] The existence

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[72] ibid at 171.
[73] ibid at 174.
[74] *Bogdanic v Secretary of State for the Home Department* [2014] EWHC 2872 (QB) [47]–[48], cited in Bennion and others (n 15) 831.
[75] *Bogdanic v Secretary of State for the Home Department* (n 74) [48].
[76] *Wiseman v Borneman* (n 49) at 308, cited in Bennion and others (n 15) 833.
[77] See *Jackson v Attorney General* [2005] UKHL 56, [2006] 1 AC 262 [102] (Lord Steyn), [104]-[107] (Lord Hope), [159] (Baroness Hale); and *Moohan v The Lord Advocate* [2014] UKSC 67, [2015] AC 901 [35] (Lord Hodge). For the opposite view (denying the existence of such hard limits), see *Jackson v Attorney General* [9] (Lord Bingham), [168], [177] (Lord Carswell).

of such hard limits is a highly doubtful and controversial matter, into which I will not enter.[78] Instead, this thesis assumes the orthodox view, according to which there are no limits that Parliament cannot displace.

Finally, I should clarify that, while the strong weight of constitutional presumptions has been repeatedly stressed by UK courts, not everyone agrees that they should be harder to displace than mere canons of construction. For Richard Ekins, for example, all presumptions (whether underpinned by constitutional values or not) should be defeasible by clear evidence of a contrary legislative intention that may be manifested 'more *or less* explicitly', since they all are 'pointers towards legislative intent'.[79] While I endorse the view that all presumptions should be ultimately defeasible by Parliament, I think that it makes sense to set higher required thresholds of clarity (that is, clear words or necessary implication) when constitutional presumptions are at stake.

(3) Recent Developments in Two Opposite Directions

I will now look at two recent cases that illustrate how presumptions of legislative intent (in these cases, constitutional presumptions) can become stronger or weaker over time.

[78] For a critical analysis of the ideas on common law constitutionalism underlying the *obiter dicta* in *Jackson*, see Neil Duxbury, *Elements of Legislation* (CUP 2013) 42–51 and sources cited there.

[79] Richard Ekins, *The Nature of Legislative Intent* (OUP 2012) 260 (emphasis in the original). See also ibid 265–68; Richard Ekins and Graham Gee, 'Submission to the Joint Committee on Human Rights: 20 Years of the Human Rights Act' (18 September 2018) 382.

Privacy International

The Supreme Court's decision in *Privacy International* illustrates how far courts may be willing to strain the most natural reading of a provision on the basis of a constitutional presumption—in this case, the presumption against the ousting of judicial jurisdiction.[80] The Regulation of Investigatory Powers Act 2000 ('RIPA 2000') established the Investigatory Powers Tribunal ('IPT'), a special tribunal with jurisdiction to examine the conduct of the UK intelligence services. Section 67(8) provides: 'Except to such extent as the Secretary of State may by order otherwise provide, determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be questioned in any court'. Privacy International complained before the IPT that one of the intelligence services had carried out unlawful computer hacking. It argued that the warrants authorising this action were not included within the meaning of section 5(2) of the Intelligence Services Act 1994 because they were not specific enough. The IPT held that they were lawful, and Privacy International sought judicial review of that decision on the basis that the IPT had misconstrued section 5(2). The High Court ruled that section 67(8) of the RIPA 2000 prohibits judicial review of the IPT's decision. The Court of Appeal dismissed the appeal against that ruling. The Supreme Court allowed the appeal against that decision and held that section 67(8) did not oust the supervisory jurisdiction of the High Court to quash the IPT's judgment for error of law.

[80] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22, [2020] AC 491.

The most natural or straightforward reading of section 67(8) is arguably the one defended by Lord Wilson in his dissenting judgment. He reasoned that the words in parenthesis (namely, 'including decisions as to whether they have jurisdiction') are 'surely' meant 'to encompass within the exclusion of judicial supervision all the decisions of the IPT in relation to its "jurisdiction"', including—in line with the interpretation adopted in *Anisminic*—'ordinary errors of law'.[81] The majority, by contrast, held that it was possible to read section 67(8) as not ousting the jurisdiction of the High Court to review the IPT's decision in this case. Even though this alternative construction was strained, the Court considered it reasonable. Delivering the majority judgment, Lord Carnwath stressed that the interpretive exercise here was not 'one of ordinary statutory interpretation, designed simply to discern "the policy intention" of Parliament', as this would 'downgrad[e] the critical importance of the common law presumption against ouster'.[82]

It is true that, in *Anisminic*, it was understood that decisions that are erroneous in law are decisions taken outside a court or tribunal's jurisdiction broadly understood. However, the word 'jurisdiction' in section 67(8) of the RIPA 2000 is used as part of the larger expression 'decisions as to whether … [a tribunal] ha[s] jurisdiction'. The Court opined that this expression, read as a whole, pointed towards a narrow reading of 'jurisdiction', referring only to decisions made by a tribunal on whether it was entitled to enter on an inquiry and adjudicate a case or not. It would, in effect, be odd to read the expression 'decisions as to whether they have jurisdiction' as extending to decisions about

[81] ibid [224].
[82] ibid [107].

the meris of the case which are erroneous in law.[83] It should also be stressed that, in *Anisminic*, the Court had commented on the ambiguity of the word 'jurisdiction' and the problems that this causes.[84] In this context, its use in section 67(8) is not as unequivocal as Lord Wilson considered. A clearer formulation could have been, for example: 'including decisions made outside the tribunal's jurisdiction'.

According to the Court, what the ouster clause at stake in *Privacy International* refers to are legally valid decisions as to whether the IPT was entitled to decide a case or not.[85] In other words, what is excluded from judicial review are decisions involving jurisdictional issues of fact—that is, decisions on whether the facts that are pre-conditions for the IPT to have jurisdiction had taken place (basically, whether certain acts of surveillance had been carried out).[86] Regarding the logic of drawing a distinction between factual and legal pre-conditions of the tribunal's jurisdiction, it has been pointed out that '[t]he statutory scheme is designed so that an individual does not know whether they have been subject to surveillance (unless the tribunal finds that they have been subjected to unlawful surveillance)'.[87] Given this, it is 'not surprising that the RIPA excludes judicial review on grounds of jurisdictional fact, i.e. as to whether alleged surveillance has in fact occurred'.[88]

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[83] ibid [108].
[84] *Anisminic Ltd v Foreign Compensation Commission* (n 66) 171 (Lord Reid), 207 (Lord Wilberforce).
[85] *R (Privacy International) v Investigatory Powers Tribunal* (n 80) [109].
[86] ibid [110].
[87] Tom Hickman, 'The Investigatory Powers Tribunal: A Law Unto Itself?' [2018] PL 584, 592.
[88] ibid.

Given that this reading of the Act was a reasonable one, the Court concluded that 'the words employed in section 67(8) do not make provision with sufficient clarity for the exclusion of the review jurisdiction of the High Court in respect of errors of law'.[89] It stressed that the presumption against ousting 'can only be excluded by "the most clear and explicit words."'[90] While this general quote goes beyond the normally applicable standard—for which necessary implication suffices—it is important to note that section 67(8) did not in fact create a necessary implication that the Court decided to ignore. Instead, as I said, the Court considered that the meaning it upheld was a reasonable interpretation.

As an example of a formulation that could have met this high standard, the Supreme Court mentioned clause 11 of the Asylum and Immigration (Treatment of Claimants, etc) Bill 2003.[91] This clause expressly provided that the Bill would 'prevent a court, in particular, from entertaining proceedings to determine whether a purported determination, decision or action of the Tribunal was a nullity by reason of – (i) lack of jurisdiction, (ii) irregularity, (iii) error of law, (iv) breach of natural justice, or (v) any other matter…'. The Court noted that this 'attracted powerful objections from within and outside Parliament', including from the Constitutional Affairs Committee, and was ultimately withdrawn.[92] The Court linked this to the principle of legality and, in particular, to Lord Hoffmann's remarks about how it helps to ensure that Parliament 'squarely confront[s] what it is doing

[89] *R (Privacy International) v Investigatory Powers Tribunal* (n 80) [166].
[90] ibid [111], citing *R (Cart) v Upper Tribunal (Public Law Project intervening)* [2012] 1 AC 663 [31].
[91] *R (Privacy International) v Investigatory Powers Tribunal* (n 80) [101].
[92] ibid [101], [111].

and accept[s] the political cost'.[93] In the 2003 Bill's case, it seems that the political cost of completely ousting the jurisdiction of the courts was prohibitively high.

Coughlan

The Supreme Court's more recent ruling in *Coughlan* is a step in the opposite direction, towards the weakening of two constitutional presumptions: the principle of legality and the presumption in favour of a strict construction of Henry VIII powers.[94] *Coughlan* turned on the interpretation of section 10 of the Representation of the People Act 2000, which conferred on the Secretary of State a power to make orders to implement pilot schemes regulating local government elections in certain jurisdictions. That power was worded in extremely broad and general language, as the Court itself stressed.[95] Section 10(1) provides that 'the Secretary of State shall by order make such provision for and in connection with the implementation of [a] scheme in relation to … [local government] elections'. In turn, section 10(2) defines the relevant schemes as those 'which make[] … provision differing in any respect from that made under or by virtue of the Representation of the People Acts' regarding, among other matters, 'when, where and how voting at the elections is to take place' (subsection (a)).

In the case, this power had been used to introduce a new, temporary requirement for voter identification to vote in local government elections. The claimant submitted that this requirement may inhibit some people from exercising

[93] ibid [100], citing *R v Secretary of State for the Home Department, Ex p Simms* (n 47) 131.
[94] *R (Coughlan) v Minister for the Cabinet Office* [2022] UKSC 11, [2022] 4 All ER 351 [16]–[17]. This section draws on my discussion in Morón (n 24), where I develop my arguments in greater detail.
[95] *R (Coughlan) v Minister for the Cabinet Office* (n 94) [42], [45].

their fundamental right to vote and could have a greater impact on disadvantaged groups, who are more likely to lack suitable forms of identification. In a unanimous judgment (given by Lord Stephens), the Supreme Court held that the intended meaning of section 10 (and, therefore, the intended scope of the power) was clear from its language. It opined that the phrase 'how voting at the elections is to take place' was 'sufficiently broad to encompass procedures for demonstrating an entitlement to vote, including by proving identity, as part of the voting process'.[96] Moreover, the Court noted that this broad reading was compatible with the statutory purpose, since the reason for introducing pilots is to test the positive and negative effects of different voting schemes.[97] Negative effects could include inhibiting some people from voting.

When reaching its decision, the Court failed to examine, first, the prior question of whether—as the claimant had argued—the Act had to be interpreted restrictively, subject to implied limits by virtue of the principle of legality and the presumption in favour of a strict construction of Henry VIII powers. The Court thought it was unnecessary to consider whether such principles were engaged in the case at all, so it did not even address the question of whether the right to vote in local elections was a fundamental right.[98] Instead, it reasoned that almost any pilot would create the risk of having a negative effect on the exercise of people's right to vote.[99] On this basis, it concluded that '[w]hether or not the right to vote in a local government election is a fundamental constitutional right, … Parliament

[96] ibid [41].
[97] ibid [54].
[98] ibid [16]–[17].
[99] ibid [54].

has squarely confronted what it was doing and by necessary implication authorised voter identification pilot schemes'.[100]

A problem with the Court's reasoning is that we cannot know what is implied by a provision until we determine whether a constitutional principle or right is at stake or not. When this is the case, the principle of legality tells us that we should presume that Parliament intended courts to read the relevant provision subject to an implied limitation, protecting that principle or right. If this presumption could be displaced so easily—by language that is as broad and general as that of section 10—it would not be able to perform the role to which Lord Hoffmann alluded in *R v Secretary of State for the Home Department, Ex p Simms*.[101] Such a broad and general statutory formulation cannot be effective in making sure that Parliament does not inadvertently legislate against the principles and rights at stake, and that it pays the political cost of doing so. In concluding that the intended meaning of section 10 was clear without examining, first, whether a restrictive approach was applicable, the Court appeared to treat the principle of legality and the presumption in favour of a strict construction of Henry VIII powers as mere canons of construction, reserved only to cases where the language of a provision is doubtful on its face. This casts doubts on the status of constitutional presumptions as they have been traditionally understood.

IV. Presumptions and Parliament's Intentions

This section considers whether the judicial pedigree of presumptions means that, rather than providing an insight into Parliament's intentions, presumptions are an

[100] ibid at 55.
[101] *R v Secretary of State for the Home Department, Ex p Simms* (n 47) [131].

imposition by courts. When speaking of their judicial pedigree, I am referring to the fact that presumptions are initially formulated and developed by judges, even if many of them then find their way into drafting guidance and books, which take into account how courts have interpreted past statutes. This contrasts with interpretive directives that are issued by Parliament, such as section 2(4) of the (now repealed) European Communities Act 1972 and section 3(1) of the Human Rights Act 1998. The fact that presumptions are formulated and developed by courts raises the question of whether rulings that are based on them reflect Parliament's intentions or, rather, judges' preferences.

In what follows, I will argue that, in the case of both canons of construction and constitutional presumptions, the fact that both courts and lawmakers rely on such shared presumptions contributes to making sure that judicial interpretations stay close to Parliament's intentions. My view is that, far from threatening parliamentary sovereignty or democracy, the development of clear presumptions that are consistently applied enhances such values by helping courts and lawmaker to be 'on the same page'. I will make this point, first, in relation to canons of construction and then move on to constitutional presumptions, since these involve some additional difficulties.

Canons of Construction

Judges rely on canons of construction to interpret a statutory provision when its text, read in the light of the admissible aids to construction, leaves doubts about what propositions Parliament intended to introduce as law. These doubts may arise because the text is itself vague or ambiguous, or because the legal system to which this provision belongs (including past enactments and judicial doctrines)

suggests that the provision is probably taking for granted propositions that are usually recognised. In such situations, courts are still required to adjudicate the cases brought before them. To fulfil this obligation, they have to make a call on what Parliament most likely intended. When there are doubts about this, all that courts can do is reflect as carefully as possible on how people—and lawmakers and drafters in particular—use language, and consider the past substantive choices that Parliament has made in its previous enactments, as well as the features of that legal system more generally. Based on this reflection, courts may come up with a default rule that can be applicable not just to the case at hand but to future ones as well.

The judicial enunciation of canons of construction can thus help to diminish uncertainty, in future cases, about what Parliament intended. We can see a similar phenomenon in daily conversations. The longer and more iterative an ongoing dialogue is, the clearer the maxims and assumptions that govern it become because there are more chances to spot and correct misunderstandings, and prevent future ones. Speakers and hearers can enhance this process and improve the success rate of their communication by making explicit the assumptions which they are making or taking the other party to be making. When hearers, in particular, do this, speakers are given the opportunity to correct hearers' assumptions or to accept them. They may choose to accept them because those assumptions do in fact reflect beliefs that the speakers had held all along, or because they offer an appealing default rule on a point that they had not yet settled themselves (or a better settlement than the one they had reached). In the latter case, the assumptions voiced by the hearer are internalised or absorbed by the speaker. (At times, this may happen not because speakers

necessarily agree with them, but rather because they do not have the time or means to correct them.)

Something similar happens in the law-making context. The enunciation by courts of clear presumptions that they will adopt by default allows Parliament to rely on such rules with greater confidence in future enactments. Alternatively, when the presumption is not welcome by Parliament, its enunciation by courts gives Parliament a clear opportunity to reject it and adjust its drafting techniques to make itself better understood in the future. Parliament may either include different or more specific words on a certain point, or expressly announce what the general default presumption should be.[102] For this to be possible, the judicial application of presumptions must be clear, widespread, and consistent enough. (Towards the end of this chapter, I consider the limits of Parliament's ability to disavow unwelcome presumptions.)

All this is well recognised by drafters, who stress that '[t]he way in which a person drafts a law or any other document must depend on the principles which will be applied by those reading it'.[103] The clearer and more explicit these principles are, the more likely it is that interpreters will succeed in ascertaining the intended meaning. For this reason, 'statutory interpretation is very much relevant to the drafter' and 'must be in the mind of the drafter' because '[b]eing aware of the implications of interpretation when drafting allows the drafter the opportunity to fine-tune their expression to the tone that enhances the meaning that they wish to communicate'.[104] Thus, '[a]s the drafter drafts, they precipitate, in so far as possible, the manner in which the legislative text will be applied and

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[102] For illustrations, see text accompanying n 42-43.
[103] Greenberg (n 26) 473.
[104] Xanthaki (n 35) 319.

interpreted', and they anticipate the application of 'general principles of statutory interpretation expressing legislative communication rules that have become … widely accepted'.[105] Drafters know that they can either rely on such principles or choose to make a 'conscious departure' from them and, in the latter case, 'ensure that the reader is aware of the different meaning' and 'the scope of this difference'.[106] In turn, judicial '[d]evelopments in statutory interpretation will influence future drafting practices'.[107]

As I discussed in chapter 2, drafting guidance documents issued by the Office of the Parliamentary Counsel contain many examples showing that drafters pay careful attention to how courts have interpreted terms and expressions in the past, and choose which words to use in future statutes accordingly. This includes the breadth or narrowness with which courts have interpreted certain concepts and linking phrases, and the implications they have derived from certain terms. Drafters advise, for instance, to '[d]raft on the basis that the natural meaning of "function" covers powers and duties', on the basis of Lord Templeman's remarks to that effect in *Hazell v Hammersmith and Fulham London Borough Council* [1992] 2 AC 1.[108] They also note that, for example, the term 'in respect of' has been said by courts to have 'the widest possible meaning of any expression intended to convey some connection or relation'.[109] In the same way, drafting guidelines direct drafters' attention to the default presumptions

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[105] ibid 319, 328 (footnote omitted).
[106] ibid 328.
[107] Bailey (n 33) 221.
[108] Office of the Parliamentary Counsel, 'Drafting Guidance' (18 June 2020) s 11.1.9.
[109] ibid s 11.1.29, citing *Albon v Naza Motor Trading* [2007] EWHC 9 (Ch) 27. See also s 8.1.8 (comparing the expressions 'within' and 'before the end of' a period of time).

applicable in their jurisdiction, in order to identify the likely effects of leaving a statute silent on a specific point. This concerns the question of whether something needs to be said in order to achieve a certain result—for instance, in order to establish that a public authority shall not need a license to do an activity that is to be subject to a licensing regime.[110] On that specific example, guidelines note that '[d]ifferent interpretative rules for Westminster legislation, devolved Scots legislation and devolved Northern Ireland legislation mean that silence about public authorities may, for any that are Crown bodies, produce different results'.[111]

The process of mutual understanding between courts and lawmakers is often gradual, with multiple exchanges and incremental advances. The formulation by courts of clear presumptions helps to improve that process. When courts announce these presumptions, they are making the reasoning behind their decision more transparent and thereby reducing the chances of future misunderstandings between them and Parliament—both in relation to the specific provision at stake and, more generally, for any provision that raises similar linguistic or substantive issues.[112] This makes it more likely that legislative intentions will be respected in the future, as the shared assumptions between both parties become clearer.

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[110] Office of the Parliamentary Counsel, 'Common Legislative Solutions: A Guide to Tackling Recurring Policy Issues in Legislation' (March 2021) 42.
[111] ibid (n 4).
[112] See Richard Ekins, 'Intentions and Reflections: The Nature of Legislative Intent Revisited' (2019) 64 The American Journal of Jurisprudence 139, 160–61.

Constitutional Presumptions

Much of what I have just said about the value of courts' enunciating clear canons of construction is applicable to constitutional presumptions as well. However, the common law origin of constitutional presumptions and the fact that judges may often rely on them to push back against the words that Parliament has chosen make matters more complex. Therefore, more must be said to explain how constitutional presumptions respect parliamentary sovereignty and democracy. This brings us back to the discussion above about the role of constitutional presumptions as safety valves, and how they can help to make it less likely that fundamental values to which Parliament has a standing commitment will be inadvertently infringed when a broadly worded Act is passed.[113] To avoid this, special hurdles are required—in particular, an unequivocal indication that Parliament did indeed intend to legislate against such values. This is the safeguard that a ruling like *Coughlan* threatens to erode.

The above raises a question: if these presumptions are so important and valuable, why did Parliament not formally enact them in the first place and, instead, left the initiative to courts? A possible answer is that this is precisely what it means to take something for granted. Lawmakers may have a deep commitment to certain values and rights, but it may not have occurred to them to expressly spell this out in a legal instrument. In turn, once courts have taken the initiative and formulated a presumption, its formal inclusion in an enactment by Parliament may serve no clear purpose. The presumption is already out there, to be relied on without the need for express words. In fact, enacting an already existing presumption could be potentially confusing and raise questions such as

[113] See section III(2)(ii) above.

whether Parliament's intention was to slightly modify the presumption at stake. Other doubts that this could generate include whether other pre-existing presumptions that were not enacted still hold or should be seen as abolished based on an idea similar to that behind the principle of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of the other), and whether new presumptions can still be identified by courts or whether this now requires Parliament's action.

Someone might object that, regardless of the advantages that constitutional presumptions might have, judges—who are not democratically elected—should not exercise any kind of pressure or influence on the value and policy choices that belong exclusively to Parliament. I will address this critique in more detail in chapter 8, because it is one that has also been made against judges' playing a role in keeping statutes up-to-date by taking into account current attitudes, conceptions, and standards (rather than considering themselves bound by those endorsed by lawmakers at the time of enactment). There, I will consider institutional reasons that may lead Parliament to rely on courts' contribution in the safeguarding of certain rights and principles, and argue Parliament should be free to make that choice.[114]

The point I wish to make for now is that the sovereignty of Parliament and its democratic underpinnings, as understood in the UK, require that Parliament should have the last word on what the law shall be. It does not, however, prohibit Parliament from relying on courts' contribution towards making sure that newly enacted laws are read in light of the long-standing constitutional commitments that permeate the legal system. As Goldsworthy has argued, '[j]udges who

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[114] This is related to the point discussed above in n 57 and accompanying text.

interpret a statute by presuming that Parliament did not intend to violate an important common law principle do not deliberately flout the doctrine of parliamentary sovereignty unless they know that there is clear, admissible evidence that it did intend to do so'.[115] In such cases, courts 'exercise a kind of equitable power, to prevent inadvertent harshness in the application of statutes, which Parliament has implicitly delegated to them or, at least, tacitly consented to' by not disavowing the well-established presumptions that are normally applied by courts and, therefore, well-known to drafters and legal advisers.[116]

Parliamentary Counsel, in particular, are acutely aware of this, and advise lawmakers accordingly. They recognise that presumptions 'are effective only because they are … tolerated by Parliament', who has the 'power to abrogate them by express provision either generally or in specific contexts'.[117] They thus argue that, in general, we may infer acquiescence or tacit approval from Parliament's failure to take steps to reverse a ruling (especially when the introduction of a Bill on the subject affords an opportunity to do so).[118]

The Limits of Parliamentary Checks and Acquiescence

I have just commented on the fact that Parliament can revise or disavow presumptions applied by courts that it considers mistaken because they do not accurately reflect the way it uses language, the substantive choices it generally makes, or its value commitments. My goal in this section is to nuance this claim

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[115] Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (OUP 2001) 252.

[116] ibid. See also Jeffrey Goldsworthy, 'The Real Standard Picture, and How Facts Make It Law: A Response to Mark Greenberg' (2019) 64 The American Journal of Jurisprudence 163, 188.

[117] Greenberg (n 26) 119.

[118] FAR Bennion, *Statutory Interpretation* (2nd edn, Butterworths 1992) 620.

to some extent, by considering the limitations that Parliament may face. However, the fact that this parliamentary check on the judicial formulation and application of presumptions is not perfect does not mean that it is non-existent or insufficient.

In practice, it may not always be easy for Parliament to reject or correct mistaken presumptions. There are many possible reasons, other than acquiescence, behind Parliament's silence or inaction following a judicial interpretation. In some relatively low-profile cases, Parliament (and the government) may simply be unaware of the decision at stake or of relevant aspects of it, since it is unrealistic to expect its members and advisers to be permanently up to date with the caselaw of all courts. Alternative reasons may include the high political costs of opening up a debate on the issue and lack of time in the parliamentary agenda.[119] This is especially true in relation to constitutional presumptions: the discussion above on *Privacy International* and the Asylum and Immigration Bill 2003 illustrates how difficult it may sometimes be to find an appropriate formula and enough political support for it when fundamental constitutional values are at stake.[120] Parliament may also be counting on the possibility that the decision will be overturned in the future by another court, and may deem it unnecessary to spend its scarce time and resources on doing so itself. Another reason may be a change in government, in a situation where the new government is pleased with (or indifferent to) a judicial interpretation and therefore does nothing to correct it, despite the fact that the interpretation goes against what had been the intention of Parliament (in its

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[119] Diggory Bailey, 'Interpreting Parliamentary Inaction' (2020) 79 CLJ 245, 246 and 249.

[120] See, for example, 'The Independent Review of Administrative Law' (CP 407, March 2021) para 1.35, 1.39.

original composition). As a result, one cannot jump to the conclusion that parliamentary inaction means that a judicial interpretation must have been aligned with Parliament's intent.

Despite this, we would still expect that if Parliament considers that a matter is serious enough, it will find a way to push back against courts. Ultimately, the existence of a small number of cases in which judges get Parliament's intentions wrong is probably inevitable. However, there is no reason in principle why having presumptions of legislative intent should lead to more frequent or more serious mistakes. Instead, as I have argued, their formalisation will normally bring about greater clarity and the possibility of identifying and clarifying misunderstandings.

Finally, it is worth stressing that the limitations on Parliament's check on what presumptions of legislative intent are applied by courts (and how they are applied) are aggravated when the presumption at stake was not well-established at the time the relevant statute was drafted and enacted. Some principles, like the principle against doubtful penalisation, are of long-standing. Others, however, may have an unclear content and scope, perhaps because they have only recently emerged or because they are undergoing transformations, as in the examples discussed earlier in this chapter. As the Law Commission indicated, '[p]articular presumptions of intention will … be modified or even abandoned with the passage of time, and with the modification of the social values which they embody'.[121] These modifications are likely to bring about periods of uncertainty. When a presumption's content or scope is unclear, contested, or still 'under construction', its exact application by courts is difficult to anticipate. In such cases,

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[121] Law Commission, *The Interpretation of Statutes* (Law Com No 21, 1969) para 34, cited in Bennion and others (n 15) 514.

it will be harder for Parliament to understand its content and implications, and decide whether it wishes to rely on it or disavow it.

I think this matter should be framed as part of the larger issue of those situations where the content that Parliament promulgates is underdetermined in some way. This could be because a relevant presumption is unclear or, alternatively, because the statutory words themselves (read in their context) are vague or ambiguous. In such cases, of legislative reliance on 'blurry' presumptions or enactments of otherwise 'blurry' statutory texts, what will be clear to Parliament (and its legal advisers and drafters) is that courts will have to decide the cases that arise without being able to seek further clarifications from Parliament. To do so, courts will have to make determinate what Parliament left underdetermined. In some cases, this may involve developing or sharpening a presumption that is relevant to the solution of the case but does not yet clearly point in one direction or another. After this new case has been decided, the presumption will have a fuller outline.

In such cases, provided that the presumption was visibly unclear at the time of enactment (a fact that would usually have been known by Parliamentary Counsel), Parliament is knowingly leaving this matter in the hands of courts, rather than supplementing the missing details itself. Books and guidelines on statutory interpretation discuss this matter. They distinguish between well-established presumptions, where a contrary intended policy would require 'clear words to that effect', and points on which the law 'is not entirely clear' and where 'it is better to leave no doubt'.[122] Once again, even though uncertainty is a problem that can affect both types of presumptions, the situation is more worrying

[122] Office of the Parliamentary Counsel (n 110) 53, 55, 79.

when a constitutional presumption is at stake given that these presumptions may often be relied on to push against the natural meaning of statutory provisions. This should lead courts to be especially careful when invoking yet unsettled presumptions to strain the clear meaning of Parliament's words.[123]

V. Conclusion

This chapter explained how Parliament relies on presumptions regularly applied by courts in order to convey more information than (or information somewhat different from) what the statutory words alone state. It classified such presumptions into two kinds and explained why despite their differences—in terms of origin, rationale, and operation—applying both kinds of presumptions is compatible with ascertaining the intention of Parliament. The following chapters will examine in detail the canon of construction that is the central focus of this thesis: the presumption in favour of an updating approach to statutory interpretation.

[123] Sales (n 23) 605–06.

PART II

THE PRESUMPTION IN FAVOUR OF AN UPDATING APPROACH

CHAPTER 4: Historical Development

I. Introduction

This and the next three chapters offer a detailed analysis of the presumption in favour of an updating approach to statutory interpretation in the UK. Put briefly, this approach requires courts to interpret statutes taking into account circumstances, attitudes, and understandings present at the time of adjudication when these differ from those prevailing at the time of enactment.

This chapter looks at the gradual sharpening of the presumption in the caselaw of UK courts over time. I will show that the presumption has a long pedigree and that relatively recent applications of it that sparked some controversy are, in fact, a natural extension of the original rule. The next chapter, in turn, will examine in more depth the kinds of changes that are relevant to its application, and what exactly it enables (or requires) courts to do. Chapter 6 will analyse the limits of its applicability and the different ways in which this canon of construction can be displaced or limited. Chapter 7 completes my profile of the presumption by explaining in what sense we can say that Parliament intends to rely on it when it does not displace it.

II. Initial Formulations and Early Cases

Early works on statutory interpretation make it clear that, since the start, statutes were generally regarded as applicable to objects and procedures which were not available or known at the time of enactment. As one of the canonical works put it, '[e]xcept in some few cases where a statute has fallen under the principle of

excessively strict construction, the language of a statute is generally extended to new things which were not known and could not have been contemplated by the legislature when it was passed'.[1] Acts were seen as 'deal[ing] with a genus' and applicable to 'species of it' that emerged after they were passed.[2] Examples of this included technological developments, like the invention of photography, and legal changes, such as the creation of categories (for instance, degrees of nobility) that did not exist before.[3]

Thus, for example, in *Attorney General v Edison Telephone Co of London Ltd*, it was held that a telephone was a 'telegraph' for the purposes of the Telegraph Acts 1863 and 1869, which had been passed before telephones were invented.[4] The 1869 Act provided that 'The term "telegraph" shall, in addition to the meaning assigned to it in "The Telegraph Act, 1863" mean and include any apparatus for transmitting messages or other communications by means of electric signals'. Stephen J (giving the opinion of the Court) reasoned that '[o]f course no one supposes that the legislature intended to refer specifically to telephones many years before they were invented, but they use[d] language embracing future discoveries as to the use of electricity for the purpose of conveying intelligence'.[5] Numerous cases adopted the same logic, with courts holding, for instance, that photographs were within the scope of the Engraving Copyright Act 1734,[6] a steam tricycle was a 'locomotive' for the purposes of the

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[1] Peter Benson Maxwell, *The Interpretation of Statutes* (William Maxwell & Son 1875) 89.
[2] ibid.
[3] ibid 90.
[4] *Attorney General v Edison Telephone Co of London Ltd* (1880) 6 QBD 244, cited in Sir Rupert Cross, *Cross: Statutory Interpretation* (1st ed, Butterworths 1976) 45–46.
[5] *Attorney General v Edison Telephone Co of London Ltd* (n 4) 254.
[6] *Gambart v Ball* (1863) 32 LJCP 166.

Highways and Locomotives (Amendment) Act 1878,[7] and an electric tramcar was a 'stage carriage' within the meaning of the Stage Carriages Act 1832.[8]

This, taken by itself, would not be enough to argue that, already at that time (in the late 19th century), the general presumption was in favour of an updating approach. After all, the possibility of applying old statutes to things made possible by technological advances (or other material changes that took place since the time of enactment) is something that even scholars that are very critical of updating approaches accept. An example of this is Antonin Scalia, who—despite his anti-updating stance—had no trouble accepting that provisions referring to means of communication or forms of torture could be applied to machines or practices that were unknown at the time of enactment.[9] (I will address below, in section IV, the question of whether these cases are instances of updating at all.)

However, looking at another, related doctrine of statutory interpretation helps us better understand the scope of this presumption in the UK. This is the doctrine known as *contemporanea expositio est optima et fortissima in lege* (a contemporaneous exposition is the best and strongest in the law). It states that statutes should be interpreted as if one were doing so at the time of their enactment and, accordingly, gives great weight to evidence of how a provision

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[7] *Parkyns v Preist* (1881) 7 QBD 313.

[8] *Chapman v Kirke* [1948] 2 KB 450. For more examples, see Francis Bennion and others, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020) s 14.2 (n 46).

[9] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Amy Gutmann ed, 2nd edn, Princeton University Press 2018) 140, 145; Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson/West 2012) 85–87.

was interpreted at that time.[10] In both old and recent decisions, courts have repeatedly stressed two limitations regarding this rule: it is generally applicable only to ancient statutes, and only where their language is ambiguous, equivocal, or otherwise doubtful.[11] Commentators have also emphasised this. Writing about Magna Carta, Sir Edward Coke stated that such 'ancient acts and graunts must be construed and taken as the law was holden at that time when they were made'.[12] The question that reference to contemporaneous interpretations may help answer is which of the different possible senses of an expression was the one intended by the lawmakers. The doctrine is thus 'confined to the construction of ambiguous language used in very old statutes where indeed the language itself may have had a rather different meaning in those days'.[13] Therefore, the relevance of old interpretations was understood, from early on, as limited to ascertaining the sense in which an expression had been used in very old statutes,

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[10] Daniel Greenberg, *Craies on Legislation* (12th edn, Sweet & Maxwell 2020) 971; Dan Meagher, 'The "Always Speaking" Approach to Statutes (and the Significance of Its Misapplication in *Aubrey v the Queen*)' (2020) 43 University of New South Wales Law Journal 191, 193.

[11] See *R v Johns* (1772) 98 ER 541 (King's Bench) 541 (Lord Mansfield); *Presbytery of Dundee v Magistrates of Dundee* (1858) 20 D 849 (Court of Session, Inner House) 891 (Lord Cowan); *Lord Blantyre v Clyde Navigation Trustees* (1871) 9 M (HL) 6 (House of Lords) 19 (Lord Chelmsford); *The Trustees of the Clyde Navigation v Laird & Sons* (1883) 8 App Cas 658 (House of Lords) 673 (Lord Watson); *Campbell College, Belfast (Governors) v Commissioner of Valuation for Northern Ireland* [1964] 2 All ER 705; [1964] 1 WLR 912 (House of Lords) 941 (Lord Upjohn); and *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 (HL) [69] (Lord Clyde).

[12] Edward Coke, *The Second Part of the Institutes of the Laws of England: Containing the Exposition of Many Ancient, and Other Statutes* (Printed for W Clarke and Sons, Law Booksellers, Portugal Street, Lincoln's Inn 1809) 1, cited in Greenberg (n 10) 971.

[13] *Campbell College, Belfast (Governors) v Commissioner of Valuation for Northern Ireland* (n 11) 941 (Lord Upjohn). See also *George Morgan v Henry Crawshay* (1871-72) LR 5 HL 304 (House of Lords) 315 (Martin B, delivering the opinion of the judges to the House of Lords).

enacted so far back in time that language use may have suffered changes.[14] The usual example is that 'trespass' was used as 'wrongdoing' in general. The position was that the rule of '*contemporanea expositio* ought rarely, if ever, to be applied to modern Acts'.[15]

On occasions, however, the doctrine has been applied to avoid anachronistic interpretations of statutes enacted only decades earlier if changes in language use have already taken place within that relatively short time span. While the risk of such anachronisms rises as time moves on and our language, circumstances, ideas, and legal systems change, this problem is not confined to statutes 'passed one or two centuries ago', as some cases seem to suggest.[16] This is illustrated by Lord Simon's reasoning in *Black-Clawson*. The question for the House of Lords was whether a judgment by a foreign court (in an action for liability for dishonoured bills of exchange) was conclusive between the parties—thus barring any proceedings in UK courts—or not. To determine this, it was necessary to interpret the Foreign Judgments (Reciprocal Enforcement) Act 1933. Lord Simon stressed that it would be a 'fundamental error' to read the 1933 Act 'with 1974 eyes' and interpret it 'in 1974 terms', as referring to legal concepts that 'were not developed by 1933' and, therefore, 'could not possibly be what

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[14] William Feilden Craies, *A Treatise on Statute Law* (Stevens & Haynes 1907) 80–81; Herbert Broom, *Principles of Legal Interpretation* (Sweet & Maxwell 1837) 109–11; AB Kempe, *On the Interpretation of Statutes* (3rd edn, Sweet & Maxwell 1896) 83–85; G Granville Sharp and Brian Galpin, *Maxwell on the Interpretation of Statutes* (10th edn, Sweet & Maxwell 1953) 20–23; SGG Edgar, *Craies on Statute Law* (6th edn, Sweet & Maxwell 1963) 80–82.

[15] Craies (n 14) 80; Edgar (n 14) 81. See also Broom (n 14) 112.

[16] This temporal limitation was invoked, for example, by Lord Watson in *The Trustees of the Clyde Navigation v Laird & Sons* (n 11) 673, where he opined that *contemporanea expositio* 'is of no value whatever in construing a British statute of the year 1858'.

Parliament and the draftsman then had in mind'.[17] While less than forty years had passed between 1933 and the decision, Lord Simon noted that reading the 1933 Act as referring to such concepts would be 'scarcely less anachronistic than … attempt[ing] to interpret *Magna Carta* by reference to' a precedent from the 1960s.[18]

The Longford is a similar example. It concerned a private statute from the 1830s, which provided that '[n]o action in any of His Majesty's Courts of Law to which the company shall be liable' could be brought without giving one month's notice.[19] The Court of Appeal, deciding the case about sixty years after the statute had been enacted, opined that it 'must be construed as if one were interpreting it the day after it was passed'.[20] It held that the provision at stake was not applicable to actions *in rem* before the Admiralty Court ('Admiralty actions'). Lord Esher (with whom the other Justices agreed) reasoned that at the time of enactment—before the passing of the Judicature Act in 1873—such actions had a different name ('suits' or 'causes'), 'the Admiralty Court was not called and was not one of His Majesty's Courts of Law', and '[m]ost of the cases to which the section applies were not … cases that could have come before' it.[21] In addition to this, he noted that including Admiralty actions within the provision would render it 'futile' since the ship against which such an action was brought 'might without difficulty be taken out of the jurisdiction of the Court before the one month's notice had elapsed'.[22] Note that the question in this case would not have arisen if Parliament

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[17] *Black-Clawson International Ltd v Papierwerke AG* [1975] AC 591, 643–44. (The concepts at stake were 'cause of action estoppel' and 'issue estoppel'.)
[18] ibid at 644.
[19] *The Longford* (1889) 14 PD 34, cited in Cross (n 4) 45.
[20] *The Longford* (n 19) 36.
[21] ibid at 37.
[22] ibid.

had amended the statute—and all those containing similar expressions—when it enacted the Judicature Act 1873, which changed the way certain expressions were used.[23] Given the pressures on Parliamentary time, however, these situations are bound to happen often.

The fact that the doctrine of *contemporanea expositio* had, since the start, such a narrow application supports the view that the general rule was always in favour of an updating approach. In other words, outside the very specific issue of disambiguating old statutes, the rule was that courts should not search for how contemporaneous people would have interpreted a provision at the time of its enactment.

In this context, Sir Rupert Cross' analysis of the matter in his influential book *Statutory Interpretation* looks like an outlier. Cross initially understood the doctrine of *contemporanea expositio* as—though not unqualified—having a much broader scope. This led him to consider that later cases, which applied an updating approach in relation to changes in social attitudes and moral conceptions and standards, may have represented an erosion of the original rule in favour of a historical interpretation.[24]

His position is, however, not altogether clear because he also considered that 'Parliament may, and often does, evince an intention that the meaning to be attributed to its words should not be ossified on the day on which they were enacted'.[25] He mentioned as an example 'the use of general words such as "cruelty", as in the successive Matrimonial Causes Acts from 1937 to 1965', and

[23] FAR Bennion, *Statute Law* (Oyez Publishing Limited 1980) 186.
[24] Cross (n 4) 45–47, citing *Dyson Holdings Ltd v Fox* [1976] QB 503 as a case that 'goes much further' and 'could herald the erosion of the rule, or at least its restriction'. I discuss this case below.
[25] Cross (n 4) 46.

indicated that this 'necessarily implies that much is to be left to the courts'.[26] Cross was also in agreement with the Privy Council's decision in *Attorney General of Ontario v Attorney General of Canada*, where Lord Jowitt (delivering the judgment of the Court) reasoned that the British North America Act 1869 was an 'organic statute', which had to be given 'the flexible interpretation … which changing circumstances require'.[27] (The question in that case was whether the Parliament of Canada had the power to pass a Bill providing that the Supreme Court of Canada shall have ultimate jurisdiction.)

In any case, Cross' statements would be clarified or rectified on this point by the new editors of his book, John Bell and Sir George Engle, who significantly narrowed down Cross' account of the scope of the rule of *contemporanea expositio*. This later edition stated, in 1987, that a historical approach should be applied only exceptionally, since the presumption is in favour of updating interpretations.[28] It is significant that one of the editors of the later editions of Cross' book—Engle—served as First Parliamentary Counsel[29] and, therefore, had an insider's perspective.

It is perfectly understandable that the scope of this doctrine became gradually clearer over time, as more cases were decided. Cross himself had been cautious in his initial analysis, noting as a 'warning' to his readers that he 'may have attached too much importance' to certain decisions.[30] In particular, Cross cited *Attorney General v HRH Prince Ernest Augustus of Hanover* as a decision

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[26] ibid.
[27] *Attorney General of Ontario v Attorney General of Canada* [1947] AC 127 (Privy Council) 154, cited approvingly in Cross (n 4) 46.
[28] Sir Rupert Cross and others, *Cross: Statutory Interpretation* (2nd ed, Butterworths 1987) 50.
[29] (Between 1981 and 1986. He had been a member of the Office since 1957.)
[30] Cross (n 4) 42. See also ibid 47.

which he might have read too broadly.[31] In the House of Lords' judgment (which affirmed the Court of Appeal's decision), Lord Normand held that it was 'not in doubt that the Act' at stake (Act 4 Anne, c 4, from 1705) 'must be construed as it would have been construed immediately after it became law'.[32] However, this decision does not support the conclusion that the general rule at the time was in favour of a historical approach. Instead, it is authority for the much narrower proposition that the rationale of statutes dealing with a problem confined to a particular point in history (rather than with ongoing concerns) must be interpreted from a historical perspective when determining whether a given interpretation would yield an absurd result. This case was about the naturalisation as a British citizen of a distant descendant of Princess Sophia of Hanover. A wide interpretation of the Act (which the Court of Appeal and the House of Lords ultimately favoured) would allow the naturalisation of a large number of descendants (including the applicant), rather than only those born in the lifetime of Queen Anne—a qualification supposedly suggested by the Act's preamble. The Court of Appeal held that interpreting the provision in the wide way suggested by its general words only leads to an inconvenience or absurdity when this is judged from the perspective of today, more than two centuries after the Act was passed, and given that it was not repealed after its purpose had been served.[33]

A quick look at *Craies on Legislation* could also give the impression that first there was a rule in favour of a historical or frozen approach, which courts then changed to the opposite presumption. The relevant chapter begins by saying

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[31] Cross (n 4) 42.
[32] *Attorney General v HRH Prince Ernest Augustus of Hanover* [1957] AC 436, 465.
[33] *Attorney General v HRH Prince Ernest Augustus of Hanover* [1956] Ch 188 (EWCA Civ) 209–10.

that, '[p]ut simply, while the rule was once to give effect to legislation as when it was passed or made, the rule now is to allow legislation to have an "always speaking" meaning'.[34] This, as the text states, is a simplification, which must be read in the light of the authorities and doctrines cited there (namely Coke's writings and the precedents on the rule of *contemporanea expositio*).[35]

Thus, while it is true that the updating presumption was originally invoked in relation to 'new things' (like telephones and photographs), this has to be understood alongside the narrow scope of the doctrine about the relevance of contemporaneous understandings. I will argue below that later developments in the caselaw respected the original logic of the rule and expanded it to its full implications. In other words, while the presumption in favour of updating was the general default position from the start, its scope—and, in particular, its applicability to changed social attitudes, and moral conceptions and standards—only became clearer over time, from the 1970s.

Someone might disagree with my claim that it is clear from the sources I have cited that, already by the late 19th century, there was a general presumption in favour of updating, and that this presumption was part of the background against which Parliament legislated. I think the case in favour of inferring this general rule from early on is strong enough. In any case, what is certainly clear from the discussion above is that, at the very least, there was no general rule in favour of a historical interpretation. This means that the cases I will consider in the next section cannot be dismissed as going against Parliament's intentions, or against the default rules that Parliament relied on to convey those intentions.

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[34] Greenberg (n 10) 971 (footnote omitted). I discuss the appropriateness and origin of the phrase that statutes are 'always speaking' below, in section V.
[35] Cited in ibid (n 1).

At most, someone who questioned my historical inference could say that the first round of decisions I discuss in the following section did not involve (as I think) the application of a default rule of long standing but, rather, the development of a default rule where before there was none. On such a view, there would only be a clear intentionalist justification in favour of an updating approach—in situations of changed social attitudes and moral conceptions or standards—from the 1970s onwards, when the rule in respect of those situations was unequivocally enunciated by courts and commentators. The legitimacy of those first decisions would have to be assessed, instead, on their merits. Relevant considerations may include the substantive values and social needs at stake, and the relative institutional strengths and weaknesses of Parliament and the judiciary. Here, I will not embark on this analysis.

III. Later Developments

Later decisions continued the earlier line of cases applying statutory expressions to things or procedures that had become possible thanks to scientific, technological, or medical progress**.** Thus, for example, in *Barker v Wilson*, the Divisional Court held that the definition of 'bankers' books' in section 9 of the Bankers' Books Evidence Act 1879 includes business records kept by the bank in microfilm, a technology that was not available at the time the statute was enacted.[36] Bridge LJ reasoned that the statute 'was enacted with the practice of bankers in 1879 in mind' and 'must be construed in 1980 in relation to the practice of bankers as we now understand it'.[37]

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[36] *Barker v Wilson* [1980] 1 WLR 884, [1980] 2 All ER 81 (High Court), cited in Cross (n 4) 52.
[37] *Barker v Wilson* (n 36) 887.

A similar logic was followed in a more complex case, where the House of Lords was sharply divided: *Royal College of Nursing of the United Kingdom v Department of Health and Social Security*.[38] Section 1(1) of the Abortion Act 1967 provides that 'a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner' and other conditions are met. The question was whether this applied to abortions carried out by a nurse under a doctor's instructions. This issue would not have arisen in 1967, when all abortions were surgically done. Since 1972, however, a new method (called 'medical induction') was available which did not require surgery but only the administration of a substance. It could, therefore, be performed by a nurse. In a ruling with two dissents, the House of Lords held that this would be included within the meaning of section 1(1) provided that the entire treatment and the nurse's participation was 'at all times under the control of the doctor even though the doctor is not present throughout' it.[39] The majority reasoned that a contrary decision would 'plac[e] an unduly restricted and unintended meaning' on the statutory words,[40] which had to be given a 'wider construction'.[41]

In his dissent, Lord Wilberforce opined that the development of this new method 'invites, and indeed merits, the attention of Parliament'.[42] He reasoned that it 'is clearly not just a fresh species or example of something already

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[38] *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800.
[39] ibid at 838 (Lord Roskill).
[40] ibid at 834 (Lord Keith).
[41] ibid at 838 (Lord Roskill).
[42] ibid at 824.

authorised', so extending the Act to cover abortions performed by a nurse 'is not something which ought to, or can, be effected by judicial decision'.[43]

A more recent decision featuring a similar logic is *R (Quintavalle) v Human Fertilisation and Embryology Authority*.[44] The relevant change in *Quintavalle* was the development of a technique, called 'cell nuclear replacement', which allowed human embryos to be created without fertilisation. The question was whether embryos thus created were subject to the regulations and prohibitions set out in the Human Fertilisation and Embryology Act 1990. The difficulty was that section 1(1) of the Act defined embryos by reference to fertilisation as this was, in 1990, the only way embryos could be created.[45] The House of Lords held that embryos created through cell nuclear replacement fell within the regulatory scope of the 1990 Act. Lord Bingham (with whom Lord Steyn, Lord Hoffmann, and Lord Scott agreed) stressed that Parliament had 'opted for a strict regime of control', where '[n]o activity within this field was left unregulated'.[46] He opined that Parliament could not have intended to distinguish between embryos depending on whether they had been created with or without fertilisation since it 'was unaware that the latter alternative was physically possible' and simply 'took for granted' that all embryos would fall within the former one.[47] Lord Steyn (with whom Lord Scott

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[43] ibid at 822, 824. See also ibid at 833 (Lord Edmund-Davies).
[44] *R (Quintavalle) v Human Fertilisation and Embryology Authority* [2003] UKHL 13, [2003] 2 AC 687.
[45] Section 1(1) provided:

> In this Act, except where otherwise stated—
> (a) embryo means a live human embryo where fertilisation is complete, and
> (b) references to an embryo include an egg in the process of fertilisation,
> and, for this purpose, fertilisation is not complete until the appearance of a two cell zygote.

[46] *R (Quintavalle) v Human Fertilisation and Embryology Authority* (n 44) [13].
[47] ibid [14].

agreed) added that it had not been argued that ‘the 1990 Act falls in the exceptional category’ of statutes to which a historical approach should be applied, which makes sense ‘[g]iven its subject matter’.[48] He reasoned that the Act may thus ‘be construed in the light of contemporary scientific knowledge.[49]

How did the House of Lords deal with the language of section 1(1)? The court understood that in the statutory expression ‘embryo means a live human embryo *where fertilisation is complete*’, the last four words (italicised) had a ‘somewhat marginal importance’ and were not intended to form part of the definition of the word ‘embryo’—they were ‘merely illustrative’.[50] Lord Steyn identified, as an alternative possibility (which he ultimately did not favour), ‘imply[ing] a phrase in section 1(1) so that it defines embryo as “a live human embryo where [if it is produced by fertilisation] fertilisation is complete”’.[51] Some scholars were unpersuaded by the decision, and considered that the Act’s language and subject matter made it unfit for the court’s expansive, straining approach.[52]

The updating presumption was also applied to new information that had been previously unavailable and had become possible thanks to scientific, technological, or medical progress. In line with the decisions cited above, courts considered that they should take into account such progress and decide cases

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[48] ibid [23].
[49] ibid.
[50] ibid [14] (Lord Bingham), [26] (Lord Steyn), and [46] (Lord Millett).
[51] ibid [26] (Lord Steyn).
[52] See, for example, Mary Ford, ‘*R (On the Application of Quintavalle) v. Secretary of State for Health* [2003] UKHL 13’ (2003) 25 Journal of Social Welfare and Family Law 243; Kathy Liddell, ‘Purposive Interpretation and the March of Genetic Technology’ [2003] CLJ 563; and Thérèse Callus, ‘Omnis Definitio Periculosa Est: On the Definition of the Term Embryo in the Human Fertilisation & Embryology Act 1990’ (2003) 6 Medical Law International 1. In the following chapters, I will consider some of the objections raised in these works.

according to the state of knowledge at the time of the decision (or, in certain cases, at the time of the facts of the case).

An example of this is *R v Ireland*.[53] The case revolved around the interpretation of section 47 of the Offences against the Person Act 1861, which established criminal liability for an 'assault occasioning actual bodily harm'. A man had harassed women by repeatedly calling them on the phone, mostly at night, remaining silent and sometimes breathing heavily. One of the issues in the case was whether 'bodily harm' included psychiatric illnesses, which the women had suffered as a result of the calls. The House of Lords answered the question in the affirmative. Lord Steyn (with whom all the other Lords agreed) opined that because this 'is a statute of the "always speaking' type"', it 'must be interpreted in the light of the best current scientific appreciation of the link between the body and psychiatric injury'.[54] He accepted that 'the Victorian legislator … would not have had in mind psychiatric illness' since '[p]sychiatry was in its infancy in 1861', but considered that this was 'immaterial'.[55]

Baker v Quantum Clothing Group Ltd is a similar example.[56] *Baker* revolved partly around the interpretation of section 29(1) of the Factories Act 1961, which provides that workplaces 'shall, so far as is reasonably practicable, be made and kept safe for any person working there'. Factory employees had

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[53] *R v Ireland* [1998] AC 147 (HL).

[54] ibid at 158–59. I discuss the origin of the 'always speaking' phrase in section V below.

[55] ibid. (A further question in the case was whether silent calls could ever amount to an 'assault'. To support his conclusion that they could do so, Lord Steyn relied on precedents establishing that acts causing someone to fear imminent physical violence may be considered an assault against her; ibid at 161–62. Because these precedents were not based on an updating approach, I will not assess the reasoning behind them here.)

[56] *Baker v Quantum Clothing Group Limited* [2011] UKSC 17, [2011] 4 All ER 223 (UKSC), cited in Bennion and others (n 8).

suffered hearing loss due to exposure to high noise levels. When the 1961 Act was enacted, this risk was not appreciated and noise levels were not contemplated as an element of safety.[57] The Court held that, despite this, section 29 applies to noise because safety is not 'an unchanging concept' but one that must 'be judged according to the general knowledge and standards of the times'.[58] Lord Dyson reasoned that the provision's language 'is general and "always speaking"' and can thus 'accommodate working methods and technological developments that were not foreseeable (and attitudes to safety that were not held) at the time when the statute was enacted'.[59]

A number of cases decided in the 1970s did something partly different: courts based their decisions there on changes in attitudes, conceptions, and standards that had no direct relation to technological, scientific, or medical developments. As I explained above, this possibility had not been denied in the past, but previous decisions had not ruled on this precise point.

One of these cases is *Dyson Holdings Ltd v Fox*, where Lord Denning MR reasoned that a 'court is not absolutely bound by a previous decision … when, owing to the lapse of time, and the change in social conditions, the previous decision is not in accord with modern thinking'.[60] On this basis, the Court of Appeal ruled that a tenant's 'common law wife', who had resided with him for years but did not have children with him, was a 'member of the tenant's family'

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[57] *Baker v Quantum Clothing Group Limited* (n 56) [61] (Lord Mance), [107] (Lord Dyson), with whom Lord Saville agreed at [136].
[58] ibid [64], [80] (Lord Mance).
[59] ibid [107]; see also ibid [52] (Lord Mance), [173]-[175] (Lord Kerr), [190] Lord Clarke.
[60] *Dyson Holdings Ltd v Fox* (n 24) 509.

within the meaning of section 12(1)(g) of the Rent and Mortgage Interest Restriction Act 1920 (re-enacted by the Rent Act 1968).[61]

Twenty five years earlier, the Court of Appeal had held in *Gammans v Ekins* that a man in that same situation was not a member of the deceased tenant's family.[62] In line with Lord Denning's judgment, James LJ opined in *Dyson* that the word 'family' is a popular term whose meaning 'is not fixed once and for all time' but has changed with the passage of years and 'must be given its popular meaning at the time relevant to the decision in the particular case'.[63] The question was thus whether, at the time of the tenant's death, 'the ordinary man would have regarded the defendant as a member of' the tenant's family.[64] The Court answered this question in the affirmative. Bridge LJ stressed that 'between 1950 and 1975 there has been a complete revolution in society's attitude to unmarried partnerships of the kind under consideration'.[65] He noted that those unions had become 'far commoner than they used to be', and '[t]he social stigma that once attached to them ha[d] almost, if not entirely, disappeared'.[66]

A few years later, in *C v C*, the Court of Appeal adopted a similar approach. Section 1 of the Matrimonial Causes Act 1937 established that a person may file a petition for divorce during the first three years after marriage on the ground of 'exceptional hardship suffered by the petitioner' or 'exceptional depravity on the

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[61] That section provides that 'the expression "tenant" includes the widow of a tenant … who was residing with him at the time of his death, or, where a tenant … leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the county court'.
[62] *Gammans v Ekins* [1950] 2 KB 328.
[63] *Dyson Holdings Ltd v Fox* (n 24) 511–12.
[64] ibid at 511.
[65] ibid at 512.
[66] ibid.

part of the respondent'.[67] In the case, the petitioner's claim invoked both grounds and was based on the alleged fact that her husband had ceased to attempt intercourse with her and had 'made distressing remarks' about women and 'overt homosexual advances'.[68] Ormrod LJ (delivering the judgment of the Court) reasoned that '[t]he principal difficulty lies in knowing what standards to use in assessing' these matters, as they 'involve value judgments of an unusually subjective character' and 'standards in society' that 'are not stable and are subject to considerable changes over comparatively short periods of time'.[69] He considered that the ground of 'exceptional depravity' was especially difficult, partly because the word 'has fallen out of general use' and 'now conveys only a vague idea of very unpleasant conduct'.[70] He added that '[i]n 1937 it may have carried to contemporary minds a much more specific meaning, but norms of behaviour, particularly in the sexual sense, have changed greatly in the last 40 years'.[71] Given these changes, he rejected the relevance, for the present case, of definitions suggested in earlier rulings.[72] The decision in the case was that the wife had made out a case of exceptional hardship, but not one of exceptional depravity.

Two very salient cases that followed maintained this logic: *Fitzpatrick v Sterling Housing Association Ltd*[73] and *Yemshaw v Hounslow London Borough*

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[67] *C v C* [1980] Fam 23, cited in FAR Bennion, *Statutory Interpretation* (2nd edn, Butterworths 1992) 626.
[68] *C v C* (n 67) 25.
[69] ibid at 26.
[70] ibid at 26–27.
[71] ibid at 27.
[72] ibid (opining that '[i]t is unlikely that the meaning … suggested by Denning L.J. in *Bowman v. Bowman* [1949] P. 353 would find much support today'). A decision that had adopted an approach similar to that in *C v C* (also by the Court of Appeal, and cited in *C v C*) was *Blackwell v Blackwell* [1973] 1 WLUK 96.
[73] *Fitzpatrick v Sterling Housing Association Ltd* (n 11).

Council.[74] An important aspect of these decisions is that they expressly linked the issue at stake there to earlier cases involving things or procedures made possible—and information made available—after the enactment of the relevant statute thanks to technological, scientific, or medical advances. Specifically, they cited *Royal College of Nursing* and *R v Ireland*.[75] Thus, *Fitzpatrick* and *Yemshaw* emphasise the connection between interpretations that involve new things or new factual information, on the one hand, and interpretations that (like *Fitzpatrick* and *Yemshaw* themselves) take into account changes in social attitudes, conceptions, and standards, on the other hand.[76] I will discuss these two rulings in more detail than the cases above, both because they are especially vocal in analysing the updating presumption and because they have arguably been more controversial.

Fitzpatrick

In *Fitzpatrick*, the House of Lords had to interpret the Rent Act 1977 (as amended in 1988), which consolidated, among other statutes, the Increase of Rent and Mortgage Interest (Restrictions) Act 1920.[77] The Act afforded an assured tenancy of the dwelling-house by succession to 'the spouse' of the deceased tenant or to a person living with them 'as his or her wife or husband' (paragraph 2 of Schedule 1). It also provided that, where paragraph 2 did not apply, the protection was

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[74] *Yemshaw v Hounslow London Borough Council* [2011] UKSC 3, [2011] 1 All ER 912.
[75] See *Fitzpatrick v Sterling Housing Association Ltd* (n 11) [11], [16] (Lord Slynn), [53] (Lord Nicholls), [69] (Lord Clyde); *Yemshaw v Hounslow London Borough Council* (n 74) [25] (Lady Hale).
[76] Section IV below will analyse the relationship between these two types of cases.
[77] *Fitzpatrick v Sterling Housing Association Ltd* (n 11).

afforded to ‘a person who was a member of the original tenant’s family’ and ‘was residing with him in the dwelling-house’ for a certain period of time (paragraph 3).

Mr Fitzpatrick had been living with the original tenant of a flat for several years until the latter’s decease, and both were partners in a longstanding and monogamous relationship. The House of Lords rejected his submission that he was included within paragraph 2. The Court understood that since both he and the deceased tenant were men, the applicant could not be the tenant’s spouse or someone who lived with him as his wife or her husband, terms which were held to be, ‘in this context, gender-specific words’.[78]

The remaining question was whether the word ‘family’ in paragraph 3 extended to same-sex partners. Lord Slynn, Lord Nicholls, and Lord Clyde held that it did. They noted that courts had already established that ‘family’, as used in the Rent Acts, is not a term of art but an ‘undefined expression’ of ‘ordinary usage’, ‘a flexible and wide term’ to which ‘courts have given a wide and elastic meaning’.[79] Lord Clyde reasoned that ‘[t]he general presumption is that an updating construction is to be applied’, and saw ‘no grounds for treating the provisions’ at stake in this case ‘as being in the relatively rare category of cases where Parliament intended the language to be fixed at the time when the original Act was passed’.[80] The majority opined that there was an ‘essential meaning of the word’, a ‘concept underlying membership of a family’, or ‘hall marks of the relationship’ that did not change and had to do with a caring relationship where

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[78] *Fitzpatrick v Sterling Housing Association Ltd* (n 11) [45] (Lord Nicholls); see also ibid [13] (Lord Slynn).
[79] *Fitzpatrick v Sterling Housing Association Ltd* (n 11) [16] (Lord Slynn), [36], [46] (Lord Nicholls), [66] (Lord Clyde).
[80] ibid [69].

people share their lives in the same house.[81] They noted that changes in social habits, opinions, and attitudes can affect the application of that word (that is, the people capable of being members of a family) and the relevant question is its 'ordinary popular understanding … at the date when its falls to be applied'.[82] (As I will explain in the next chapter, Lord Slynn did not frame the ruling as one adopting an updating approach.[83] I will argue that this is, however, what the Court effectively did.)

The dissenting judges (Lord Hutton and Lord Hobhouse) thought that the majority had exceeded the limits of what courts may do. In their view, the question of whether, given the changes in social attitudes to same-sex partners, the protection of the Rent Act should extend to such couples is one for Parliament alone.[84] In Lord Hobhouse's words, the applicant's claims 'involve developments of policy and fall far outside the proper ambit of statutory construction'.[85] He added that '[i]t is an improper usurpation of the legislative function, for a court to adopt social policies which have not yet been incorporated in the relevant legislation'.[86] The Court of Appeal had decided the case along these lines.[87] Some scholars have criticised the decision for similar reasons, arguing that the issue was one for Parliament alone, and that the House of Lords' approach

[81] ibid [69] (Lord Clyde), [47] (Lord Nicholls), [23] (Lord Slynn).
[82] ibid [69] (Lord Clyde), [23] (Lord Slynn).
[83] ibid [16], [26]. Lord Clyde appears to share Lord Slynn's view on this; see ibid [69]. The remaining judgments in *Fitzpatrick* did not use the term 'updating'.
[84] *Fitzpatrick v Sterling Housing Association Ltd* (n 11) [105]–[106] (Lord Hutton), [111], [136] (Lord Hobhouse).
[85] ibid [136].
[86] ibid [111].
[87] *Fitzpatrick v Sterling Housing Association Ltd* [1998] Ch 304 (EWCA Civ).

misapplied earlier decisions.[88] These objections will be examined—and rebutted—in the chapters that follow, as they become relevant to my analysis.

Yemshaw

Even more controversial was the Supreme Court's decision in *Yemshaw v Hounslow London Borough Council*.[89] The Housing Act 1996 (as amended in 2002)—which repeats the terms of the Housing (Homeless Persons) Act 1977—imposes on authorities certain duties towards homeless people. Section 177 (in Part VII, 'Homelessness') provides:

> (1) It is not reasonable for a person to continue to occupy accommodation if it is probable that this will lead to domestic violence or other violence against him …
> (1A) For this purpose 'violence' means – (a) violence from another person; or (b) threats of violence from another person which are likely to be carried out; and violence is 'domestic violence' if it is from a person who is associated with the victim.

In *Yemshaw*, the Supreme Court had to decide whether the term 'violence' required physical contact or included also psychological and emotional forms of abuse. The Court of Appeal had ruled that the former (narrower) proposition was

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[88] See, for example, Richard Ekins, 'Updating the Meaning of Violence' (2013) 129 LQR 17, 19; and SM Cretney and FMB Reynolds, 'Limits of the Judicial Function' (2000) 116 LQR 181, 184.
[89] *Yemshaw v Hounslow London Borough Council* (n 74).

correct,[90] but the Supreme Court held it was the latter. Lady Hale (with whom Lord Hope, Lord Walker, and Lord Roger agreed) reasoned, first, that 'whatever may have been the original meaning in 1977 … , by the time of the 1996 Act the understanding of domestic violence had moved on from a narrow focus upon battered wives and physical contact'.[91] She illustrated this citing, among other documents, the House of Commons Home Affairs Committee's 1993 Report on Domestic Violence, General Recommendation 19 adopted by the Committee on the Elimination of Discrimination against Women in 1992, and the Declaration on the Elimination of Violence against Women adopted by the General Assembly in 1993.[92] Accordingly, for Lady Hale, the Court did not need to give an updating interpretation to the statutory text in order to read it as including non-physical violence.[93]

She added, secondly, that even if she was 'wrong about that', there was 'no doubt' that 'the general understanding of the harm which intimate partners or other family members may do to one another has moved on now'.[94] She mentioned as examples the Home Office's report *Domestic Violence: A National Report*, published in 2005, and the 2006 version of the Homelessness Code of Guidance for Local Authorities, which adopted this broad understanding.[95] Citing *Fitzpatrick*, Lady Hale pointed out the similarities between the words 'violence' and 'family'.[96] 'Violence', she noted, 'is not a term of art' and 'is capable of bearing

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[90] *Yemshaw v Hounslow London Borough Council* [2009] EWCA Civ 1543 (EWCA Civ).
[91] *Yemshaw v Hounslow London Borough Council* (n 74) [24].
[92] ibid [20]–[21].
[93] ibid [20].
[94] ibid [24], [28].
[95] ibid [24].
[96] ibid [26]–[27].

several meanings and applying to many different types of behaviour', which—as courts have recognised—'can change and develop over time'.[97] She added that '[t]here is no comprehensive definition of the kind of conduct which it involves in the Housing Act 1996'.[98] She concluded that if violence did not already include psychological abuse by 1996, the courts should give the term an updated interpretation that extended it thus.

Lord Brown wrote a separate judgment expressing his 'profound doubt' about whether the provisions 'were intended to extend beyond the limits of physical violence', but he did not carry this 'to the point of dissent'.[99] Some scholars, in turn, were much more fiercely critical of Lady Hale's judgment, arguing that it did not attempt to ascertain Parliament's intention but, instead, illegitimately amended the statute.[100] Once again, I will address these objections in the following chapters, as they become relevant.

<u>More Recent Cases</u>

Courts have continued to apply this presumption in recent cases. In *Owens v Owens*, a woman petitioning a divorce claimed that her husband 'behaved in such a way that [she] cannot reasonably be expected to live with [him]', within the meaning of section 1(2)(b) of the Matrimonial Causes Act 1973.[101] Lord Wilson (with whom Lord Hodge and Lady Black agreed) reasoned that he could not 'readily think of a decision which more obviously requires to be informed by

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[97] ibid [25]–[27].
[98] ibid [27].
[99] ibid [48], [60].
[100] See, for example, Ekins (n 88); Richard Ekins, *The Nature of Legislative Intent* (OUP 2012) 265; Chris Bevan, 'Interpreting Statutory Purpose - Lessons from *Yemshaw v Hounslow London Borough Council*' (2013) 76 MLR 742.
[101] *Owens v Owens* [2018] UKSC 41, [2018] AC 899.

changing social norms than an evaluation whether, as a result of the respondent's behaviour … an expectation of continued life together would be unreasonable'.[102] He stressed that the biggest changes were 'related to our society's insistence upon equality between the sexes', and cited examples of decisions from the early 1970s that would now seem 'almost comical' and 'inconceivable'.[103] As authority in support of its approach, the Court cited the decision in *Quintavalle*.[104] Even with these revised standards, however, Mrs Owens' petition for a divorce was dismissed because the Court decided that she had not proved she could not reasonably be expected to live with her husband given his behaviour.

In another very recent case, *T W Logistics Ltd v Essex County Council*, the Court reasoned (in a unanimous judgment given by Lord Sales and Lord Burrows, with whom Lady Black, Lady Arden, and Lord Stephens agreed) that 'almost all statutes' should be regarded as 'always speaking' and cited *R v Ireland* as authority.[105] This extended to two Victorian statutes (the Inclosure Act 1857 and the Commons Act 1876) which enacted criminal offences protecting the public's use of areas registered as a town or village green ('TVG').[106] The Court understood that the application of the 'always speaking' principle 'means that the

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[102] ibid [32].
[103] ibid [33]–[34], citing *Ash v Ash* [1972] Fam 135 (EWHC) 140 (Bagnall J) (suggesting that 'a violent petitioner can reasonably be expected to live with a violent respondent; a petitioner who is addicted to drink can reasonably be expected to live with a respondent similarly addicted; … and if each is equally bad, at any rate in similar respects, each can reasonably be expected to live with the other'), and *Priday v Priday* [1970] 3 All ER 554, 557 (Cumming-Bruce J) (referring to a husband's use of force to make his wife have sexual intercourse with him as 'a desperate attempt … to re-establish what might have been an important element in matrimonial consortium').
[104] *Owens v Owens* (n 101) [30] (Lord Wilson).
[105] *T W Logistics Ltd v Essex County Council* [2021] UKSC 4, [2021] AC 1050 (UKSC) [73].
[106] ibid [2], [73].

correct approach is to interpret the words of the Victorian statutes in the light of modern conditions rather than conditions that prevailed in Victorian times'.[107] The 'modern conditions' in this case referred to legal changes—in particular, the introduction of a procedure that created a public right of use to lands registered as TVG and extended to kinds of lands which 'could not plausibly have been contemplated as being a TVG when the Victorian statutes were enacted'.[108]

This principle was also considered 'well-established' within 'the modern approach to statutory interpretation' in *News Corp UK and Ireland Ltd v Revenue and Customs Commissioners*.[109] The question in that case was whether digital versions of print newspapers were 'newspapers' within the meaning of the Value Added Tax Act 1994 and, therefore, whether they were zero-rated for VAT purposes.[110] The Court stressed that the general rule is that 'a statute should be interpreted taking into account changes that have occurred since the statute was enacted', including changes in technology, scientific understandings, social attitudes, and the law.[111] It added that a provision is 'tied to an historic or frozen interpretation' only '[e]xceptionally', when this is 'clear, from the words used in the light of their context and purpose'.[112] In support of this, it cited several of the cases I have considered above, including *Royal College of Nursing*, *R v Ireland*, *Quintavalle*, and *Owens v Owens*.[113]

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[107] ibid [73].
[108] ibid.
[109] *News Corp UK & Ireland Ltd v Revenue and Customs Commissioners* [2023] UKSC 7, [2023] 3 All ER 447 [28].
[110] (The question was limited to the period before the Value Added Tax (Extension of Zero-Rating to Electronically Supplied Books etc) (Coronavirus) Order 2020 (SI 2020/459) was issued; see ibid [3].)
[111] ibid [29] (Lord Hamblen and Lord Burrows, with whom Lord Hodge and Lord Kitchin agreed).
[112] ibid.
[113] ibid [28].

While this would point towards giving a wide interpretation to the 1994 Act which included digital newspapers, the Court held that, in this case, the always speaking principle 'has to be applied narrowly' because of other interpretive directives 'pulling in [a] different direction[]'.[114] These were 'the EU law requirement to interpret exemptions from VAT strictly and to give effect to a "standstill" provision' that established that items could only be zero-rated if they were so prior to 31 December 1975.[115] The Court thus adopted the ordinary meaning of 'newspapers' in 1975 (the date relevant to the standstill provision), which was limited to print newspapers.[116] It clarified that this did not 'close off entirely the operation of the always speaking principle'; for example, the term 'newspapers' would still be interpreted to include newspapers printed by computers or using physical materials which were not used or even contemplated in 1975.[117] Lord Leggatt was the only judge to hold, in his concurring opinion, that the always speaking principle had no role to play in this case.[118] Because his judgment raises interesting questions about the scope of the updating presumption and its applicability to technological developments, I will look at it in the next chapter when addressing that matter.

Thus, these later decisions follow the line of reasoning featured in earlier ones, to which they expressly refer. Interestingly, *Fitzpatrick* and *Yemshaw* were not cited in these decisions (except by Lord Leggatt, who referred to *Fitzpatrick* in *News Corp UK*).[119] *Fitzpatrick* has, however, been cited as authority by lower

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[114] ibid [2], [60].
[115] ibid [2], [18], [21].
[116] ibid [60].
[117] ibid [58].
[118] ibid [96].
[119] ibid [87]–[88].

courts to justify adopting an updating approach,[120] as well as in *Yemshaw*. It has also been cited approvingly in cases that did not themselves involve the adoption of this approach.[121] *Yemshaw* has also been followed by lower courts,[122] though not cited again by the Supreme Court.

IV. The Interrelationship Between these Kinds of Cases

This section discusses the connection between cases like *Fitzpatrick*, *Yemshaw*, and *Owens v Owens*—involving revised social attitudes, and moral conceptions and standards—and decisions like *Royal College of Nursing* and *R v Ireland*—concerning new things, procedures, or information made available by scientific developments. As noted above, this connection has been repeatedly emphasised by courts in their citations of previous cases as authority.

This link, however, has been disputed by some. Richard Ekins, for example, believes that the presumption applied in cases like *Fitzpatrick* and *Yemshaw* lacks good authority and rests on confused doctrinal analysis.[123] In his view, these later cases 'misread the earlier decision' in *Royal College of Nursing*.[124] Generally speaking, the cases that have been most controversial are those in which adopting an updating approach required courts to take into

[120] An example of this is *R (Smeaton) v Secretary of State for Health* [2002] EWHC 610 (Admin) [297], [314]–[319], [350]. There, the term 'miscarriage' in sections 58 and 59 of the Offences Against the Person Act 1861 was interpreted according to the latest scientific and medical knowledge, as excluding the use of contraceptives which prevented implantation.
[121] See, for example, *Ahmad v Secretary of State for the Home Department* [2012] UKUT 267 (IAC) [23]; *Rodriguez v Minister of Housing of Gibraltar* [2009] UKPC 52 [27].
[122] See, for example, *Hussain v Waltham Forest LBC* [2015] EWCA Civ 14. See also *London Steam-Ship Owners' Mutual Insurance Association Ltd v Kingdom of Spain* [2020] EWHC 1582 (Comm) [114]–[115].
[123] Ekins (n 88) 19.
[124] ibid.

account changed social attitudes and moral conceptions and standards. In contrast, decisions are usually perceived as less problematic when they involve projecting legal schemes onto objects or procedures that were not available at the time of enactment and only became possible, for example, thanks to later scientific advances. For some, these are not even cases of updating but a mere reflection of the fact that lawmakers do not intend their laws to be applicable only to the specific cases or situations they contemplated but to all instances of the more general categories they enacted.[125]

Against this proposed separation, I believe that all these cases are instances of the same general rule, and bright dividing lines cannot be drawn between them. What is distinctive about rulings where judges take into account changes in social attitudes and moral conceptions and standards is that the court's decision may depart from the one that Parliament would have made if it had had the case before it, the day after enactment. In some cases, this conclusion will be only an inference, but often we can be relatively certain about it. It may have been a very established and well-known stance at the time of enactment, and there may even be judicial decisions from back then that clearly corroborate this. Someone might argue that we should reserve the label of 'updating' for these decisions only—that is, those that Parliament would, most likely, not have endorsed because they clash with the evaluative standards it held at the time of enactment. This view might claim that, in contrast, cases where new objects or procedures are at stake involve merely a purposive approach, and no real updating task.

[125] See, for example, Ekins (n 100) 254–55; Ekins (n 88) 19; Scalia (n 9) 145.

I accept that there might perhaps be a reason to have a special label to refer to the former kind of decisions, in which interpreters adopt attitudes and moral conceptions and standards that were (or would probably have been) rejected at the time of enactment. Chapter 8 of this thesis is especially concerned with objections to these kinds of decisions in particular, since they are usually the most controversial. We could perhaps refer to them as cases of updating in a strong (or narrow) sense. However, I think that it is not possible to divorce these two categories and claim that only one of them is a true instance of updating.

The common logic behind them is that, in both kinds of cases, we presume that when statutes refer to (or are premised on) certain variables that change over time, judicial interpretations should—in principle—take such changes into account. These variables include, among others, available technology, the state of knowledge in science, and the legal categories recognised in a legal system, as well as the social attitudes towards a certain phenomenon and the moral conceptions and standards held about it. Crucially, these variables are often inextricably interrelated, in at least two senses. First, revisions of our attitudes, conceptions, and standards often arise at least partly due to changes in material facts and information. Thus, for example, scientific progress in psychiatry and psychology may have enhanced our understanding of certain kinds of conduct or sexual orientations and, as a result, led us to revise our beliefs and judgments about them. As Kavanagh notes, ‘much of the moral change which occurs in society follows change in the conditions of life and is inextricably bound up with it’.[126]

[126] Aileen Kavanagh, ‘The Idea of a Living Constitution’ (2003) 16 Canadian Journal of Law & Jurisprudence 55, 85.

Second, deciding how general propositions enacted long ago should be applied to facts that did not exist at the time of enactment (or that were not properly understood then, as in the example of hearing loss due to noise pollution) may require us to re-examine and develop past attitudes, conceptions, and standards. This is a matter of degree. Thus, for example, a new car model that only has minor improvements over past ones will not need much evaluative judgment to be considered a 'car' or 'vehicle' within the meaning of an Act. However, further developments (such as much larger and faster cars, with a higher potential for destruction in the event of a crash, or self-driving cars) may require more from judges. Determining whether they are included within old provisions may require judges to rethink what the original category's defining properties are. At times, this can involve evaluative or moral judgment. Thus, for example, the invention of new pain-free methods to execute people or coerce them into making confessions may lead interpreters to rethink what the concept of 'cruelty' means, what the wrongfulness in torture is, and so on. Scholars have made this point in relation to *Quintavalle*, for example, noting that the development of a new technique to create an embryo meant that courts had to consider, among other matters, whether this 'raise[d] moral or social issues that push[ed]' these new facts 'into a new genus or add[ed] a new dimension'.[127] When analysing these facts, courts will be partly guided by the attitudes and understandings present at the time of the decision, since they involve questions that had not been posed before, at the time of enactment.

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[127] Kathy Liddell, 'Purposive Interpretation and the March of Genetic Technology' [2003] CLJ 563, 565.

There is a final, related point I wish to make against reserving the label of 'updating' for decisions that depart from how provisions would have been interpreted the day after enactment, when different social attitudes and moral conceptions and standards prevailed. This is that claims about whether an interpretation involves such a departure or not are ultimately speculative and, therefore, they cannot help to draw a clear boundary. These claims involve counterfactual reasoning about what someone would have decided the day after enactment if, hypothetically, she had had these exact facts before her. However, exactly what knowledge we feed to this hypothetical interpreter is a key question. I concede that if an interpreter in the early 1900s was told only that two people of the same sex were romantically involved and sharing a life and a home together, she would have refused to consider them a 'family' for the purposes of statutory protections like those in the Rent Acts. However, the more knowledge we give to this interpreter about life and the world today, the less sure we can be that she will stick to her old assumptions and conclusions about how to understand and apply the categories established in the statute. Changes in our understandings or perceptions of certain phenomena (in the example, same-sex couples), or in our attitudes towards them are not inexplicable mood swings, and they do not take place in a vacuum. They are normally the product of years or decades of reflection upon new facts and information. In order for our hypothetical interpreter to respond to exactly the same question that courts are facing today, she should be informed about the gradual changes that have taken place over the years. Relevant information may include sociological facts about how people live together and how they react to different living arrangements of others, insights from fields like psychology about how same-sex individuals relate to others and

about the kinds of couples they can form, and so on. This is what it means to assess how a statute applies in a changed set of circumstances. This set of circumstances is not limited to the facts of the case narrowly understood, detached from these broader developments.

For these reasons, I follow the orthodox practice among UK courts and commentators of considering together cases of changed 'hard' facts and changed attitudes, conceptions, and standards.

V. The Phrase 'Always Speaking'

The last matter I will address in this chapter is how the idea that a statute is 'always speaking' changed its meaning over time. Initially, this statement did not refer—as it would come to do later—to the presumption in favour of an updating approach. The origin of the phrase has been traced back to a 19th century treatise of legislative drafting in the UK: George Coode's *On Legislative Expression: Or, the Language of the Written Law*.[128] Coode encouraged the use of the indicative present tense in legislative drafting, arguing that 'indicative language describing the case as now existing, or as having now occurred, is consistent with the supposition of the law being always speaking'.[129] The phrase was used in the same way in Lord Thring's 1902 book *Practical Legislation*. Lord Thring recommended that 'An Act of Parliament should be deemed to be always speaking, and therefore the present or past tense should be adopted, and "shall"

[128] Neal Goldfarb, '"Always Speaking"? Interpreting the Present Tense in Statutes' (2013) 58 Canadian Journal of Linguistics 63, 63, cited in Meagher (n 10) 192.
[129] George Coode, *On Legislative Expression: Or, the Language of the Written Law* (William Benning and Co 1845) 23, cited in Goldfarb (n 128) 63.

should be used as an imperative only, and not as a future'.[130] This is how the phrase 'always speaking' was understood in the first edition of Cross' book, in 1976.[131]

Nowadays, the phrase is most commonly used to refer to the presumption in favour of an updating approach to the interpretation of statutes. This is illustrated by several of the rulings discussed in previous sections, which expressly invoke the 'always speaking' principle. Current canonical books on statutory interpretation—including Cross' later editions—adopt this new usage as well.[132]

The first step towards this new reading may have been given by Francis Bennion. Writing in 1980, Bennion read Lord Thring's words as 'a reminder of the vitality of statutes', which 'warns the draftsman to choose wording that will be effective throughout the life' of the statute.[133] He linked this to the problems caused by the durability of statutes, which he described as 'static text[s] amid constant flux', with continual '[c]hanges in language, in technology, in social practice and in the surrounding law' that create doubts about how to interpret a statute at any given time.[134] Bennion indicated that an alternative to 'the deep freeze' approach used in cases like *The Longford* 'is to remember that statutes are said to be always speaking' and to reason along the lines of Stephen J in *Edison Telephone Co*.[135]

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[130] Lord Thring, *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents Lord* (2nd ed, John Murray 1902) 82–83, cited in Sir Rupert Cross and others, *Cross: Statutory Interpretation* (3rd edn, Butterworths 1995) 51.
[131] Cross (n 4) 45.
[132] Cross and others (n 130) 51–52; Greenberg (n 10) 971.
[133] Bennion, *Statute Law* (n 23) 136.
[134] ibid 136–37.
[135] ibid 139.

Bell and Engle's 1987 edition of *Cross on Statutory Interpretation* adopted this new reading of the phrase 'always speaking', noting that this 'approach takes account of the viewpoint of the ordinary legal interpreter of today, who expects to apply ordinary current meanings to legal texts, rather than to embark on research into linguistic, cultural and political history, unless he is specifically put on notice that the latter approach is required'.[136]

These editions did not cite rulings where courts had invoked the 'always speaking' principle to justify the decision to adopt an updating approach.[137] In turn, the first rulings where UK courts incorporated this new reading of the phrase cite only these books. Thus, in *R v Hammersmith & Fulham London Borough Council* (decided in 1997), Lord Woolf (giving the judgment of the Court) reasoned that the National Assistance Act 1948 'is a prime example of an Act which is "always speaking", and so should be construed "on a construction that continuously updates its wording to allow for changes since the Act was initially framed" (see Bennion, Statutory Interpretation, 2nd Ed. section 288 at page 617)'.[138] Later on, in its decision in *Fitzpatrick*, the Court of Appeal cited the same passage from Bennion to describe the Rent Act, and indicated that this approach had 'recently received the approval of this court in *Reg. v. Hammersmith and Fulham London Borough Council*'.[139] The Court of Appeal added that this 'was the approach to the Act taken by the majority in *Dyson Holdings Ltd. v. Fox*',[140]

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[136] Cross and others (n 28) 50.
[137] See Bennion, *Statute Law* (n 23) 136, 139; FAR Bennion, *Statute Law* (2nd ed, Oyez Longman 1983) 162, 166; FAR Bennion, *Statutory Interpretation* (1st edn, Butterworths 1984) 356; Bennion, *Statutory Interpretation* (n 67) 617–18; Cross and others (n 28) 50; and Cross and others (n 130) 51–52.
[138] *R v Hammersmith & Fulham London Borough Council* (1998) 30 HLR 10 (EWCA Civ) 16.
[139] *Fitzpatrick v Sterling Housing Association Ltd* (n 87) 324 (Ward LJ).
[140] ibid (Ward LJ).

but the majority in *Dyson* had not used the words 'always speaking'. *Hammersmith* is also the earliest case cited on this point in the latest edition of Bennion's *Statutory Interpretation*.[141]

In *R v Ireland*, Lord Steyn (with whom all the other Lords agreed) adopted the same reading of the phrase 'always speaking' and of Lord Thring's exhortation.[142] In support of this, Lord Steyn cited only the 1995 edition of *Cross on Statutory Interpretation* and the 1996 edition of Pearce and Geddes' *Statutory Interpretation in Australia*.[143] Lord Steyn added that while '[s]tatutes dealing with a particular grievance or problem may sometimes require to be historically interpreted', the drafting technique advocated by Lord Thring means 'that statutes will generally be found to be of the "always speaking" variety'.[144] He cited *Royal College of Nursing* as 'an example of an 'always speaking' construction in the House of Lords',[145] even though, once again, those words had not been used in that case.

Thus, over time, the phrase 'always speaking'—which originally expressed only a grammatical point about tenses—came to be associated with the presumption that statutes should be interpreted according to the circumstances, attitudes, and understandings present at the time of adjudication as opposed to enactment. The irony of the fact that the 'always speaking' metaphor itself

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[141] Bennion and others (n 8) 507.
[142] *R v Ireland* (n 53) 158.
[143] ibid. According to Pearce and Geddes, that 'an Act is to be deemed to be always speaking' means that its 'words … are to be interpreted in accordance with their current meaning'; DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (4th ed, Butterworths 1996) 91. The case they cite to illustrate this (*Chappell & Co Ltd v Associated Radio Co of Australia Ltd* [1925] VLR 350) does not use the expression 'always speaking'.
[144] *R v Ireland* (n 53) 158.
[145] ibid.

changed in meaning over time is not lost on judges and commentators.[146] I think it was potentially misleading to begin using this phrase to refer to the updating presumption. This might be seen by some as an attempt to present the updating presumption as resting on an authority that does not actually support it. This is unfortunate because, in fact, the historical credentials of this presumption are strong, as I have argued in this chapter.

Bell and Engle clearly acknowledge that Lord Thring was talking about something else.[147] Bennion, in contrast, is less explicit and can be read as suggesting that the updating presumption is a natural extension of Coode's and Lord Thring's thought,[148] which, to me, is quite doubtful. Despite this, I think that, by this point, a return to the original meaning of the phrase 'always speaking' would cause more confusion than it would solve, as this new reading has become settled in the caselaw. Therefore, this thesis uses the phrase in the same way as judges currently do, to refer to the presumption in favour of an updating approach to the interpretation of statutes.

VI. <u>Conclusion</u>

This chapter examined the crystallisation, over time, of the (defeasible) presumption that courts should give statutes an updating interpretation. I have argued that the rule has a long pedigree and a broad scope, even though it was initially applied only to changes in material circumstances.

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[146] See, for example, *News Corp UK & Ireland Ltd v Revenue and Customs Commissioners* (n 109) [78] (Lord Leggatt).
[147] Cross and others (n 130) 51–52.
[148] See Bennion, *Statute Law* (n 23) 136, 139; Bennion, *Statutory Interpretation* (n 137) 356.

CHAPTER 5: Content and Rationale

I. Introduction

While the existence of a default presumption in favour of an updating approach to statutory interpretation is not really doubted in the UK, the presumption is often formulated in very abstract terms. What is the exact content of the set of narrower and more concrete rules that govern what the presumption allows or requires, what its scope is, and how it operates are partly contested matters.[1] This chapter looks at the specific kinds of variables in relation to which the presumption is applicable, and explains why it can make sense—from the perspective of lawmakers—to rely on courts to take into account changes in those variables when they interpret statutes. I also analyse what exactly judges are required to do when adopting an updating approach.

The table that follows attempts to present the two axes of my analysis in a visually clear way, with judicial rulings that illustrate the relevant categories. Most of these rulings were introduced in the previous chapter and others will be discussed in this one. While this chapter has an important doctrinal component and pays close attention to the presumption as it is applied by courts, it also maintains some critical distance with the way courts describe what they do.

[1] Andrew Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement (The Hamlyn Lectures 2017)* (CUP 2018) 21–22; Jeffrey Goldsworthy, 'Lord Burrows on Legislative Intention, Statutory Purpose, and the "Always Speaking" Principle' (2022) 43 Statute Law Review 79, 101; *News Corp UK & Ireland Ltd v Revenue and Customs Commissioners* [2023] UKSC 7, [2023] 3 All ER 447 [80] (Lord Leggatt).

<table>
<tr><td colspan="2"></td><td colspan="5">Type of change</td></tr>
<tr><td colspan="2"></td><td>Scientific or technological developments</td><td>New available information</td><td>Legal changes</td><td>Changed social habits</td><td>Changed attitudes or evaluative standards</td></tr>
<tr><td rowspan="3">Updating task</td><td>Revise an expression’s application</td><td>AG v Edison Telephone Co</td><td>R v Ireland; Baker</td><td>T W Logistics Ltd</td><td></td><td></td></tr>
<tr><td>Revise its criteria of application</td><td></td><td></td><td></td><td>Dyson; Fitzpatrick</td><td>Dyson; Fitzpatrick; Yemshaw</td></tr>
<tr><td>Strain a provision’s language</td><td>Royal College of Nursing; Quintavalle</td><td></td><td></td><td></td><td></td></tr>
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A point worth stressing is that while the updating presumption is a general one (which applies always, unless it has been displaced for a specific provision in the ways discussed in the next chapter), rulings in which judges adopt updating approaches are probably not the norm. This does not deny the presumption’s status as one of general application. It only means that changes in circumstances during the life of a statute that are relevant to its interpretation in the context of a dispute will probably not arise in relation to many statutory provisions. The presumption, however, is always there, latent (unless displaced) just in case such a change occurs.

II. Types of Changes

The table above and the analysis that follows do not attempt to offer an exhaustive list of the categories of possible variables that are relevant to the updating presumption. This is not possible, since the categories are not fixed.[2] I am only looking at the main ones that emerge from the caselaw. Other kinds of changes that UK courts may consider relevant in the future could include, for example, different material or economic conditions caused by natural disasters or economic crises. Moreover, as I argued in the previous chapter, variables are often interrelated, sometimes inextricably so.

(1) Scientific and Technological Facts and Information

The most common examples of courts applying old statutory provisions in changed circumstances usually involve changes in natural or material facts produced by advances in science, technology, or medicine. The invention of the telephone (which gave rise to the dispute in *Edison*)[3] and the development of the technique of cell nuclear replacement (at the centre of *Quintavalle*)[4] are examples of this.

Progress in science, technology, medicine, and the like is usually slow, tentative, gradual, and steady. It would be unfeasible for Parliament (or Law Commissions) to periodically monitor these fields and evaluate any developments in relation to all the statutes that touch upon related matters, in order to determine whether any amendments are necessary. In contrast, judges

[2] Francis Bennion and others, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020) 504.
[3] *Attorney General v Edison Telephone Co of London Ltd* (1880) 6 QBD 244.
[4] *R (Quintavalle) v Human Fertilisation and Embryology Authority* [2003] UKHL 13, [2003] 2 AC 687.

have the capacity to adjust the law to these changes case by case, in a narrow, incremental, and revisable way.[5] In other words, the way judicial adjudication takes place is ideally suited to making sure the law stays relevant as these changes occur. This is why it makes sense for Parliament to rely on courts for this task.

The same considerations apply to cases in which, thanks to these developments, we now have new—or improved—information about a pre-existing situation that has not itself changed. Statutes dealing with injuries, harms, and safety measures to prevent them offer good examples of cases in which more information usually becomes available years after their enactment. This is illustrated by the realisation—taken into account in *Baker*—that noise pollution can cause hearing loss.[6] As the Court noted in *R v Ireland*—discussing, in particular, the idea of psychiatric harm—scientific explanations are usually incomplete and imperfect.[7] This makes the grant of interpretive flexibility to courts a particularly well-suited method of making sure that statutes keep up to date with scientific knowledge over time.

Nothing above denies that, at some point, Parliament will need to take action and amend the statute at stake, rather than keep relying on courts to adjust it to new circumstances so that it stays relevant. The question in any given situation is, as Leggatt J has put it, whether it is 'reasonable to suppose that the

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[5] See Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009) 195–97; MDA Freeman, 'Standards of Adjudication, Judicial Law-Making and Prospective Overruling' (1973) 26 CLP 166, 179; Roger J Traynor, 'Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility' (1977) 28 Hastings Law Journal 533, 537.
[6] *Baker v Quantum Clothing Group Limited* [2011] UKSC 17, [2011] 4 All ER 223 (UKSC).
[7] *R v Ireland* [1998] AC 147 (HL) 156 (Lord Steyn).

legislature intended a court applying the law in the future to ignore such changes and to act as if the world had remained static since the legislation was enacted'.[8]

Lord Leggatt has recently challenged the idea that the updating presumption is applicable to cases where new things have become available thanks to technological advances. In his concurring judgment in *News Corp UK*, he reasoned that 'the fact that digital editions and the technology required to produce them did not exist' at the time of enactment 'makes no difference from a legal point of view to whether such editions … fall within the meaning of the term "newspapers" in the … Act' at stake in that case.[9] In his view, '[w]hereas there is a presumption … that current social values and scientific knowledge should be applied' when interpreting a statute, 'the advent of new technology seems … an essentially neutral factor', since there is 'no reason why the law should favour novelty for its own sake'.[10] For him, '[t]he most that can be said is that the fact that an object or process did not exist and could not have been foreseen when a statute was enacted is not a reason to regard the statute as inapplicable and that a purposive interpretation may lead to the conclusion that the statute applies to it'.[11] He notes, however, that 'there is nothing singular about this' since all general rules are applicable beyond the specific cases that their authors contemplated.[12]

I think this reasoning is not quite right. The point of relying on the updating presumption in these cases is not to 'favour novelty' but to make sure that laws stay relevant in the face of such novelties. The presumption does not tell us that

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[8] *R (N) v Walsall MBC* [2014] EWHC 1918 (Admin) [45], cited in Bennion and others (n 2) 504.
[9] *News Corp UK & Ireland Ltd v Revenue and Customs Commissioners* (n 1) [74].
[10] ibid [90].
[11] ibid.
[12] ibid.

we should assume that all technological developments are included within a statute enacted before this development. Interpreters need to assess whether there are enough relevant similarities between a new object (or procedure) and the kinds of objects (or procedures) that Parliament had in mind when it legislated. Relevant points of comparison may include the function that this object performs, the risks it creates, and so on. There is no presumption about the outcome of this comparison.

What the updating presumption tells us is that *if* the objects are sufficiently similar, then we should—in principle—presume that legislators intended courts to consider that the new object is included within the old provision. In some cases, interpreting the provision in a way that includes this object may require courts to strain the statutory language. I discuss in more detail what this straining consists in below, in section III(3). As I will explain there, straining is not limited to cases of updating interpretations: courts may also strain the language of statutes when the updating presumption is not at stake. However, for this to be justified, courts must be satisfied that this interpretation respects Parliament's intentions, even though it does not follow from a natural reading of the statutory language. Because that language is the main vehicle through which Parliament conveys its intention, the justification threshold for straining interpretations is particularly high. In section III(3) below, I explain the role that the updating presumption plays in meeting that threshold. This underscores the relevance that the presumption has in cases of technological or scientific inventions.

(2) Legal Changes

Adopting an updating approach may also require courts to take into account changes in the legal system that took place after a statute was enacted. Thus, for instance, a statutory reference to one institution should normally be read as referring to a new one that has taken its role.[13] The question in such cases, as presented by Lady Arden in *General Dynamics*, is one of 'functional equivalence'.[14] Lady Arden reasoned that 'the word "writ" will in appropriate circumstances be interpreted as including a claim form' when, as it had happened, 'the function of a "writ" is assumed by a "claim form"'.[15] In contrast, as discussed in the previous chapter, in *The Longford* there was no functional equivalence between the different kinds of actions at stake and, therefore, an updating approach was not appropriate.[16] Ideally, Parliament would be expected to amend past statutes when it introduces legal changes that affect them. However, given the size of the statute book, it may not be feasible to expect it to update every single reference, and reliance on courts may be unavoidable.

Another example, also mentioned in the last chapter, not involving outdated or mismatching legal references is *T W Logistics Ltd*.[17] There, the Court reasoned that the kinds of spaces that could be registered as a town or village

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[13] *R (N) v Walsall MBC* (n 8). (This decision is about the interpretation of a regulation laid before Parliament, but its reasoning and conclusion are applicable to statutes.)

[14] *General Dynamics United Kingdom Ltd v State of Libya* [2021] UKSC 22, [2022] AC 318 (UKSC) [95]. (This idea of functional equivalence is similar to the one that may be relevant when assessing whether an old provision is applicable to new objects or procedures made possible by technological developments, as discussed above.)

[15] ibid.

[16] *The Longford* (1889) 14 PD 34.

[17] *T W Logistics Ltd v Essex County Council* [2021] UKSC 4, [2021] AC 1050 (UKSC).

green (TVG) were not limited to what had been contemplated at the time the relevant statute was enacted. Instead, courts had to take into account later legal developments. In that case, those developments were related to the introduction of a process to register lands as TVGs, the rights that this gave to the public, and the kinds of lands that this could be relevant to.

An interesting question related to legal changes that is worth considering here briefly is whether enactments that update statutes in the face of new circumstances can have the effect of *blocking*—rather than justifying—updating interpretations. If Parliament has amended a statutory provision in a certain way (for example, expressly extending it to case *X*), would applying an updating approach to its original language to achieve the same result (seeing *X* as included within it from the start) necessarily go against Parliament's original intention?[18] We cannot generalise here. In amending the provision, Parliament might simply have intended to clarify beyond any doubt that it was applicable to a certain kind of situation or object. It does not necessarily follow from this that interpreting the original language in that way was (or would now be) incorrect. A good example of this is *R v Fellows*, where the Criminal Division of the Court of Appeal held that images stored in a computer counted as 'photographs' for the purposes of section 1 of the Protection of Children Act 1978.[19] This Act had been amended by section 84(3)(b) of the Criminal Justice and Public Order Act 1994 so that 'photograph' now expressly included 'data stored on a computer disc or by other electronic means which is capable of conversion into a photograph'. The defendant had

[18] (I have in mind cases in which the prior version of the statute is applicable, for example because it was the existing one when the facts of the case took place.)
[19] *R v Fellows (Alban)* [1997] 1 Cr App R 244 (EWCA Crim), cited in Bennion and others (n 2) 516, 518 (n 54).

submitted that it followed from this amendment that data stored in that way was not included within the original Act (applicable to the facts of the case), whose scope was narrower. The Court rejected this argument, reasoning that the meaning of a statute has to be ascertained looking at its words at the date when it was passed.[20] This could not be 'altered by the later introduction of amendments' (unless retrospective legislation is introduced, which had not been suggested here) since statutes must be interpreted 'by the courts' and 'not by the later views of Parliament'.[21]

A related question is whether the fact that an Act has been formally amended to update it in a certain way (let us say, again, to include case *X*) means that judicial interpretations that update it in another way (say, to include case *Y*) are wrong. Once again, this is not necessarily so. Cretney and Reynolds criticise *Fitzpatrick* based on a reasoning like this, which I find unpersuasive. According to them, one reason why the decision is wrong is that the Housing Act 1988 'put into statutory form the entitlement of a heterosexual cohabitant but … made no mention of homosexual relationships'.[22] In their view, 'the omission of a provision equating the position of homosexual and heterosexual cohabitants' must have been deliberate.[23] The relevant question, however, is whether when enacting the original Act—or when amending it—Parliament intended to displace or narrow down the updating presumption. In the next chapter, I will argue that it did not.

[20] *R v Fellows (Alban)* (n 19) 253.
[21] ibid.
[22] SM Cretney and FMB Reynolds, 'Limits of the Judicial Function' (2000) 116 LQR 181, 184.
[23] ibid.

(3) <u>Social Habits</u>

Changes in society's habits, practices, or ways of life are usually slow, gradual, and continuous. They may progressively erode the rationale of old statutes or alter the boundaries of the categories established in them. Normally, statutes are enacted under the assumption that courts will take these changes into account in their interpretations. The alternative for Parliament would be to constantly monitor these changes and amend statutes in response—which, once again, would be unfeasible—and have its laws become ossified until it does so.

An example of such changes has been the proliferation of unmarried couples (including same-sex couples) living together in the stable, public way that, in the past, used to be reserved for (heterosexual) spouses. In *Fitzpatrick*, Lord Nicholls opined that giving a 'narrow or rigid meaning' to the word 'family' 'would fail to reflect the diverse ways people, in a multi-cultural society, now live together in family units' and, as a result, 'the legislation would fail to cover the whole of the target intended to be protected'.[24] *Fitzpatrick* involved both changes in the ways people live together and modified social attitudes towards (or perceptions of) these new ways of life.[25] The following section focuses specifically on the latter kinds of changes. As I argued in the previous chapter, these two developments often feed into each other. When more and more people start living their lives and relationships in a different way, it becomes more likely that, at some point in the future, society at large will change how it regards such choices. This modified perception, in turn, can foster further changes in people's choices, thanks to the promise of being met with a higher degree of acceptance.

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[24] *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 (HL) [46].
[25] See ibid [53]–[54] (Lord Nicholls) and [73] (Lord Clyde).

Another example turning on changes in society's ways of doing things is *McCartan Turkington Breen v Times Newspapers Ltd*.[26] This was a defamation claim for the publication of a newspaper article reporting what had been said at a press conference. Invitations to the conference had been limited to members of the press, and had not included the general public. The question was whether the article was protected by section 7 of the Defamation Act (Northern Ireland) 1955, as '[a] fair and accurate report of the proceedings at any public meeting held in the United Kingdom' (paragraph 9 of the Schedule to the Act). In holding that it was, the House of Lords overruled the decision of the trial judge, who had considered that the meeting had not been public because only people with certain ties with the organisers had been invited, rather than the general public. Arguing for this narrow reading, counsel for the claimant had stressed that the statutory language could be traced back to an Act from 1888, a time at which 'the phenomenon of press conferences was unknown'.[27]

Against this, the House of Lords reasoned that the 'reference to "public meeting" … must be interpreted in a manner which gives effect to the intention of the legislature in the social and other conditions which obtain today'.[28] It noted that a press conference 'has become an important vehicle for promoting the discussion and furtherance of matters of public concern, and there is nothing in the nature of such a conference which takes it outside the ordinary meaning of "public meeting"'.[29] The Court also emphasised that, in modern societies, only a small minority can participate personally in discussions of public relevance and

[26] *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277.
[27] ibid [295].
[28] ibid [292] (Lord Bingham).
[29] ibid.

the majority can do so only indirectly, relying on the press to be kept informed.[30] In this context, the Court took into account the cardinal importance that freedom of expression and access to information have in our current legal system.[31] As Lord Steyn wrote extrajudicially, the decision thus 'construed the legislation in the light of the utility of press conferences in the modern world, taking into account the law of freedom of expression as it exists today'.[32] This illustrates, once again, the interrelation between different kinds of variables—in this case, the evolution of our social practices and our legal protections. We may add that, more recently, advances in digital technology seem to have changed further what we would understand today by 'public meeting'.

(4) <u>Social Attitudes and Evaluative Standards</u>

Decisions like *Fitzpatrick* and *Yemshaw* reinforce a point that had already been made clear from the contrast between *Dyson* and *Gammans*. This is that what may give rise to an updating interpretation is not just the presence of facts or situations that had not occurred before but also changes in the attitudes towards, or perceptions of, pre-existing facts or situations. The facts in *Gammans* and *Dyson* were very similar: both were cases of childless, unmarried couples. As Bridge LJ noted in *Dyson*, what had emerged by then, twenty five years after *Gammans*, was a 'changed social attitude and consequent change' in how we understand 'the scope of a common English word' ('family').[33] Something similar can be said of *Yemshaw*: psychological or emotional abuse was not invented

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[30] ibid [289]–[291] (Lord Bingham).
[31] ibid [289]–[291] (Lord Bingham), [296] (Lord Steyn).
[32] Johan Steyn, 'Dynamic Interpretation amidst an Orgy of Statutes' (2004) 35 163, 169.
[33] *Dyson Holdings Ltd v Fox* [1976] QB 503, 513.

after the enactment of the Housing Acts; it happened and harmed people before that. What changed in the last few decades is our recognition of this and our attitude towards it.

It is thus beside the point to remark in a case, as Lord Hobhouse's dissent did in *Fitzpatrick*, that 'it is difficult to see what fresh set of facts has … come into existence', since '[h]omosexual relationships have been known about and existed throughout any relevant period of time and homosexual couples have shared accommodation'.[34] In addition to this being inconsequential—since the caselaw rightly recognises that changed social attitudes alone can justify an updating interpretation—it was also probably not entirely accurate. As discussed in the previous section, there had been changes in the ways people live together: same-sex couples cohabiting gradually became more numerous and less covert.

The reasons why lawmakers may want to rely on courts to keep up to date statutes that feature evaluative terms, in the face of changes in social attitudes, conceptions, and standards, should be familiar by now. The piecemeal, tentative, and reversible nature of these changes corresponds to the characteristics of the judicial adjudication process. This, and the highly particularistic and context-sensitive reasoning required to assess whether a situation is included within an evaluative term or not, makes these changes hard to deal with through the mechanism of general legal reforms. Moreover, revisions of our attitudes, conceptions, and standards are pervasive and continuous, which, once again, suggests that it would be extremely difficult for Parliament to stay on top of these changes. Courts, by contrast, can make adjustments on a case-by-case basis and add increasing nuance by distinguishing new situations from those

[34] *Fitzpatrick v Sterling Housing Association Ltd* (n 24) [113].

considered in past cases. This helps to explain the legislative reliance on them. Of course, there may come a point when these changes are of such magnitude that this mechanism is no longer well-suited to deal with them and formal amendment becomes necessary.

The 'family' example shows that the terms at stake may be evaluative only in part, in the sense that they designate empirical or sociological facts but also include an evaluative or normative component (for example, a moral standard) based on which we identify such facts and distinguish them from others that we think do not fall within the concept at stake.[35] Other terms, like 'abusive' and 'cruel', seem to be, by contrast, almost entirely evaluative. Updated understandings of them may emerge when people reflect upon what are impermissible ways to treat people.

Another example of a decision that adopted an updating approach to interpret a term that is only partly evaluative is the word 'religious' in *R (Hodkin) v Registrar General of Births, Marriages and Deaths*. The Supreme Court held that a chapel of the Church of Scientology is a 'place of meeting for religious worship' within section 2 of the Places of Worship Registration Act 1855 and, as a result, marriage ceremonies can be conducted there.[36] It thus overruled a precedent where the Court of Appeal had held that a chapel of the Church of Scientology fell outside the Act because the 'governing idea' of 'religious worship' is normally the reverence to a deity or a superior being or entity outside the

[35] See *News Corp UK & Ireland Ltd v Revenue and Customs Commissioners* (n 1) [87] (Lord Leggatt).
[36] *R (Hodkin) v Registrar General of Births, Marriages and Deaths* [2013] UKSC 77, [2014] AC 610 (UKSC), cited in Bennion and others (n 2) 514.

worshipper's own self, which is absent in Scientology.[37] The Supreme Court held in *Hodkin* that that understanding 'was unduly narrow' and added that, 'even if it was not unduly narrow in 1970, it is unduly narrow now'.[38] Lord Toulson (with whom Lord Neuberger, Lord Clarke, and Lord Reed agreed) opined that there are several reasons that go against attaching 'a narrowly circumscribed meaning' or 'definitive formula' to the word 'religion', including 'the variety of world religions, developments of new religions and religious practices, and developments in the common understanding of the concept of religion due to cultural changes in society'.[39]

Whose Attitudes and Standards?

Changes in attitudes and evaluative conceptions or standards can involve most of society or remain limited, at least for the time being, to a certain group of people, such as governmental institutions (at a national or international level), or experts in a certain field like psychiatry, psychology, or philosophy. This raises an important question: whose attitudes, conceptions, and standards should courts take into account when these differ among different people? Should they, for example, prefer the majoritarian social consensus (when there is one) over the niche views of a specialised elite? And are they always meant to track someone else's understandings (be it society's or a group of experts') or should they ever follow their own independent judgment instead?

[37] *R v Registrar General, Ex p Segerdal* [1970] 2 QB 697 (EWCA Civ) 707 (Lord Denning MR), 708-709 (Winn LJ), and 709 (Buckley LJ).
[38] *R (Hodkin) v Registrar General of Births, Marriages and Deaths* (n 36) [61], [65].
[39] ibid [34], [57].

Advocates of updating approaches have sometimes been criticised for failing to address this question properly. Bradley Miller, for instance, argues that Aileen Kavanagh is not clear about whether and to what extent conventional morality (and changes in it) should constrain judges, or whether judges should freely follow their own moral judgment without deferring to current popular views.[40] Something similar might be said of the work of Jeffrey Goldsworthy, who is a 'moderate originalist'[41] and defends the view that updating interpretations by judges can be justified by the original intentions of the lawmakers.[42] Goldsworthy argues that, when interpreting a law, judges 'must decide for themselves how it should be applied, according to its true meaning', which may require them to make judgments of value, 'properly guided by the beliefs and values of their own time and place'.[43] He adds that interpreting moral and evaluative standards 'requires contemporary assessments', as these standards are applied 'according to current understandings', 'guided by current scientific knowledge, or current evaluative beliefs or attitudes'.[44] This does not tell us to what extent judges' decisions should be based on their own moral or evaluative judgment and to what extent they should be 'guided' by—and perhaps sometimes even defer to—standards, beliefs, and attitudes held by society (or any specific group within it).

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[40] Bradley Miller, 'Beguiled By Metaphors: The "Living Tree" and Originalist Constitutional Interpretation in Canada' (2009) 22 Canadian Journal of Law and Jurisprudence 331, 350–51, commenting on Aileen Kavanagh, 'The Idea of a Living Constitution' (2003) 16 Canadian Journal of Law & Jurisprudence 55, 83–86.

[41] Jeffrey Goldsworthy, 'Response to Contributors' in Lisa Burton Crawford and others (eds), *Law Under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Hart Publishing 2019).

[42] Goldsworthy (n 1) 92–95.

[43] ibid 93–94.

[44] ibid 94–97.

The first thing to note about this question, however, is that it does not arise only in cases in which an updating approach is applicable and judges are required to revise past understandings of open-textured, evaluative expressions. It is equally present on day one, before anyone has had time to change their understandings, when a first case arrives at a court and judges have to develop what the law says because its broad, evaluative language is not determinate enough to solve the case.[45] When an expression in a statute has an evaluative component (or is purely evaluative), its interpretation and application partly depend on someone's judgment about what it requires. The expression is thus indexed to this judgment, and its interpretation and application may change over time as this judgment changes (unless the expression is being used in a way that is tied to a specific point in time). When there are different, competing judgments about it, judges will need to ask themselves what the expression was originally indexed to, from the moment it was enacted. This question may be difficult to answer, partly because at the time of enactment there might have been more or less universal agreement on the issue at stake, or the issue might not have arisen at all. Later on, as competing standards emerge, we need to figure out whose standards the statute was tracking from day one. Once we figure this out, it naturally follows that, when these change over time, judges should take into account their current state. (Once again, this is so unless the expression was not left open but clearly tied to how it was originally understood. The next chapter discusses how this may be done.)

[45] Daniel Greenberg and someone who wished to remain anonymous emphasised this point in our interviews.

To begin answering the question of what a broad, evaluative expression in a statute is indexed to, we need to reflect on what is, most likely, the reason why Parliament left this particular concept in this particular statute underdeveloped, for interpreters to flesh out in the cases before them. (Since my focus is on courts, I am setting aside here cases where the statute creates delegated powers for the executive to issue secondary legislation that develops the concept at stake.) There are different 'services' that judges may perform by developing the law and keeping it updated. In mentioning the three main ones below, I do not mean to suggest that these are the only possibilities or that the distinctions between them will always be clear-cut.

First, as I have already explained, Parliament may grant flexibility to future interpreters so that they can help to keep the law up to date with changes in social attitudes and standards when these are so gradual and constant that Parliament could not keep up with them through formal enactments. In such cases, courts are supposed to ascertain what society's consensus is at any given time and interpret statutes accordingly. A term like 'family' is a good example of this. What popular expressions like this designate should be obvious enough to everyone and yet hard to pin down with a strict definition that will remain relevant over time. This may lead Parliament to opt for a vague formulation and leave the task of making it more precise to courts, on a case-by-case basis and in accordance with society's views at any given time. Another good example of this is the term 'cheating', in the context of the Gambling Act 2005.[46] 'Cheating' is a concept present in colloquial conversations and easy to grasp for anyone who may

[46] The example is taken from Daniel Greenberg, *Craies on Legislation* (12th edn, Sweet & Maxwell 2020) 498–500.

consider committing the deed. However, its application is deeply sensitive to the details of the situation. Moreover, new ways of cheating emerge all the time, as gambling houses and other similar establishments become aware of older methods. Thus, this term illustrates how '[a]n attempt to remove all element of discretion from the courts will … produce more uncertainty and confusion than it removes'.[47] In cases like this, courts are not called upon to revise society's views in any way but simply to track them over time.

Second, Parliament may grant flexibility to courts in order to make sure that statutes are interpreted and applied in accordance with the most updated expert consensus in a field with which, once again, Parliament could not keep up. Statutes referring to 'violence' and 'abusive behaviour'—given psychiatry's and psychology's ever-evolving understanding of these phenomena—are examples of this. In these cases, in which a statute refers to standards adopted and developed by experts of disciplines that are constantly re-examined and improved upon, judges will have to decide according to the most updated theories at the time of the facts of the case or the decision.

Finally, statutory expressions may, instead, evoke the open-ended language of human rights treaties and bills of rights (or may actually be part of a bill of rights). In these situations, the most plausible interpretation of the intention behind the enactment of broadly worded rights or principles that are left undefined (or partially undefined) will normally be that Parliament has entrusted courts with a role in contributing to their protection. This will usually grant courts discretion to serve as independent arbiters, rather than simply defer to the interpretation that would be more popular within society or the government. I will return to this matter

[47] ibid (mentioning 'hunting' as another example).

in chapter 8, when examining—against critics—the institutional reasons that may explain Parliament's decision to grant interpretive discretion to courts in relation to certain issues. There, following insights put forward by Ronald Dworkin and John Hart Ely, among others, I will argue that it is reasonable for Parliament to seek the judiciary's input in relation to matters like the rights of unpopular or politically powerless groups, or principles aimed at preventing abuses of power by the executive or electoral majorities. The point for now is that, when this is what Parliament appears to have done, courts interpreting statutes may be required to go against the majoritarian social or political consensus, when this is hostile to the rights and principles with whose protection they have been entrusted by Parliament. This does not mean that, when deciding what is the correct interpretation of the right or principle at stake, courts are entirely free to exercise their moral judgment and follow the theories or conceptions that they personally prefer. They should make these decisions within the constraints and pre-commitments of the legal system to which they belong. Among other things, this may require them to take into account what other authorities (such as other national and supra-national courts) have said on this and related matters.

Relevant variables to ascertain which service or task courts are being called on to perform in any given case include the type of language used in the provision at stake and the type of statute that it is. Thus, for example, a word like 'cheating' in a criminal statute should, in principle, be interpreted according to its colloquial understanding at the time of the facts, as suggested by the fact that this is a popular term and given the importance of allowing all members of society to understand and predict what behaviours will likely carry criminal punishments. This same reasoning would not hold in a statute regulating the use of 'embryos'

or enshrining a right to 'freedom of expression'. Another important variable is the type of obligation that the provision creates (if any). If, for example, someone's situation fell within the statutory protection at stake in *Yemshaw*, she would be deemed 'automatically homeless', despite the fact that she has a right to remain in that home and regardless of housing shortages.[48] This would trigger a series of duties on local housing authorities, including the provision of advisory services, housing assistance, and interim accommodation in cases of priority need.[49] Since these resources are limited, it makes sense for a society to decide—through its elected representatives—which situations merit the granting of these forms of aid and in what order of priority. In this context, the Court's examination of parliamentary and government reports and guidance documents (to understand that decision better) looks fitting.[50]

(5) <u>An Excluded Category: Linguistic Changes</u>

Changes in the sense in which people use certain terms or expressions are, by contrast, not something that courts should follow when they interpret provisions enacted before these changes took place. Following these new uses would be arbitrary and potentially absurd, so there is no basis on which to argue that Parliament intended courts to do so. This is illustrated by the reference to a jury of 'twelve sad men' in a statute enacted in the reign of Henry VII (3 Hen 7 c 14,

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[48] *Yemshaw v Hounslow London Borough Council* [2011] UKSC 3, [2011] 1 All ER 912 [7].

[49] Sections 179, 183, and 188 of the Rent Act 1996, respectively.

[50] *Yemshaw v Hounslow London Borough Council* (n 48) [21]–[24].

1487), when 'sad' meant sober and discreet.[51] Lawrence Solum uses the expression 'linguistic drift' to refer to this phenomenon.[52]

Changes in our linguistic conventions and usages are unpredictable for Parliament, and there is no reason to think that they will preserve the rationale of the legal provisions where that language happened to be included. From the point of view of the logic behind these provisions, linguistic changes are haphazard. Thus, when over time a word or expression comes to designate a different concept (either retaining the original sense alongside or replacing it with this new one), statutes featuring such terms should be interpreted in their original sense.[53] This is the worry that is behind the rule of *contemporanea expositio*, discussed in the previous chapter. While very old statutes are especially likely to bring about these situations, more recent ones can also include terms or expressions that are now used to designate something else.

Defending a certain interpretation of a provision which just happens to have become linguistically tenable would be a case of 'semantic opportunism'.[54] Someone attempting to do this would be exploiting to her own advantage random changes in our linguistic conventions that bear no relation to Parliament's law-making choices. An example of this could be based on a provision like section 119 of the Australian Constitution, which establishes: 'The Commonwealth shall

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[51] *News Corp UK & Ireland Ltd v Revenue and Customs Commissioners* (n 1) [82] (Lord Leggatt), citing FAR Bennion, *Statutory Interpretation* (1st edn, Butterworths 1984) 367–68.
[52] Lawrence B Solum, 'The Fixation Thesis: The Role of Historical Fact in Original Meaning' (2015) 91 Notre Dame Law Review 1, 17.
[53] Bennion and others (n 2) 505–06; *News Corp UK & Ireland Ltd v Revenue and Customs Commissioners* (n 1) [82]–[83] (Lord Leggatt).
[54] I am taking the phrase 'semantic opportunism' from Richard Ekins, 'A Critique of Radical Approaches to Rights-Consistent Statutory Interpretation' [2003] European Human Rights Law Review 641. (Note that, in that work, Ekins is not discussing linguistic changes in particular.)

protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence'.[55] The fact that the expression 'domestic violence' is now predominantly used to refer to violence within the home (especially among partners) should, of course, play no role in its interpretation. Someone attempting to ground a constitutional protection against violence within the home on the basis of that provision would be acting opportunistically.

(6) A Remaining Question: Update From What Point in Time?

When the facts, information, or prevalent attitudes at the time a statute was enacted differ from those present at the time of the facts of a case, and these—in turn—differ from those present at the time of adjudication, what is the relevant 'date' in relation to which statutes must be kept up to date? So far, to simplify, I have mostly talked of interpreting statutes according to the circumstances present at the time of adjudication. However, on certain occasions, the time at which the facts of the case took place will be the correct standpoint. *Baker* is one example. There, the Supreme Court held that employers' liability for the hearing loss suffered by their employees should be ascertained by reference to the knowledge and safety standards at the time the facts took place.[56] This contrasted with the Court of Appeal's approach, which had judged these matters according to the knowledge and standards of the time of the decision, retroactively applying them to the facts of the case.[57] Because the relevant Act

[55] The example is taken from Goldsworthy (n 41) 282–83. Lawrence Solum uses a similar example (from the US Constitution) in Solum (n 52) 16–18.
[56] *Baker v Quantum Clothing Group Limited* (n 6) [64] (Lord Mance), [111], [126] (Lord Dyson).
[57] See ibid (Lord Mance).

here seemed to be establishing relative (rather than absolute) liability for what someone might reasonably foresee, the Supreme Court's approach looks like the correct one.

The rule of thumb appears to be that courts should update statutes taking into account circumstances present at the time of adjudication, unless it is very clear that a change that had taken place by then had not yet occurred when the facts of the case took place and this is relevant to the application of the statute (for example, because, as in *Baker*, it would not be appropriate to hold someone liable in such circumstances).[58] This makes sense: once, for example, old evaluative standards have been revised or deficient information has been replaced with accurate knowledge, courts should not stick to such dated standards and information, unless there are compelling reasons to do so based on reliance or fair warning.

III. <u>Updating Tasks</u>

I will now look at the kinds of tasks that courts may have to carry out when adopting an updating approach.

(1) <u>Revise an Expression's Application</u>

The simplest cases are those where judges apply a statutory expression to an object (or entity, action, procedure, situation, or the like) which was not regarded as included within the scope of the expression at the time it was enacted. This could be due to the fact that the object simply did not exist or had not yet been

[58] See, for example, *Dyson Holdings Ltd v Fox* (n 33) 513 (Bridge JL), 511 (James LJ).

discovered at the time of enactment. Examples of this abound, such as *Edison*, where telephones were considered to be included within the Telegraph Acts.[59] Another example is a decision holding that an electric tramcar was a 'stage carriage' within the meaning of the Stage Carriages Act 1832, enacted at a time when electric tramcars had not yet been invented.[60]

In other cases, the object or situation at stake will have existed and been known at the time of enactment but still not considered to be included within the relevant provision. An example of this is *Owens v Owens* (cited in the previous chapter), where the Court reasoned that section 1(2)(b) of the Matrimonial Causes Act 1973 'nowadays sets at a low level the bar for the grant of a [divorce] decree'.[61] The threshold for concluding that someone cannot reasonably be expected to remain living with their spouse, given the latter's behaviour, has become lower, especially in the case of women tolerating their husbands' conduct.[62] This means that behaviours that would once have been considered outside the scope of section 1(2)(b) could now be seen as falling within it. Lord Wilson was careful to stress that what had changed were not the variables or requirements that were relevant to that section but only 'the moment' at which someone's behaviour reaches that point. (I discuss cases in which those variables or requirements have changed in the next section.) He thus opined that 'old authorities continue to provide a correct interpretation of the subsection', for example, insofar as they establish that blame and gravity are not necessary

[59] *Attorney General v Edison Telephone Co of London Ltd* (n 3).
[60] *Chapman v Kirke* [1948] 2 KB 450.
[61] *Owens v Owens* [2018] UKSC 41, [2018] AC 899 [17] (Lord Wilson, with whom Lord Hodge and Lady Black agreed).
[62] ibid [17], [34].

requirements of a successful petition under it.[63] What occurred was only 'a legitimate enlargement of its application reflective of changing social norms'.[64]

Depending on how concrete and specific the statutory language is, applying it to a new case may involve straining its language, as I will discuss in section III(3) below. I do not think there is always a clear-cut line between these two situations. Some cases may be in a grey area, where it is not easy to say whether the court simply adjusted the application of a statutory provision or strained its language. *Barker*, for example—where the expression 'bankers' books' was held to include records kept in microfilm—could arguably fall within this grey area. As Caulfield J noted, while microfilm 'would not be called in ordinary language a book', a traditional banker's book would not be called a 'book' either in ordinary language.[65] This may be read as suggesting that the expression 'bankers' book' in the statute was a technical term and would thus not require straining to be applicable to records kept in other mediums.

An updating approach could, alternatively, lead to narrowing down what was originally thought to be the scope of application of an expression. For instance, measures that would have been considered enough to render a workplace 'safe … so far as is reasonably practical', within the meaning of the Factories Act 1961, at the time *Baker*[66] was decided may not be considered so today if they have been found to be ineffective.

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[63] ibid [24], [27]–[28], [30], [34], [38].
[64] ibid [36].
[65] *Barker v Wilson* [1980] 1 WLR 884, [1980] 2 All ER 81 (High Court) 887.
[66] *Baker v Quantum Clothing Group Limited* (n 6).

(2) Revise an Expression's Criteria of Application

In contrast to the decision in *Owens v Owens*, what courts will revise in some cases are precisely the variables or requirements that determine how a statutory expression is to be applied. To explain this difference it is helpful to consider the distinction between what philosophers of language call the 'extension' (or 'reference') of a term and its 'intension' (or 'sense').[67] A term's extension is made up of the set of objects or instances that the term designates. In turn, its intension are the criteria or conditions that determine to which instances the term applies—that is, the function that determines the term's extension. The cases discussed in the previous section involve a change in the set of objects, situations, or instances understood to be designated by the relevant statutory provision. In the case of the Telegraph Act 1863, for example, what had changed at the time *Edison* was decided was the set of objects designated by the words 'any apparatus for transmitting messages or other communications by means of electric signals'. That set now included telegraphs.

In other cases, instead, we may realise that what we previously (at the time of enactment or in early cases) thought were essential components or requirements of an expression are not so. In *Fitzpatrick*, for example, the court reasoned that different genders were not a necessary condition for two people romantically involved to be considered a 'family'. The Court noted that something analogous had happened before with the requirement of being formally married: as Lord Clyde put it, '[t]he formal bond of marriage is now far from being a significant criterion for the existence of a family unit'.[68] Similarly, in *Yemshaw*, the

[67] Colin McGinn, *Philosophy of Language: The Classics Explained* (The MIT Press 2015) ch 5.

[68] *Fitzpatrick v Sterling Housing Association Ltd* (n 24) [73].

Court concluded that physical contact was not a necessary component of the definition of 'violence'.

I believe it is important to be clear about the fact that, in these kinds of cases, courts are revising the fine-grained definitions of statutory expressions. The need for transparency is especially important given how often intentionalists are criticised for relying on 'masks' and 'fig-leaves' that hide what courts truly do, as I discussed in chapter 2. Such transparency is sometimes lacking in judges' own descriptions of their reasoning, when they downplay the degree to which they are revising previous interpretations. Some judges claim—in my view, mistakenly—that only the 'application' or 'content' of a statutory expression may change over time, while its 'meaning' cannot.[69] Some scholars accept this as an accurate description. Goldsworthy, for instance, argues that the 'meaning' of a term—which he understands as 'the criteria or function that determine its application'—'may not change except by formal amendment'.[70]

Differentiating between meaning and application is important, but we should also draw a further sub-distinction between two types of meaning. One is the detailed list of the conditions or requirements that something must meet to be an instance of that concept—the fine-grained criteria that determine when the concept is applicable. This is its intension, in the distinction above. The other is the more basic and thinner outline of the concept itself, which gives us a general idea of what we are talking about. (This is what we often find in dictionaries, but

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[69] See, for example, *Oakley v Birmingham City Council* [2001] 1 AC 617 (HL) 631 (Lord Hoffmann); *R v G* [2003] UKHL 50, [2004] 1 AC 1034 [29] (Lord Bingham); *General Dynamics United Kingdom Ltd v State of Libya* (n 14) [94] (Lady Arden); and *News Corp UK & Ireland Ltd v Revenue and Customs Commissioners* (n 1) [88] (Lord Leggatt).
[70] Goldsworthy (n 1) 92.

some dictionary definitions may go beyond this and lay out the criteria for the application of a word.) Different ways of capturing this distinction have been put forward. An especially influential one is the distinction between a 'concept' and different 'conceptions' of it, which helps to explain how we can disagree about what exactly is required by a concept with a normative component (like 'justice') and yet agree that we are arguing about one and the same concept.[71] Goldsworthy contemplates the possibility of relying on this distinction, but does not do so himself.[72]

I believe that drawing this sub-distinction is important to see the sense in which the meaning of a statutory expression remains frozen and the sense in which it can be revised by judges adopting an updating approach. What is fixed beyond the reach of judicial updating are the enacted concepts—that is, the thin, abstract idea behind an expression. Departing from this would create a situation of semantic opportunism, as discussed above with the 'domestic violence' example. The fact that an expression happens to be linguistically compatible with more than one abstract concept does not mean that interpreters can substitute one for the other.

In contrast, the fine-grained criteria of application of an expression are, in principle, revisable by courts to some degree. This is illustrated by the revision of the characteristics that ties between people must have for us to be able to speak of them as a 'family' (in cases like *Dyson* and *Fitzpatrick*), and of the requirements

[71] See Ronald Dworkin, *Law's Empire* (Hart Publishing 1998) 70–72; WB Gallie, 'Essentially Contested Concepts' (1956) 56 Proceedings of the Aristotelian Society 167. (My thesis will not examine Gallie's claim that some concepts are 'essentially contested' in the sense that disputes about their criteria of application are inevitable and cannot be resolved by any kind of argument.)
[72] Goldsworthy (n 1) 99.

that a behaviour or treatment must satisfy to count as 'violence' (in cases like *Yemshaw*). For this reason, I think Lord Slynn's framing of the question at the centre of *Fitzpatrick* is not entirely accurate. Voting with the majority, he opined that '[t]he first question is what were the characteristics of a family in the Act of 1920 and the second whether two same-sex partners can satisfy those characteristics so as today to fall within the word "family"'.[73] He added that '[a]n alternative question'—which it was 'not necessary to consider', given the affirmative answer to the previous one—'is whether the word "family" in the Act of 1920 has to be updated so as to be capable of including persons who today would be regarded as being of each other's family, whatever might have been said in 1920'.[74] I do not think the majority (Lord Slynn included) limited themselves to analysing whether the claimants fell, at the time of the decision in 1999, within what a 'family' was understood to be at the time the statute was enacted (or amended). Instead, after reflecting upon the criteria of application of 'family' accepted at the time of enactment, the Court decided that—contrary to what it was believed then—a difference of genders between partners is not a relevant criterion. The concept of a 'family' was not replaced by a different one for which we also happen to use that word today, after a linguistic drift. However, the criteria that determine its application were revised. This is roughly how Lady Hale portrayed *Fitzpatrick* in her judgment in *Yemshaw*, when she said that the question in *Yemshaw*, 'as it was in *Fitzpatrick*, is whether an updated meaning' should be given to the term 'violence'.[75] While this was an inaccurate portrayal of

[73] *Fitzpatrick v Sterling Housing Association Ltd* (n 24) [16].
[74] ibid [16], [26].
[75] *Yemshaw v Hounslow London Borough Council* (n 48) [27]. (Lady Hale's full sentence was: 'The essential question, as it was in *Fitzpatrick*, is whether an

what Lord Slynn had said in *Fitzpatrick*,[76] I think she was right on the substance because that is effectively what the Court (rightly) did there.

Another case where the Court had to revise the criteria of application of a statutory expression in order to solve a dispute, but did not expressly indicate so, is *Quintavalle*. Lord Bingham reasoned that there is 'no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking'.[77] For him, statutory expressions (like 'dogs' or 'cruel and unusual punishments') do not change their meaning over time; they 'retain[] the meaning [they] had when Parliament used [them]'.[78] What happens, instead, in cases like *Quintavalle* is, in Lord Bingham's view, that such expressions may be applied to instances that were not thought to fall within them at the time of enactment but are held to do so now.[79] I think this way of putting it risks downplaying what courts are truly doing. Kathy Liddell rightly points out that, despite appearances, *Quintavalle* was not limited to a value-free application of an expression to new facts.[80] The Court had to revise the criteria of application of the term 'embryo'—as employed in the statute—to decide how to accommodate the previously non-existent case of non-fertilised embryos. It had to consider, for one, whether these 'raise moral or social issues that push them into a new genus or add a new dimension'.[81] Given the concrete, specific terms used in the relevant

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updated meaning is consistent with the statutory purpose'. In the next chapter, I will analyse in more detail this way of putting the question.)

[76] This has been noted, for example, in Goldsworthy (n 1) 93.

[77] *R (Quintavalle) v Human Fertilisation and Embryology Authority* (n 4) [9].

[78] ibid.

[79] ibid.

[80] Kathy Liddell, 'Purposive Interpretation and the March of Genetic Technology' [2003] CLJ 563, 565.

[81] ibid. Lord Wilberforce had made a similar point in his dissent in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, 824.

provision, this revision required straining the statutory language, and so I will return to this ruling in the next section. (Having cited Liddell, I should clarify that I disagree with her suggestion that, because the Court carried out value-based judgments, its decision reflects its 'own moral views rather than being a discovery of … Parliament's true intention'.[82] I think this presents a false dichotomy since Parliament's intention will often be precisely that courts carry out such value-based judgments—this is one of the core ideas defended in my thesis. I will consider this kind of objections in chapter 8.)

Courts and scholars have used other terms to refer to the distinction between the sense in which an expression's meaning is frozen and the sense in which it may be revised. Some, for example, distinguish between an expression's meaning, on the one hand, and its 'core' or 'essential' meaning, on the other hand.[83] When talking like this, however, it is important to remember that the list of components that we think form part of an expression's 'core' or 'essence' may look different depending on the point in time at which we approach this question. Certain properties may only look essential from the perspective of today. We may also say today, retrospectively, that elements that we thought were essential before are not so. This could change again in the future.

Another way to attempt to capture the sense in which an expression's meaning is frozen (and may not be changed or revised by interpreters, even when the updating presumption is in principle applicable) can be found in Lord

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[82] Liddell (n 80) 565.

[83] See, for example, *Fitzpatrick v Sterling Housing Association Ltd* (n 24) [69] (Lord Clyde); James Edelman, '2018 Winterton Lecture: Constitutional Interpretation' (2019) 45 University of Western Australia Annual Law Review 1; and Dan Meagher, 'The "Always Speaking" Approach to Statutes (and the Significance of Its Misapplication in *Aubrey v the Queen*)' (2020) 43 University of New South Wales Law Journal 191.

Wilberforce's remarks in *Royal College of Nursing*. Lord Wilberforce opined that courts may hold that new states of affairs 'fall within the parliamentary intention … if they fall within the same genus of facts as those to which the expressed policy has been formulated'.[84] These remarks, despite being made in a dissent, were described as 'authoritative' by Lord Bingham,[85] were considered the 'clearest exposition' of the always speaking principle by Lord Kerr,[86] and have been widely cited by courts.[87] Once again, however, to identify what the 'genus' is, we have to decide which of all the properties held by the original set of facts should be considered defining ones and which should be seen as contingent. When this has not been spelled out in detail by the lawmakers, it will require evaluative judgment and our conclusions may change over time.

Before moving on, it is worth noting that our conclusions about the relevant criteria of application of a statutory expression at any given time can be different regarding the same expression—or similar ones—when used in different statutes. This is illustrated by the contrast between, on the one hand, the decisions in *Barker* and *R v Fellows* (considering, respectively, that 'bankers' books' include microfilm and that 'photographs' can be stored in computer databases) and, on the other hand, the narrow approach adopted in *News Corp UK*. In the latter case, digital newspapers were not considered 'newspapers' because physicality and accessibility without a device were deemed essential properties of the original 'genus of facts', so that there was 'a conceptual

[84] *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* (n 81) 822.
[85] *R (Quintavalle) v Human Fertilisation and Embryology Authority* (n 4) [10].
[86] *Baker v Quantum Clothing Group Limited* (n 6) [175].
[87] See, for example, *Fitzpatrick v Sterling Housing Association Ltd* (n 24) [112]; and *News Corp UK & Ireland Ltd v Revenue and Customs Commissioners* (n 1) [32].

difference'—'one of kind not merely degree'—between printed newspapers and digital editions.[88] In contrast, whether texts or images were printed in a physical medium had played no role in *Barker* or *R v Fellows.*

(3) Strain a Provision's Language

Straining the language of a statutory provision may involve preferring a less natural and more contrived reading of it, perhaps one that 'reads into' the text qualifications or exceptions that are not expressed by it, or that 'reads down' certain specifications. In chapter 3, I talked about this in relation to situations in which obvious drafting errors have been committed or constitutional principles are applicable. In contrast, textual straining may be required by the updating presumption in cases in which—through no error or fault of the lawmakers or drafters—the enacted text does not deal properly with a situation because this situation is relevantly different from that assumed by those who designed the text. This change in circumstances may result in a provision being under- or overinclusive.

Quintavalle is one of the clearest and most famous examples of this. Section 1(1)(a) of the Human Fertilisation and Embryology Act 1990 established that, for the purposes of the Act, 'embryo' meant 'a live human embryo where fertilisation is complete'. This worked well in 1990 because the only way in which embryos could be brought into existence back then was through fertilisation. As discussed in chapter 4, this changed later on, when a new procedure for creating embryos without fertilisation ('cell nuclear replacement') became available. In

[88] *News Corp UK & Ireland Ltd v Revenue and Customs Commissioners* (n 1) [50]–[55].

Quintavalle, the Court had to consider this new possibility and determine whether an embryo that had not undergone fertilisation was an 'embryo' for the purposes of the Act. To hold that it was (and that, therefore, the regulatory scheme created by the 1990 Act applied to embryos created by cell nuclear replacement), the Court had to strain the statutory language.

As I explained in the previous chapter, the Court reasoned that the words 'where fertilisation is complete' were—despite being included in a definitional clause—'not intended to form an integral part of the definition of embryo but were directed to the time at which it should be treated as such' (that is, the provision would be clarifying that *if* there has been fertilisation, there is an 'embryo' from the moment when fertilisation is complete).[89] That passage was thus treated as 'merely illustrative', 'not describ[ing] the essential characteristics of an embryo', and 'obviously inapplicable' to embryos created without fertilisation.[90] To justify this over a more natural reading, Lord Bingham noted that 'Parliament (entirely understandably on the then current state of scientific knowledge) took for granted' that embryos would be created via fertilisation.[91] It is worth noting that the Act at stake in *Quintavalle* was later amended by Parliament in line with what the Court had decided.[92] Such amendments are helpful: while a later Parliament cannot speak retroactively for the one that enacted a prior statute, it can settle the matter prospectively, so we can be sure of what the legislative intention is.

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[89] *R (Quintavalle) v Human Fertilisation and Embryology Authority* (n 4) [14] (Lord Bingham).
[90] ibid [26] (Lord Steyn), [46] (Lord Millett).
[91] *R (Quintavalle) v Human Fertilisation and Embryology Authority* (n 4) [14].
[92] See section 1 of the Human Fertilisation and Embryology Act 2008. I thank two interviewees who wished to remain anonymous for bringing this up.

Prior to that, the decision in *Royal College of Nursing* also required a somewhat strained reading of the statutory text to conclude that a pregnancy can be held to have been 'terminated by a registered medical practitioner' (in the terms of section 1(1) of the Abortion Act 1967) in cases in which it is carried out by a nurse acting under a doctor's instructions.[93] A more natural reading of the provision would require that the actions must be performed directly by the doctor herself, rather than just supervised by her. However, the House of Lords understood that the reason behind this choice of language was not to exclude terminations carried out by nurses.[94] This point is important because, as I will discuss in chapter 6, often the choice for concrete, specific language suggests that Parliament did not intend to grant flexibility to interpreters but to firmly fix a requirement. In this case, however, what explained the choice for that formulation was not this intention. Instead, as in *Quintavalle*, what explained it was the fact that, at time of enactment, a pregnancy could only be terminated by surgical means, so it was reasonable for the lawmakers and drafters to assume that every case of termination would be one done by a doctor. This changed in 1972, when non-surgical methods became available.

In these examples, strained readings readjust a provision's language so that the provision can serve its purpose and preserve its rationale in changed circumstances. At times, however, these changed circumstances may have rendered the purpose itself obsolete, perhaps because the 'mischief' has been

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[93] *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* (n 81).
[94] ibid at 834 (Lord Keith).

eradicated. In such cases, courts may sometimes strain the statutory language to minimise its effects.[95]

It is worth clarifying that a straining approach may exceptionally be justified in situations where the updating presumption is not involved because they could have taken place the day after enactment. These are situations where the factual assumptions based on which the text of an Act was chosen do not hold true in a case, but—by contrast to cases like *Quintavalle* and *Royal College of Nursing*—this is not due to the passage of time and the progress that comes with that. Contrasting cases in which the updating presumption is at stake with others in which it is not is helpful to understand what is the relevance of invoking the updating presumption in the former kinds of cases.

Robinson v Secretary of State for Northern Ireland is a good example to use here.[96] The case concerned the election of a First Minister and Deputy First Minister by the Northern Ireland Assembly. The Northern Ireland Act 1998 establishes a period of six weeks during which the election must take place and provides that if that period expires without an election, the Secretary of State shall propose a date for an early poll to elect a new Assembly. In the case, the Assembly had elected a government two days after the expiry of the period, but before the Secretary of State had proposed a date for a poll. By a 3-2 majority, the House of Lords ruled that the election was valid. A strict, literal reading of the Northern Ireland Act 1998 (which would render the late election invalid) was rejected because it was 'difficult to see why Parliament, given the purposes it was

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[95] See FAR Bennion, *Statutory Interpretation* (2nd edn, Butterworths 1992) 624; and FAR Bennion, *Statute Law* (Oyez Publishing Limited 1980) 129.
[96] *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] 7 WLUK 633.

seeking to promote, should have wished to constrain local politicians and the Secretary of State within such a tight straitjacket'.[97] The majority thus adopted a strained or less natural reading of the text, according to which the Assembly's power to elect a government does not become extinguished with the expiry of the six-week period but only with the proposal of a date for an early poll to elect a new Assembly. On this strained reading, the only effect of the expiry of the period is that it generates a duty on the Secretary of State to propose a poll date, but the Secretary retains reasonable discretion when exercising it and may judge that an early poll is no longer necessary.

Robinson thus illustrates that sometimes courts will strain a provision's language to accommodate circumstances that could have arisen the day after enactment, as they involved no changes in technology or science, information, legal rules, social habits, or attitudes. What is, then, the relevance of such changes when they do take place? I think the key lies in the explanatory or justificatory power that they have. To justify straining the statutory language in a case, a judge must be convinced that the case departs, in relevant ways, from the situations assumed by the lawmakers and drafters when they chose a legal scheme and the text to convey it. The judge must also be satisfied that this is the reason why the text sits uncomfortably with the circumstances of the case before her. Thus, the choice of words must be due, most likely, to the fact that this situation was not contemplated, rather than to the fact that Parliament intended to exclude this situation from the scope of the provision. This means that there must be a clearly identifiable reason why this situation was not contemplated. When a case involves a development that was made possible thanks to the

[97] ibid [14] (Lord Bingham).

passage of time—which fosters scientific and technological progress, as well as changes in our habits and revisions of our past attitudes—the explanation is obvious. Lawmakers and drafters probably did not choose language that properly accommodates this situation because they legislated before these changes took place, at a time when they were not clearly foreseeable.

In cases like *Robinson*, by contrast, this is not obvious, and the work needed to justify straining the statutory language is much harder. The facts of *Robinson* could have taken place any time, and they could have been foreseen at the time of enactment without the need to envision a changed society, a revised scientific knowledge of the world, new frontiers for what is technologically possible, or anything of the sort. Therefore, a lot more must be said about why Parliament did not contemplate this situation, in order to justify straining the statutory language. Otherwise, we should presume that Parliament chose language that would—on a natural reading—render the late election invalid precisely because it intended it to be invalid if made outside the established time limit.

I think, however, that the decision in *Robinson* can be justified because a strained interpretation was necessary to fulfil the Act's purposes and preserve its rationale in a relatively improbable scenario that was, most likely, not one for which the lawmakers had specifically legislated. The scenario was very unlikely or exceptional in that the Assembly was able to accomplish in just a couple of days what it had not been able to do in six weeks. This meant that the situation was such that electing a new Assembly—the established way to avoid deadlocks and delays in electing a government—was more likely to cause such deadlocks and delays than keeping the old Assembly and accepting as valid its (late)

election of a government. Legislating for the most common or frequent scenarios is a perfectly acceptable way of drafting statutes. As Lord Bingham noted in *Quintavalle*, literal interpretations 'encourage[] immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise'.[98] This is not only impossible to realise in full but also dangerous to attempt. Trying to expressly regulate all possible scenarios, and not just the most obvious or frequent ones, creates a state of 'false accuracy'.[99] It encourages on interpreters the unmeetable expectation that all the situations that the legislature intended to be included within (or excluded from) a provision will be expressly signalled as such in the text, given that one or more particular ones were. In his judgment in *Robinson*, Lord Bingham also reasoned that devising a statute where 'all political contingencies' are subjected to 'predetermined mechanistic rules … would not be consistent with ordinary constitutional practice in Britain'.[100] Granting 'scope for the exercise of political judgment' by leaders (in this case, about whether and when to seek a dissolution of the Assembly) 'permit[s] a flexible response to differing and unpredictable events in a way which the application of strict rules would preclude'.[101] To justify its decision, the Court also stressed the fundamental importance of the values that the Northern Ireland Act 1998 serves, which were at stake in the case. The Act implements the Belfast Agreement, aimed at establishing a new devolved cross-community government in Northern Ireland, with unionists and nationalists sharing power in the hope of putting an end to a long history of violent conflicts and deep divisions.[102]

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[98] *R (Quintavalle) v Human Fertilisation and Embryology Authority* (n 4) [8].
[99] Greenberg (n 46) 319–21.
[100] *Robinson v Secretary of State for Northern Ireland* (n 96) [12].
[101] ibid.
[102] ibid [11] (Lord Bingham), [33] (Lord Hoffmann).

The appropriateness of a straining interpretation in *Robinson* depended on all this: the fundamental importance and sensitive nature of the issue, the unlikeliness of the facts that had taken place, and the circumstance that this odd situation subverted the logic of the statutory provision at stake. Making these points requires careful thought. In contrast, cases where the updating presumption is applicable provide a much more straightforward justification. When something did not exist—or was not known, or not properly understood—at the time a statute was drafted, it is easy to see why its occurrence may subvert the assumptions on which the drafting of the statute was based. This is why I disagree with Lord Leggatt's view, expressed in *News Corp UK*, that it makes no difference whether a technological development occurred before or after the relevant statute was enacted.[103] The relevance of the fact that something became possible or was invented after a statute was enacted is that this fact readily explains why this 'something' may not fit neatly within the statutory language, and why straining that language may be necessary—namely, because that language was not chosen with this 'something' in mind. In other words, the value of the updating presumption in these cases—and the reason why it illuminates the correct solution—lies in its explanatory or justificatory power.

Both in situations where the updating presumption is involved and in those where it is not, the reason why respecting Parliament's intention may require courts to strain the statutory text is related to the fact that Parliament cannot predict and properly legislate specifically for all possible scenarios that may arise. Parliament is aware of this limitation, and this is what explains its reliance on

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[103] *News Corp UK & Ireland Ltd v Revenue and Customs Commissioners* (n 1) [90]–[91].

courts. What is distinctive about cases of updating is that these scenarios include general changes (technological, scientific, sociological, and so on), which transcend the narrow facts of the case and make the need for straining easy to see. In theory, Parliament could attempt to immediately respond to any such general changes as they occur and amend the law as soon as possible, so that no cases have to be decided based on statutes that are ill-adjusted to these changed circumstances. However, the updating presumption recognises that—as I have argued in this chapter—this possibility is only theoretical, since it is unfeasible for Parliament to do so in relation to all its statutes all the time.

IV. Conclusion

This chapter analysed the types of changes that may create the need for an updating approach, as well as the tasks that courts perform when adopting that approach. It argued that, in all cases, the logic behind Parliament's grant of interpretive flexibility to courts is similar. Parliament expects its statutes to stay in the books for several years, which may predictably bring about changes that are relevant to matters covered by them. Parliament cannot anticipate these changes in detail or properly legislate for them in advance. Neither can it constantly monitor all its statutes to assess whether any changes that have occurred have created the need to amend their words.

CHAPTER 6: Limits

I. Introduction

This chapter examines the limits that courts should not cross under the pretext of applying an updating approach. It looks at the kinds of situations in which judges should not adopt this approach, and the kinds of tasks that they may not carry out even when such an approach is applicable. The relevant constraints are derived from different considerations, including the institutional design of courts, the scope and operation of the updating presumption as recognised in established judicial doctrines, the steps that Parliament may have taken on any given occasion to displace the presumption (that is, to cancel its applicability) or narrow it down in relation to an expression or provision, and the rules of precedent.

A Note on my Scope

Because the goal of this thesis is analysing the updating presumption, my discussion—in this and the previous chapter—of what courts may and may not do to keep a statute up to date is centred on what this presumption allows or requires by default, and how it can be displaced or limited. This leaves out of my analysis the consideration of general interpretive directives expressly issued by Parliament that may be relevant to a case. An example of this is section 3 of the Human Rights Act 1998 (HRA 1998), according to which judges must, insofar as possible, interpret legislation in a way compatible with a series of rights guaranteed under the European Convention on Human Rights. The operation of

such directives may lead judges to interpret a statute in a way that departs from what the updating presumption would dictate.

Section 3 of the HRA 1998 may lead a court to interpret a statutory provision in an updated, expansive way that goes against the rigid limits imposed by the specific words used by Parliament—words which suggest, when read in their context, that Parliament's intention was to block updating interpretations of them. Such an interpretation may be necessary to make the provision compatible with a Convention right, such as the right to non-discrimination. This is illustrated by the gender-specific language of paragraph 2 of Schedule 1 to the Rent Act 1977, which refers to 'a person who was living with the original tenant as his or her wife or husband'. The choice of gendered pronouns and nouns strongly suggests that this provision was firmly limited to heterosexual couples. However, in *Ghaidan v Godin-Mendoza*, the House of Lords held that the cohabiting, same-sex partner of a tenant could be included within it.[1] *Ghaidan* was a controversial case, but it is beyond my scope here to analyse whether the House of Lords applied section 3 of the HRA 1998 correctly.[2] What is clear is that reliance on the updating presumption alone would not have justified this decision, as the Court had found earlier in *Fitzpatrick*, when the material provisions of the HRA 1998 were not yet in force.[3]

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[1] *Ghaidan v Godin-Mendoza (FC)* [2004] UKHL 30, [2004] 2 AC 557.
[2] For discussions of this case and, more generally, of section 3 of the HRA 1998 and its limits, see Aileen Kavanagh, 'Choosing between Sections 3 and 4 of the Human Rights Act 1998: Judicial Reasoning after *Ghaidan v. Mendoza*' in Helen Fenwick and others (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007); Alison L Young, '*Ghaidan v Godin-Mendoza*: Avoiding the Deference Trap' [2005] PL 23; Jan van Zyl Smit, 'The New Purposive Interpretation of Statutes: HRA Section 3 after *Ghaidan v Godin-Mendoza*' (2007) 70 MLR 294; Neil Duxbury, *Elements of Legislation* (CUP 2013) 234–40.
[3] *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 (HL) [13] (Lord Slynn), [45] (Lord Nicholls), [62] (Lord Clyde).

The reason why I leave these considerations outside the scope of my analysis here is not that they are unimportant. They may well be crucial for the decision in a case. They are, however, general matters that are not specifically related to the updating presumption. Arguments based on interpretive directives like section 3 of the HRA 1998 come at a later stage, when the interpretation of a statute according to the conventions examined in chapters 2 and 3 (including the presumption in favour of updating) yields a result that seems to conflict with one or more such directives.

The application of constitutional presumptions, such as the principle of legality, may too have the effect of leading to interpretations that depart from what the updating presumption alone would dictate. I spoke about constitutional presumptions in chapter 3 and will not return to them here, where my focus is specifically on the effects of the updating presumption. I will, however, note below that Parliament can rely on other interpretive presumptions—either constitutional ones or mere canons of construction—to convey its intention to displace or narrow down the updating presumption without the need to use express words.[4]

II. Limits of the Updating Presumption

There are five main kinds of judicial decisions that would not be justified by the application of the updating presumption. An updating interpretation is, in principle, legitimate when it does not fall within any of these cases. (I say 'in principle' because, once again, interpretive directives like the HRA 1998 may dictate otherwise.) The underlying principle at stake in four of these five kinds of decisions is the principle of separation of powers. The concern is that, if courts

[4] See section II(3)(ii) below.

went against these limits, they would be exceeding their role. In turn, the last limit considered below—related to the rules of precedent—is underpinned by the values of certainty and predictability.

(1) **Radical, Extensive Legal Reforms**

Radical, extensive legal reforms that require a systematic approach are ill-suited to courts. The Supreme Court alluded to this recently, in *Owens v Owens*. Lord Wilson (with whom Lord Hodge and Lady Black agreed) opined that, as he had observed in a previous decision, '[o]ur society in England and Wales now urgently demands a second attempt by Parliament, better than in the ill-fated Part II of the [Family Law Act 1996], to reform the five ancient bases of divorce'.[5] That kind of structural reform, which involves redesigning the law on divorce, requires Parliamentary action. Lord Wilson added that, 'meanwhile, in default, the courts have set … at an increasingly low level' the threshold below which it is unreasonable to expect someone to remain living with her partner.[6] Thus, adopting an updating approach can lead courts to understand the threshold of the existing statutory grounds for divorce in accordance with current social attitudes. It cannot, however, lead to a judicial redesign of what should be considered grounds for divorce.

The facts of *Bellinger v Bellinger* offer another example of the limits of the role of courts. It is important to note, however, that that case concerned the application of the HRA 1998. Despite this, the Court's reasoning about the boundaries of the judicial role extends beyond that Act and is relevant to this

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[5] *Owens v Owens* [2018] UKSC 41, [2018] AC 899 [35].
[6] ibid [35], [37].

discussion as well. In that case, a transexual woman's marriage to a man was declared invalid because the woman was legally a man.[7] (This was before the enactment of the Gender Recognition Act 2004 and the Marriage (Same Sex Couples) Act 2013.) The House of Lords issued a declaration of incompatibility between the Matrimonial Causes Act 1973—which provided in section 11(c) (now removed from the Act) that 'a marriage is void' if 'the parties are not respectively male and female'—and the HRA 1998 (Schedule 1, Part I, articles 8 and 12). However, it refused to recognise the applicant as a woman for the purposes of the 1973 Act. Lord Nicholls opined that such a recognition would involve 'a major change in the law' with 'far reaching ramifications' and would thus require 'extensive enquiry and the widest public consultation and discussion'.[8] He noted that this 'is part of a wider problem', which extends to other kinds of gender-based distinctions, such as those in education facilities, prisons, and sports competitions.[9] This matter 'should be considered as a whole and not dealt with in a piecemeal fashion' but instead by formulating 'a clear, coherent policy'.[10] The Court concluded, on these bases, that the issues at stake in *Bellinger v Bellinger* are 'altogether ill-suited for determination by courts and court procedures', and 'pre-eminently a matter for Parliament'—especially since the Government had announced its intention to legislate on the matter.[11]

[7] *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467.
[8] ibid [37]. The other Lords agreed with this reasoning; see ibid [56], [76], [80]–[81].
[9] *Bellinger v Bellinger* (n 7) [45].
[10] ibid.
[11] ibid [37].

(2) Expressions Originally Perceived as Unchangeable

Courts should not adopt an updating approach when they are interpreting expressions that were not perceived as susceptible to change at the time of enactment. Terms like 'family' and 'violence' refer, respectively, to social arrangements and types of behaviour whose perceived contours evidently change across time and space. A minimal knowledge of history would have been enough for the lawmakers and drafters who designed and voted upon the statutes at stake in *Fitzpatrick* and *Yemshaw* to realise that, in the past, the lines dividing families from other relations and violence from acceptable forms of treatment have been redrawn, and to be therefore alerted to the possibility that they may be redrawn again in the future.

Other terms, by contrast, may have originally been seen as rigid and static by everyone (or most people, including lawmakers).[12] Over time, however, we may develop a fluid understanding of them. Words like 'man' and 'woman' illustrate this. Decades ago, these were understood as tied to a biological fact that was ascertainable at the time a person was born and remained constant throughout his or her life. A lawmaker using these terms in a statute enacted at that time, for example, would not have been alerted to the fact that people might come to revise their criteria of application. Such criteria were largely uncontested at the time and had not changed in the past either.

If lawmakers could not have predicted that the presumption in favour of an updating approach could be applied to an expression, we cannot expect them to have displaced it if they intended to exclude that approach. Therefore, in such

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[12] Daniel Greenberg, *Craies on Legislation* (12th edn, Sweet & Maxwell 2020) 975.

cases we cannot justify adopting an updating approach based on Parliament's intention to rely on that presumption. As a result, courts should stick to the rigid understanding that Parliament assumed, unless and until Parliament amends the law. For this reason, a judge deciding a case involving a situation like the one in *Bellinger v Bellinger*[13] would have been wrong to apply an updating approach to the interpretation of section 11(c) of the Matrimonial Causes Act 1973. Adopting a new understanding of gender that is fluid or mobile—instead of the rigid and static notion arguably assumed by Parliament when it enacted the 1973 Act—had to wait until Parliament enacted the Gender Recognition Act in 2004.

It is important to clarify what is the relevant question for a court having to decide whether an expression in an Act should be given an updated interpretation when our understandings or perceptions of it have changed since the time the Act was passed. The question is whether it is likely that Parliament was aware, at the time of enactment, of the possibility of changes in those understandings or perceptions, or whether, instead, it would have been caught by surprise by the possibility of any such changes. The issue is not whether it would have been surprised by a change in a particular direction. The answer to that will often be affirmative, since the particular direction of such changes is very difficult to predict. The question is, instead, whether Parliament would have been surprised by a term's very susceptibility to any such changes.

As an example of this contrast, consider *Fitzpatrick*. I accept that it is very likely that, in 1920, not many people would have envisaged the specific changes we would later see in how people form families. This includes, in particular, the

[13] (I am, once again, setting aside from my discussion the effects of the HRA 1998 on this case.)

proliferation of same-sex couples who are as committed, stable, and public as any other couple, who live together and may be raising children together, and who are (in general) socially accepted and treated by others just like any other couple. I also accept that the failure to anticipate these social developments may have persisted for many more decades. The fact that homosexual acts were decriminalised in the UK only in 1967 is sad proof of this. Thus, it may well be that a family being made up of two same-sex partners was a possibility that was not accepted in 1977 (when the Rent Act at stake was enacted) and perhaps—though this is less clear—in 1988 (when it was amended).

This, however, is not the right thing to focus on. What matters is that—as the House of Lords stressed in its judgment—there had been, in the past, 'far-reaching changes in ways of life and social attitudes',[14] and courts had held, since very early on, that the term 'family' in the Rent Acts was a 'loose and flexible expression',[15] apt to reflect those changes. Parliament had insisted on using 'the same undefined expression' in 'successive Rent Acts' despite being aware of these circumstances.[16] Just two years before the Rent Act 1977 was passed, the Court of Appeal had stressed in *Dyson* that the term 'family' does not have a meaning 'fixed once and for all time' but one that 'with the passage of years … has changed', and that it must be interpreted according to its 'meaning at the time relevant to the decision in the particular case'.[17]

Moreover, in contrast to its approach in the Rent Acts, Parliament had, in other statutes, provided specific definitions of the kinds of relationships that were

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[14] *Fitzpatrick v Sterling Housing Association Ltd* (n 3) [54] (Lord Nicholls) .
[15] ibid [66] (Lord Clyde), citing *Price v Gould* (1930) 46 TLR 411.
[16] *Fitzpatrick v Sterling Housing Association Ltd* (n 3) [54] (Lord Nicholls) .
[17] *Dyson Holdings Ltd v Fox* [1976] QB 503, 511–12 (James LJ).

to be included within 'family' for the purposes of those statutes. Examples of this are the detailed provisions of section 113 of the Housing Act 1985,[18] and section 721(4) of the Income Tax (Earnings and Pensions) Act 2003.[19] Parliament could have provided for something similar in the Rent Act, but it decided not to, leaving the term 'family', instead, open for future interpreters to adopt an updating approach.

The claim that Parliament had not predicted (in 1920, 1977, or even 1988) that such an approach would lead, in particular, to recognising same-sex partners as a 'family' (or the claim that Parliamentarians at the time would not have approved of that particular interpretation) is immaterial. Once an updating task is entrusted to courts, its fulfilment is not constrained by the specific expectations or preferences that Parliamentarians may have had about concrete future applications. This is hardly a radical claim. Even most originalists and intentionalists who dispute the claim that Parliament normally entrusts courts with an updating task accept that the concrete expectations that lawmakers had—about the particular cases or instances to which the legal propositions they

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[18] This section provides that—outside the case of spouses and persons living together as husband and wife, mentioned in paragraph (a)—'[a] person is a member of another's family within the meaning of this Part if … he is that person's parent, grandparent, child, grand-child, brother, sister, uncle, aunt, nephew or niece'. Paragraph (2) adds further precisions to subsection (1)(b), concerning the equivalences between relationship by marriage, blood, and half-blood, and stepchildren and 'illegitimate' children.

[19] This section provides:

> (4) For the purposes of this Act the following are members of a person's family—
> (a) the person's spouse or civil partner,
> (b) the person's children and their spouses or civil partners,
> (c) the person's parents, and
> (d) the person's dependants.

enacted would be applied—are not binding law.[20] (Their objections to the claim that courts are normally entrusted with an updating task will be addressed in chapter 8.)

Thus, the Court was right to adopt an updating approach in a case like *Fitzpatrick* because it would have been clear to Parliament, at the time of enactment, that it was possible that family arrangements—and the kinds of bonds that people regard as family ties—may, in the future, look different from how they did back then. It does not matter whether Parliament contemplated (or approved) the specific possibility of same-sex partners coming to be regarded as a family. This is in line with what the Supreme Court recently held in *News Corp UK and Ireland Ltd*:

> What is meant by the always speaking principle is that, as a general rule, a statute should be interpreted taking into account changes that have occurred since the statute was enacted. Those changes may include, for example, technological developments, changes in scientific understanding, changes in social attitudes and changes in the law. *Very importantly it does not matter that those [particular]*

[20] See, for example, Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Amy Gutmann ed, 2nd edn, Princeton University Press 2018) 144; Keith E Whittington, 'Originalism: A Critical Introduction' (2013) 82 Fordham Law Review 375, 382–86; Richard Ekins, *The Nature of Legislative Intent* (OUP 2012) 254–55. See also Jeffrey Goldsworthy, 'Lord Burrows on Legislative Intention, Statutory Purpose, and the "Always Speaking" Principle' (2022) 43 Statute Law Review 79, 93 (indicating that '[m]ost originalists maintain that only the lawmakers' "enactment intentions" are directly relevant to the meaning of a written law, and not their "application intentions"').

> *changes could not have been reasonably contemplated or foreseen at the time that the provision was enacted.*[21]

Given this, Lord Brown was addressing the wrong question when he reasoned, in *Yemshaw*, that 'Parliament is unlikely to have contemplated or intended' that, one day, psychological abuse would come to be regarded as 'violence'.[22] (In addition to this, Hansard shows that this claim is mistaken, as I will explain below.) The crucial fact was, instead, that Parliament chose broad, loose language—'violence', rather than something more concrete, like 'battery'— to refer to a type of behaviour or treatment about which our conceptions and standards have evidently changed over time. It would have been apparent to lawmakers that what counts as 'violence' (as opposed to, for example, rough or unpleasant but socially tolerated behaviour) changes from one society to the next, and over time within the same society. Throughout history, these changes have occurred as we revised our judgments about what are acceptable and unacceptable ways of treating others in different circumstances, and our understanding of the kinds of harms that mistreatment can cause.

In contrast, with terms like 'man' and 'woman', what would have surprised lawmakers who enacted laws featuring them decades ago are not only certain specific changes in our understanding of those terms (for example, that part of society would come to see them as changing with changes in one's self-

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[21] *News Corp UK & Ireland Ltd v Revenue and Customs Commissioners* [2023] UKSC 7, [2023] 3 All ER 447 [29] (emphasis added). See also *R (Hodkin) v Registrar General of Births, Marriages and Deaths* [2013] UKSC 77, [2014] AC 610 (UKSC) [56].

[22] *Yemshaw v Hounslow London Borough Council* [2011] UKSC 3, [2011] 1 All ER 912 [51].

perception and ways of living, or as a result of certain specific surgeries or treatments that were previously unavailable). The main surprise would have been that those terms would come to be seen as changing—full stop. In such a situation, we could not argue that Parliament intended to rely on the updating presumption rather than choose to displace it. Parliament was simply not aware that this presumption might play a role regarding the term at stake and, therefore, was not alerted to the need to cancel its applicability if it so intended.

(3) Parliament's Intention to Displace the Presumption

For those cases in which Parliament was alerted to the applicability of the updating presumption, how can Parliament displace it (in relation to a particular expression or provision) or narrow down its scope?[23] This section examines the techniques that Parliament has available to indicate that it intends to rule out updating interpretations, either in general or in relation to specific future changes that it anticipates and intends to exclude. Courts should examine whether Parliament has made use of any of these techniques and, if it has, defer to Parliament's intention.

To clarify, my view is not that the question of whether an updating approach should be applied or not must be answered on a case-by-case basis, by looking at whether there is enough empirical evidence that the lawmakers intended the particular expression (or provision) at stake in the case at hand to be interpreted using an updating approach or not. Avoiding this is the whole point of having a presumption in place, as the UK does. Treating the matter as one to

[23] In the next chapter, I will briefly comment on the possibility of eliminating the presumption altogether—that is, for all statutes; see section IV of chapter 7.

be determined case by case, with no default presumption either way, would leave unanswered the question of what courts should do in cases of doubt.[24] It would also burden Parliament with the task of having to actively decide and convey in each case that a statute should be updated (or not), rather than safely assume that this will be the case unless otherwise specified. As *Craies on Legislation* points out, while '[i]t is always open to Parliament to specify expressly that an expression is to have an ambulatory meaning', such an approach creates the 'danger' that 'the more drafters include it out of an abundance of caution, the more difficult it is for other drafters in other contexts to rely confidently on the "always speaking" doctrine'.[25]

The updating presumption does not have constitutional weight—it is a mere canon of construction that establishes an easily displaceable default rule about what Parliament most likely intended.[26] Therefore, the threshold for cancelling its applicability to an expression or provision is not especially high, in contrast to the one needed to displace constitutional presumptions. Parliament just needs to make its intention to that effect clear, either in the statutory text or the admissible aids to its interpretation, in the ways discussed below. Including express words in the statutory text may generally be advisable for prudential reasons, but there is no requirement for Parliament to do so and, on certain

[24] In contrast, Dan Meagher argues that a case-by-case approach is the correct one in Australia; see Dan Meagher, 'The "Always Speaking" Approach to Statutes (and the Significance of Its Misapplication in *Aubrey v the Queen*)' (2020) 43 University of New South Wales Law Journal 191, 207–08 (maintaining that the claim that a statute is 'always speaking' is a conclusion about its meaning and not an interpretive principle). In his view, '[t]o *begin* the interpretive process with the "always speaking" approach is, arguably, to put the cart before the horse'; ibid 208 (emphasis in the original).
[25] Greenberg (n 12) 979.
[26] See, for example, Duxbury (n 2) 173.

occasions, it might be deemed counterproductive. In defending a low standard to displace the updating presumption (which, I argue, is the standard that UK courts apply), I am departing from the view of scholars like Jeff King, who believes that 'the advantage of purposive, updating interpretations is so clear that we would need some special interpretive statement in a legal instrument saying otherwise'.[27]

It is important to note that, while the presumption is easy to displace in theory, it will often not be so in practice. It may be very difficult for lawmakers to anticipate what developments are likely to happen in the future and to identify, among them, those that Parliament does not want to be regarded as included within a provision. Parliament can take steps to shield a provision from changes that it is already beginning to see or that it fears will take place soon. For example, as same-sex couples became more open and publicly accepted, lawmakers with conservative views could insist on marriage being limited to heterosexual couples, as Parliament did in the Matrimonial Causes Act 1973. However, Parliament has no effective way of guarding its statutes from the unforeseen; it can only depart from what it can more or less confidently predict.[28] With fluid concepts like 'violence', 'harm', or 'abuse', Parliament has no way of telling where social standards and experts' consensus will move towards, and, therefore, no way of knowing where it would stand in relation to those changes. Speculating will carry great risks. Moreover, even in relation to changes that Parliament does foresee, expressly legislating for them can also cause problems, such as

[27] Jeff King, 'Three Wrong Turns in Lord Sumption's Conception of Law and Democracy' in NW Barber and others (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing 2016) 144.
[28] Author's interviews with Daniel Greenberg and Lord Pannick.

excessive prolixity and a state of 'false accuracy'.[29] The fact that a provision expressly addresses a certain possible scenario can distort courts' reasoning about other possible scenarios that Parliament did not mention, through the operation of interpretive principles like *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of the other). Notwithstanding this important caveat, I will now discuss the techniques that Parliament has available to displace or limit the presumption.

(i) Displacing the Presumption in the Statutory Text

In theory, Parliament could indicate that an updating approach should not be applied to a statutory expression by including a general directive in the statute saying something like 'the expression *X* is to be interpreted according to circumstances, attitudes, and understandings contemporary to the enactment of this Act, and courts shall not take into account future ones'. However, such a vague formula does not seem feasible. Retrieving in the future such circumstances, attitudes, and understandings—and determining what they entail for the case at stake—may prove very difficult for interpreters, who may well have to rely on speculation. Once lawmakers identify specific components of a concept that they want to permanently fix within (or exclude from) its definition, they are likely to expressly specify them rather than use a generic formula, and they will normally be advised to do so.[30]

There are, however, other techniques that Parliament can use to displace or narrow down the updating presumption. The clearest way of doing so is

[29] I discussed these two problems in chapter 5, section III(3). See also Greenberg (n 12) 319–21.
[30] Author's interviews with three persons who wished to remain anonymous.

including, in the statutory text, an exhaustive definition that is concrete and specific, and whose components are fixed in time. Such definitions can be included throughout the Act, as concepts are mentioned, or in a separate definitions section. The definition can consist in a list of the necessary and sufficient properties that something must have to be included within an expression. (In logic, these are called 'intensional' definitions.) Alternatively, an expression can be defined through a closed list of all the specific cases that fall within it. (These are called 'extensional' definitions.) Examples of this latter kind are the provisions on who shall be considered members of a person's family contained in section 113 of the Housing Act 1985 and section 721(4) of the Income Tax Act 2003, mentioned above.[31] In turn, examples of definitions that establish a concept's necessary and sufficient properties are the Housing Act 1985's definition of 'qualified accountant' (section 51, mentioning the required qualifications and disqualifying considerations) and of 'long tenancy' (section 115, establishing the relevant time periods and rules on termination).

Definitions need not be exhaustive. It is possible to enact a broad, general expression that is open to judicial updating while, at the same time, partially constraining judicial discretion by making sure that certain instances will always (or never) be included within that expression. This can be achieved using expressions like '*X* includes but is not limited to *Y*' (an 'inclusive' definition) or '*Y* shall not be included within *X*' (an 'exclusive' definition).[32] Such formulas

[31] See n 18 and 19. Section 13 of the Housing Act 1985 lists that person's 'parent, grandparent, child, grand-child, brother, sister, uncle, aunt, nephew or niece', in addition to her spouse or person living as such. In turn, section 721(4) of the Income Tax Act 2003 lists that person's 'spouse or civil partner', 'children and their spouses or civil partners', 'parents', and 'dependants'.
[32] Francis Bennion and others, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020) ch 18.

simultaneously acknowledge and limit interpreters' discretion to expand (or narrow down) a concept as circumstances change over time. For example, the Climate Change Act 2008 provides that '"Pollution" means pollution of the air, water or land which may give rise to any environmental harm, including (but not limited to) pollution caused by light, noise, heat or vibrations or any other kind of release of energy' (Schedule 6, part 1, paragraph 4B(3)). Subsection (5), in turn, adds that '"air" includes (but is not limited to) air within buildings and air within other natural or man-made structures above or below ground'. Thus, in contrast to the closed lists I mentioned above, Parliament can opt for one that is open. Section 8 of the European Union (Withdrawal) Act 2018 further illustrates this: section 8(2) lists a number of situations that count as '[d]eficiencies in retained EU law' (such as redundancies or references to entities that no longer have functions or arrangements that no longer exist), and section 8(3)(a) extends this to 'anything in retained EU law which is of a similar kind to any deficiency which falls within subsection (2)'.

Rather than including a definition (whether intensional or extensional, and exhaustive or partial) in its text, an Act can use a term that has been defined in another Act or in the caselaw, thus attracting that definition. In legal contexts, these are known as 'referential' definitions.[33] The word 'spouse', for example, is defined in the laws that regulate the formal requirements of marriage—requirements which it is not necessary to repeat in every Act using that term—and thus cannot change without formal amendment. This contrasts with more flexible expressions that would, in principle, be compatible with updating, such as 'partners', 'family', and people '*living as* spouses'. It is important for interpreters

[33] ibid.

to check whether what may appear on its face to be a broad expression is not, in fact, referring to a concept that is well established elsewhere.

Another possible way of conveying the intention that courts should not adopt an updating approach is, in certain cases, to entrust this updating task to the executive instead. Where an Act provides that a statutory definition may be amended by secondary legislation through the exercise of a Henry VIII power, this should be interpreted as, in principle, displacing the updating presumption for courts. Because secondary legislation can be issued and amended with much greater speed than primary legislation, this may be an apt way of making sure that the law will stay up to date. While Parliament usually relies on courts for this purpose, the creation of a power to amend a certain aspect of a statute through secondary legislation suggests that, on this occasion, Parliament chose to leave this matter in the hands of the executive rather than courts. This is, in principle, a reason for courts to defer to what the executive regulations stipulate at any given time.

An example of this kind of provision is the definition of 'family' in section 721(4) of the Income Tax (Earnings and Pensions) Act 2003, referred to above.[34] Section 103 of the Finance Act 2005 confers a Henry VIII power and, exercising that power, the executive inserted a reference to 'civil partners' in a list in the 2003 Act that, before, only mentioned 'spouses'.[35] Alternatively, an Act can establish that the expression at stake may be defined in secondary legislation from the start (and, as a result, may be amended in the same way). Section 39 of the Welfare Reform Act 2012, for example, refers to persons who 'are

[34] In n 19 and 31.

[35] Tax and Civil Partnership Regulations 2005 (SI 2005/3229), regs 1(1), 168(a) and (b).

members of the same household', when defining 'couples' in paragraph (1). In turn, subsection (3)(c) provides that 'regulations may prescribe ... circumstances in which people are to be treated as being or not being members of the same household'.

Leaving the definition of an expression to be updated through delegated legislation allows the government of the day to keep a strong hold on how it is interpreted by courts over time.[36] The government may expand or tighten the boundaries of a concept in the future as desired, depending on how circumstances, attitudes, and understandings change. This hold over how courts interpret statutes may also extend to Parliament, provided that the statutory instrument is subject to parliamentary scrutiny (especially the affirmative procedure, which offers a greater degree of scrutiny by requiring that the instrument must be actively approved by both Houses of Parliament).

Before moving on to discussing how Parliament may convey the intention to displace the updating presumption through the aids to construction (rather than in the statutory text), let me clarify how what I have argued so far fits with the claim (made in chapter 5) that adopting an updating approach may lead judges to strain very specific language. After all, I have just said that that kind of language may normally be taken as evidence that Parliament intended to cancel the applicability of an updating approach. The question here is whether the best explanation for that kind of language is indeed Parliament's apparent intention to displace the updating presumption or whether, instead, there is a more convincing alternative explanation. As I explained in chapter 5, to apply an

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[36] This point was stressed by two of my interviewees who wished to remain anonymous.

updating approach that requires straining the concrete and specific language of a provision, the court must be satisfied that the obvious reason why the provision's language does not—when given a natural reading—properly deal with a certain scenario is that the provision was drafted without this scenario in mind (as opposed to having been drafted with the intention of excluding it).

The reason why courts have to meet this high standard is that the statutory language is the main vehicle through which Parliament conveys its intention, so courts should be wary of departing from it lightly. This is also related to the fact that the updating presumption is a mere canon of construction and not a constitutional presumption. Constitutional presumptions are weightier and can justify strained interpretations outside cases like these or of obvious drafting errors. The decision to adopt an updating, straining interpretation amounts to a decision to rectify the drafters' linguistic choice, in order to better adjust the enacted text to the propositions that Parliament appears to have intended to turn into law. This adjustment is needed when changed circumstances alter the assumptions on which that choice of language was based and render it no longer well-suited to convey the intended content. While this situation does not really involve a mistake or oversight by the lawmakers or drafters—since, by hypothesis, the linguistic choice was appropriate at the time it was made—the problem it creates is similar to the one that drafting errors generate.[37]

In contrast, an example of a statute whose text could not be strained to accommodate an updating interpretation is the Matrimonial Causes Act 1973, which, in the past, established that 'a marriage is void' if 'the parties are not

[37] The (limited) analogies between these cases and cases of rectifying mistakes were pointed out by two of my interviewees who wished to remain anonymous.

respectively male and female' (section 11(c)). Courts could not have relied on the updating presumption to consider valid a marriage celebrated between two people of the same sex. The choice of rigid, gendered language was entirely deliberate, the result not of limited foresight but of a policy choice. Unlike, for example, the development of cell nuclear replacement in *Quintavalle* or of new abortion techniques in *Royal College of Nursing*, the existence of romantic relationships between people of the same sex was, obviously, a fact known to Parliament when it legislated. The only plausible explanation for it having introduced a requirement that parties should be, respectively, male and female is precisely the intention to exclude same-sex relationships from marriage. The updating presumption cannot justify amending this deliberate—and unequivocally and specifically spelled out—law-making choice.

(ii) Displacing the Presumption in the Aids to Construction

Alternatively, Parliament's intention to displace or narrow down the updating presumption in relation to an expression or provision can also emerge from the Act's purpose, other presumptions, and other elements that make up the context of its enactment and are considered admissible aids to its interpretation.

An example of an Act whose purpose was incompatible with an updating approach is an old case discussed in chapter 4: *The Longford*. Stretching the word 'action' in the statute at stake there to include other types of proceedings (like 'suits' and 'causes') that were also called 'actions' later on but not at the time of enactment would have subverted the statutory purpose. As I explained in chapter 4, it would have entailed placing a month's notice requirement on such actions, which would have allowed the defendant to remove the ship out of the

jurisdiction of the Court.[38] *The Longford* was cited very recently by the Supreme Court, in *News Corp*, to illustrate situations where, '[e]xceptionally, the always speaking principle will not be applied' because 'it is clear, from the words used in the light of their context and purpose, that the provision is tied to an historic or frozen interpretation'.[39]

News Corp, in turn, is an example of a case where the displacement or narrowing down of the updating presumption was conveyed by the operation of other presumptions that blocked an updating reading—in that case, the EU law directive of interpreting VAT exceptions strictly.[40]

Parliament could also, at least in theory, convey its intention to displace or limit the updating presumption through other aids to construction, such as explanatory notes published alongside the Bill or ministerial statements made during the legislative debates and adduced in argument following the requirements set out in *Pepper v Hart*. This might be a good way to add further clarifications or qualifications to dispel any possible remaining doubts when doing so in the statutory text itself would create excessive prolixity or false accuracy. Unlike what happens with the statutory text, these aids allow recourse to explanatory tools like repetition, alternative formulations of the same idea, and examples.[41] However, the limited weight that courts attach to these external

[38] *The Longford* (1889) 14 PD 34, 37.
[39] *News Corp UK & Ireland Ltd v Revenue and Customs Commissioners* (n 21) [29].
[40] ibid [48].
[41] See Daniel Greenberg, 'All Trains Stop at Crewe: The Rise and Rise of Contextual Drafting' (2005) 7 European Journal of Law Reform 31, 41–42; Christopher Jenkins, 'Helping the Reader of Bills and Acts NLJ 798' (1999) 149 NLJ.

materials[42] makes it likely that Parliament will, instead, choose to make its intention clear in the statutory text.

The above is related to a larger discussion on the admissibility and weight of aids to construction that is not peculiar to updating interpretations in particular. There is, however, something distinctive about cases where a well-established canon of construction (like the updating presumption) is displaced by government reassurances in oral statements or written documents. Parliamentarians (and their advisers and drafters) will normally take for granted the general operation of such canons. Therefore, it is important that courts carefully assess whether any government assurances going against them are made in line with clearly established conventions which attempt to make sure that the sources that courts take into account as evidence of legislative intent reflect what are, most likely, the assumptions shared by Parliamentarians. The consideration of these materials should not, instead, serve in practice to offer a route for the government to impose contra-textual readings on a provision surreptitiously, without making this clear and open to Parliament as a whole.[43]

(iii) Was Parliament's Intention Disregarded in *Yemshaw* and *Fitzpatrick*?

Yemshaw has been described as '[t]he boldest illustration … of updating' in the absence of legislation specifically indicating that such an approach should be adopted, and as 'perhaps the closest any English judge has ever come to entertaining the possibility of dynamic statutory interpretation without regard for

[42] On which see chapter 2 of this thesis.
[43] (I will develop this point further in chapter 9, section II, when discussing the role of courts within the separation of powers.)

the real or hypothesized intentions of the enacting legislature'.[44] One of the critiques made against the decision is that Parliament had indicated its intention to freeze a narrow conception of 'violence' (limited to physical aggression) in the Housing Act 1996.

Section 177(1A)[45] stipulated that, for the purposes of the Act, 'violence' meant '(a) violence from another person; or (b) threats of violence from another person which are likely to be carried out'. According to critics of the ruling, if 'violence' included psychological abuse, adding 'threats of violence' to its definition would be redundant because such threats are a form of psychological abuse. Therefore—so the objection goes—such threats would already be encompassed within subsection (a) (whether they were likely to be carried out or not), and subsection (b) would add nothing. This argument had been decisive in a previous case decided by the Court of Appeal—*Royal Borough of Kensington & Chelsea v Danesh*, concerning section 198 of the Housing Act 1996 (which, in contrast to section 177, deals with non-domestic violence, but draws the same distinction between violence and threats).[46] The redundancy charge was also crucial in Lord Brown's separate judgment in *Yemshaw*,[47] and has been endorsed by scholars who are very critical of the Supreme Court's decision, such as Ekins.[48]

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[44] Duxbury (n 2) 229–31.
[45] (Introduced by the Homelessness Act 2002. In its original version, section 177(1) of the Housing Act 1996 had an equivalent definition.)
[46] *Royal Borough of Kensington & Chelsea v Danesh* [2006] EWCA Civ 1404 [14], [16].
[47] *Yemshaw v Hounslow London Borough Council* (n 22) [49]–[50].
[48] Ekins (n 20) 265; Richard Ekins, 'Updating the Meaning of Violence' (2013) 129 LQR 17.

I think this objection must be treated carefully. It makes the right kind of argument against extending violence to psychological abuse based on an updating approach—namely, that this goes against Parliament's intention, since it is incompatible with the definition that Parliament enacted.[49] A problem with the majority's judgment in *Yemshaw* is that it did not address this important objection properly. I find Lady Hale's treatment of this matter (with which Lord Hope and Lord Walker agreed) obscure. She reasoned that 'there are some forms of conduct'—for example, stalking—which can put 'the victim in very real (and justified) fear of violence in the narrow [physical] sense' but 'would not necessarily be described as threats'.[50] She also mentioned actions like locking someone up or depriving her of food, and concluded that 'if the concept of violence includes [these] other sorts of harmful or abusive behaviour, then the reference to threats is not redundant'.[51] I do not see how this answers the redundancy charge. If such conduct (stalking, locking someone up, and so on) are included within 'violence', why are 'threats of violence'—which are also likely to harm a person or make her fear physical violence—singled out rather than also englobed within 'violence'?

To rebut the redundancy charge, one needs to explain why the lawmaker may have felt the need to single out 'threats of violence … which are likely to be carried out'. Given that such threats are a form of psychological abuse, what could be the reason to provide that they count as 'violence' other than the fact that one is assuming that psychological abuse in general does not otherwise count as 'violence'? To respond to this objection, I would begin by pointing out that there is something odd about relying on a provision intended to broaden the

[49] See Meagher (n 24) 198–99.
[50] *Yemshaw v Hounslow London Borough Council* (n 22) [31].
[51] ibid [32].

scope of a concept in order to support a narrow reading of it. It is also important to remember that this provision is defining situations where people cannot reasonably occupy a home anymore, not creating a criminal offence. To that extent, there is no presumption that a narrow construction should be applied to this provision which could make us think that the provision was drafted under the assumption that it would be interpreted narrowly.

With section 177(1A), the lawmakers seem to have wanted to make sure that instances of conduct prior to abuse (namely, likely threats) were also included. This does not deny that at least most threats might be considered abusive behaviour in themselves. However, the statute's separate reference to threats clarifies, beyond any doubts, that even threats that are made in what could be described as a 'non-violent' manner (very calmly and even 'politely', without shouts, insults, or harassment) count as violence for the purposes of this provision (as long as they are likely to be carried out). This reading seems to me at least as reasonable as the narrow one. In this situation, we cannot conclude that the updating presumption was displaced or limited by the way in which the provision was written and structured.

Also important in confirming that the Court's decision respected Parliament's intention—and, regrettably, also absent from the majority's judgment—is evidence taken from Hansard. Donald Drakeman has convincingly argued that recourse to Hansard would have shown that Parliament did not intend to exclude psychological violence from section 177. In a statement during the legislative debates, the Minister responsible for the Bill answered exactly this question when a member of the House of Lords asked if 'the Government

include[d] within that term psychological violence as well as physical violence'.[52] The then-Minister of State for the Department of the Environment, Transport and the Regions (Earl Ferres), on whose behalf the statute had been introduced, replied that the Government 'do[es] not rule out the fact that psychological violence could be covered'.[53] He added that 'psychological violence covers a very wide spectrum' and the conclusion 'would depend on the nature of the violence'.[54] The Court's decision in *Yemshaw* made no reference to these statements.

Fitzpatrick offers another example of this kind of argument—one that is relevant in principle but ultimately unsuccessful—in favour of the claim that Parliament intended to displace or narrow down the updating presumption. In his dissent, Lord Hutton reasoned that the statutory reference to 'spouse' in one paragraph (or person living as husband or wife) and 'family' in another meant that a partner who was not a spouse (or was not living as one) could not be considered a family member.[55] This reasoning is very similar to that in *Yemshaw*. Both attempt to argue for a narrow reading of a statutory protection based on a provision designed to expand its scope, and both concern Acts to which no presumption in favour of a narrow construction is applicable.

In the statute at stake in *Fitzpatrick* (the Rent Act 1977, as amended in 1988), the lawmaker gave a stronger protection to the tenant's spouse (or partner living as one) than to other family members, who were, nonetheless, also

[52] HL Deb 8 July 1996, vol 574, col 72, cited in Donald L Drakeman, 'Constitutional Counterpoint: Legislative Debates, Statutory Interpretation and the Separation of Powers' (2017) 38 Statute Law Review 116, 121. (On the rules concerning judicial recourse to Hansard, see ibid 121–22 and chapter 2 of this thesis.)
[53] HL Deb 8 July 1996, vol 574, col 73.
[54] ibid cols 72-73.
[55] *Fitzpatrick v Sterling Housing Association Ltd* (n 3) [93].

protected. The former had priority: other family members would be excluded by the presence of a spouse (or partner living as one) and—in the absence of a spouse—if more than one such family member was living at the house, they would have to agree on (or have the court settle) which one of them would remain there. This justifies dealing with spouses in a separate paragraph. That Parliament intended to give a stronger protection to couples of certain characteristics (including, arguably, the fact of being heterosexual) does not mean that other couples (including same-sex ones) could not fall within the loose and flexible term 'family'. Once again, the effect of having a presumption in favour of updating is that intended departures from it (to either displace it or narrow it down) must be clearly indicated. In cases of doubt, the default presumption holds.

(4) Analogical Extensions

Courts should not expand the problem or situation that a statute is intended to remedy, thus stretching the statute to deal with adjacent—but different—concerns. An example where this line was drawn is *Oakley v Birmingham City Council*, where the House of Lords held that the reference to 'premises in such a state as to be prejudicial to health' in section 79(1)(a) of the Environmental Protection Act 1990 did not extend to the absence of a washbasin in, or near, the toilet.[56] The majority of the Lords accepted that the statutory words were linguistically capable of having a broad meaning, which could extend to the layout of the facilities in the house.[57] They also stressed that standards, attitudes, and awareness of health risks change over time, and a statute should be interpreted

[56] *Oakley v Birmingham City Council* [2001] 1 AC 617 (HL).
[57] ibid at 623 (Lord Slynn), 628 (Lord Hoffmann).

taking into account modern ones.[58] However, they reasoned that earlier statutes on the matter (going back to the 19th century), whose language coincided with that of the 1990 Act, clearly established that Parliament had intended to use the expression to refer to a narrow concept.[59] They opined that the legislative history showed that the Act's purpose was to deal with the presence of conditions that in themselves pose a direct risk to health (such as filth or mould), which went against an expansive reading of its language.[60] In Lord Hoffmann's words, the 'always speaking' doctrine does not 'mean that one can construe the language of an old statute to mean something conceptually different from what the contemporary evidence shows that Parliament must have intended'.[61]

A similar case was *Goodes v East Sussex County Council*, quoted in *Oakley*.[62] In *Goodes*, the House of Lords decided that the duty imposed on Highway Authorities by section 41(1) of the Highways Act 1980 to 'maintain the highway' did not extend to the removal of ice and snow, despite the fact that this reading was linguistically possible.[63] Lord Hoffmann reasoned that the specific provisions included in earlier legislation to keep highways free of dirt, ice, and snow showed 'that the general duty to maintain them was regarded as confined to keeping the fabric in repair', and that 'the removal of obstructions was not in itself regarded as falling within the concept of maintenance'.[64]

[58] ibid at 627 (Lord Slynn), 631-632 (Lord Hoffmann).
[59] ibid at 627–28 (Lord Slynn), 630-632 (Lord Hoffmann).
[60] ibid at 627 (Lord Slynn), 631-632 (Lord Hoffmann), 637-638 (Lord Millet).
[61] ibid at 631.
[62] ibid at 631–32 (Lord Hoffmann).
[63] *Goodes v East Sussex County Council* [2000] UKHL 34, [2000] 3 All ER 603, 605 (Lord Slynn), 607, 612 (Lord Hoffmann).
[64] ibid at 610–11.

These scenarios contrast with the facts in *Baker*, the work safety and hearing loss case.[65] There, the Court did not adopt a broader concept of safety than that originally intended by Parliament. Nothing suggested that the matter (or 'mischief') that Parliament was concerned with was limited to only certain sources or kinds of risks to health. What happened was that Parliament was not aware, at the time the relevant statute was enacted, that high noise levels could produce any such risks. Once this awareness has arisen, however, there is no basis on which one can draw a relevant distinction between noise pollution and other kinds of threats to safety for the purposes of the Act.

Did Lady Hale's reasoning in *Yemshaw* erase this line, suggesting that even an Act meant to deal exclusively with physical violence could be stretched to instances of psychological abuse? Her judgment has been criticised for seemingly suggesting that judges have a license to give expansive, updating interpretations to statutory provisions as long as this serves the statutory purpose broadly understood and is consistent with the statutory language. Ekins, for instance, has argued that Lady Hale 'takes the way in which "domestic violence" is often now used, coupled with the semantic possibilities of "violence" in general, to ground the conclusion that "violence" in s.177 may rightly be read very widely'.[66] For him '[t]he fundamental problem with the approach is its inattention to what it is that Parliament did—what it decided and intended to convey—in 1996 and 2002 in uttering the statutory text'.[67]

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[65] *Baker v Quantum Clothing Group Limited* [2011] UKSC 17, [2011] 4 All ER 223 (UKSC).
[66] Ekins (n 48) 19. See also Goldsworthy (n 20) 97–99.
[67] Ekins (n 48) 19.

I think a more charitable reading of Lady Hale's judgment is possible. This reading would stress how her analysis pays close attention to the kind of language chosen by Parliament and to the way courts had interpreted similar kinds of terms in the past.[68] It would understand her judgment as inferring—on these bases—what Parliament most likely intended.

However, I do think there is some truth to the critiques made against the judgment, which could have been worded more cautiously. When addressing what she took to be '[t]he essential question' of the case, Lady Hale noted that the term 'violence' 'is capable of bearing several meanings and applying to many different types of behaviour', which 'can change and develop over time', and that including psychological abuse within it would be 'consistent with the statutory purpose'.[69] The statutory language and purpose certainly are crucial considerations when interpreting a statute and deciding whether an updating approach should be applied to it. Lady Hale's judgment, however, may give the impression that these are the only relevant considerations, which is not correct. The cases cited above in this section make it clear that the fact that an interpretation is linguistically possible does not necessarily entail that it is the right one.[70] Moreover, Parliament does not merely choose broad purposes and grant courts a mandate to do what they think best to achieve them.[71] Courts are

[68] *Yemshaw v Hounslow London Borough Council* (n 22) [26]–[27].
[69] ibid [27]–[28], [30]. (I am focusing here on Lady Hale's second, alternative reason for her decision—the applicability of an updating approach. As I explained in chapter 4, her first reason was that the understanding of the term 'violence' already included psychological violence at the time the Housing Act 1996 was enacted, so updating it was unnecessary.)
[70] *Oakley v Birmingham City Council* (n 56) 623 (Lord Slynn), 628 (Lord Hoffmann); *Goodes v East Sussex County Council* (n 63) 605 (Lord Slynn), 607, 612 (Lord Hoffmann).
[71] Ekins (n 48) 19; Goldsworthy (n 20) 97–99.

constrained by the means chosen by Parliament in the legal schemes it enacts, and Parliament conveys its intentions not just through express statutory words but also by implication and relying on external aids to construction. A weakness of Lady Hale's judgment is that it fails to adequately consider whether the updating presumption had been displaced or limited by Parliament when it enacted this Act. As I said above, she does not satisfactorily address the redundancy charge against her expansive interpretation of the Act, and fails to cite Hansard statements that would have settled this matter.[72]

(5) Expectations Based on Precedents

The existence of a well-established line of precedent adopting a narrow reading of a provision, on which people have been relying, may lead a court to adopt a more conservative interpretation of that provision than what the updating presumption would indicate. This is due to the fact that there are reasons to protect people's legitimate expectations even when this involves following an interpretation that is now considered mistaken. These reasons are based on the values of certainty, stability, predictability, and treating like cases alike (a dimension of equality).

Mistaken past interpretations may be due, for example, to the fact that the courts misread the statutory text, or failed to notice (or misinterpreted) relevant elements of the context in which it was enacted. This could, for instance, have led courts to conclude that Parliament had intended to displace the updating presumption—or to exclude certain cases from a provision's scope—when in fact this was not the case. Alternatively, a precedent may have been based on judicial

[72] See section II(3)(iii) above.

reasoning that has since been shown to be incoherent, fallacious, or otherwise flawed.

While the requirement to decide cases according to the laws enacted by Parliament should lead courts to correct those mistakes in future cases, the values of certainty, stability, predictability, and equality may militate against this. To determine what to do, judges will have to do a balancing exercise between these competing reasons, within the constraints placed by the rules of precedent established in the relevant jurisdiction. This balancing exercise is not peculiar to the application of the updating presumption but part of the more general problem of what to do about mistaken precedents.[73]

There is no reason in principle to think that one certain set of reasons will always prevail so that the conclusion, in cases of tension, will always be for (or against) adopting an updating approach. This will depend on the type of statute at stake and the details of the case in which the mistaken interpretation could be overruled. Other relevant considerations include the question of whether the court has the possibility of overruling a case only prospectively—rather than retroactively—and, if so, whether that would be appropriate in the case at hand. Prospective overruling can be a way to minimise the disappointment of legitimate expectations, but the possibility of using this tool in the UK is contested.[74]

It is important to bear in mind here the distinction between mistaken precedents (that is, decisions which were already wrong at the time they were

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[73] For a recent analysis of this matter, see Sebastian Lewis, 'Precedent and the Rule of Law' (2021) 41 OJLS 873.
[74] See Mary Arden, 'Prospective Overruling' (2004) 120 LQR 7; MDA Freeman, 'Standards of Adjudication, Judicial Law-Making and Prospective Overruling' (1973) 26 CLP 166; Anthony Lester, 'English Judges as Law Makers' [1993] PL 269, 286–87; Ben Juratowitch, 'Questioning Prospective Overruling' [2007] New Zealand Law Review 393.

decided) and precedents that are not authority for a current case because they were decided in relevantly different circumstances. In the latter situation, the application of the updating presumption should lead courts to analyse the issue afresh. This does not entail overruling the prior decision but only distinguishing the two cases. Let us suppose, for example, that statute *S* says only that activity *A* has to be carried out 'reasonably'. A first ruling may have developed this, holding that, in circumstances *C1* (including, for instance, a certain type of infrastructure and certain social standards about how *A* should be done), 'reasonably' means carrying out certain prior checks and doing things at a certain speed. Let us call this set of precautions *P1.* Circumstances may change in the future; for example, infrastructure may become more complex and people may raise their expectations about how much care others should take when they do *A*. When a new case is decided in changed circumstances *C2*, doing *A* 'reasonably' may be held to require not precautions *P1* but *P2* (there may, for example, be more or different checks to perform and a new acceptable speed range). The previous ruling is not overruled by this later one but distinguished. The court does not hold that the previous decision that is not followed 'is "wrong" in the sense of "wrong-at-the-time-decided" but only that it has been overtaken by changes'.[75] This is what the majority held had happened in *Dyson.* As James LJ put it, the prior decision in *Gammans v Ekins* 'is binding only upon the meaning to be given to "family" at that time' (in 1949), but 'is not authority for the proposition

[75] Richard HS Tur, 'Time and Law' (2002) 22 OJLS 463, 477.

that at some later time a person in a similar position … could not in law be a member of the tenant's family'.[76]

In contrast, in other cases, courts are not just developing the law by distinguishing between cases. They are substituting new legal propositions for old ones which are no longer considered correct. Before deciding a case in a way that departs from a precedent that is now seen as mistaken all along, courts will have to consider and balance the considerations I alluded to above.

III. <u>A Related Issue: Can Executive Officials Adopt an Updating Approach?</u>

The focus of this thesis is on the role that Parliament intends courts to play in keeping statutes up to date. A related question, which I will consider here only briefly, is whether executive officials can also adopt an updating approach when interpreting and applying a statute. I am assuming here that Parliament did not displace the updating presumption when it enacted that statute, in any of the ways discussed above. Otherwise, the answer is, naturally, that the executive should not adopt an updating approach. I am also setting aside statutes that expressly empower the executive to issue secondary legislation and amend primary legislation, which I discussed above.[77] The fact that such powers have not been created, however, does not necessarily mean that the executive has no role at all in keeping a statute up to date, though it does give courts the ultimate authority on this matter.

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[76] *Dyson Holdings Ltd v Fox* (n 17) 512. See also ibid at 513 (Bridge LJ). Lord Denning MR, in contrast, opined that *Gammans v Ekins* had been wrongly decided; ibid at 509.
[77] In section II(3)(i).

There are three kinds of scenarios to discuss here. The first is one where courts have not yet had an opportunity to rule on whether a certain object or situation is included within a statutory provision or not. In such cases, an executive official who adopted an updating approach would not be contradicting any judicial precedents. She would, instead, be following the general rules settled in the caselaw on the always speaking principle. Depending on the situation, she may also have to take into account rulings relevant to the case at hand—for example, decisions that established that the provision at stake should be given an updating interpretation but did not address the specific question that this new case raises. Executive officials would thus be attempting to mirror what courts would, most likely, do with this case if they had to decide it. The fact that courts have ultimate authority does not mean that in the meantime—before courts have had an opportunity to rule on this matter because a case has not yet reached them—executive officials should act as if Parliament had displaced the updating presumption when this is not the case.

An alternative scenario is one where courts have adopted in the past an updating interpretation of a provision that now appears outdated. The possibility of an executive official departing from this interpretation in a later case raises rule of law concerns, as it might be argued that the executive is acting unlawfully by not following the law as it has been set out by courts, its ultimate interpreters. However, I think that to speak, in a case like this, of a departure from a precedent is to misconstrue what that precedent really established. This takes me back to the discussion in the previous section about precedents that are not authority for a current case because circumstances are relevantly different. In the hypothetical judicial ruling that the executive now considers outdated, the court will have

based its updating interpretation on a set of circumstances (for example, current living arrangements and social attitudes about what a family is) that were different from those at the time of enactment. Once such circumstances have changed yet again, to insist on a judicial interpretation tied to the old ones would be to contradict—rather than respect—the logic of the prior ruling and, more generally, of the always speaking principle, on which the ruling was based. In a case like *Dyson*, for example, the Court's conclusion that a tenant's 'common law wife' was his 'family' was premised on the proposition that the term 'family' should be understood according to its popular meaning at the time of the decision.[78] To follow the logic of the Court's decision in *Dyson* in a case that takes place decades later, future interpreters need to determine what the popular meaning is at the time of the new decision, rather than stick to old understandings that have now been abandoned.

The executive's initial assessment on this matter will be revisable by the courts, who have ultimate authority. Courts, for their part, may do well to pay attention to what executive officials have decided because this could shed light on the current state of affairs, including things like the majoritarian social consensus on a certain matter or experts' views about it. In adversary systems, the evidence presented to courts by counsel, and the facts of which courts may take judicial notice, may be narrower than what government and Parliament can gather (for example, through departmental investigations).[79]

There are exceptions to the above—that is, matters which executive officials should, in principle, not re-examine and should, instead, continue to

[78] *Dyson Holdings Ltd v Fox* (n 17) 511–13.
[79] Freeman (n 74) 176–77.

interpret in accordance with what courts said on the last occasion they ruled on them. I cannot offer a complete analysis here, but this may be the case with statutory provisions that direct courts to act, within constraints, as independent arbiters, rather than track majoritarian attitudes, conceptions, and standards as they evolve over time. An example of this is the open-ended and morally loaded language of bills of rights. (I introduced this idea in the previous chapter and will discuss it at more length in chapter 8.) In these cases, Parliament's intention may be to seek the judiciary's input on certain matters, which can then be fed into the legislative process. In matters in which executive officials cannot offer the insights that the judiciary—thanks to its institutional design—is uniquely well-suited to provide, they should follow and not revise past judicial rulings. A point to add is that, when confronted with a situation where a judicial interpretation of a provision of this kind has apparently become outdated, executive officials can bring the matter before courts.[80]

A third and final possible scenario to discuss is one where there is a precedent in which a court adopted an interpretation that the executive regards as mistaken (that is, as incorrect already at the time it was decided). In such cases, the executive should defer to that judicial interpretation even if it disagrees with it. Judges are the ultimate interpretive authority and their decisions can only be reversed in the future by another court or by a legislative amendment.

IV. Conclusion

In this chapter, I completed the analysis of the content and operation of the updating presumption that I began in chapter 5. While that chapter focused on

[80] Tur (n 75) 479.

what the presumption enables or requires courts to do, this one discussed the limits of judges' updating role. Some of these limits emerge from the default content of the updating presumption as recognised in established judicial practices, and the ways in which Parliament may cancel or limit its applicability to a particular expression or provision. Other limits, by contrast, are related to general matters that go beyond the updating presumption. These include the rules of precedent and the general institutional boundaries of the role of judges.

CHAPTER 7: Relationship to Legislative Intent

I. Introduction

This chapter analyses the relationship between the presumption in favour of an updating approach and legislative intent. It discusses the sense in which Parliament can be said to have intended to rely on this presumption when it has not displaced it in any of the ways discussed in the previous chapter. I will argue that legal advisers and Parliamentary Counsel are deeply familiar with the content and operation of the updating presumption, and will normally consider the long-term effects of statutes taking the presumption into account and advise Parliamentarians accordingly. Discussing as examples provisions taken from recent Acts, I will show that Parliament often opts for broad formulations deliberately, in order to grant flexibility to future interpreters (that is, executive officials and, ultimately, courts).

II. Parliament's Knowledge of the Presumption

I have been arguing that Parliament intends to rely on the updating presumption when it does not displace it. However, in what sense can we say that Parliamentarians, when they debate and vote on Bills, are aware of the existence of this presumption and count on it being applied to the interpretation of the statutes they enact? Granted, many individual legislators are probably not thinking about the long-term consequences of each statute they enact, how changed circumstances in the distant future may affect its application, and how its text interplays with the canons of construction that courts regularly apply. In

general—outside the case of legislation in fields that are obviously fast moving, like technology—most Parliamentarians tend to focus their attention mainly on how to deal with the issues of the day.[1] They are less likely to worry about how their laws will apply in the distant future, when the circumstances of the problems that concerned them at the time of enactment will have changed. Moreover, the canons of construction applied by courts often involve complex and technical matters, and all Parliamentarians cannot be expected to be informed about the existence, content, and scope of each presumption. Most Parliamentarians do not normally consider or discuss these technical matters.[2]

Instead, only certain actors are likely to focus on these issues (that is, on each Bill's medium- and long-term implications, and the impact that canons of construction have on the meaning conveyed by the statutory language). This takes me back to the idea of division of expertise, labour, and trust within government and Parliament discussed in chapter 2. We can expect most (if not all) Parliamentarians to be aware of the basic aspects of important choices made by Parliament. For example, Parliament's intention to combat a certain kind of behaviour by criminalising it and attaching to it a heavy prison sentence will normally be something of which all Parliamentarians voting on the Bill at stake will be conscious. As I argued in chapter 2, however, in order to say that Parliament had an intention, it is not necessary that the content of this intention be expressly present in the minds of all the individuals who make up Parliament (or a majority of them). The conventional notion of legislative intent with which

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[1] Author's interviews with Lord Pannick, Stephen Tierney, Alison Young, and someone who wished to remain anonymous. Looking at Hansard tends to confirm that impression, as I discuss below.
[2] Author's interviews with Daniel Greenberg and Lord Pannick.

courts, lawmakers, and other officials operate is not one that looks directly at the mental states present in the minds of all individual lawmakers (or a majority of them). Detailed knowledge about what the relevant conventions say and how to work with them, and about what each Bill does in relation to those conventions will not normally be held by all or most lawmakers, in the same way that it is unlikely that all or most of them will have very detailed knowledge about the text of many Bills.

Given the vastness and complexity of the facts that legislation deals with and the speed at which lawmakers must attempt to respond to many of them, the government and Parliament could not function if they did not have in place a system of division of labour. The large majority of Parliamentarians belong to political parties, which have their own values and agenda. Within each party, different responsibilities and roles are allocated to different members and advisers, who are trusted to perform them properly. These tasks may involve preparing a legislative proposal on a certain matter; scrutinising certain aspects of a proposal made by others, raising relevant concerns (for example, about a provision's possible long-term consequences), and requesting amendments; and determining how the party should vote in relation to a Bill and instructing members accordingly. The government will also rely on the expertise of Parliamentary Counsel to draft Bills that capture and convey the policies and schemes that the government wishes to turn into law. In turn, Parliament also has a structure of division of responsibilities and expertise, with different committees in charge of scrutinising different aspects of Bills. The fact that a legislator may vote for or against a Bill that she does not know to its fullest detail is not worrying and does not suggest that legislators are making decisions thoughtlessly. They are,

instead, relying on the fact that each person involved in the law-making process has a role to perform (including perhaps scrutinising that certain others have performed their role properly). Legislators trust that Bills are the product of a carefully distributed group effort, of which each of them is only a part.

Regarding the updating presumption in particular, what matters is that certain key actors—on whose expertise and judgment Parliamentarians rely—will normally have considered the long-term consequences of a Bill's provisions and how courts are likely to respond to them, and made a decision as to whether to rely on the updating presumption, displace it, or narrow it down. The initial assessment will normally have been made by someone in (or advising) the government, and then scrutinised by others during the Bill's passage through Parliament. Other legislators, in turn, will either trust that decision or, if they have reasons to be wary about it, inspect it and potentially criticise it (or endorse someone else's criticisms of it). Thus, in the first instance, we can expect the Bill's promoter, her legal and policy advisers, and the Parliamentary Counsel who worked on that Bill to have considered its long-term consequences. Later on, certain parliamentary committees will normally scrutinise the Bill thinking both of its immediate and long-term application. These may include the Constitution Committee (for example, when the vagueness or uncertainty surrounding a concept is likely to give rise to constitutional matters) and the Delegated Legislation Committee (when a statute delegates law-making powers to the executive). The next section considers examples that illustrate this.

Expecting all or most members of Parliament to have been directly involved in the decision to rely on the updating presumption is to fail to understand how a complex group with a vast agenda like Parliament can reasonably function.

Individuals organise themselves and trust each other to achieve, through their cooperation, a level of command of the details of a Bill (and of the facts about the situation or 'mischief' that the Bill is designed to deal with) that they could not hope to reach working alone. If many Parliamentarians may not be familiar with the content, scope, and operation of judicial interpretive principles (including the updating presumption), the actors on whose expertise they rely are deeply knowledgeable of these matters and can advise Parliamentarians on that as needed.

Such knowledge is illustrated by the fact that the canonical texts on statutory drafting and interpretation (which I have been citing throughout this thesis as authorities on the updating presumption) are usually edited by people who serve or have served as Parliamentary Counsel. Francis Bennion was Parliamentary Counsel for several years,[3] and Diggory Bailey and Luke Norbury (co-editors of *Bennion, Bailey and Norbury on Statutory Interpretation*) are both currently Parliamentary Counsel and have occupied that role for many years. Daniel Greenberg, editor of *Craies on Legislation* (among other works on statutory drafting and interpretation), was also Parliamentary Counsel for almost twenty years[4] and Counsel for Domestic Legislation in the House of Commons.[5] George Engle, co-editor of *Cross on Statutory Interpretation*, served as First Parliamentary Counsel.[6] Parliamentary Counsel closely look at judicial rulings to see how different terms and expressions have been interpreted,[7] while

[3] (From 1953 to 1965, and from 1973 to 1975.)
[4] (From 1991 to 2010.)
[5] (Between 2016 and 2022.)
[6] (Between 1981 and 1986. He had been a member of the Office since 1957.)
[7] Chapters 2 and 3 illustrate this with examples from drafting guidance issued by the Office of the Parliamentary Counsel.

government department officials do so to monitor whether their policies are being effectively implemented and whether any amendments are necessary.[8] Furthermore, three of my interviewees are or had been Legal Advisers to the Constitution Committee of the House of Lords—and a fourth one is a former member—and all of them were very familiar with this and other presumptions of legislative intent. To the extent that any doubts or worries that Parliamentarians have would be addressed by such experts, the latter's knowledge—on which Parliamentarians rely—can be attributed to Parliament.

III. Examples of Parliament Granting Interpretive Flexibility

Reading Hansard and committee reports shows that Parliament's choice for broad, open-ended expressions is often expressly motivated by the intention to grant flexibility to future interpreters who may have to apply statutes in changed circumstances. This is a deliberate choice to avoid rigid formulations that would tie the hands of officials applying the law (that is, executive officials and, ultimately, courts) and prevent them from interpreting statutes over time in a way that adequately responds to what new scenarios require. The specific details of such interpretations may be unforeseeable (or look unlikely or perhaps even undesirable) at the time of enactment. Below, I discuss three recent examples of Acts featuring broad, open-ended language in order to avoid rigid definitions and preserve flexibility for future applications.

This flexibility is indispensable, for example, when a statute is concerned with a value whose protection may require different things in different contexts, and which can be threatened or undermined suddenly, leaving no time for

[8] Author's interview with two persons who wished to remain anonymous.

Parliament to respond to this by enacting new legislation. Public health is a clear example of this, and the language of statutes like the Public Health (Control of Disease) Act 1984 is accordingly broad and general. Another example—which I discuss below—is national security.

Flexibility for future interpreters is also important in matters in which changes in relevant circumstances are subtle, constant, and gradual, so that adapting the law to them would require constant monitoring and amending from Parliament. Examples of this include the rent and housing laws discussed in earlier chapters. These protect changing social arrangements like families and couples, and safeguard people from kinds of conduct—violence and abuse—which can manifest themselves in many different ways and about which our standards change gradually over time. Further illustration of this is offered by the legislative history of the recently enacted Domestic Abuse Act 2021, discussed below.

Before delving into these examples, let me clarify a point. I do not mean to suggest that the choice for such broad, open-ended language will always be motivated primarily by a concern with a Bill's long-term consequences. This will often be the case with legislation on obviously fast-moving fields, such as technology and science. However, in other cases, interpretive flexibility will be desirable from day one, and the fact that it will allow interpreters to adapt the law to changed circumstances in the more distant future may only be a consequence of this initial need. In such cases, what may be at the forefront of legislators' minds (or of those who advised or worked with them) is the fact that they are dealing with a matter that is, already at present, very complex and context-sensitive. When they opt for terms like 'reasonable', 'offensive', 'abusive', and so

on, the realisation that our standards about them will likely change over time (as we deal with changed material circumstances and revise past conceptions) will not necessarily be the central concern (though it may be). On occasions, first and foremost may be the realisation that what is reasonable, offensive, abusive, and so on may look very different in different scenarios taking place the day after enactment.[9] An alternative possible explanation for broad, open-ended language may be that legislators simply could not agree on a more precise scheme and relied on interpreters to engage in creative interpretation to fill in gaps.[10]

In chapter 8, I will comment on the legitimacy of these legislative choices. The point for now is that, in these situations, the fact that this language will allow interpreters to accommodate circumstances that have changed over time will be only a consequence of Parliament's main, present-oriented concerns (or, depending on the case, of the barriers to reaching a more concrete agreement among Parliamentarians).

When lawmakers choose underdetermined expressions partly tied to variables that change over time (such as scientific information and social habits or attitudes)—without somehow indicating that a certain fixed understanding or conception of them should be adopted—applying those expressions in the future will inevitably lead interpreters to take into account contemporary standards.[11] This is the case regardless of whether lawmakers were mainly concerned with the need for flexibility in the present, rather than with future adjustments. In other

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[9] Author's interview with two persons who wished to remain anonymous.
[10] See Helen Xanthaki, *Drafting Legislation* (Hart Publishing 2014) 319 (indicating that vague or incomplete legislative provisions may be preferred in relation to 'issues that remained unresolved within the drafting team possibly for policy or political reasons').
[11] Sir Rupert Cross and others, *Cross: Statutory Interpretation* (3rd edn, Butterworths 1995) 53.

words, the interpretive discretion granted for today is of a standing kind. Crucially, actors like Parliamentary Counsel and legal advisers of the government and of parliamentary committees are acutely aware of this fact, and will take it into account when designing or scrutinising a Bill. The leading works on statutory interpretation I have been citing make this very clear, and the examples I discuss below further illustrate it. To that extent, conferring this discretion for interpreters in the future is an intentional choice even in those cases where lawmakers' concerns with the need for flexibility were focused on the present.

Bennion presented the choice for broad or wide terms—which normally create doubts about their interpretation and application—as a kind of 'delegation' from Parliament to courts, for courts to exercise judgment and work out detailed rules through successive cases over time, rather than have Parliament specify these at the outset in legislation.[12] While I would hesitate to use the word 'delegation' to describe the decision not to limit interpreters' discretion, Bennion's description underscores how this kind of language is a deliberate legislative choice to allow (or, rather, require) the exercise of that discretion by courts and other law-applying officials. Interpreters exercising this discretion will draw on contemporary attitudes, standards, and understandings when a statute does not indicate otherwise.

(1) <u>The Domestic Abuse Act 2021 (DAA 2021)</u>

Section 1 of the recently enacted DAA 2021 establishes a very broad definition of 'domestic abuse', which includes 'physical or sexual abuse', 'violent or threatening behaviour', 'controlling or coercive behaviour', 'economic abuse', and

[12] FAR Bennion, *Statute Law* (Oyez Publishing Limited 1980) 120–21.

‘psychological, emotional or other abuse’. Economic abuse, in turn, is defined in subsection 1(4) as ‘any behaviour that has a substantial adverse effect’ on the victim’s ability to ‘acquire, use or maintain money or other property’ or ‘obtain goods or services’.

When shown these provisions, all my interviewees accepted that our standards and conceptions regarding these terms may evolve in the future. They indicated that they expected courts would take this into account when interpreting future cases, rather than defer to lawmakers’ original expectations about what specific conduct would be considered ‘domestic abuse’.[13] (This would be constrained by the limits established by courts in their caselaw on the always speaking principle, and subject to whether Parliament had conveyed a contrary intention.)

When explaining the choice for broad rather than specific categories, the Minister for the Home Office indicated that the aim was to make sure all relevant behaviours fell within the Act, as ‘[i]t would be open to courts or whichever forum is looking at it to interpret those broad categories accordingly’.[14] The express reference to courts confirms that it was understood that the Act will grant interpretive flexibility to judges in particular, and not just to executive officials. The Minister stressed that legislators ‘cannot seek to define every way in which a perpetrator will seek to abuse’ since there is a ‘huge array of ways in which a

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[13] One of my interviewees did, however, suggest that the Supreme Court, in its present composition, might turn out to be more cautious than in past rulings when assessing whether the current ordinary meaning of an expression reflects changes in moral understandings (as opposed to other kinds of changes, such as factual circumstances pertaining, for example, to technology or social habits).
[14] Joint Committee on the Draft Domestic Abuse Bill Deb 21 May 2019 (oral evidence, HC 2075), question 269.

determined perpetrator can abuse their so-called loved ones'.[15] The Minister was specifically asked whether she was confident that the Bill's 'broad categories [are] sufficiently broad to include things that maybe nobody has identified so far', and her answer was affirmative.[16] She said that they 'wanted the categories to show the ways in which harm can be conducted, but not the manifestations of those categories, because [they] don't want to cut off ways of behaviour that perpetrators may discover'.[17] As an example, she mentioned the fact that, '[t]en years ago, when people were talking about domestic violence, as they would probably have called it then, they probably would not have foreseen the way in which mobile phones can now be used to stalk, to coerce, to control and so on'.[18]

In its Report, the Joint Committee on the Bill 'endorse[d] the Government's approach to defining domestic abuse by the inclusion of broad categories of behaviour in order to future-proof the statutory definition'.[19] It did, however, recommend that the Bill should be amended to provide that certain forms of behaviour (such as female genital mutilation and forced marriages) 'are always treated as domestic abuse', while also 'mak[ing] it clear that specifying these types of abuse does not limit the definition of domestic abuse'.[20] This recommendation was not adopted. In its response, the Government indicated that '[l]isting specific acts of abuse on the face of the Bill risks limiting the understanding of domestic abuse'.[21] This claim seems doubtful: as explained in

[15] ibid.
[16] ibid.
[17] ibid.
[18] ibid.
[19] ibid para 29.
[20] Joint Committee on the Draft Domestic Abuse Bill, *Draft Domestic Abuse Bill* (2017–19, HL 378, HC 2075), para 28.
[21] Home Office, *Response to the Report from the Joint Committee on the Draft Domestic Abuse Bill*, July 2019, CP 137, para 34.

chapter 6, there are textual techniques that allow lawmakers to partially limit interpreters' discretion (firmly fixing a certain situation within the meaning of a provision) while clearly preserving the default applicability of an expansive, updating approach. In any case, the Government explained that its plan was 'to provide further details … in the statutory guidance which will accompany the definition' and which 'will be regularly updated to allow for emerging trends and behaviours to be recognised'.[22]

(2) The National Security and Investment Act 2021 (NSIA 2021)

The NSIA 2021 is also worded in very general terms. Section 1 provides that the Secretary of State may give a 'call-in notice for national security purposes' if she 'reasonably suspects' that 'a trigger event has taken place in relation to a qualifying entity or qualifying asset, and the event has given rise to or may give rise to a risk to national security', or if 'arrangements are in progress or contemplation which, if carried into effect, will result in a trigger event taking place'. Section 65 defines what a series of terms mean but does not specify or provide any guidance about how to understand 'national security' or what constitutes a 'risk'. A more precise definition is not established in other legislation either.[23]

Just like with the DAA 2021, the breadth and under-determinacy of section 1 of the NSIA 2021 are deliberate and did not go unnoticed in the law-making process. In a memorandum to the Delegated Powers and Regulatory Reform

[22] ibid. Such guidance was issued; see Home Office, *Domestic Abuse Act 2021: Statutory Guidance*, July 2022.
[23] See, for example, the Security Services Act 1989 (section 1) and the Regulation of Investigatory Powers Act 2000.

Committee to assist with the scrutiny of the Bill, the Department for Business, Energy and Industrial Strategy noted that '[d]ue to the wide-ranging and evolving nature of national security risks, a broad call-in power is necessary in order for the Secretary of State to be able to safeguard national security', and, as a result, 'it would not be appropriate to further limit the scope of the call-in power'.[24] The Delegated Powers and Regulatory Reform Committee, for its part, acknowledged that '[t]he Bill confers wide ranging powers on the Secretary of State' and that '[t]he kinds of entities and assets which are qualifying entities and assets for the purposes of the Bill are extremely wide'.[25] However, it 'concluded that there is nothing in the Bill to which [they] would wish to draw the attention of the House'.[26] The Constitution Committee, for its part, did not publish a report.

Speaking before the House of Commons, the Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy (Nadhim Zahawi) said that '[t]he Bill's approach reflects the long-standing policy of Governments of different hues to ensure that powers relating to national security are sufficiently flexible to address the myriad risks that may arise'.[27] He added that 'national security risks are multi-faceted and constantly evolving, and what may constitute a risk today may not be a risk in the future'.[28] Other Parliamentarians also stressed the need for flexibility and remarked that national security 'is not a static thing or concept'.[29] The importance of not establishing a rigid definition of national

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[24] 'National Security and Investment Bill: Memorandum from the Department for Business, Energy and Industrial Strategy to the Delegated Powers and Regulatory Reform Committee' (10 November 2020) para 14.
[25] Delegated Powers and Regulatory Reform Committee, *National Security and Investment Bill* (HL 2019-21, 225) para 3.
[26] ibid para 2.
[27] HC Deb 20 January 2021, vol 687, col 1030.
[28] ibid.
[29] ibid cols 1010-1013

security in order to preserve flexibility was underscored even by Parliamentarians who had proposed amendments to the Bill aimed at offering greater clarity (for example, a clause including an open list of factors relevant to assessing risks to national security), which were rejected by the Government.[30] In turn, another Under-Secretary (Paul Scully) stressed before the House of Lords that '[i]t is so important that we keep the flexibility in the definition of "national security", in order to future-proof the Bill'.[31]

Later on, a statement published in accordance with section 3 of the NSIA 2021 set out how the Secretary of State expected to exercise this power. It indicated that '[t]he Act intentionally does not set out the circumstances in which national security is, or may be, considered at risk', which 'reflects longstanding government policy to ensure that national security powers are sufficiently flexible to protect the nation'.[32] The Secretary of State stressed that, as a result, nothing in that 'statement should be interpreted as a definition of national security',[33] and 'each qualifying acquisition will be assessed on a case-by-case basis'.[34]

While, in this case, the focus was on granting flexibility and a wide margin of action to the executive, it was of course understood that its actions may be subject to judicial review and that courts may have to evaluate, for example, whether 'the Secretary of State took into account political factors outside the remit of national security'.[35] Independently of the question about the degree of

[30] ibid cols 989 and 999.
[31] HL Deb 26 April 2021, vol 693, col 165.
[32] Cabinet Office and Department for Business, Energy & Industrial Strategy, 'National Security and Investment Act 2021: Statement for the Purposes of Section 3' (2 November 2021) para 4.
[33] ibid para 16.
[34] ibid para 5.
[35] HC Deb 20 January 2021, vol 687, col 1032. See also ibid col 1004-1005.

deference that courts should have towards the executive's exercise of discretion, what is clear is that courts should carry out their assessment taking into account current understandings of what national security requires and standards on what may count as risks to it. The Parliamentary Under-Secretary, Nadhim Zahawi, also stressed on a number of occasions that disputes on the correct interpretation of the Act's provisions would be ultimately for the courts to settle, and was reluctant to have further specifications of broad, context-sensitive concepts provided for in delegated legislation rather than left to the courts' interpretation.[36] In any case, the more general point that the passages quoted in the paragraphs above illustrate are the kinds of concerns that may lead Parliamentarians to deliberately opt for open-ended expressions that grant flexibility to interpreters (whether executive officials or courts) to develop and adjust the interpretation of those expressions over time.

(3) <u>The Online Safety Act 2023 (OSA 2023)</u>

The language and legislative history of the OSA 2023 also show lawmakers' concern with granting flexibility to those who will apply the Act in the future, as well as a deliberate choice for the kind of broad, open-ended language that can offer that flexibility. The Act uses this kind of language when it defines, for example, what counts as 'content that is harmful to children' in sections 60-62. Section 235, in turn, defines 'harm' as 'physical or psychological harm', including harm arising from 'the nature of the content', 'the fact of its dissemination', or 'the manner of its dissemination'.

[36] HC Deb 20 January 2021, col 215-217

This Act relies mainly on the Secretary of State and the Office of Communications (OFCOM) to keep its provisions up to date, rather than on courts. The Act's broad, open-ended language is thus primarily meant to grant to these authorities a flexible framework within which to perform this updating role. There are two tools that are central to it. First, the Act creates a series of Henry VIII powers, which, among other things, allow the Secretary of State to add offences (to section 40), and to amend the statutory definitions of 'primary priority content that is harmful to children' (in section 61) and 'priority content that is harmful to children' (in section 62).[37]

The OSA 2023 does, however, establish a scope of interpretive flexibility for judges in particular, for instance, when it includes a third category in section 60(2)'s definition of 'content that is harmful to children'. That third category refers to content that has not been defined as 'primary priority content that is harmful to children' or 'priority content that is harmful to children' in sections 61 and 62 (which, as I just explained, can be amended by secondary legislation), but is 'of a kind which presents a material risk of significant harm to an appreciable number of children in the United Kingdom' (section 60(2)(c)). This is labelled 'non-designated content that is harmful to children' (section 60(4)), and it generates a series of duties of care for service providers.[38] Its interpretation is left, ultimately, to courts. Thus, courts play a residual role in keeping the Act up to date.

As a further updating tool, the Act provides that codes of practice with recommendations for providers of online services must be issued and kept under

[37] See, respectively, sections 219 and 220. Additional Henry VIII powers are established in sections 216, 218, and 221-223.
[38] See, for example, sections 11-13.

review by OFCOM.[39] These codes are generally subject to the negative parliamentary procedure (and, in certain cases where the Secretary of State has directed OFCOM to modify a draft code, to the affirmative procedure).[40] Lack of compliance with the recommendations in such codes does not, in itself, generate liability, but a provider who complies with them will be treated as complying with the relevant duty.[41]

These two tools allow the Secretary of State and OFCOM (and, to some extent, Parliament) to help to make sure that, over time, the Act works as intended and stays relevant and up to date. This partly constrains the role of courts in that task, but, as I said, it does not fully exclude it. The broad, open-ended language of the Act is thus designed to grant flexibility first and foremost to the Secretary of State and OFCOM and, residually, to courts.

The importance of conferring that flexibility through the use of that kind of language was stressed in the parliamentary debates. Legislators discussed whether the Bill was 'wide', 'futureproofed', 'agile', and 'flexible' enough to accommodate the emergence of future technological platforms, networks, or tools, as well as the development of new ways of interacting online and—with that—of new kinds of conduct that may harm children.[42] Legislators and witnesses mentioned the Metaverse, blockchain, and AI tools (for example, to 'undress' people in photos) as recent developments that they observed, and which made them expect further ones beyond their imagination.

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[39] Sections 41-42 and 46-47.
[40] Sections 43-45.
[41] Sections 49-50.
[42] See, for example, PBC Deb (Bill 4) 24 May 2022, cols 12-13, 16-17, and 91; 7 June 2022, col 239; 14 June 2022, col 380; and 23 June 2022, col 589.

This concern was already present in the Online Harms White Paper (from 15 December 2020). This contained an 'initial list of online harmful content or activity' (paragraph 2.1), divided into categories including '[h]arms with a clear definition' and '[h]arms with a less clear definition' (the latter included things like '[d]isinformation', '[v]iolent content', and '[a]dvocacy of self-harm'). The White Paper clarified that this list was, 'by design, neither exhaustive nor fixed' since '[a] static list could prevent swift regulatory action to address new forms of online harm, new technologies, content and new online activities' (paragraph 2.2).

Parliamentary committee reports also stressed the importance of avoiding terms or expressions which 'may prove too limiting in a rapidly developing online world', and referred to 'the need to ensure that the Bill keeps up with changes in the online world'.[43] They suggested amendments (some of which were incorporated) that 'would better reflect the range of online risks people face' at present and, at the same time, 'cover new forms of interaction that may emerge as technology advances'.[44]

Thus, lawmakers were concerned with the fact that new forms of interaction that may be made possible by future technological advances may raise questions about what is harmful content and what is appropriate. In addition to this, our very standards about such matters will, most likely, change over time, as they have done in the past. In the debates around the OSA 2023, Parliamentarians alluded to the fact that different persons and groups have different standards about what is harmful or distasteful.[45] Clearly, there is also a

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[43] Joint Committee on the Draft Online Safety Bill, *Draft Online Safety Bill* (2021–22, HL 129, HC 609), para 67. See also paras 170-171, 198, and 320.
[44] ibid para 68.
[45] See, for example, HC Deb 19 April 2022, vol 712, col 117.

temporal dimension to this. All my interviewees considered, for example, that we may come to understand what is harmful to children differently in the future. They indicated that they would, in principle, expect courts to decide cases according to current standards even when these departed from lawmakers' original expectations about how the Act should apply to concrete situations.[46] (Once again, this would be constrained by the limits established in the caselaw, and subject to whether Parliament had conveyed a contrary intention. Moreover, given the design of the OSA 2023, secondary legislation and codes of guidance will be central for courts deciding cases.) Over time, we have come to regard as perfectly appropriate content that past generations may have considered potentially disturbing for children of a certain age—for example, depictions of loving same-sex relationships. Similarly, it seems that conduct previously regarded as socially acceptable 'banter' is now recognised as a harmful form of bullying.

IV. The (Limited) Significance of Parliament's Failure to Eliminate this Presumption

Parliament could, at least in theory, attempt to get rid of the updating presumption altogether and replace it with its opposite, for example by amending the Interpretation Act 1978 and introducing a provision to that effect.[47] If Parliament expressed the intention to modify the updating presumption, a failure to respect this by courts could not be reconciled with their well-established acknowledgement that they are bound by Parliament's intentions. As far as I am

[46] (See, however, the qualification made in n 13.)
[47] (This Act currently makes no reference to the updating presumption.)

aware, no such modification proposal has emerged within Parliament to date. None of my interviewees could recall any instances where Parliamentarians had expressed concerns about the legitimacy of courts' adopting updating approaches to statutory interpretation.

While one might attempt to derive from this fact additional support for the claim—defended in this thesis—that Parliament endorses and normally intends to rely on the updating presumption, we should be cautious here. There could be many reasons behind Parliament's failure to propose or pass legislation on this or any other matter.[48] The fact that a proposal or debate about the general desirability of the updating presumption has not, so far, found its way into the government's or Parliament's agenda may be due to factors like lack of time or the prospect of meagre political gains (or none at all). The equation might change if UK courts started adopting a more aggressive approach and expanded their updating role. This, however, certainly seems unlikely, at least in the near future.

More significant than Parliament's failure to pass an Act modifying the presumption is, I believe, its insistence on using the kind of broad, evaluative terms that have given rise to very famous decisions like *Fitzpatrick* and *Yemshaw*. As the House of Lords noted in *Fitzpatrick*, courts had held time and again that the expression 'family' in older Rent Acts—repeated in the 1977 Act and its 1988 amendment—was loose, flexible, and capable of adapting to social changes.[49] Similarly, it is significant that the very broad definition of 'domestic abuse' in section 1 of the DAA 2021 was drafted and passed after the Court had given an

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[48] See Diggory Bailey, 'Interpreting Parliamentary Inaction' (2020) 79 CLJ 245.
[49] *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 (HL) [54] (Lord Nicholls), [66] (Lord Clyde). See also *Dyson Holdings Ltd v Fox* [1976] QB 503, 511–12 (James LJ).

expansive interpretation of 'domestic violence' in *Yemshaw*, based (in Lady Hale's alternative reason) on current understandings. Far from attempting to discourage or correct this interpretive approach, the language of Acts like the DAA 2021 is even broader and can be read as further encouraging it.

V. Uncertainty Surrounding the Presumption

A final matter to consider is to what extent Parliament can be taken to intend to rely on a presumption whose exact contours have not always been clearly formulated or remained stable, and whose precise application can be hard to predict with certainty.

These difficulties are not exclusive to the presumption in favour of updating. Judicial doctrines and legislative practices change over time and, therefore, so do the content and operation of presumptions of legislative intent. In chapter 3, for example, I discussed how the weight of certain constitutional principles was arguably strengthened in *Privacy International* and then limited in *Coughlan*. Furthermore, in relation to how presumptions may be displaced, I mentioned in chapter 2 that the rule against judicial recourse to Hansard in statutory interpretation was relaxed in *Pepper v Hart*, a relaxation that was subsequently partly undermined again in the cases that followed.

Regarding the updating presumption in particular, chapter 4 suggested that the initial concern behind it was mainly expressed in terms of things that did not exist before (such as technological devices). The expansion to social attitudes and standards—though compatible with the original rationale of the presumption—was only explicitly recognised in the caselaw later on. Moreover, I also argued in chapter 5 that, even today, courts are not always accurate when

they explain what the presumption directs them to do and what is beyond its scope. In particular, they do not seem to voice a clear, consistent stance on the sense in which the meaning of a provision is fixed at the time of enactment and the degree to which it may be open to evolve. In addition to this, as I discussed in chapter 6, the Court's decision in *Yemshaw* could be read (and has been read by some) as suggesting an extension of the scope of the updating presumption beyond what earlier decisions had accepted (and beyond what the logic of the updating presumption can justify).

Presumptions of legislative intent are not strict, formal rules. It is part of their nature that they are developed over time and are always open to being revised. This does not mean that Parliament's sovereignty is compromised. It is always open to Parliament to make its intention in relation to a matter clear (for example, in the statutory text) so that recourse to presumptions on that matter is unnecessary. A failure to do this in relation to a matter on which the relevant presumptions are unclear inevitably involves undertaking the risk that courts may give interpretations that are unexpected or undesired. This thesis has attempted to provide further clarity on the content and operation of the updating presumption, in order to explain what exactly Parliament should be taken to have consented to when it has not displaced it in the ways I discussed.

Should Parliament attempt to define the updating presumption in an enactment? It is hard to imagine a general formula that could add detailed specifications about the content and operation of a presumption that is deeply context-sensitive since it involves granting flexibility and discretion for the future. It would certainly be possible for Parliament to give statutory authority to the

always speaking principle, as it has been done in other jurisdictions.[50] Mentioning the updating presumption in an enactment can serve to erase doubts about its existence and status when these are contested. This, however, is not the situation in the UK. As the previous chapters have shown, the presumption has clear authority supporting it. It seems preferable that any necessary further clarifications should keep emerging from the interaction between judicial rulings and subsequent enactments. At this stage, legislating on it could even cause confusion—for example, about whether the enactment of the presumption simply recognises what courts have been doing or gives greater weight to the presumption by making it somehow harder to displace.

Finally, it is also important to remember that, to a significant degree, uncertainty about the consequences of its application is inherent to the updating presumption. After all, its logic is related to the fact that Parliament relies on interpreters to understand, develop, and adjust enacted provisions as required by new circumstances, attitudes, and understandings that Parliament did not contemplate when it legislated.

VI. Conclusion

This chapter analysed the sense in which we can say that relying on the updating presumption is an intentional choice by Parliament. It discussed as examples recent Acts that show how pre-legislative and legislative materials often include explicit references to Parliament's intention to grant interpretive flexibility to courts

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[50] For possible examples, see section 17 of the Legislation Interpretation Act 2021 (South Australia), section 8 of the Interpretation Act 1984 (Western Australia), and section 10 of the Interpretation Act 1985 of Canada.

(as well as executive officials), who will have to decide cases in changed circumstances.

The next two chapters will address a series of principled objections to the role that my thesis recognises for judges in keeping statutes up to date. Some of these objections claim that this role is narrower than I have argued, while others believe it is broader.

PART III

THE ROLE OF COURTS AND ITS LIMITS: RIVAL ACCOUNTS

CHAPTER 8: Originalist Accounts

I. Introduction

This thesis has put forward an intentionalist defence of the adoption by courts of an updating approach to statutory interpretation. I have argued that updating interpretations are both licensed and limited by Parliament's intentions. The key question for UK courts is whether Parliament, when drafting and enacting the statute at stake, displaced or narrowed down the default presumption in favour of an updating approach (in the ways described in chapter 6) or not. This defence of updating interpretations—and the scope it recognises for judges' updating role—is contested by rival theories that have different views about the role that courts should (and should not) play in keeping statutes up to date. This and the next chapter address such theories, which can be grouped into two main camps. This chapter will look at scholars who argue that courts' legitimate updating role is narrower than what I have defended (or non-existent). The next chapter, in turn, will look at those who argue that it is broader.

The discussion that follows in this and the next chapter includes literature on the interpretation of other kinds of legal instruments in addition to statutes (namely, codified constitutions and regional or international treaties), in jurisdictions where similar debates have taken place. These similarities have been recognised by authorities on statutory interpretation in the UK.[1] I do not mean to suggest, however, that arguments addressed to other kinds of legal

[1] See, for example, FAR Bennion, *Statutory Interpretation* (2nd edn, Butterworths 1992) 618 (noting that, '[j]ust as the US Constitution is regarded as "a living Constitution", so an ongoing British Act is regarded as "a living Act"').

instruments are directly applicable to statutes. The type of instrument at stake and the particular design of each legal system are crucial variables. One important difference between statutes, on the one hand, and constitutions and treaties, on the other hand, is that statutes are normally much easier to amend. This fact cuts both ways for the question of whether interpreters should adopt an updating or a historical approach. While the need for courts to adjust a provision to current circumstances is less pressing when it is easy to formally amend the provision, the fact that amending it is easy provides, at the same time, a stronger check on courts. For that reason, objections to judicial updating interpretations based on the separation of powers lose part of their strength when lawmakers can easily reject such interpretations by amending the provision at stake. Another related difference is that constitutions and treaties are normally designed to last longer, which suggests that flexibility will normally be an important part of their design.

Further differences worth noting include the fact that statutes are usually more detailed, and are drafted against the background of a dense, pre-existing set of legal rules that informs the interpretation of new statutes enacted in that context.[2] This contrasts with, for example, constitutions that mark a stark change with the past order (including past enactments and past precedents), or treaties that apply to multiple countries with their different legal traditions, rules, and precedents (rather than operate against a unified set of background rules, like statutes do). The enactment of statutes is also normally a more centralised and unified exercise than the adoption of a constitution or a treaty requiring

[2] See, for example, William N Eskridge, Jr, *Dynamic Statutory Interpretation* (Harvard University Press 1994) 7.

successive endorsements by multiple provinces or states. It is also more iterative: statutes are enacted and amended all the time, partly in response to how courts and agencies have interpreted rules in the past.[3] These considerations mean that there will usually be more evidence available to support claims about the assumptions that lawmakers held when they enacted a statute.

Notwithstanding these caveats about the limits of comparisons, this and the next chapter consider arguments focused on constitutions and treaties because some of the general claims they make are relevant to UK statutory law as well, especially for Acts that feature similarly broad, evaluative language. The rich scholarly and political debate that has taken place in those contexts can thus shed light on my discussion of statutes.

The scholars that I discuss in this chapter make two main kinds of claims. Those examined in section II below are concerned with understanding what it is that lawmakers do when they enact a provision. They argue that lawmakers do not intend to entrust to courts the updating task that I have been discussing. Section III, in turn, addresses the view that, regardless of what intentions Parliament had as a matter of fact when it enacted a statute, entrusting courts with this updating task entails an illegitimate kind of delegation. Both kinds of objections are focused mainly on cases where updating requires courts to take into account changed social attitudes and changed moral conceptions and standards

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[3] ibid.

II. Originalist Accounts of Lawmakers' Intentions

(1) Old Originalism

The focus of the first wave of originalism in the US, which took place between the 1960s and the 1980s, was on the original intentions of the framers of the Constitution and, in the case of statutes, of the authorities who drafted and passed them.[4] The most prominent defender of this early version of originalism was Robert Bork, and other historical figures associated with it were Attorney General Edwin Meese, Justice William Rehnquist, and Raoul Berger.[5] Bork believed that courts should interpret values and principles enacted in statutes and constitutions according to how they were understood by the people who drafted and enacted them. To this end, courts should look at the speeches and remarks made by framers and lawmakers (among other sources) in order to understand exactly what they had in mind when they enacted the proposition at stake.[6]

Using the example of the Equal Protection Clause in the Fourteenth Amendment to the US Constitution is helpful to explain Bork's views. He argued that if, for example, the framers were concerned with racial equality and only discussed cases of racial discrimination, then courts should not apply the clause to distinctions based, for instance, on sexual orientation, despite the fact that the broad language of the clause does not indicate in any way that it is limited to racial equality.[7] Even within racial equality, if the legislative history showed that

[4] Lawrence B Solum, 'What Is Originalism? The Evolution of Contemporary Originalist Theory' in Grant Huscroft and Bradley Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (CUP 2011) 12.
[5] Keith E Whittington, 'The New Originalism' (2004) 2 Georgetown Journal of Law & Public Policy 599, 599; Solum (n 4) 17.
[6] Robert H Bork, 'Legislative Intent and the Policy of the Sherman Act' (1966) 9 The Journal of Law & Economics 7.
[7] Robert H Bork, 'Original Intent: The Only Legitimate Basis for Constitutional Decision Making' (1987) 26 Judges' Journal 13, 16.

the framers considered that racial segregation in schools was acceptable, Bork thought that courts would be bound by this narrow understanding of the principle of equality and could not apply it to cases of racial school segregation.[8] He adopted the same approach in relation to statutory interpretation, famously defending a very narrow view of the original legislative intent behind US antitrust law.[9] For him, intentionalism is committed to these outcomes because, otherwise, interpreters would be substituting their own choices for those enacted by the lawmakers and, thereby, impermissibly stretching and transforming the intended meaning of the law.[10]

Bork clarified that his view was not that judges should apply provisions 'only to circumstances specifically contemplated by the framers' (or lawmakers)—that is, to the concrete scenarios or cases that they had before them or had foreseen.[11] He noted that, '[s]ince we cannot know how the framers would vote on specific cases today, in a very different world from the one they knew, no intentionalist of any sophistication employs th[at] narrow version' of intentionalism.[12] This means that even the earliest versions of originalism could, in principle, be compatible with the rulings discussed in previous chapters that applied old laws to later technological developments (such as *Edison Telephone Co*),[13] or took into account scientific or medical information that was previously

[8] Robert H Bork, 'Neutral Principles and Some First Amendment Problems' (1971) 47 Indiana Law Journal 1, 13.
[9] Bork, 'Legislative Intent and the Policy of the Sherman Act' (n 6).
[10] Bork, 'Neutral Principles and Some First Amendment Problems' (n 8) 13; Bork, 'Original Intent' (n 7) 15.
[11] Bork, 'Original Intent' (n 7) 14.
[12] ibid.
[13] *Attorney General v Edison Telephone Co of London Ltd* (1880) 6 QBD 244.

unavailable (such as *Baker*, on noise pollution as a cause of hearing loss).[14] Bork's own example of this was that courts 'are able to apply the Fourth Amendment's prohibition on unreasonable searches and seizures to electronic surveillance'.[15] This means, going back to the Equal Protection Clause, that while the fact that framers were concerned exclusively with racial inequality would exclude rulings extending the clause to cases of gender discrimination, it would be legitimate to extend it to ethnic groups that had not arrived in the US at the time it was adopted (even if their arrival had been completely unexpected by the framers). Thus, whether a provision is applicable to situations or cases that were not present (or even imaginable) at the time of enactment depends, for Bork, on whether they are instances of the more abstract propositions that lawmakers had in mind, understood with the same level of breadth or narrowness as that with which the lawmakers thought about them.[16]

While Bork's version of originalism has been superseded by more sophisticated ones (which I consider in the next section), echoes of his views can still be found in some of the arguments that have been made in the UK against recent rulings that adopted an updating approach. An example of this is Cretney and Reynolds' analysis of *Fitzpatrick*. Their take on the case reflects Bork's concern with attempting to discover how broad or narrow were the specific conceptions preferred by lawmakers —in that case, of what a 'family' is. Cretney and Reynolds pay close attention to the specific kinds of ties that were regarded as worthy of being valued and protected by lawmakers, and they stress

[14] *Baker v Quantum Clothing Group Limited* [2011] UKSC 17, [2011] 4 All ER 223 (UKSC).
[15] Bork, 'Original Intent' (n 7) 15.
[16] See Keith E Whittington, 'Originalism: A Critical Introduction' (2013) 82 Fordham Law Review 375, 382–86.

Parliament's and the government's negative attitude to homosexuality at the time.[17] In their view, whether to expand the notion of 'family' beyond the lawmakers' original concern with heterosexual couples 'surely is a matter to be decided by the elected Government and Parliament and not by three Law Lords however well attuned those concerned may feel themselves to be to … changes in social attitudes to same-sex relationships'.[18]

Chris Bevan's criticism of the Court's expansive interpretation of 'violence' in *Yemshaw* is also strongly reminiscent of Bork's theory. For Bevan, 'the central issue' at stake in *Yemshaw* was 'what was in the minds of the legislature when the statute was being drafted and as it passed through the scrutiny and debates of both Houses'.[19] He argues it was 'patently fundamental' to consider the 'political mood of the day' at the time the Housing Act 1996 was conceived and enacted.[20] He stresses the fact that, back then, 'the governing elite' had an extremely unsympathetic perception of the homeless and placed moral blame on them, accusing them of idleness and queue-jumping.[21] This was reflected in the Conservative government's housing policy, which favoured reducing public spending and curtailing local authorities' duties towards the homeless.[22] For Bevan, these factors bore 'heavily on the question of Parliament's statutory intentions', but 'sadly none of those presiding in the Supreme Court in *Yemshaw* felt it necessary to address' them.[23] Bevan argued that the Court's inattention to

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[17] SM Cretney and FMB Reynolds, 'Limits of the Judicial Function' (2000) 116 LQR 181, 184.
[18] ibid.
[19] Chris Bevan, 'Interpreting Statutory Purpose - Lessons from *Yemshaw v Hounslow London Borough Council*' (2013) 76 MLR 742, 751.
[20] ibid.
[21] ibid 752–53.
[22] ibid 751–52.
[23] ibid 752.

these 'critical' facts 'result[ed] in an overly broad and illegitimate interpretation of the statute's purpose', which, in turn, led to an excessively expansive interpretation of 'violence'.[24]

Further claims reminding us of Bork's views have been made in the UK in relation to other legal instruments—for example, in Lord Sumption's critiques of the European Court of Human Rights' 'living instrument' doctrine. For Lord Sumption, the Court's caselaw on Article 8 of the European Convention on Human Rights (ECHR)[25] is an example of how the Court has wrongly recognised unwarranted 'new rights' or 'extensions'.[26] He maintains that Article 8 'was originally devised as a protection against the surveillance state by totalitarian governments', and criticises the fact that, 'in the hands of the Strasbourg Court, it has been extended' to matters such as abortion, rights of sexual minorities, and assisted suicide, which formed no part of the concerns of the day.[27] The similarities between Lord Sumption's views and those previously defended in the US by Bork (as well as by Antonin Scalia, whose account I analyse in the next section) have been pointed out by others.[28] Lord Sumption himself has acknowledged the comparison without rejecting it.[29]

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[24] ibid 753.

[25] Article 8 recognises that 'Everyone has the right to respect for his private and family life, his home and his correspondence'.

[26] Lord Sumption, 'The Limits of Law' in NW Barber and others (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing 2016) 20.

[27] ibid.

[28] See, for example, Martin Loughlin, 'Sumption's Assumptions' in NW Barber and others (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing 2016) 34–36; Jeff King, 'Three Wrong Turns in Lord Sumption's Conception of Law and Democracy' in NW Barber and others (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing 2016) 143.

[29] Lord Sumption, 'A Response' in NW Barber and others (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing 2016) 215.

Problems with these Views

Bork's account considers that an interpreter is bound by the values cherished by legislators (or framers) and the specific conceptions of such values that they held. It expects courts 'to recapture the mindset of a Framer' and decide cases in that spirit.[30] This is an exceedingly difficult task—so much so, that it is hard to believe that lawmakers could expect courts to perform it. Bork was well aware of the fact that these historical quests would often yield no results because legislators (or framers) may not even have had such detailed preferences (or any sort of coherent philosophy or stance on certain matters) for the interpreter to retrieve, and they often disagreed with each other.[31] This, for Bork, 'permits, indeed requires, resort to other modes of interpretation'.[32] However, Bork omits considering the possibility that the choice for broad, evaluative expressions may have been deliberate, and that lawmakers may have chosen them because they intended to grant flexibility to future interpreters to read these terms according to changed circumstances, attitudes, and understandings.

A further serious problem with the approach favoured by Bork is that, because it invites this quite speculative exercise, it can lead highly intelligent commentators and interpreters to adopt contested historical positions. At times, it may even lead interpreters to adopt readings that are biased and follow their own political views, under the cover of unearthing those favoured by legislators and framers. As Keith Whittington puts it, '[t]he language of original intent too often encouraged the pursuit down false trails in an effort to locate the

[30] See Whittington, 'Originalism: A Critical Introduction' (n 16) 382.
[31] Bork, 'Neutral Principles and Some First Amendment Problems' (n 8) 13, 22.
[32] ibid 13.

preferences of political actors, or buried ideas, or value systems'.[33] Lord Sumption's take on Article 8 of the ECHR and Bevan's analysis of section 177 of the Housing Act 1996 may illustrate this.

Bevan's inferences about the intended scope of 'violence', based on the 'zeitgeist of the mid-1990s' and the government's unsympathetic regard for the homeless,[34] are flatly rebutted by the fact, discussed in previous chapters, that the promoter of the Bill had answered the precise question at stake in *Yemshaw*. As I explained, he had stated that the Government was not ruling out a more expansive interpretation, encompassing psychological abuse.[35]

Lord Sumption's narrow view of Article 8 of the ECHR is similarly flawed. Far from establishing that states were exclusively preoccupied with surveillance by totalitarian states, the Convention's preparatory works suggest there was a concern with protecting familial ties and intimacy beyond the specific issue of state surveillance.[36] In turn, the more general question of whether the authorities involved in the drafting and adoption of the ECHR thought that its text should be interpreted in an evolutive and expansive way or in a static and narrow one does not have a clear answer. Based on the available evidence from the preparatory

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[33] Whittington, 'Originalism: A Critical Introduction' (n 16) 381.
[34] Bevan (n 19) 748–53, 756.
[35] HL Deb 8 July 1996, vol 574, cols 72-73, cited in Donald L Drakeman, 'Constitutional Counterpoint: Legislative Debates, Statutory Interpretation and the Separation of Powers' (2017) 38 Statute Law Review 116, 121. (Note that the approach which Bork's theory invites and which Bevan's arguments illustrate—a search into the political mood of the day and the ideological leanings of the government of the time—contrasts with the much more constrained use of Hansard statements that *Pepper v Hart* allows, discussed in chapter 2.)
[36] See, for example, David Harris and others, *Law of the European Convention on Human Rights* (4th edn, OUP 2018) ch 11 n 41; Sandra Fredman, 'Living Trees or Deadwood: The Interpretive Challenge of the European Convention on Human Rights' in NW Barber and others (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing 2016) 50.

works, experts have concluded that the principles of its interpretation were not clearly established until the 1970s and that, at the time of its drafting and adoption in 1950, different states had markedly different ideas.[37] One group, among which the UK representatives were the most vocal, had a view similar to Lord Sumption's and was deeply antagonistic to the idea that the ECHR may develop over time into a European Bill of Rights. They considered that the ECHR was only meant to safeguard and conserve the limited set of basic rights expressly mentioned in the text against totalitarian advances, and that its interpretation should not develop or expand it any further beyond the 'collective pact against totalitarianism' arrived at when it was drafted.[38] In contrast, another group favoured the evolutive, expansive approach that ultimately prevailed. There simply was no original consensus either way.[39] Lord Sumption's reading underscores, once again, that the kind of approach favoured by Bork can easily lead to doubtful reconstructions of lawmakers' original intentions.

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[37] Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010) 308–09, 325–26, 364–65. See also Danny Nicol, 'Original Intent and the European Convention on Human Rights' [2005] PL 152, 152.
[38] Bates (n 37) 87, 104, 308, 364.
[39] In the particular case of the ECHR, the fact that—after the Court's approach to its interpretation had been unequivocally established and announced—signatory states kept accepting the Court's rulings, maintained their acceptance of the Convention's optional clauses, and ratified Protocol 11 (which replaced the existing Commission and Court with a new permanent Court) has been seen as suggesting that they acquiesced to the evolution undergone by the ECHR. See ibid 309–10, 385; King (n 28) 144–46.

(2) New Originalism

Scalia's Original Public Meaning

Scalia's defence of originalism was chronologically contemporary with that of Bork, Meese, and other early advocates of this view. However, Scalia's version of originalism is more sophisticated than the claims examined above about the concrete and specific values, thoughts, wishes, or expectations of the people who drafted and enacted statutory and constitutional provisions. Against claims like those, Scalia argued that 'it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated'.[40] For him, '[t]hat seems … one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read'.[41] This draws Scalia closer to what became known as 'new originalism', which 'focused less on the concrete intentions of individual drafters … than on the public meaning of the text that was adopted'.[42] Other figures who adopted this position include Gary Lawson and Henry Monaghan.[43] Later exponents of it,

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[40] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Amy Gutmann ed, 2nd edn, Princeton University Press 2018) 17.
[41] ibid.
[42] Whittington, 'The New Originalism' (n 5) 609; Whittington, 'Originalism: A Critical Introduction' (n 16) 378–79. See, however, Mitchell N Berman and Kevin Toh, 'On What Distinguishes New Originalism from Old: A Jurisprudential Take' (2013) 82 Fordham Law Review 545. Berman and Toh argue that while old originalism was primarily a theory of adjudication, new originalism is primarily a theory of law. This jurisprudential take on the distinction considers Scalia to be an old originalist.
[43] Whittington, 'Originalism: A Critical Introduction' (n 16) 380, citing Gary Lawson, 'Proving the Law' (1992) 86 Northwestern University Law Review 859, and Henry Paul Monaghan, 'Stare Decisis and Constitutional Adjudication' (1988) 88 Columbia Law Review 723.

who put forward more nuanced accounts, include Whittington, whose views I discuss further below.

For new originalists, the question is not what the people involved in the drafting and enactment of a provision happened to value, think, wish, or expect, but what content that provision would have conveyed to a person reading it at the time it was enacted. This is known as the 'original public meaning' of the provision. In Scalia's view, ascertaining the original public meaning of old constitutional and statutory provisions 'requires immersing oneself in the political and intellectual atmosphere of the time [of enactment]—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day'.[44]

Scalia identified as a 'textualist' (as opposed to an intentionalist)—that is, as someone who is not attempting to discover what the legislature (or the framers) meant but what the statutory text (or the constitution) means.[45] He explained that, as a judge, he would read, for example, Hamilton's and Madison's writings on *The Federalist* to interpret the Constitution, 'not because they were Framers and therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood'.[46] For that reason, he would 'give equal weight to Jay's pieces in *The Federalist* and to

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[44] Antonin Scalia, 'Originalism: The Lesser Evil' (1989) 57 University of Cincinnati Law Review 849, 856–57.
[45] Scalia (n 40) 16–23. (Scalia considered that there are no distinctions between what interpreters should look for when interpreting constitutions and statutes; see ibid 38.)
[46] Scalia (n 40) 38. See also Whittington, 'Originalism: A Critical Introduction' (n 16) 382.

Jefferson's writings, even though neither of them was a Framer'.[47] This clearly contrasts with a view like Bork's.

Despite this apparent eschewing of the relevance of lawmakers' original intentions, Scalia did in fact endorse a kind of intentionalism. In his words, judges interpreting laws 'do not really look for subjective legislative intent' but 'for a sort of "objectified" intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*'.[48] Considering Ronald Dworkin's differentiation between the lawmakers' 'semantic intentions' (what they intended to say in enacting a certain legal text) and their expectations about the consequences of applying the laws they enacted,[49] Scalia claimed he followed 'semantic intention'.[50] He added that he 'would prefer the term "import" to "semantic intention"—because that puts the focus where [he] believe[d] it should be, upon what the text would reasonably be understood to mean, rather than upon what it was intended to mean'.[51] However, he noted that, '[u]ltimately, of course, those two concepts chase one another back and forth to some extent, since the import of language depends upon its context, which includes the occasion for, and hence the evident purpose of, its utterance'.[52] This betrays the fact that Scalia's account of legal interpretation is concerned with understanding the legislative intention behind a legal provision. This understanding is not derived from historical evidence of the concrete views, hopes, and so on of individual

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[47] Scalia (n 40) 38.
[48] ibid 17.
[49] Ronald Dworkin, 'Comment' in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Amy Gutmann ed, 2nd edn, Princeton University Press 2018) 117–19.
[50] Scalia (n 40) 144.
[51] ibid.
[52] ibid.

legislators, but—instead—from reflecting on the legal changes that legislators, most likely, intended to introduce, based on their language choice, in the context in which they made that choice.[53]

The point above is important because one of Scalia's main arguments against updating approaches to constitutional interpretation was based precisely on a reflection about the kinds of choices that it makes sense for framers to make. Writing, in particular, about constitutional provisions that establish rights, Scalia argued that to leave such rights open to be interpreted by judges taking into account changes in social attitudes and moral conceptions and standards makes no sense because that is to offer no protection at all, which is contrary to the idea of establishing a right in the first place. If the people who make up each generation did not 'embe[d] … their moral values' in the rights they enacted, these rights 'could be brought to nought' and 'would be no protection against the moral perceptions of a future, more brutal, generation'.[54] Thus, for example, the Eighth Amendment to the US Constitution refers to 'the existing society's [that is, the society present at the time of the clause's adoption] assessment of what is cruel'—it is 'rooted in the moral perceptions *of the time*'.[55]

Similarly, considering the First Amendment, Scalia argued that '[i]t makes a lot of sense to guarantee to a society that "the freedom of speech you now enjoy (*whatever* that consists of) will never be diminished by the federal government"…', but 'it makes very little sense to guarantee that "the federal

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[53] See Stephen Neale, 'Determinations of Meaning' in Ernest Lepore and David Sosa (eds), *Oxford Studies in Philosophy of Language*, vol 2 (OUP 2022) 135. See also Jeffrey Goldsworthy, 'Legislative Intentions in Antonin Scalia's and Bryan Garner's Textualism' (2021) 52 Connecticut Law Review 1549.
[54] Scalia (n 40) 145–56.
[55] ibid 145 (emphasis in the original).

government will respect the moral principle of freedom of speech, which may entitle you to more, or less, freedom of speech than you now legally enjoy"'.[56] While the former 'is to guarantee something permanent', the latter, for Scalia, 'is to guarantee nothing in particular at all'.[57]

Scalia clarified that his position was not that provisions could only be applied to objects or situations that were present (or imaginable) at the time a provision was adopted. On this point, his views are aligned with Bork's. Thus, for example, the First Amendment is, for Scalia, perfectly applicable to means of communication that 'did not exist … in 1791', such as 'movies, radio, television, and computers'.[58] This, for him, is very different from interpreting the clause taking into account changes in moral conceptions and standards. On that, Scalia thought that it cannot be the case that 'the *very acts* that were perfectly constitutional in 1791 (political patronage in government employment and contracting, for example) may be *un*constitutional today'.[59]

It is important to note that the above arguments are tied to the logic of constitutional rights, and Scalia himself did not extend these points to statutes as well. He was thinking of legislatures in particular as the agents which could 'bring to nought' constitutional rights that did not embed the values of the time the relevant constitutional provision was adopted. While a similar reasoning could perhaps be stretched and adapted to the case of statutes, the argument would become much weaker. The claim would be that it would make little sense for lawmakers to establish a statutory right or protection while, at the same time,

[56] ibid 148 (emphasis in the original).
[57] ibid 135–36.
[58] ibid 140.
[59] ibid 141 (emphasis in the original).

entrusting courts with the task of deciding what it requires at any given time according to evolving moral conceptions and standards. This could apply, for example, to the notion of 'violence' in the statute at stake in *Yemshaw*. Leaving that notion to be expanded or narrowed down by interpreters, depending on how social attitudes and standards happen to evolve, might be seen as hard to square with the logic behind setting up this protection in the first place.

Finally, it is worth stressing that Scalia focused much of his discussion on constitutional law because he flatly dismissed '[p]roposals for "dynamic statutory construction"' as 'concededly avant-garde' and contrary to the 'formally enunciated rule for statutory construction: statutes do not change'.[60]

Whittington's Version of Originalism

Unlike Scalia, Whittington is open—at least in theory—to the possibility that framers and lawmakers may have intended judges to interpret provisions in the light of current moral conceptions and standards, rather than deferring to original understandings and attitudes. He thus concedes that 'it is at least conceptually possible to recognize that constitutional drafters might … empower judges through constitutional provisions that authorize them to exercise substantial discretion'.[61] Nonetheless, Whittington does not seem sympathetic towards this possibility, and he characterises as 'substantively empty' these kinds of provisions, whose interpretation requires judges to reason about substantive values and principles.[62] He also criticises scholars who assume that this was what

[60] ibid 40.

[61] Whittington, 'Originalism: A Critical Introduction' (n 16) 387. See also Whittington, 'The New Originalism' (n 5) 611.

[62] Keith E Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent and Judicial Review* (University Press of Kansas 1999) 186.

drafters intended without having gathered enough evidence to support that conclusion.[63] In his view, historical evidence is needed to determine, on a case-by-case basis, whether this was the intention, with 'judicial restraint [being] the appropriate response to lingering textual ambiguities'.[64] This inverts the presumption that I have been defending.

Whittington's acceptance of the relevance of the intentions of framers and lawmakers is more clearly expressed than Scalia's. He explicitly rejects the view that 'intentions are irrelevant to textual meaning', and thinks that 'textual meaning embodies and conveys intentions'.[65] Whittington is, however, highly critical of Bork's views and believes that enacted principles 'should not be reduced to the founders' scope of beliefs about th[ose] principle[s]' (that is, to the sub-set of matters raised by that principle to which the lawmakers' attention was limited).[66]

An important aspect of Whittington's work is its reliance on the distinction between what he and others call 'construction' and 'interpretation'. This distinction is also central to the work of other modern originalists, such as Lawrence Solum.[67] So far in this thesis, I have used both terms as synonyms, following UK practice. For these authors, by contrast, 'construction' refers to creative interpretation, by which interpreters develop or supplement the meaning of a provision where it remains under-determinate after its language and the relevant aids to its interpretation have been taken into account.[68] This is an

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[63] ibid.
[64] Keith E Whittington, 'Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation' (2000) 62 The Review of Politics 197, 214, 221 and n 14.
[65] Whittington, 'The New Originalism' (n 5) 610.
[66] ibid.
[67] Lawrence B Solum, 'The Interpretation-Construction Distinction' (2010) 27 Const Comment 95.
[68] Whittington, 'Originalism: A Critical Introduction' (n 16) 403.

interstitial law-making role that interpreters play and, to do so, they will normally resort to substantive reasons, such as the moral or economic desirability of one or another construction. Speaking in particular of constitutional constructions, Whittington conceded the possibility that 'perhaps', 'on occasion', these should be made by judges, and not just legislators and executive officials.[69] (It is not clear to me whether he would be just as hesitant in the case of statutory provisions, preferring that most constructions were made by executive officials rather than courts.)

Problems with these Views

The kinds of law-making choices of which these views are sceptical are, however, ones that UK lawmakers usually adopt. As the previous chapters have shown, the intent behind a large number of statutory provisions is precisely to grant to future interpreters flexibility to adapt the law to current circumstances, attitudes, and understandings, including changed moral conceptions and standards. The leading works on statutory drafting and interpretation clearly state that the default assumption governing the work of Parliament is one in favour of updating, so statutes are designed on the understanding that judges will interpret them in this way. Thus, views like Scalia's and—to a lesser extent—Whittington's lead us to question the logic of a central and well-established feature of law-making in the UK (as well as other jurisdictions with similarly well-established presumptions in favour of updating). In previous chapters, I have also explained why this practice is reasonable, since it relies on courts to perform a constant, piecemeal updating task that Parliament could not carry out but may consider desirable.

[69] Whittington, 'The New Originalism' (n 5) 611–12.

It would not be accurate to say that to legislate in this way regarding certain matters is ‘to guarantee nothing at all’. It is true that the precise content and scope of protections of this kind may gradually vary over time. However, establishing that an interest shall be justiciable and that courts shall decide cases based on a certain evaluative standard is not the same as not legislating about it at all. Some people might prefer provisions that, for better or worse, are ossified, but this does not mean that enacting a provision that grants interpretive flexibility makes no sense.

Moreover, the claim that the most plausible reconstruction of what lawmakers were trying to do is that they were trying to enact standards which were ossified is hard to square with the kind of language featured in the provisions that Scalia considers. Fundamental disagreements on matters of abstract moral principle are so apparent and ubiquitous among different people and across time that lawmakers would have to be exceedingly naïve to expect provisions featuring broad, evaluative language to convey to everyone the same concrete content or conception.[70] Furthermore, the difficulties of trying to ascertain past moral conceptions and standards (assuming there was a consensus in the first place) are so great and obvious that, if lawmakers had intended to ‘freeze’ them, we would expect them to have defined them in value-free terms that are hard-edged and refer to objective facts or properties. As Dworkin convincingly put it, ‘[i]t is highly implausible that people who believe their own opinions about what counts as equality or justice should be followed … would use only the general language

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[70] Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 52–54; Cass R Sunstein, ‘Incompletely Theorized Agreements’ (1995) 108 Harvard Law Review 1733, 1735.

of equality and justice in framing their commands'.[71] One would expect, instead, that 'they could have found language offering more evidence of their own conceptions than simply naming the concepts themselves'.[72]

Moreover, it will often be unlikely that a clear consensus on such matters even existed in the first place, at the time a statutory provision was enacted or a constitutional clause was adopted. When Scalia, for example, argues that '[t]he Americans of 1791 … were embedding in the Bill of Rights their moral values',[73] he is assuming a level of moral agreement that was probably non-existent. He himself acknowledges, for example, that the framers 'disagreed bitterly on the matter' of capital punishment, as it 'presents moral questions that philosophers, theologians, and statesmen have grappled with for millennia'.[74] It is not clear what makes him think that the framers' generation did not disagree bitterly on other questions about the concept of cruelty as well as other moral terms featured in the US Constitution, so that shared values could be 'embedded' in it. As John Perry suggests, 'there is no evidence that the Constitution expresses a moral vision that was shared by the authors or the ratifiers, who ranged from slave owners like Madison to abolitionists'.[75]

A final point worth mentioning concerns Scalia's claim that, in the US, the rules on statutory interpretation are against updating approaches. The principles of statutory interpretation on this point are certainly different in the UK and the US, but it would not be accurate to say that the US has the opposite rule to the

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[71] Dworkin (n 70) 53.
[72] ibid.
[73] Scalia (n 40) 146.
[74] *Glossip v Gross* 576 US 863 (2015).
[75] John Perry, 'Textualism and the Discovery of Rights' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (OUP 2011) 128.

UK. *If* Scalia's method was indeed the one required by the rules on statutory interpretation embodied in the practices of lawmakers and judges in the US (or any other country), I would subscribe to that method because that is what respect for legislative intentions would require. However, a more accurate description of the situation in the US is that there is no clear default rule either way. I will develop this point in the next chapter, when considering the views of a scholar whose work is centred on statutory interpretation in the US—William Eskridge.

Moderate Originalism

I would like to finish this section by commenting on Jeffrey Goldsworthy's 'moderate originalism', which goes a step further than Whittington's account and is not sceptical of legislative intentions to let courts adopt an updating approach when interpreting statutes. Instead, Goldsworthy stresses in his work the many ways in which a commitment to respecting lawmakers' original intentions can be compatible with rulings where judges adopt an updating approach.[76] His views are, thus, largely aligned with those at the core of my thesis.

In chapter 5, however, I noted that my understanding of courts' updating role is broader than his in that I argue that courts can revise the very criteria of application of an expression, and not just the situations or instances to which it applies. This does not seem to translate itself into differences of opinion as to how the main rulings applying the always speaking principle in the UK should have been decided. However, assessing this is not easy because Goldsworthy's

[76] Jeffrey Goldsworthy, 'The Case for Originalism' in Grant Huscroft and Bradley Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (CUP 2011); Jeffrey Goldsworthy, 'Lord Burrows on Legislative Intention, Statutory Purpose, and the "Always Speaking" Principle' (2022) 43 Statute Law Review 79, 91–101.

treatment of the cases that have sparked the most controversy in the UK (*Fitzpatrick* and, especially, *Yemshaw*) is somewhat conjectural.[77] He does not unequivocally endorse or condemn the reasoning in those rulings. After explaining the idea that the application of provisions 'can and often must change as a result of developments in social circumstances, without their meaning changing', he indicates that, in *Fitzpatrick*, 'two out of three members of a majority of the House of Lords applied this reasoning (*whether rightly or wrongly*) to the word "family" in a 1922 statute'.[78] In turn, regarding *Yemshaw*, he notes that he is 'concerned not with the intended meaning or purpose [of the relevant statute], but instead, with whether the decision can be justified on the alternative ground that adopting an updated or contemporary meaning would be appropriate'.[79] He adds that, therefore, '[f]or [his] purpose, it is necessary to assume that the updated meaning differed from the original intended meaning'.[80] He thus 'side-step[s]' the disagreement of 'what the original intended meaning or scope of the word "violence" was'.[81]

As to whether I would describe the views defended in my thesis as 'originalist' or 'moderately originalist', I would hesitate to do so. It is true that I endorse what are often signalled as originalism's two basic commitments or 'crucial components', to the extent that I believe that something that is fixed at the time a provision was enacted (more specifically, Parliament's intentions) constrains how courts should interpret that provision.[82] However, I believe that it

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[77] Goldsworthy, 'Lord Burrows on Legislative Intention, Statutory Purpose, and the "Always Speaking" Principle' (n 76) 92, 96.
[78] ibid 92 (emphasis added).
[79] ibid 96.
[80] ibid.
[81] ibid 98.
[82] Whittington, 'Originalism: A Critical Introduction' (n 16) 378.

may be confusing to use the label of 'originalism' for a thesis whose main argument is that Parliament's intention is, in the majority of cases, that courts adopt an updating approach to the interpretation of its statutes. This is because this label is most commonly associated with authors who are strongly sceptical of that claim and critical of judicial updating interpretations. The term 'intentionalism' seems more apt to describe the basic commitments of my thesis without suggesting a sceptical attitude to what I defend as a widespread, reasonable, and legitimate law-making choice—to grant flexibility to interpreters—that courts should presume by default.

III. An Illegitimate Delegation to Courts

In contrast to the views addressed in the previous section, a second kind of objection to my account does not rest on claims about what it was, most likely, that Parliament intended to do when it enacted a provision. The critique is, instead, that Parliament *should not* have the intention to entrust courts with the updating task I have been speaking about. This is seen as an illegitimate outsourcing of Parliament's law-making responsibility and an illegitimate delegation of its exclusive power to amend the law, which is contrary to the rule of law, and the principles of democracy and separation of powers. Richard Ekins and Graham Gee have put forward arguments along these lines. In previous chapters, I discussed Ekins' claim that the always speaking principle lacks good authority and that, in cases like *Yemshaw*, the courts misinterpreted what Parliament intended to do. In contrast, my focus in what follows is on his views about the role that courts should play—and the role that Parliament should

allocate to them—within the separation of powers. Much of Ekins' criticism is directed specifically at bills of rights, like the HRA 1998.

The gist of Ekins' and Gee's position is that political authorities—and not judges—should make the open-ended policy choices that shape our legal system.[83] This includes not only the initial choice about what the law shall be, but also its revision (and, potentially, expansion) as time passes and circumstances change.[84] Democracy and self-government require that 'the precise content of legal rights' and legal arrangements should be 'the subject of public deliberation and choice within a representative body'.[85] The outcome of this deliberation should yield legal rights that are 'clear, specific, concrete', and 'fit to be followed without further argument about how they should be understood'.[86] Ekins criticises bills of rights for 'affirm[ing] propositions that are often vague and incomplete', and 'require further moral argument' by interpreters 'about what should be done', which is 'itself subject to revision in subsequent judgments'.[87] While these arguments are directed specifically to bills of rights, they may also be relevant, to some extent, to provisions like those at stake in cases like *Dyson*, *Fitzpatrick*, and *Yemshaw* if one assumes that the intention behind them is (as I have argued) to grant discretion to courts.

Ekins stresses that having to flesh out statutory rights worded in very broad terms requires courts to consider the merits of contested political matters, in

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[83] Richard Ekins, 'Human Rights and the Separation of Powers' (2015) 34 University of Queensland Law Journal 217, 217; Richard Ekins and Graham Gee, 'Putting Judicial Power in Its Place' (2017) 36 University of Queensland Law Journal 375, 376, 385.
[84] Ekins, 'Human Rights and the Separation of Powers' (n 83) 219–21; Ekins and Gee (n 83) 376.
[85] Ekins, 'Human Rights and the Separation of Powers' (n 83) 219–20.
[86] ibid 224.
[87] ibid 224–25.

relation to which there is reasonable disagreement about what should be done.[88] He cites the question of assisted suicide as 'one amongst many contested moral questions that are the subject of adjudication'—in his view, regrettably so.[89] For him, '[o]nly Parliament can decide' what the law on assisted suicide should be and its decision should not consist in 'outsourc[ing] its responsibilities' by paying close attention to judicial decisions on the merits of the issue, based on broad provisions like Article 8 of the ECHR (which establishes the right of respect for private life).[90] Courts, he contends, have no democratic legitimacy or competence to 'determin[e] the political questions that modern human rights adjudication invites'.[91]

Ekins thinks these problems are compounded when the judicial practice is to adopt an updating approach to the interpretation of legal provisions.[92] In his view, to 'update' a statute 'is in truth to amend it by judicial fiat'.[93] The adoption by courts of an updating approach to statutory interpretation is seen with concern by Ekins and Gee, as an example of a more general trend of rising judicial power in the UK, which 'eschews the traditional limits on judicial technique and authority'.[94]

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[88] ibid 221; Richard Ekins, 'Human Rights and the Morality of Law' (*UK Constitutional Law Association*, 5 June 2019) <https://ukconstitutionallaw.org/2019/06/05/richard-ekins-human-rights-and-the-morality-of-law/> accessed 7 November 2023; 'Only Parliament Can Decide the Law on Assisted Dying' (*UK Constitutional Law Association*, 22 July 2017) <http://judicialpowerproject.org.uk/richard-ekins-only-parliament-can-decide-the-law-on-assisted-dying/> accessed 7 November 2023.
[89] Ekins and Gee (n 83) 389.
[90] Ekins, 'Only Parliament can decide the law on assisted dying' (n 88).
[91] Ekins, 'Human Rights and the Morality of Law' (n 88). See also Ekins and Gee (n 83) 389.
[92] Ekins, 'Human Rights and the Separation of Powers' (n 83) 227.
[93] Richard Ekins, *The Nature of Legislative Intent* (OUP 2012) 265.
[94] Ekins and Gee (n 83) 381–84.

Similar views have been expressed by other authors, such as Cretney and Reynolds. Their critique of the decision in *Fitzpatrick*, which Ekins cites in his own work,[95] follows this logic. They argue that 'few areas of the law are more calculated to arouse strongly divergent feelings than those concerned with the consequences of sexual relationships'.[96] (This, even if perhaps true at that time, is clearly no longer the case today.) They also note that '[f]ew branches of the law more obviously reflect the outcome of conflict between competing economic and political interests than the Rent Acts'.[97] These considerations mean, for them, that 'there is a powerful reason for regretting the fact that the majority [of the Court] considered the issue of succession rights appropriate for judicial rather than legislative action'.[98] While this critique is addressed to the Court, it can be reformulated to apply to Parliament. The idea would be that even assuming that the Court had interpreted Parliament's intentions properly (a point which Cretney and Reynolds by no means concede), it was wrong for Parliament to have intended to delegate these matters to courts, since they involve the kinds of value-based choices that only democratic bodies should make.

Lord Sumption has also expressed the view that many of the questions that courts have to deal with when adjudicating human rights cases are 'obviously' questions 'of policy' that '[m]ost people'—himself included—would regard as 'inherently political'.[99]

At their root, these concerns are related to what Alexander Bickel termed the 'counter-majoritarian difficulty', which emerges when an unrepresentative,

[95] Richard Ekins, 'Updating the Meaning of Violence' (2013) 129 LQR 17, 19.
[96] Cretney and Reynolds (n 17) 184.
[97] ibid.
[98] ibid.
[99] Sumption (n 26) 21.

unelected minority departs from the decisions of the democratically elected majority.[100] Bickel was concerned with strong forms of judicial review (like the one adopted by US courts), in jurisdictions where judicial decisions on constitutional matters are not reversible by legislative majorities.[101] In contrast, the scholars cited in the paragraphs above write about the UK and are worried about judicial decisions which Parliament could strike down by amending the Act that they interpreted. Ekins and Gee have indicated that even soft (declaratory) forms of judicial review of legislation (though preferable to strong forms) exert 'improper pressure' on the democratic process,[102] and 'threaten[] Parliament's law-making freedom'.[103] This echoes concerns that have been raised by Mark Tushnet, writing also about jurisdictions where courts cannot strike down legislation. Tushnet analyses how judicial rulings can cause 'policy distortion'.[104] This happens when legislators place excessive weight on judges' reasoning and conclusions and treat them as decisive, which leads legislators to choosing policies that are not those that they would have preferred if judges had not had their say on the matter.[105] Because this alters legislative outcomes and shapes legislative policy, judicial rulings are seen as an undesirable constraint on democratic decision-making.

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[100] Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed, Yale University Press 1986) 16–17.
[101] ibid 20.
[102] Richard Ekins and Graham Gee, 'Submission to the Joint Committee on Human Rights: 20 Years of the Human Rights Act' (18 September 2018) 8.
[103] Ekins, 'Only Parliament can decide the law on assisted dying' (n 88).
[104] Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty' (1995) 94 Michigan Law Review 245, cited in Aileen Kavanagh, *The Collaborative Constitution* (CUP 2023) 184.
[105] Tushnet (n 104) 247–50, 259.

Tushnet was writing specifically about rulings where courts interpret constitutional provisions.[106] In such cases, what could (for Tushnet) have an excessive influence on legislators was what courts had said that the constitution requires.[107] Similar worries have been expressed in the UK in relation to the HRA 1998. These include the claim that human rights law mechanisms which 'diminish the role of parliaments and extend the political role of courts' are illegitimate.[108] Critics argue that these mechanisms may not only allow 'unelected, unaccountable, and irremovable judges … to second-guess decisions made by elected and representative politicians', but may also distort the executive's and the legislature's 'moral and political judgments'.[109] I think these concerns, like Tushnet's, might also be considered relevant beyond constitutions and statutes that create enhanced judicial powers like the HRA 1998. They might also be thought applicable to cases of ordinary statutory interpretation in which courts carry out value-based reasoning. Clear examples where this happens are, of course, decisions in which courts adopt an updating approach to interpret broad, evaluative statutory expressions. The concern would be that even though Parliament could formally amend its laws to reject such interpretations, it is more likely to accept courts' views and perhaps even to incorporate them in future laws on related topics.

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[106] ibid 247.
[107] ibid 259.
[108] See, for example, Tom Campbell and others, 'Introduction' in Tom Campbell and others (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011) 1, cited in Kavanagh (n 104) 184.
[109] Campbell and others (n 108) 4–5. See also Janet L Hiebert, 'Governing Like Judges?' in Tom Campbell and others (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011).

A possible implication of these views seems to be that when there is a reasonable margin of doubt about whether Parliament left a statutory expression open for courts to develop it (according to current standards) or not, courts should presume the latter. This reverses the presumption I have been defending throughout this thesis. This reversed presumption could lead, for example, to accepting as decisive the textual arguments in favour of a narrow reading of the statutes at stake in *Yemshaw* and *Fitzpatrick*, which I considered (and discarded) in chapter 6.

Problems with these Views

These scholars raise important points that merit our attention. In a representative democracy, creating and amending laws—and making the policy decisions required for that—should be mainly in the hands of our democratically elected representatives, and not those of courts. The fact that, in countries like the UK, Parliament can always amend the law at stake to strike down a judicial interpretation that goes against its preferences is an important check on the judiciary, but it does not fully respond to the democratic concerns summarised above.

The first point to note is that my argument is not that Parliament *should* seek the judiciary's views on what is required by the substantive values at stake in the matters on which Parliament legislates, or on how those values change over time. All I argue is that it is legitimate for Parliament to seek that judicial input if it so chooses, and that there are plausible reasons that could justify its choosing to do so.

Regarding the use of vague or open-ended provisions that grant interpretive flexibility, it is clear that this is a technique commonly used by Parliament. Examples of this are the frequently enacted standards of 'due care' and 'reasonableness', as well as the broad legal propositions that regulate matters like public security, public order, and health policy. Leaving these concepts undefined or partly underdetermined, for interpreters to flesh them out (with courts having the last say on the matter), makes sense because it is hard to know in advance what exactly will be required in the endless number of possible scenarios that may arise. The need for flexibility when it is impossible or self-defeating to be overly prescriptive and regulate everything in detail is a well explored matter. Scholars have discussed at length the value of choosing vague or otherwise underdetermined language when enacting legal rules, to make sure interpreters will have a margin of discretion to deal with the specific circumstances of any particular case that might arise in a way that respects the provision's rationale and purpose.[110] This enables a piecemeal, incremental, and revisable development of the law as circumstances change, a kind of role which courts are well accustomed to play thanks to their experience in the context of the common law.[111]

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[110] See HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 128–36; Timothy AO Endicott, *Vagueness in Law* (OUP 2000); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009) 193–94; Kavanagh (n 104) 89, 213.

[111] See Raz (n 110) 195–97; MDA Freeman, 'Standards of Adjudication, Judicial Law-Making and Prospective Overruling' (1973) 26 CLP 166, 179; Roger J Traynor, 'Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility' (1977) 28 Hastings Law Journal 533, 537; Ruth Sullivan, *Statutory Interpretation* (2nd edn, Irwin Law 2007) 101; Timothy AO Endicott, 'The Value of Vagueness' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (OUP 2011) 26.

While there is a cost in terms of certainty and predictability, these provisions may still provide enough guidance to citizens, and they may be necessary to make sure that the law stays relevant in changing circumstances.[112] (Of course, the kinds of consequences that attach to the breach of a law are a relevant factor in determining what threshold of certainty and predictability that law should meet.)[113] In fact, in cases that are deeply context-sensitive and require a holistic approach, vague standards may provide better guidance than what a rigid, precise formula could offer.[114]

It would be implausible to argue that this 'pervasive legal tool'[115] is illegitimate. In fact, the scholars examined above do not argue that it is. Ekins, for example, acknowledges that 'it may be reasonable for the legislature to authorize another person or body to decide', for instance, 'by enacting a vague standard which calls for specification at a later stage'.[116] He also accepts that general terms may have been intended to have a meaning that was 'suitably general' and would 'involve and … make possible a (wide) range of applications over time'.[117]

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[112] Hart (n 110) 132, 251–52; *R (A) v Secretary of State for the Home Department* [2021] UKSC 37, [2022] 1 All ER 177 [51].

[113] Nothing in my account upsets, for example, the principle against doubtful penalisation in criminal law or similar presumptions in favour of narrow interpretations of other kinds or provisions. As I noted in chapter 6, one way for Parliament to convey its intention to displace or narrow down the updating presumption is precisely by relying on these principles in favour of a strict interpretation.

[114] Endicott (n 111) 23–27; Scott Soames, 'What Vagueness and Inconsistency Tell Us About Interpretation' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (OUP 2011) 40–41 (both discussing, as an example, the concept of 'child neglect', which cannot—and should not—be reduced to a checklist since a child's welfare involves a myriad of needs and requires parents or guardians to carry out a holistic and context-sensitive evaluation).

[115] Endicott (n 110) 189.

[116] Ekins, *The Nature of Legislative Intent* (n 93) 238. See also ibid 255.

[117] Richard Ekins, 'Objects of Interpretation' (2017) 32 Constitutional Commentary 1, 12.

The question, then, is whether there is a difference of degree between these kinds of provisions, on the one hand, and human rights provisions in particular, on the other hand. What critics argue is that the extent to which human rights provisions rely on vague language and involve policy considerations is excessive or unnecessary. They see them as using unduly open-ended language in relation to especially controversial matters.

The legitimacy of human rights instruments is something that needs to be determined case by case. Defending—or assessing at all—the legitimacy of the enhanced judicial powers that statutes like the HRA 1998 create is outside the scope of my thesis, which is concerned with cases of ordinary statutory interpretation. All I wish to point out here is that there are a number of considerations that may lead courts to decide to use, in the context of human rights law, the 'pervasive legal tool' of granting interpretive discretion to courts by choosing vague language.

Parliament may consider that some kinds of law-making choices may be more, rather than less, democratic if they are made taking into account the judiciary's input. It may consider that, given the institutional features of the judiciary and the way in which judicial processes are structured, courts offer a particularly suitable forum.[118] This may apply to issues involving the rights of unpopular or powerless individuals or groups, who are somehow marginalised in

[118] This paragraph and the next one draw on John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) 87–88, 101–04, 135; Rosalind Dixon, 'Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited' (2007) 5 International Journal of Constitutional Law 391; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008) 92–123; and Roberto Gargarella, 'From "Democracy and Distrust" to a Contextually Situated Dialogic Theory' (2020) 18 International Journal of Constitutional Law 1466.

the political arena—either in general because of their small number, or their social, political, or economic status, or specifically when trying to advocate for certain rights that are seen as irrelevant or undesirable by the majority.

In a judicial process, all affected parties have equal standing regardless of their political power: courts must listen to the arguments of all parties and justify rulings that go against any of the parties. This means that a ruling on the rights of unpopular or powerless individuals or groups—reached after a deliberation that included them at its centre—may be a unique contribution to feed into the wider democratic process. Parliament may thus consider that having a degree of judicial involvement in these matters can help to make it more likely that our legal system will be receptive to the interests and needs of such individuals or groups, and treat all members of the community with equal concern and respect.[119] Again, my argument is not that Parliament *should be required* to seek and take into account this judicial input but only that we should not censure it for choosing to do so because there may be legitimate reasons behind this choice.

Claims that this judicial input is likely to distort legislative decision-making tend to be speculative.[120] More importantly, speaking of a 'distortion'—with that word's negative connotation—seems dogmatic and somewhat circular. It assumes that the effect of having this input is an undue influence on the legislative process, rather than an enhanced understanding of certain issues. This takes me to my next point. Whether having judges develop and adjust the content of statutes over time (according to current circumstances, attitudes, and

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[119] John Hart Ely and Dworkin have made arguments of this kind, though in relation to strong forms of judicial review; see Ely (n 118); and Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1997) 14–18.
[120] Kavanagh (n 104) 186, 194.

understandings) is a way to obtain valuable inputs or a route to undesirable interferences is a complex question. The answer is contested. It is at least as controversial as some of the substantive questions that matters like assisted suicide, housing allocation, and so on, raise. Following the logic of the views discussed above, this should lead us to conclude that Parliament should answer that question. In other words, it should be up to Parliament to decide whether courts should have a first say on a matter, because there is no obvious answer to the question of whether this would improve our legal system and our democracy or not. The previous chapters have argued that the UK Parliament frequently adopts this strategy. When it disagrees with the courts' take on a matter and it considers that it is sufficiently important to merit its attention, it will amend the statute at stake. It may also use the techniques discussed in chapter 6 to displace or narrow down the presumption in favour of updating, so that courts cannot revise the matter again.

There may be other possible reasons behind Parliament's choice for open-ended provisions that grant flexibility and discretion to courts. It may be, for example, that legislators were simply not capable of reaching an agreement on a more concrete formula, or on a fuller policy or moral conception. In such situations, a useful strategy is to opt for 'constructive ambiguity', adopting an underdetermined formula that will require interpreters to settle the disagreements that lawmakers could not settle. Even if these disagreements may also be present between judges, the law can still be developed through what Cass Sunstein calls 'incompletely theorised agreements'.[121] Courts may agree on how to apply an underdetermined provision to a case, even when judges may share the same

[121] Sunstein (n 70).

deeper disagreements that may have led legislators to enact a vague standard. In these situations, judges will agree on the outcome of a concrete case but not—on a more abstract level—on the underlying theory or principles that justify it.[122] The piecemeal nature of the judicial role and its narrow focus on the case at hand make this progress possible.

Finally, with regard to courts' updating role in particular, I have explained in previous chapters that the need for it arises from the fact that it would be unfeasible for Parliament to periodically monitor all its past Acts, ascertain what the original understanding of them was (including any specific underlying moral conceptions and standards), and assess whether this is still in keeping with the times or whether any amendments are necessary to realign the provision to its original rationale.[123] Law Commissions would also be overwhelmed by the enormity of this task and its incessant nature. The updating presumption recognises this fact.

IV. Conclusion

This chapter has addressed objections to the updating role that I believe courts should play which have been voiced by scholars who argue that this task is not one that lawmakers intend to allocate to courts and that, even if they did, this would be an illegitimate outsourcing of their law-making responsibility. I have argued that these views misconstrue lawmakers' choices and the reasons behind

[122] ibid 1737.
[123] Francis Bennion and others, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020) 503; JF Burrows and Ross Carter, *Statute Law in New Zealand* (4th edn, LexisNexis 2009) 397–98, 405; Sullivan (n 111) 101; *News Corp UK & Ireland Ltd v Revenue and Customs Commissioners* [2023] UKSC 7, [2023] 3 All ER 447 [30].

them. The next chapter looks at objections made by scholars in the opposite camp.

CHAPTER 9: Dynamic Accounts

I. Introduction

Standing in the opposite camp of the views discussed in the last chapter, certain scholars claim that the scope for judges' updating role is broader than I have argued. These claims rest on non-intentionalist justifications for that role—justifications that divorce courts' updating role from Parliament's intentions. I will argue that these views—which I classify below in three categories—have a mistaken view of the role of courts in the separation of powers and risk inviting judges to exceed the limits of that role.

Like the rest of this thesis, the discussion that follows is concerned with courts' updating role in cases of ordinary statutory interpretation. This means that I will not comment on the scope of the interpretive powers that courts may exercise based on general interpretive directives like section 3 of the HRA 1998 or constitutional presumptions like the principle of legality, when these are applicable. When courts depart from past understandings of a provision on the basis of section 3 or the principle of legality, they do so not as part of their role in keeping statutes up to date, but in safeguarding conventional or constitutional rights and principles. I should note, however, that these discussions sometimes figure more prominently in the works of some of the authors I consider than the question of ordinary statutory interpretation on which I focus. I will only consider those works to the extent that they are relevant to the latter question, and will not assess what they say about matters like the appropriate role of courts in the light of the HRA 1998 or the principle of legality.

II. Judicial Updating to Improve the Law

Some legal scholars argue that carrying out updating interpretations is a power which inherently belongs to courts and which Parliament can only constrain using express words in the statutory text. According to this view, interpreters should always adopt the 'best' possible interpretation of the statutory language at any given time, even when aids to construction suggest that lawmakers intended courts to adopt a historical interpretation.

Aileen Kavanagh is a prominent advocate of a 'living instrument' approach to interpretation who does not consider that its appropriateness depends on the intentions of the authority who enacted the instrument at stake. Drawing on the jurisprudential work of Joseph Raz,[1] Kavanagh argues that judges face a choice between applying 'the law in a conservative or innovative fashion'—that is, they 'face a dual task of applying the law as it exists and adjusting, improving and sometimes changing it to accommodate new circumstances'.[2] She argues that when choosing between adopting a conservative or an innovative approach, judges must balance the competing values of 'legal certainty, stability and continuity on the one hand', and 'equity and justice on the other'.[3]

Kavanagh describes this updating role as one that courts 'sometimes assume' and through which they 'help the legislature to implement the law over time, ensuring that it can be gradually adapted to changing circumstances'.[4]

[1] Aileen Kavanagh, 'Original Intention, Enacted Text, and Constitutional Interpretation' (2002) 47 American Journal of Jurisprudence 255, 257; Aileen Kavanagh, 'The Idea of a Living Constitution' (2003) 16 Canadian Journal of Law & Jurisprudence 55, 57.
[2] Kavanagh, 'The Idea of a Living Constitution' (n 1) 88.
[3] Aileen Kavanagh, 'The Role of Courts in the Joint Enterprise of Governing' in NW Barber and others (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing 2016) 133–34.
[4] Aileen Kavanagh, *The Collaborative Constitution* (CUP 2023) 213.

However, she does not claim that courts may legitimately perform this role only to the extent that the legislature relied on them to do so.[5] She expressly distances herself from the argument that the use of general moral terms in statutes is a strong indicator that lawmakers probably intended interpreters to engage in moral reasoning to determine how to apply these terms (rather than defer to lawmakers' own moral views about the instances to which they are applicable).[6] She does not only dismiss that claim as speculative and unlikely but, more importantly, as 'beside the point'.[7]

In Kavanagh's view, judges have to exercise discretion when open-textured, evaluative terms are used in a provision because the intent expressed by the lawmakers in the text is not specific enough, and not because—as I have argued—we should presume in such cases that lawmakers intended judges to exercise such discretion (unless they indicated otherwise).[8] Based on a narrow understanding of legislative intent, Kavanagh believes that when a question about a provision's content is 'linguistically irresolvable'—so that judges cannot decide it by 'looking to dictionary definitions or the conventions of language'—judges should rely on moral reasons to justify what is 'the best understanding of the ... provision'.[9] This view sets aside other contextual evidence that may clarify

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[5] ibid.
[6] Kavanagh, 'Original Intention, Enacted Text, and Constitutional Interpretation' (n 1) 283–84. Note that while Kavanagh is discussing constitutional interpretation here, her arguments are extensible to statutory provisions featuring similar, morally loaded language. When writing about statutory interpretation, Kavanagh references her own work on constitutional interpretation; see Aileen Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998' (2006) 26 OJLS 179, 182 (n 14). Accordingly, in what follows, I use the term 'lawmaker' to encompass the authors of both constitutions and statutes.
[7] Kavanagh, 'Original Intention, Enacted Text, and Constitutional Interpretation' (n 1) 284, 286.
[8] ibid 284–85.
[9] Kavanagh, 'The Idea of a Living Constitution' (n 1) 61.

the reasons that explain Parliament's choice for a certain formulation, including evidence of whether, for example, Parliament intended courts to apply a narrow approach or whether, instead, it intended to grant them flexibility to adopt an expansive approach in line with changed circumstances.[10] Kavanagh's position is only concerned with the linguistic boundaries of the text and not with what other sources suggest about the lawmakers' reasoning behind that language.

Kavanagh is, however, careful to clarify that her position is not that legislative intentions are fictional or irrelevant.[11] She draws a distinction between 'enacted' and 'unenacted' intentions, and equates legislative intentions with 'enacted' intentions only.[12] These are the intentions that 'are manifest and expressed in the words of the statute itself', which is the 'legally relevant way' that the legislative process provides Parliament to express its intentions and turn them into binding law.[13] Kavanagh stresses, by contrast, the difficulty of identifying intentions that are not spelled out in the text and gauging the level of support for them among legislators.[14] For her, one of the rationales of the law-making process is precisely 'to provide a clear demarcation line between those activities which result in valid law and those which do not'.[15] The duty of courts is to uphold

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[10] Kavanagh, 'Original Intention, Enacted Text, and Constitutional Interpretation' (n 1) 286.

[11] Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998' (n 6) 182; Kavanagh, 'Original Intention, Enacted Text, and Constitutional Interpretation' (n 1) 298.

[12] Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998' (n 6) 182.

[13] Aileen Kavanagh, '*Pepper v Hart* and Matters of Constitutional Principle' (2005) 121 LQR 98, 100; Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998' (n 6) 181–82.

[14] Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998' (n 6) 182–83; '*Pepper v Hart* and matters of constitutional principle' (n 13) 105.

[15] Kavanagh, '*Pepper v Hart* and matters of constitutional principle' (n 13) 106.

Parliament's enacted intentions. For Kavanagh, if courts enforce as law propositions that have not 'cleared the procedural hurdles and safeguards of the enactment process' (including being voted by a majority), 'Parliament's control over what is enacted into law' is undermined.[16] (Here, Kavanagh has in mind Hansard statements in particular, but the point is extensible to other aids to construction such as White and Green Papers, committee reports, and so on.) In support of her view, she relies on the work of Jeremy Waldron, according to whom, '[b]eyond the meanings embodied conventionally in the text of the statute, there is no state or condition corresponding to "the intention of the legislature" to which anything else … could possibly provide a clue'.[17]

Kavanagh's position has strong similarities with Lord Burrows', except for the fact that, unlike Kavanagh, Lord Burrows adopts a clearly anti-intentionalist stance, as I explained in chapter 2. Lord Burrows suggests that '[w]e can … see from the "always speaking" doctrine that a fundamental problem with reference to the legislator's intention' is 'that it is directed to the wrong question'.[18] In line with Kavanagh, he considers that 'the right question is what is the best interpretation *now* of the Act … because the judges are interpreting a legal rule laid down in the public interest, which is not the same as interpreting interpersonal communications in everyday life'.[19] Thus, when arguing that the 'task of deciding on the best interpretation of a statute with the benefit of hindsight falls to the judges', Lord Burrows does not claim that this is so because it is, most likely, what

[16] ibid 101.
[17] Jeremy Waldron, *Law and Disagreement* (OUP 1999) 142, cited in Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998' (n 6) 182 (n 18).
[18] Andrew Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement (The Hamlyn Lectures 2017)* (CUP 2018) 30.
[19] ibid (emphasis in the original).

Parliament intended.[20] This task is, for Lord Burrows, 'somewhat analogous to their [judges'] role in interpreting a common law precedent', with the caveat that 'the words of a statute impose important constraints on statutory interpretation that do not apply to common law precedents'.[21] In his view, when there are good substantive reasons to adopt (or reject) a particular interpretation (such as whether it leads to reasonable or absurd consequences), claiming that Parliament intended it (or not) adds nothing.[22] Even worse, for him such claims divert attention away from scrutinising how judges are reasoning when they decide cases.[23]

Lord Burrows clarifies, however, that 'the judges are clearly not free, as a legislator would be, simply to impose anew their own preferred policies' because 'the statutory interpretative exercise is precisely constrained by the words, context and purpose of the statute'.[24] This is, once again, aligned with the position adopted by Kavanagh, who despite her narrow definition of legislative intentions nonetheless accepts that statutory words must be interpreted taking into account the statute's context (both internal and external) and purposes.[25]

Sir John Laws shared a similarly expansive view of the role of courts and the weight that substantive values should play in judges' reasoning. As I explained in chapter 2, he criticised courts' references to legislative intentions, which he considered an incoherent notion. His main objection to such references,

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[20] ibid 31.
[21] ibid.
[22] Lord Burrows, 'Statutory Interpretation in the Courts Today' (Sir Christopher Staughton Memorial Lecture 2022, 24 March 2022) 10.
[23] ibid 9–10.
[24] Burrows (n 18) 31. See also Burrows (n 22) 4–5.
[25] Kavanagh, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998' (n 6) 184.

however, was that 'the deployment of parliamentary intent as a primary tool … of statutory construction undermines vital pillars of the constitution: reason, fairness and the presumption of liberty, because it delivers them to the whim of the legislators for the time being'.[26] Applying this view to the problem of outdated statutes could lead courts to adopt an updating approach when they consider that substantive values require it, rather than on the basis that Parliament intended courts to perform that task.

The work of William Eskridge, who is one of the leading defenders of updating approaches to statutory interpretation in the US, has much in common with the views surveyed so far. Eskridge argues that courts should adopt an updating approach (or 'dynamic', as he calls it) when this is justified by policy- and value-based reasons, including consequentialist considerations.[27] Whether lawmakers intended courts to interpret the statute at stake in this way or not forms no part of Eskridge's account. In fact, he considers that the very idea of a unified legislative intention—beyond what is conveyed by the statutory language—is incoherent.[28]

Eskridge presents dynamic interpretations as 'rejuvenating' a statute by reading it according to 'the spirit of the times in which it is to be applied' in significantly changed circumstances, rather than 'the spirit with which it was

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[26] John Laws, *The Constitutional Balance* (Hart Publishing 2020) 100.

[27] See, for example, William N Eskridge, Jr, 'Dynamic Statutory Interpretation' (1987) 135 University of Pennsylvania Law Review 1479, 1492–93, 1520, 1523–24.

[28] ibid 1501, 1507, 1538–39. See, however, William N Eskridge, Jr, *Dynamic Statutory Interpretation* (Harvard University Press 1994) 16 (stating that he does 'not maintain that legislative intent is never discoverable or is irrelevant to statutory interpretation').

conceived'.[29] These, for him, are 'instances in which interpretation is not a search for legislative intent'.[30] When considering statutes that feature broad language and leave expressions undefined (such as the term 'discriminate', in Title VII of the US Civil Rights Act 1964), Eskridge does not suggest that this language may be due to a deliberate decision by Congress to entrust courts with interpretive flexibility.[31] He finds unpersuasive the idea that a statute's 'broad phrasing represents an implicit delegation of lawmaking authority to the courts' by Congress, noting that, in the US, neither legislative history nor treatises on statutory interpretation suggest that 'Congress thought it was delegating enormous law-creating powers to courts'.[32] Eskridge does argue, by contrast, that around the time the Constitution was enacted, the Framers, contemporary educated lawyers, and their immediate successors 'contemplated dynamic interpretation of statutes to adapt to changed circumstances', and did not expect courts to adopt a rigid approach.[33] However, he believes there was a shift away from this position in the second half of the 19th century, when the expectation came to be the opposite.[34]

Eskridge believes that the dynamic approach he advocates for can meet the counter-majoritarian difficulty raised by statutory interpretation decisions

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29 Eskridge, Jr, 'Dynamic Statutory Interpretation' (n 27) 1504–05 (this passage is focused, in particular, on civil law jurisdictions, but the point is extensible to the common law).
30 ibid. See also ibid 1544 (talking of statutory interpretation as something that should be 'divorced, at least at times, from the search for original intent').
31 Eskridge, Jr, 'Dynamic Statutory Interpretation' (n 27) 1489–90.
32 ibid 1517.
33 ibid 1502, 1506. See also William N Eskridge, Jr, 'All about Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806' (2001) 101 Columbia Law Review 990.
34 Eskridge, Jr, 'Dynamic Statutory Interpretation' (n 27) 1502–03, 1506.

where nonelected judges ‘slight[] the original value choices of the legislature’.[35] In his view, ‘when there has been a significant change in circumstances, the countermajoritarian difficulty presents [only] slight justification for continuing to treat old statutory majorities as decisive and controlling’, and values other than majoritarianism may take precedence.[36] The only boundaries that Eskridge appears to recognise as decisively binding upon courts (other than the piecemeal nature of their decisions and the fact that the legislature may reverse them) are those explicitly set out by the legislature in the statutory text.[37]

Even authors who draw the link between broad expressions left undefined and the legislative intention to grant flexibility for future interpreters often do so only in passing, not as the main justification for adopting an updating approach when interpreting such expressions. Wil Waluchow, for instance, whose focus is on Canadian constitutional law, argues that ‘[w]e can … choose how our [c]harters [of rights] are to function’, and ‘choosing a living tree, common law conception’ is more advantageous than other possible understandings.[38] In contrast to the view defended in this thesis, Waluchow does not define this choice as one made by the authors of the Canadian Charter of Rights and Freedoms at the moment of its drafting and adoption. Instead, he presents this as a choice that is open to the people subject to it today. When arguing that provisions with abstract moral language can and should be allowed to grow and adapt to ever-changing moral, social, and political circumstances, it is only in a footnote that he

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[35] ibid 1523.
[36] ibid.
[37] ibid 1524, 1533, 1542.
[38] WJ Waluchow, ‘Constitutions as Living Trees: An Idiot Defends’ (2005) 18 Canadian Journal of Law and Jurisprudence 207, 222–23 (emphasis removed).

briefly suggests that, '[i]ndeed, that is why abstract provisions are chosen in the first place': because 'they allow for growth as concrete views change'.[39]

Peter Hogg, for his part, does argue—based on historical evidence of the proceedings—that those who drafted and adopted the Charter assumed that courts would interpret its text in ways that departed from those preferred or predicted by them.[40] However, like Waluchow, Hogg does not appear to regard this fact as crucial. Rather, his point is that '[i]t would be wrong to conclude' that a 'progressive' or 'flexible' approach to interpretation 'is *necessarily* inconsistent with the intentions of the framers', and he criticises originalism for overlooking this possibility.[41] His defence of such an approach is mainly based, instead, on the view—endorsed by the Canadian Supreme Court—that it is desirable, necessary, and inevitable.[42]

Problems with these Views

Adopting the views surveyed above may lead judges to misunderstand their role and the extent to which it is constrained by Parliament's decisions. In a democracy, the role of judges is significantly constrained by the law-making choices made and conveyed by our democratically elected authorities.[43]

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[39] WJ Waluchow, 'Democracy and the Living Tree Constitution' (2011) 59 Drake Law Review 1001, 1029 (n 163).

[40] Peter W Hogg, *Constitutional Law of Canada* (5th edn, Carswell 2007) 36-27, 60-9.

[41] ibid 60-9 (emphasis added).

[42] ibid 36(26)-36(27), 60(7)-60(8.1).

[43] (I explained in chapter 3 why this is not necessarily incompatible with the role that constitutional presumptions play in statutory interpretation in the UK. This relates to the fact that Parliament may rely on courts' contribution to improve democratic deliberation and help to make sure that Parliament does not inadvertently or lightly legislate against its long-standing and fundamental value-commitments.)

Eschewing references to Parliament's intentions—or understanding such intentions as limited to what the statutory text asserts—creates the risk that courts will see themselves as allowed (or, indeed, required) to decide what the law should be, as long as they come up with a linguistically plausible reading of the statutory text. The text is thus seen as the boundary within which courts carry out value-based judgments to decide what are, from the point of view of policy or morality, the best legal propositions that they can ascribe to it. Other aids to statutory construction—such as the statutory purpose and other elements of the context in which it was enacted—appear in a similar light. In this way, the statutory interpretation exercise is seen less as the retrieval of a pre-existing law-making choice made by someone else (Parliament) than as the making of a choice by courts. The text and other aids are not seen primarily as evidence of the law-making choices made by Parliament.

This creates a series of difficulties. First, it may lead judges to trespass on two of the limits of the updating presumption identified earlier (in chapter 6) and apply an updating approach against Parliament's intentions. One of these concerns statutes featuring expressions that were originally perceived as unchangeable (such as 'man' and 'woman', decades ago). I have argued that new conceptions of such expressions should not be adopted by courts (unless Parliament formally amends the statute) because, at the time of enactment, Parliament was not aware of the very possibility that any such new conceptions could emerge. As a result, it was not alerted to the need to displace the updating presumption if it so wished, which I believe is a possibility that Parliamentarians ought to have.

In contrast, an account that sees the statutory text not as evidence of a law-making decision to retrieve but as the linguistic frame within which to make a new one struggles to explain this. If we have now revised our understanding of certain concepts (like gender) and come to realise that it may be fluid and changeable, why should the lawmakers' previous rigid and static understanding bind courts today? A position that sees the linguistic boundaries of the text (seen from the perspective of the time of adjudication) as the only constraint on courts in this situation cannot explain this. In contrast, a view like mine—preoccupied with understanding the law-making choice that the statute was intended to embody—considers that it is crucial to know whether Parliament was alerted to the need of displacing the application of the updating presumption if it so wished. If it is clear that lawmakers at the time of enactment assumed they were enacting a static term with a permanently fixed meaning, giving that term an updating interpretation would go against that choice.

The second limit to judicial updating that these views would not acknowledge involves situations where Parliament intended to displace or narrow down the updating presumption in relation to a certain expression, but considered that adding an explicit formula to that effect in the statutory text would be confusing or otherwise undesirable. They may have opted, instead, for a text that does not unequivocally exclude certain cases, trusting that their exclusion would emerge, for example, from the statute's purpose and the kind of legal consequences it provides for. While the safest course of action for Parliament will normally be to expressly clarify its intention in the statute, there may be good reasons militating against doing so on certain occasions. One could be the concern with avoiding excessive prolixity. Moreover, specifying certain points in

the statutory text may cause confusion about how to interpret other expressions that are not specifically defined or other situations that are not specifically contemplated in the statutory text, creating a false sense of accuracy.[44] In such situations, oral interventions in the legislative debates and written documents other than the statutory text may allow lawmakers to elaborate on certain points with greater clarity than what would be possible in the text of the Bill.

It is important to stress that the reason why pre-legislative and legislative materials are, in principle, relevant is that they can help us to understand the choice that lawmakers collectively agreed on, and the assumptions they shared when they chose or voted for a certain language.[45] When considering these materials, courts should carefully ascertain whether this appears to have been the case or whether, instead, the government was trying to surreptitiously influence the Act in a certain way by not spelling things out in the statutory text to keep them away from the eyes of Parliamentarians. Courts should disregard statements that attempt to impose a reading that sits uncomfortably with the text, or that add a clarification that—given its importance—should have been included in the statutory text. This is especially important when these readings go against well-established canons of construction, like the updating presumption, which Parliamentarians (and their advisers and drafters) will normally take for granted unless they have been clearly put on notice that the presumption at stake has been displaced. Determining whether a statement in a pre-legislative or legislative material gives an insight into the collective legislative choice—or,

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[44] Daniel Greenberg, *Craies on Legislation* (12th edn, Sweet & Maxwell 2020) 319–21.

[45] Stefan Vogenauer, ‘A Retreat from *Pepper v Hart*? A Reply to Lord Steyn’ (2005) 25 OJLS 629, 666–67.

instead, lets the Bill's promoter 'smuggle' content that most likely formed no part of that choice—will require a case-by-case analysis, and—in the case of Hansard—a strict application of the conditions established in *Pepper v Hart*. With these precautions (which are not peculiar to the updating presumption in particular), when it is clear that lawmakers relied on the assurances provided in pre-legislative and legislative materials about the intended scope of an expression, I believe that courts should respect this. In contrast, Kavanagh's talk of a 'clear demarcation' between 'enacted' and 'unenacted' intentions sits uncomfortably with the fact that lawmakers often imply propositions by relying on aids to construction that are not enacted by Parliament.

An additional problem of the views discussed above is that they may also struggle to offer a convincing justification for judicial updating in certain cases where this is clearly licensed—indeed, required—by Parliament's intentions. The majority's reasoning in *Yemshaw*, discussed in chapter 6, illustrates this. The judgment would have been stronger if, in addition to arguing that a broad reading (including psychological abuse) was within the linguistic boundaries of the term 'violence', the Court had considered more carefully the possible evidence of Parliament's intention to displace or limit the updating presumption. In particular, the Court should have offered a stronger rebuttal of the claim that the structure of section 177(1A) (more specifically, the division between 'violence' and 'threats of violence') suggested that Parliament had intended the term to be limited to physical violence.[46]

Moreover, citing Hansard would have strengthened the Court's interpretation by showing that not only was this interpretation compatible with

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[46] I developed such a rebuttal at length in chapter 6, section II(3)(iii).

Parliament's intention but, what is more, Parliament had expressly contemplated this specific situation. As I said in chapter 6, this exact question had been posed to the Bill's promoter and the answer given had been broad. One of the objections that critics of *Pepper v Hart* make is that recourse to Hansard goes against the principle of separation of powers to the extent that it grants to the executive the power to say what the law is, and leads to equating the government's goals and statements with Parliament's intentions.[47] This, they believe, goes against the idea that Parliament is in charge of making the law, and courts are in charge of interpreting it and developing it where it is insufficiently precise to adjudicate a case.

The first point to note in reply to this is that courts will not rely on Hansard unless the text enacted by Parliament is unclear and they are satisfied that the promoter's statement clarifying it was not disputed or rejected in the legislative debates or other external aids.[48] Furthermore, in cases in which courts are accused of overstepping their role (such as in *Yemshaw*), recourse to Hansard can help to answer—rather than create—separation of powers concerns.[49] Being able to show that the Court's interpretation was aligned with the assurances on which Parliamentarians probably relied when they voted upon the Bill shields the ruling from the critique that judges were imposing their own value-based

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[47] Johan Steyn, '*Pepper v Hart*; A Re-Examination' (2001) 21 OJLS 59, 68; Kavanagh, '*Pepper v Hart* and matters of constitutional principle' (n 13) 102–03.
[48] For an example of a committee report casting doubt on a ministerial statement (in that case, made not on the floor of one of the Houses but before the Constitution Committee), see Select Committee on the Constitution, *United Kingdom Internal Market Bill* (HL 2019-21, 151) paras 194-195 (stating that the Committee is 'not persuaded by the Lord Chancellor's construction of clause 47' as to whether it ousts judicial review).
[49] Donald L Drakeman, 'Constitutional Counterpoint: Legislative Debates, Statutory Interpretation and the Separation of Powers' (2017) 38 Statute Law Review 116, 123.

preferences about what the law should be and making decisions that only Parliament can make. Recourse to Hansard thus shows that the Court's interpretation was not an act of law-making that exceeded the Court's powers but a correct reading of a term that had been intended, since its origin, to be broad and flexible. This point extends beyond Hansard to other aids to construction that are not formally enacted by Parliament but are laid in front of legislators when a Bill is being discussed and voted on. For these reasons, the position defended in this thesis puts the decision in *Yemshaw* on a more solid footing and shields it from the critiques it has received.

A more fundamental difficulty with views that reduce the idea of legislative intent to the statutory text is that they cannot properly explain why and how the statutory purpose and the context of enactment should matter to interpreters. They either sidestep this question or perform odd manoeuvres to address it. Waldron, for example, suggests that equating legislative intentions to the statutory text can be compatible with a judicial practice of recourse to external aids like the record of legislative deliberation or committee reports because this can be seen as a change in our understanding of what counts as the statutory text.[50] This, however, does not reflect how UK courts should (and do, as a matter of fact) treat such aids.[51] The statutory text has primary importance and the statutory purpose and external aids are seen as shedding light on the law-making choices embodied in it. Failing to see the purpose and aids in this way makes these theories unfit to explain the legitimacy of interpretations in which judges rely on these considerations to strain the language of a statute in order to realign

[50] Waldron (n 17) 145–46.
[51] Neil Duxbury, *Elements of Legislation* (CUP 2013) 99.

it to its purpose and rationale in changed or unusual circumstances.[52] When Parliament's intention is reduced to what the statutory text asserts, interpretations that strain that text cannot be reconciled with Parliament's intentions and appear to be, instead, instances of judicial law-making that go against those intentions. This would exceed courts' role and, for that reason, it is not how courts present and justify such interpretations.

In *Quintavalle*, for example, how Parliament had intended to regulate the situation at stake in that case did not emerge clearly from the statutory text because its language had been chosen based on an assumption (about what was biologically or medically possible) that was no longer true.[53] If judges are not attentive to what Parliament was trying to do and the assumptions it was (reasonably) making, they may end up deciding cases based on their own substantive preferences against Parliament's choices. Theories that disregard—or cannot explain—the importance of the statutory purpose and the contextual aids to its interpretation in helping judges to understand what Parliament was trying to do may have the effect of leading judges to substitute their own policy preferences and their preferred scheme for those adopted by Parliamentarians. In *Quintavalle*, the Court was careful to point out that judges have no mandate to revise the merits of Parliament's law-making choices and improve them according to their own judgment about what the law should be.[54]

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[52] These interpretations were analysed in chapter 5, section III(3) (discussing cases like *R (Quintavalle) v Human Fertilisation and Embryology Authority* [2003] UKHL 13, [2003] 2 AC 687, and *Robinson v Secretary of State for Northern Ireland* [2002] UKHL 32, [2002] 7 WLUK 633).
[53] *R (Quintavalle) v Human Fertilisation and Embryology Authority* (n 52) [7]–[8], [14] (Lord Bingham).
[54] ibid [13], [15] (Lord Bingham).

Thus, accounts that are grounded in a misguided scepticism about legislative intentions—or in an incomplete understanding of what such intentions are and how they are conveyed—may recognise excessively expansive updating powers for courts. Their adoption may lead to accepting updating interpretations of provisions that required a historical approach. It may also erode the perceived legitimacy of updating interpretations (when these were intended by Parliament) by offering incorrect reasons to justify them. These accounts thus undermine the case for updating interpretations that are within courts' powers because they obscure or deny the link between such powers and legislative intentions. Failing to emphasise that link when it in fact exists makes rulings that adopt an updating approach appear to go against the law-making choices made by our democratically elected representatives even when they are, in reality, not doing so. In contrast, I have argued that normally an updating approach is compatible with—and indeed required by—respect for those choices.

I believe that the general reluctance among advocates of updating approaches to attempt to build an intentionalist defence of such approaches debilitates the case for them. Their overall averseness to claim the intentionalist ground has left it empty, to be occupied by scholars and judges who make doubtful claims about what kinds of original intentions matter and what their content was (or normally is), as I explained in the last chapter. Some advocates of updating approaches seem to have accepted these claims about what respecting lawmakers' intentions would require and consider, for example, that an interpretation is non-intentionalist if it departs from how the historical Parliament who enacted the provision at stake would have solved the specific

question of a case if it had been posed to it.[55] This equates legislative intentions to the concrete expectations that lawmakers had about how a provision would be applied to specific cases or scenarios. As I noted in the last chapter, however, this view is now discredited even among originalists. My intentionalist justification of judicial decisions in which courts develop open-ended expressions does not depend on whether the specific interpretations they adopt would have been (or were) endorsed by the original lawmakers. The point is, instead, that the original lawmakers intended to grant interpretive flexibility to courts to develop those expressions. What exactly this means for the solution of any given case is a question left ultimately to courts' judgment, in exercise of that flexibility. How that group of Parliamentarians would have solved the specific question at stake in a case is neither here nor there.

An alternative way of framing the views presented at the beginning of this chapter would be to understand them as arguing that the updating presumption is harder to displace than I have suggested. The claim would be that this presumption is of a kind that can only be displaced by express words (or necessary implication), like the presumption against ousting the jurisdiction of the courts or the principle of legality. This takes the updating presumption away from the category of mere canons of construction where I have placed it, and moves it closer to something more akin (at least in its operation, if perhaps not its rationale and origin) to constitutional presumptions. While the previous chapters have

[55] See, for example, Eskridge, Jr, 'Dynamic Statutory Interpretation' (n 27) 1539–41 (considering, for instance, 'how Congress in 1871 would have answered the question' at stake in a case); Eskridge, Jr, *Dynamic Statutory Interpretation* (n 28) 9, 14. See, further, Duxbury (n 51) 227–28.

explained that this is not how UK courts and commentators treat and speak of this presumption, someone might object that they are wrong not do to so.

This, however, seems implausible. It is hard to see what constitutional values could be underpinning the always speaking principle. The substantive values served by courts' adopting an updating approach to statutory interpretation are contingent. The values served by interpreting an Act in an updating way (or failing to do so) may be progressive or conservative ones, depending on the respective tendencies predominant when the Act was passed compared to those present when it is being interpreted. [56] (These tendencies may belong, depending on the provision, to society at large, experts in one field, or the conventional morality generally endorsed by the institutions of the legal system at stake, including, where relevant, international institutions like courts).

Entrusting courts with the task of keeping statutes up to date with current facts, social attitudes, and moral understandings (among other changes) is a valuable tool. It is, nonetheless, a tool that ought to be ultimately in the hands of Parliament. It ought to be up to Parliament to decide whether to use it or not on any given occasion, and—if it decides to do so—within what constraints and in relation to what kinds of changes. The presumption tackles a practical matter: the question of how much Parliament wants to depend on formal amendments and how much it wants to trust courts to update the law through their interpretations. Courts should not take it upon themselves to adapt the law to changing needs when it appears that Parliament intended to withdraw such discretion from them

[56] See Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 Federal Law Review 1, 37–38 (making this point in relation to constitutional provisions).

(and either leave that adaptation in the hands of Parliament itself or entrust it to the executive).

Before moving on, I wish to say a word about how Eskridge's US-centred account applies to my UK-centred analysis. It is not entirely clear to me what Eskridge's account would entail for a jurisdiction like the UK, where the always speaking principle (and the possibility of departing from it) is firmly established, unlike in the US. As I said, Eskridge dismisses as unpersuasive the claim that use of broad statutory language may be due to a deliberate choice by legislators to entrust courts with interpretive flexibility. However, he makes this point about the US Congress, which does not legislate against the background of the always speaking principle. It is true that Eskridge advocates updating approaches in the US despite affirming that the default principle enunciated by courts and commentators there goes against such approaches and favours a static interpretation.[57] This cannot be reconciled with the position I defend: if the default rule against whose background Parliament legislates favours a static approach, an updating interpretation cannot be justified on intentionalist grounds except when Parliament conveys the intention to displace that default rule. However, Eskridge argues that this abstract principle in favour of a static reading does not really reflect the decisions that US judges make, cites several cases in which judges adopted an updating approach, and claims that his account offers a better description of the caselaw.[58] Moreover, while he defends updating interpretations which—he argues—go against the historical evidence of legislative intent, he understands intent as the answer that lawmakers would have given to the specific

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[57] Eskridge, Jr, 'Dynamic Statutory Interpretation' (n 27) 1479–80, 1554.
[58] ibid 1481–82, 1543; Eskridge, Jr, *Dynamic Statutory Interpretation* (n 28) 14–16, 81–107.

question at stake in a case.[59] It is therefore not entirely clear to me whether Eskridge's view is that courts should go against the established default rules that make up the context in which Parliament legislates. If that is his argument, this is a view that my thesis strongly rejects.

In jurisdictions where there is no clear default rule either way (as it seems to be the case in the US), whether courts should adopt an updating or a static approach requires a different kind of answer from the intentionalist case made in my thesis. I have based this case in a close examination of the law-making and judicial practices of the UK. All my thesis has to say about jurisdictions where this exercise does not yield a conclusive answer is that it seems more plausible to conclude—in the absence of evidence of contrary a practice—that when lawmakers opt for evaluative, open-ended language, they are usually aware that this entails granting flexibility to future interpreters to develop those expressions according to current circumstances, attitudes, and understandings. As I suggested in chapter 8, using that kind of language to refer to evidently contested (or contestable) matters, without providing further specifications of the specific conceptions or standards held by lawmakers, looks like a clumsy, unreliable method to freeze such conceptions and standards and make them binding upon courts for as long as the statute remains valid law. I do not mean to deny, however, the theoretical possibility that the law-making practices and judicial doctrines in a jurisdiction may clearly establish that this is, in fact, the default rule. If this is the case, my conclusion would be that an updating approach should not be applied, unless that default presumption has been displaced in relation to the statute or provision at stake.

[59] Eskridge, Jr, 'Dynamic Statutory Interpretation' (n 27) 1479–80, 1491–94.

III. Integrity as the Determinant of the Scope for Updating

Interpretivism is another highly influential theory of legal interpretation that may lead courts to update statutes that should be given a historical interpretation. When explaining how statutes (and other legal instruments, such as constitutions) should be interpreted, Dworkin's point of departure is the virtue of integrity in the law. The basic idea is that the government is required to 'speak with one voice' about what rights people have, 'to act in a principled and coherent manner toward all its citizens, to extend to everyone the substantive standards of justice or fairness it uses for some'.[60] When interpreting legal provisions, 'integrity in adjudication' requires courts to adopt the reading of them that best fits with the principles of political morality that offer the best coherent justification of the institutional actions of that system taken as a whole.[61] Interpreters should take into account, among other things, other legal instruments passed in that jurisdiction (both before and after the enactment of the Act that is most directly relevant to a case), administrative and judicial decisions (again, both pre-existing and subsequent ones), and formal statements of purpose made by public officials. They should identify which set of principles gives the best account of that record (that is, the set that presents that record in its best moral light) and interpret the provision at stake in accordance with such principles. In other words, interpreters should ask themselves 'which reading of the act' at stake 'shows the political history including and surrounding that statute in the better light'.[62]

Thus, Dworkin does not regard statutes as authoritatively settling and communicating what the law shall be but only as providing courts with interpretive

[60] Ronald Dworkin, *Law's Empire* (Hart Publishing 1998) 165, 223.
[61] ibid 217, 337–50.
[62] ibid 313.

material.[63] That material is to be read alongside all the other institutional and social facts that have taken place up to the moment when the case is being decided (including enactments, regulations, judicial and administrative decisions, expressions of public opinions, and so on), in a search for the principles of political morality that can give the best account of all this considered as a whole. This means that, for Dworkin, the practices, decisions, and statements that make up the legislative history of an Act are not seen as helping courts to better understand the law-making choices made by Parliament when it passed that Act but as institutional facts in and of themselves.[64] Thus, for example, legislative statements made by the sponsor of a Bill matter to interpretation for Dworkin not because they help judges to understand the collective choice that was presented to all legislators and endorsed by a majority of them. Instead, they matter due to reasons of political morality, such as the wrongness of misleading the public. His ideal interpreter 'aims to make the legislative story as a whole as good as it can be', and 'he would make the story worse if his interpretation showed the state saying one thing while doing another'.[65] It is the outcome of this exercise what determines whether courts should adopt one or another interpretation—for example, an updating one that departs from the way the provision would have been interpreted the day after enactment or a static one. In contrast to the view defended in this thesis, for Dworkin this matter is not settled by looking at whether Parliament intended courts to adopt an updating approach or not. As I explained

[63] Richard Ekins, 'Legislative Intent in Law's Empire' (2011) 24 Ratio Juris 435, 456.
[64] See, for example, Dworkin (n 60) 314–16 (explaining that his ideal interpreter 'treats the various statements that make up the legislative history as political acts that his interpretation of the statute must fit and explain, just as it must fit and explain the text of the statute itself').
[65] ibid 343; see also ibid 346.

in chapter 2, Dworkin was deeply sceptical of the very idea of legislative intentions.[66]

It is worth noting that Dworkin's views have inspired interpretivist accounts of other legal instruments. George Letsas, for example, has put forward a theory about the interpretation of the European Convention on Human Rights that is diametrically opposed to Lord Sumption's. For Letsas, the Convention should be interpreted using an updating approach because it 'is meant to protect whatever human rights people *in fact* have, and not what human rights domestic authorities', including those involved in the adoption and ratification of the Convention, 'or public opinion *think* people have'.[67] This view is not based on the intentions of the authorities who drafted and adopted the Convention. Letsas does not attempt to support his theory based on historical evidence of such intentions.[68] For him, arguments of this kind are hopelessly circular and the potential relevance of such intentions requires 'a normative justification based on values of political morality'.[69]

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[66] See, however, Jeffrey Goldsworthy, 'Dworkin as an Originalist' (2000) 17 Const Comment 49. Goldsworthy argues that, in later works, Dworkin departed from the views he had expressed in *Law's Empire* and argued, instead, that courts should respect lawmakers' semantic intentions (that is, what they intended the provisions they enacted to mean). My discussion in this chapter is focused on Dworkin's arguments in *Law's Empire* and does not consider this arguable later shift.
[67] George Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' in Andreas Føllesdal and others (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP 2013) 139 (emphasis in the original).
[68] I briefly commented on the available evidence in the last chapter, when discussing Lord Sumption's views on the matter.
[69] George Letsas, 'Intentionalism and the Interpretation of the ECHR' in Malgosia Fitzmaurice and others (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Brill 2010) 269, citing Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 53–54.

Problems with these Views

It is not clear what Dworkin thinks that legislatures do when they enact a law, or how he thinks legislators understand what they do.[70] Arguing that the law-making choices made by legislators should be treated by courts as interpretive material—rather than as directly determining what the law shall be—renders the enactment of laws a somewhat mysterious act. Moreover, Dworkin's views on the relevance of the legislative history are very hard to square with our practices. Interpreters do not regard, for example, a statutory provision and the assurances that the promoter of a Bill gave to Parliamentarians about it as two separate state actions that need to be harmonised, so that the state acts with integrity.

Such assurances matter to interpreters—when they matter—because they matter to lawmakers. In principle, it is likely that Parliamentarians understood the text they were voting upon according to such assurances, since they are designated as relevant by the conventions based on which legislators form and convey a unified, collective intent. Moving amendments to formally incorporate such clarifications into the statutory text can be time-consuming and difficult, and—as I said—their inclusion will sometimes create excessive prolixity or further confusions. These reasons will normally induce lawmakers to rely on such assurances. As I argued above, courts should determine whether this is the case on any given occasion. Statements that do not appear to reflect the assumptions that Parliament relied on when voting upon the Bill at stake (but only attempts from the Bill's promoter to force a certain interpretation of it) should be dismissed by courts as irrelevant, rather than seen as something courts should attempt to harmonise with Parliament's enactment for reasons of integrity.

[70] On this point, see Ekins (n 63) 451–57.

This is not the place to delve into a debate about the jurisprudential weaknesses of interpretivism compared to positivism, the theory that my thesis is grounded in. As I noted in the introduction to this thesis, an interpretivist theory may well consider that courts should (for reasons of political morality) give weight to what lawmakers were trying to do when they enacted a statute. What I want to point out in what follows are the ways in which Dworkin's theory, like those examined above, may lead courts to trespass on the limits of their updating role and go against the decisions of our democratically elected representatives.

First, in Dworkin's account, considerations like the fact that an expression was perceived as unchanging at the time a statute was enacted or contextual evidence suggesting that Parliament intended to displace the updating presumption would not necessarily be binding upon courts. This would depend on what the principles of political morality behind a legal system require in each particular case. This is a somewhat similar outcome to that reached by the authors considered in the previous section, who hold that such decisions should be made by judges balancing all relevant substantive values.

Second, Dworkin's understanding of integrity leads him to say that judges interpreting a statute should take into account institutional decisions that took place after its enactment.[71] These include, for example, later Acts, executive regulations, administrative decisions, and expressions of policy goals. These decisions matter for Dworkin because they form part of the institutional record that is subject to the demands of integrity. Considering these later events may, on occasions, lead judges to adopt an updating approach even when this goes against Parliament's intentions. Years after the enactment of a statute, a new

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[71] Dworkin (n 60) 316, 347.

government and Parliament may pass other statutes and regulations on related matters that go against the spirit of the original statute, without, however, repealing or amending that statute. The original Act may, for example, have created a very broad visa category (let us call it *A*), with extensive rights for the people who hold that visa. Later rules on other kinds of visas (*B* and *C*), in turn, may have adopted an anti-migration stance and made the acquisition of these other visas harder and diminished the rights provided for by them. A Dworkinian judge would interpret the original Act in the light of those later changes in political tendencies. This, in the visa example, would be an instance of an updating approach that yields a narrower reading than the one that would have taken place the day after enactment. Taking into account the rules governing visas *B* and *C* when interpreting the requirements and rights associated with visa *A* would lead judges to interpret the latter in a stricter way.

The problem with this is that our mechanisms for changing the law would become perverted if politicians no longer had to gather the required number of votes to change the law to align it with their new policy preferences, and pay the political cost of doing so. Instead, Dworkinian judges could just do that for them, adjusting past laws to the government's ideological tendencies as they change over time.[72] My approach, by contrast, seeks to locate the extent of courts' power to keep statutes up to date in a prior license given to courts by Parliament itself when it enacted the statute at stake. My approach also imposes strict limits on the exercise of that judicial discretion (discussed in chapter 6) that Dworkin does not recognise. While I argue that judges should think very carefully about the intentions that Parliament had, Dworkin regards that idea with scepticism.

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[72] See ibid 349–50.

A third issue with Dworkin's approach (and the last one I will discuss here) is the mirror image of the point I just made. Integrity in adjudication may lead courts to weaken the changes introduced by a statute when the principles behind it cannot be reconciled with those behind the pre-existing rules governing other related situations. Under Dworkin's conception of the law, introducing legislative changes in a moderate and piecemeal way (as legislatures often do, since radical reforms are more difficult to achieve and implement) is very hard to do. The demands of integrity and the weight of the past dilute our attempts to move on from that past.

Let us return to the visa example but supposing, this time, that the laws governing the more restrictive visas *B* and *C* preceded the enactment of the more generous Act on visa *A*. If visa *A* clearly establishes easy-to-meet requirements and provides for extensive rights, these should not be made stricter and narrower just because the government and Parliament used to have an anti-migrant stance that is still alive in older statutes, regulations, and decisions that remain good law for the time being. Once again, this would undermine the mechanisms we have to change the law. If the intention to mark a departure with that previous stance (albeit a partial departure, at least initially) is clear, courts should not invoke the past as an obstacle to change.[73] (Given that this is the reverse of the problem I discussed in the previous paragraph, it is not clear which of these two effects would prevail in any given case for Dworkin. To simplify, in my examples I have given greater weight to the larger set of statutes—that is, visas *B* and *C*, over *A*.)

[73] (I am setting aside here situations where the incoherence with these prior rules is such that the principle of equality and non-discrimination—as recognised in the legal system at stake—is compromised. This is a much stricter standard than Dworkin's moral assessment of integrity.)

In criticising Dworkin's views on this point, I do not mean to suggest that the context in which a statute was enacted—including the pre-existing state of the law—is irrelevant to statutory interpretation. As I explained in earlier chapters, this is crucial to understanding the changes that an Act was designed to introduce. However, when the Act conveys the intention to partially break with past decisions, these decisions should not weigh down the changes it introduces. This potentially conservative aspect of Dworkin's views, which 'might propagate morally outmoded values', has been stressed, for example, by Eskridge.[74] As he has noted, feminist legal scholars, among others, may have reason to 'question any approach which sought complete coherence from the oppressive precedents of the past'.[75]

IV. Judicial Assessments of Legislators' Authority

Another view that leads to recognising a larger updating role for courts than what I have defended in this thesis is the claim that the power to carry out updating interpretations increases as a statute gets older because the passage of time diminishes the authority of the lawmakers who enacted it. This view has been put forward by Raz.[76] The undermining over time of lawmakers' authority means, for Raz, that judges should interpret very old statutes in an innovative way, departing from the original intentions of their authors (at least their intentions about a statute's details if perhaps not those about its core) provided that this is what the

[74] Eskridge, Jr, 'Dynamic Statutory Interpretation' (n 27) 1552–53.
[75] ibid.
[76] Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 235, 295–97. (He extends this point to constitutions as well; see ibid 343.)

moral values at stake require.[77] Thus, interpretations of very old statutes—whether innovative or conservative ones—are not based, for Raz, on respect for the authority of those who enacted them since, according to him, their authority eventually runs out. They are based, instead, on moral reasons—for example, on the outcome of the court's balancing of stability and respect for people's expectations against the need to improve the law and adapt it to new circumstances.[78] Raz notes that legal practices often recognise an increasingly larger scope for an innovative approach as time goes by, since the erosion of the lawmakers' authority is gradual.[79]

Contrary to Raz's account, my defence of judicial updating approaches does not see them as departing from lawmakers' original intentions but as required and justified by them. To clarify, Raz's argument is not necessarily incompatible with my defence. Raz does not comment on or question the existence or scope of the updating presumption as I have described it. As I explained in chapter 2, his account of interpretive conventions is very thin. Thus, my defence of updating approaches could, in theory, co-exist with—and perhaps be compounded by—Raz's justification of innovative interpretations when, in his view, the lawmakers' authority has diminished or run out and moral reasons point in favour of a different reading.

Problems with these Views

Raz's claim entails the view that courts interpreting a statute have the power (or the duty) to assess whether the moral authority of the people who enacted it has

[77] Raz (n 76) 235, 295–97.
[78] ibid 298.
[79] ibid 296.

run out due to the passage of time. That courts should be able to contest the authority of democratically elected authorities (elected however long ago) and replace their substantive choices when they find this authority to have run out seems undesirable as a matter of principle. This would render very unstable the background against which Parliament legislates, which is important for both legislators and interpreters to understand what exactly the statutory text conveys. It would also create for Parliament the need to spend time and resources to periodically re-enact all past laws that it wishes to keep in the books, lest courts take its omission to do so as a sign that it no longer subscribes to their content.

UK practices rightly recognise this. UK courts are committed to ascertaining the original intentions of Parliament even in relation to statutes enacted a long time ago. This concern is, in part, what explains the rule of *contemporanea expositio* (a contemporaneous exposition is the best and strongest in the law) for very old statutes that are unclear and were enacted at a time when certain expressions may have been used in a different sense.[80] Moreover, the UK does not recognise the doctrine of desuetude: the passage of time does not render a statute unenforceable, even after long periods of its being disobeyed or not enforced.[81] Acts of the UK Parliament remain in force until they are repealed,[82] and interpreting them always requires ascertaining Parliament's intentions.

[80] Greenberg (n 44) 971; *The Trustees of the Clyde Navigation v Laird & Sons* (1883) 8 App Cas 658 (House of Lords) 673 (Lord Watson).

[81] See Francis Bennion and others, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020) 263–64; 'Statutes and Legislative Process', *Halsbury's Laws of England* (2018) vol 96, para 291.

[82] Except in the relatively rare case of temporary legislation. See Bennion and others (n 81) 261–62.

It is worth noting that Raz clarifies that his argument is subject to the rules in place in the jurisdiction at stake, which—as is the case in the UK—may forbid courts to enquire into whether the lawmakers' authority has run out due to the passage of time.[83]

It is true that as more and more time passes, updating approaches normally yield judicial interpretations that are increasingly far from those that were (or would have been) adopted the day after enactment. However, the claim that judges do this because they are exercising a dubious faculty to assess whether the moral authority of lawmakers' still holds is not the only possible explanation for it, let alone the most plausible one. Raz's view is that, over time, judges acquire a 'greater liberty' and 'more and more power to adjust' the law 'to changing social and economic circumstances'.[84] However, what seems to be going on here is simply that the passage of time makes it more likely that there will be more (and deeper) changes of the kind which—from the beginning—lawmakers intended judges to be sensitive to when interpreting statutes. In other words, it is not that judges' powers expand but that they are likely to have more occasions to exercise them.

V. Conclusion

This chapter has argued that, when deciding whether they should adopt a static or an updating interpretation of a provision, courts should not jump to balancing substantive considerations, such as the importance of correcting the law's defects (including immoralities, inefficiencies, and incoherences that compromise

[83] Raz (n 76) 296.
[84] ibid.

the law's integrity). Rather, courts should first ascertain whether Parliament intended to grant them flexibility to develop or adjust the meaning of a provision over time on the basis of any such substantive considerations. While the existence of the always speaking principle makes this the default position in the UK, courts should be sensitive and defer to evidence—both textual and contextual—suggesting that Parliament intended to displace or narrow down this presumption. Moreover, assessing the degree of moral legitimacy possessed by the legislators and how this may be eroded over time should form no part of the role of courts, as UK practices rightly recognise. Invoking these kinds of substantive reasons may lead courts to update provisions that should have been interpreted historically. Alternatively, it can undermine the perceived legitimacy of updating interpretations by attempting to justify them on mistaken bases.

Chapter 10: Conclusion

This thesis has put forward an intentionalist case in favour of updating approaches to statutory interpretation in the UK. This case rests on the existence of a presumption in favour of such approaches, which is embodied in the established practices of lawmakers and courts. I have shown that this presumption is not a unilateral imposition of courts' preferences but a default rule that reflects the assumptions on which the law-making process is normally premised. Scenarios in which Parliament intends to entrust courts with this updating task are so routine that courts correctly presume this by default. I have also argued that there are good reasons that lead Parliament to generally rely on courts for this purpose and that this reliance is legitimate.

To build this argument, I developed (in chapter 2) a conventionalist, functionalist notion of legislative intent that can meet the objections usually raised against the idea that Parliament's intentions are real and relevant to the interpretation of statutes. This approach stands apart from the metaphysical analyses with which scholars generally attempt to answer those sceptical objections. I also offered (in chapter 3) a general account of presumptions of legislative intent, exploring their origin, nature, rationale, the way they operate, and how they may be displaced by Parliament.

The core chapters of the thesis (chapters 4 to 7) carried out a thorough analysis of the updating presumption in the UK. I argued that the presumption has a long pedigree, even though the earliest rulings in which it was applied were focused only on one particular type of updating (namely, updating in response to technological developments). I also examined the kinds of changes that are

relevant to the application of the presumption. These include not only technological advances but also legal reforms and improved scientific understandings of certain phenomena, as well as changes in social attitudes and revisions of past moral conceptions and standards. In all cases, the logic behind Parliament's reliance on courts to keep statutes up to date is related to the gradual and constant nature of these changes, and the resulting impossibility of legislating in response to them in a timely and effective manner. I explained that making sure that statutes stay relevant amidst those changes may require courts to revise the situations, objects, or instances to which a statutory expression is applicable, but also—on occasions—the very criteria that determine its application, even though courts do not always explicitly recognise the latter point. At times, straining the statutory language may also be required.

Moreover, I analysed the kinds of considerations that limit the applicability of the updating presumption, which include general issues such as the institutional boundaries of the role of judges and the rules of precedent. Other limits, by contrast, emerge from the way the presumption has been applied in the caselaw and the recognised techniques that Parliament has available to displace it or narrow it down, either in the statutory text or through the aids to its interpretation.

To demonstrate that the presumption is not just a judicial doctrine but an assumption on which Parliament relies, I examined a series of Acts and their pre-legislative and legislative materials. These confirm that the use of a certain kind of language in statutes is often a deliberate and conscious choice to grant flexibility to future interpreters. The interviews I conducted with experts on the parliamentary process provided further support for that conclusion.

Finally, the last two chapters (chapters 8 and 9) considered objections from scholars who believe that the updating role that judges should perform is narrower or broader than I have argued. My discussion of these views underscores the fact that the issue of judicial updating is normally approached from two points of view with which my thesis contrasts. On the one hand, scholars who attach great importance to respecting the original intentions of lawmakers tend to be sceptical of rulings in which courts adopt an updating approach to legal interpretation. On the other hand, advocates of updating approaches tend to be sceptical of the existence or relevance of legislative intentions, and ground their defence of those approaches on considerations that are independent from lawmakers' intentions. My thesis, in contrast, has argued that what justifies the adoption of an updating approach to the interpretation of statutes in the UK is that Parliament normally relies on the assumption that courts will adopt this approach (except in those cases in which Parliament displaced the updating presumption when enacting the relevant statute). This puts the legitimacy of updating interpretations on a stronger footing and shields those interpretations from some of the objections that they most commonly receive, based on the principles of separation of powers and democracy.

My hope is that this thesis has contributed to having greater clarity on an important assumption on which UK courts and lawmakers habitually rely. This assumption is normally formulated in general terms that are too vague to give an accurate idea of what the presumption licenses and where its limits lie. I have offered, in contrast, a detailed and systematic account of it. Furthermore, this presumption is often studied from an exclusively doctrinal point of view, as a mere

judicial doctrine. This thesis, instead, has also analysed it carefully from the perspective of lawmakers.

While my focus has been on the UK, I hope that several aspects of my research will be relevant to other jurisdictions and other kinds of legal instruments. These include, first, my defence of the relevance of the notion of legislative intent and its relation to the choices, actions, and beliefs of individual lawmakers and drafters, who structure their participation in the law-making process based on the conventions of legislative intent that they share with courts. My thesis argued that, when done right, judicial inferences of Parliament's intentions behind a statute retrieve a pre-existing choice made by our lawmakers, rather than fabricate and impose a new one.

Second, my analysis of the law-making choices and assumptions that prevail in the UK—and of the good reasons behind them—can help refute arguments made in other jurisdictions that it is not plausible to believe that a legislature would rely on courts to keep its statutes up to date in this way. The experience in the UK, discussed at length in this thesis, proves otherwise.

References

Arden M, 'Prospective Overruling' (2004) 120 LQR 7.

Bailey D, 'Bridging the Gap: Legislative Drafting Practice and Statutory Interpretation' [2020] PL 220.

Bailey D, 'Interpreting Parliamentary Inaction' (2020) 79 CLJ 245.

Bailey D, 'The Legal Effects of Uncommenced Legislation' [2022] PL 427.

Balkin J, 'Abortion and Original Meaning' (2007) 24 Constitutional Commentary 291.

Balkin J, 'Original Meaning and Constitutional Redemption' (2007) 24 Constitutional Commentary 427.

Balkin J, *Living Originalism* (Harvard University Press 2011).

Barak A, *Purposive Interpretation in Law* (S Bashi tr, Princeton University Press 2005).

Bates E, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (OUP 2010).

Bennion F, Bailey D, and Norbury L, *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020).

Bennion FAR, *Statute Law* (2nd ed, Oyez Longman 1983).

Bennion FAR, *Statute Law* (Oyez Publishing Limited 1980).

Bennion FAR, *Statutory Interpretation* (1st edn, Butterworths 1984).

Bennion FAR, *Statutory Interpretation* (2nd edn, Butterworths 1992).

Berman MN and Toh K, 'On What Distinguishes New Originalism from Old: A Jurisprudential Take' (2013) 82 Fordham Law Review 545.

Bevan C, 'Interpreting Statutory Purpose - Lessons from *Yemshaw v Hounslow London Borough Council*' (2013) 76 MLR 742.

Bickel AM, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed, Yale University Press 1986).

Bix B, 'Questions in Legal Interpretation' in A Marmor (ed), *Law and Interpretation: Essays in Legal Philosophy* (Clarendon Press 1997).

Bork RH, 'Legislative Intent and the Policy of the Sherman Act' (1966) 9 The Journal of Law & Economics 7.

Bork RH, 'Neutral Principles and Some First Amendment Problems' (1971) 47 Indiana Law Journal 1.

Bork RH, 'Original Intent: The Only Legitimate Basis for Constitutional Decision Making' (1987) 26 Judges' Journal 13.

Bratman ME, 'Reflection, Planning, and Temporally Extended Agency' in *Structures of Agency: Essays* (OUP 2007).

Bratman ME, *Faces of Intention* (CUP 1999).

Bratman ME, *Intention, Plans, and Practical Reason* (Harvard University Press 1987).

Brest P, 'The Misconceived Quest for the Original Understanding' (1980) 60 Boston University Law Review 204.

Brinkmann S and Kvale S, *InterViews: Learning the Craft of Qualitative Research Interviewing* (3rd edn, SAGE 2015).

Broom H, *Principles of Legal Interpretation* (Sweet & Maxwell 1837).

Burrows A, *Thinking About Statutes: Interpretation, Interaction, Improvement (The Hamlyn Lectures 2017)* (CUP 2018).

Burrows JF and Carter R, *Statute Law in New Zealand* (4th edn, LexisNexis 2009).

Burrows, Lord, 'Statutory Interpretation in the Courts Today' (Sir Christopher Staughton Memorial Lecture 2022, 24 March 2022).

Cabinet Office and Department for Business, Energy & Industrial Strategy, 'National Security and Investment Act 2021: Statement for the Purposes of Section 3' (2 November 2021).

Callus T, 'Omnis Definitio Periculosa Est: On the Definition of the Term Embryo in the Human Fertilisation & Embryology Act 1990' (2003) 6 Medical Law International 1.

Campbell T, Ewing KD, and Tomkins A, 'Introduction' in T Campbell, KD Ewing, and A Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011).

Canning JP, 'Ideas of the State in Thirteenth and Fourteenth Century Commentators on the Roman Law' (1983) 33 Transactions of the Royal Historical Society 1.

Carston R, 'Legal Texts and Canons of Construction: A View from Current Pragmatic Theory' in M Freeman and F Smith (eds), *Law and Language: Current Legal Issues*, vol 15 (OUP 2013).

Coke E, *The Second Part of the Institutes of the Laws of England: Containing the Exposition of Many Ancient, and Other Statutes* (Printed for W Clarke and Sons, Law Booksellers, Portugal Street, Lincoln's Inn 1809).

Coode G, *On Legislative Expression: Or, the Language of the Written Law* (William Benning and Co 1845).

Crabbe V, *Understanding Statutes* (Cavendish 1994).

Craies WF, *A Treatise on Statute Law* (Stevens & Haynes 1907).

Cretney SM and Reynolds FMB, 'Limits of the Judicial Function' (2000) 116 LQR 181.

Cross SR, Bell J, and Engle SG, *Cross: Statutory Interpretation* (2nd ed, Butterworths 1987).

Cross SR, Bell J, and Engle SG, *Cross: Statutory Interpretation* (3rd edn, Butterworths 1995).

Cross SR, *Cross: Statutory Interpretation* (1st ed, Butterworths 1976).

Department for Business, Energy and Industrial Strategy, 'National Security and Investment Bill' (10 November 2020).

Dixon R, 'Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited' (2007) 5 International Journal of Constitutional Law 391.

Drakeman DL, 'Constitutional Counterpoint: Legislative Debates, Statutory Interpretation and the Separation of Powers' (2017) 38 Statute Law Review 116.

Duxbury N, *Elements of Legislation* (CUP 2013).

Dworkin R, *A Matter of Principle* (Harvard University Press 1985).

Dworkin R, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1997).

Dworkin R, *Law's Empire* (Hart Publishing 1998).

Dworkin R, *Taking Rights Seriously* (Bloomsbury Publishing 2013).

Edelman J, '2018 Winterton Lecture: Constitutional Interpretation' (2019) 45 University of Western Australia Annual Law Review 1.

Edgar SGG, *Craies on Statute Law* (6th edn, Sweet & Maxwell 1963).

Ekins R and Gee G, 'Putting Judicial Power in Its Place' (2017) 36 University of Queensland Law Journal 375.

Ekins R and Gee G, 'Submission to the Joint Committee on Human Rights: 20 Years of the Human Rights Act' (18 September 2018).

Ekins R and Goldsworthy J, 'The Reality and Indispensability of Legislative Intentions' (2014) 36 Sydney Law Review 39.

Ekins R, 'A Critique of Radical Approaches to Rights-Consistent Statutory Interpretation' [2003] European Human Rights Law Review 641.

Ekins R, 'Human Rights and the Morality of Law' (*UK Constitutional Law Association*, 5 June 2019) <https://ukconstitutionallaw.org/2019/06/05/richard-ekins-human-rights-and-the-morality-of-law/> accessed 7 November 2023.

Ekins R, ‘Human Rights and the Separation of Powers’ (2015) 34 University of Queensland Law Journal 217.

Ekins R, ‘Intentions and Reflections: The Nature of Legislative Intent Revisited’ (2019) 64 The American Journal of Jurisprudence 139.

Ekins R, ‘Legislative Intent in Law’s Empire’ (2011) 24 Ratio Juris 435.

Ekins R, ‘Objects of Interpretation’ (2017) 32 Constitutional Commentary 1.

Ekins R, ‘Only Parliament Can Decide the Law on Assisted Dying’ (*UK Constitutional Law Association*, 22 July 2017) <http://judicialpowerproject.org.uk/richard-ekins-only-parliament-can-decide-the-law-on-assisted-dying/> accessed 7 November 2023.

Ekins R, ‘Updating the Meaning of Violence’ (2013) 129 LQR 17.

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

Ely JH, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980).

Endicott TAO, ‘The Value of Vagueness’ in A Marmor and S Soames (eds), *Philosophical Foundations of Language in the Law* (OUP 2011).

Endicott TAO, *Vagueness in Law* (OUP 2000).

Eskridge, Jr WN, ‘All about Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806’ (2001) 101 Columbia Law Review 990.

Eskridge, Jr WN, ‘Dynamic Statutory Interpretation’ (1987) 135 University of Pennsylvania Law Review 1479.

Eskridge, Jr WN, *Dynamic Statutory Interpretation* (Harvard University Press 1994).

Feldman D, ‘White Water Rafting: The UK’s Constitutions at a Time of Stress’ [2022] Sir David Williams Lecture 6 May 2022.

Ford M, ‘*R (On the Application of Quintavalle) v. Secretary of State for Health* [2003] UKHL 13’ (2003) 25 Journal of Social Welfare and Family Law 243.

Fredman S, ‘Living Trees or Deadwood: The Interpretive Challenge of the European Convention on Human Rights’ in NW Barber, R Ekins, and P Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing 2016).

Fredman S, *Human Rights Transformed: Positive Rights and Positive Duties* (OUP 2008).

Freeman M, ‘Standards of Adjudication, Judicial Law-Making and Prospective Overruling’ (1973) 26 CLP 166.

Fuller LL, *Legal Fictions* (Stanford University Press 1967).

Gallie WB, ‘Essentially Contested Concepts’ (1956) 56 Proceedings of the Aristotelian Society 167.

Gargarella R, ‘From “Democracy and Distrust” to a Contextually Situated Dialogic Theory’ (2020) 18 International Journal of Constitutional Law 1466.

Goldfarb N, ‘“Always Speaking”? Interpreting the Present Tense in Statutes’ (2013) 58 Canadian Journal of Linguistics 63.

Goldsworthy J, ‘Dworkin as an Originalist’ (2000) 17 Const Comment 49.

Goldsworthy J, ‘Legislative Intentions in Antonin Scalia’s and Bryan Garner’s Textualism’ (2021) 52 Connecticut Law Review 1549.

Goldsworthy J, ‘Lord Burrows on Legislative Intention, Statutory Purpose, and the “Always Speaking” Principle’ (2022) 43 Statute Law Review 79.

Goldsworthy J, ‘Originalism in Constitutional Interpretation’ (1997) 25 Federal Law Review 1.

Goldsworthy J, ‘Response to Contributors’ in L Burton Crawford, P Emerton, and D Smith (eds), *Law Under a Democratic Constitution: Essays in Honour of Jeffrey Goldsworthy* (Hart Publishing 2019).

Goldsworthy J, ‘The Case for Originalism’ in G Huscroft and B Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (CUP 2011).

Goldsworthy J, ‘The Real Standard Picture, and How Facts Make It Law: A Response to Mark Greenberg’ (2019) 64 The American Journal of Jurisprudence 163.

Goldsworthy J, *The Sovereignty of Parliament: History and Philosophy* (OUP 2001).

Green L and Adams T, ‘Legal Positivism’, *The Stanford Encyclopedia of Philosophy* (2019).

Greenberg D, ‘All Trains Stop at Crewe: The Rise and Rise of Contextual Drafting’ (2005) 7 European Journal of Law Reform 31.

Greenberg D, ‘Humpty Dumpty Rides Again: Using Voluntary Guidance to Fill Gaps in Legislation’ (2020) 41 Statute Law Review iii.

Greenberg D, ‘The Nature of Legislative Intention and Its Implications for Legislative Drafting’ (2006) 27 Statute Law Review 15.

Greenberg D, *Craies on Legislation* (12th edn, Sweet & Maxwell 2020).

Greenberg M, ‘How Facts Make Law’ (2004) 10 Legal Theory 157.

Grice P, ‘Logic and Conversation’ in P Cole and J Morgan (eds), *Syntax and Semantics*, vol 3 (Academic Press 1975).

Grice P, *Studies in the Way of Words* (Harvard University Press 1991).

Halsbury's Laws of England (2018) vol 96.

Harris D, O'Boyle M, Bates E, and Buckley C, *Law of the European Convention on Human Rights* (4th edn, OUP 2018).

Hart H, *The Concept of Law* (3rd edn, OUP 2012).

Hickman T, 'The Investigatory Powers Tribunal: A Law Unto Itself?' [2018] PL 584.

Hiebert JL, 'Governing Like Judges?' in T Campbell, KD Ewing, and A Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011).

Hoffmann, Lord, 'Judges, Interpretation and Self-Government' in NW Barber, R Ekins, and P Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing 2016).

Hogg PW, *Constitutional Law of Canada* (5th edn, Carswell 2007).

Jenkins C, 'Helping the Reader of Bills and Acts NLJ 798' (1999) 149 NLJ.

Juratowitch B, 'Questioning Prospective Overruling' [2007] New Zealand Law Review 393.

Kavanagh A, 'Choosing between Sections 3 and 4 of the Human Rights Act 1998: Judicial Reasoning after *Ghaidan v. Mendoza*' in H Fenwick, G Phillipson, and R Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (CUP 2007).

Kavanagh A, 'Original Intention, Enacted Text, and Constitutional Interpretation' (2002) 47 American Journal of Jurisprudence 255.

Kavanagh A, '*Pepper v Hart* and Matters of Constitutional Principle' (2005) 121 LQR 98.

Kavanagh A, 'The Idea of a Living Constitution' (2003) 16 Canadian Journal of Law & Jurisprudence 55.

Kavanagh A, 'The Role of Courts in the Joint Enterprise of Governing' in NW Barber, R Ekins, and P Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing 2016).

Kavanagh A, 'The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998' (2006) 26 OJLS 179.

Kavanagh A, *The Collaborative Constitution* (CUP 2023).

Kempe AB, *On the Interpretation of Statutes* (3rd edn, Sweet & Maxwell 1896).

King J, 'Three Wrong Turns in Lord Sumption's Conception of Law and Democracy' in NW Barber, R Ekins, and P Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing 2016).

Lady Arden, 'What Makes Good Statute Law: A Judge's View' (2022) 43 Statute Law Review 139.

Law Commission, *The Interpretation of Statutes* (Law Com No 21, 1969).

Laws J, *The Constitutional Balance* (Hart Publishing 2020).

Laws SJ, 'Publication Review' (2016) 132 LQR 159.

Laws SJ, 'Statutory Interpretation – the Myth of Parliamentary Intent' [2017] Renton Lecture 13 November 2017.

Lawson G, 'Proving the Law' (1992) 86 Northwestern University Law Review 859.

Leiter B, 'Explaining Theoretical Disagreement' (2009) 76 University of Chicago Law Review 1215.

Leiter B, 'Theoretical Disagreements in Law: Another Look' in D Plunkett, SJ Shapiro, and T Kevin (eds), *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (OUP 2019).

Lester A, 'English Judges as Law Makers' [1993] PL 269.

Letsas G, 'Intentionalism and the Interpretation of the ECHR' in M Fitzmaurice, O Elias, and M Panos (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Brill 2010).

Letsas G, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' in A Føllesdal, B Peters, and G Ulfstein (eds), *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (CUP 2013).

Liddell K, 'Purposive Interpretation and the March of Genetic Technology' [2003] CLJ 563.

Loughlin M, 'Sumption's Assumptions' in NW Barber, R Ekins, and P Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing 2016).

MacCallum Jr GC, 'Legislative Intent' (1966) 75 Yale Law Journal 754.

Manning JF, 'What Divides Textualists from Purposivists?' (2006) 106 70.

Marmor A, 'The Pragmatics of Legal Language' (2008) 41 Ratio Juris 423.

Maxwell PB, *The Interpretation of Statutes* (William Maxwell & Son 1875).

McGinn C, *Philosophy of Language: The Classics Explained* (The MIT Press 2015).

Meagher D, 'The "Always Speaking" Approach to Statutes (and the Significance of Its Misapplication in *Aubrey v the Queen*)' (2020) 43 University of New South Wales Law Journal 191.

Miller B, 'Beguiled By Metaphors: The "Living Tree" and Originalist Constitutional Interpretation in Canada' (2009) 22 Canadian Journal of Law and Jurisprudence 331.

Monaghan HP, 'Stare Decisis and Constitutional Adjudication' (1988) 88 Columbia Law Review 723.

Morón L, ‘Presumptions of Legislative Intent in *R (Coughlan) v Minister for the Cabinet Office*’ (2023) 86 MLR 801.

Neale S, ‘Determinations of Meaning’ in E Lepore and D Sosa (eds), *Oxford Studies in Philosophy of Language*, vol 2 (OUP 2022).

Neale S, ‘Paul Grice and the Philosophy of Language’ (1992) 15 Linguistics and Philosophy 509.

Neale S, ‘Textualism with Intent’ (unpublished manuscript, 2008).

Neale S, ‘The Intentionalism of Textualism’ (unpublished manuscript, 2009).

Nelson C, ‘What is Textualism’ (2005) 91 Virginia Law Review 347.

Nicol D, ‘Original Intent and the European Convention on Human Rights’ [2005] PL 152.

Odendahl T and Shaw AM, ‘Interviewing Elites’ in JF Gubrium and JA Holstein (eds), *Handbook of Interview Research* (SAGE 2011).

Office of the Parliamentary Counsel, ‘Common Legislative Solutions: A Guide to Tackling Recurring Policy Issues in Legislation’ (March 2021).

Office of the Parliamentary Counsel, ‘Drafting Guidance’ (18 June 2020).

Pearce D and Geddes R, *Statutory Interpretation in Australia* (4th ed, Butterworths 1996).

Perry J, ‘Textualism and the Discovery of Rights’ in A Marmor and S Soames (eds), *Philosophical Foundations of Language in the Law* (OUP 2011).

Raz J, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009).

Raz J, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (rev ed, Clarendon 1994).

Raz J, *The Authority of Law: Essays on Law and Morality* (2nd edn, OUP 2009).

Roth AS, ‘Shared Agency’, *The Stanford Encyclopedia of Philosophy* (2017).

Roulston K, ‘Considering Quality in Qualitative Interviewing’ (2010) 10 Qualitative Research 199.

Roversi C and Sardo A, ‘Ekins on Groups and Procedures’ (2019) 64 The American Journal of Jurisprudence 79.

Sales P, ‘A Comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998’ (2009) 125 LQR 598.

Sales P, ‘In Defence of Legislative Intention’ (2019) 48 Australian Bar Review 6.

Sales P, ‘Legislative Intention, Interpretation, and the Principle of Legality’ (2019) 40 Statute Law Review 53.

Scalia A and Garner BA, *Reading Law: The Interpretation of Legal Texts* (Thomson/West 2012).

Scalia A, 'Originalism: The Lesser Evil' (1989) 57 University of Cincinnati Law Review 849.

Scalia A, *A Matter of Interpretation: Federal Courts and the Law* (Amy Gutmann ed, 2nd edn, Princeton University Press 2018).

Shapiro SJ, 'On Hart's Way Out' (1998) 4 Legal Theory 469.

Shapiro SJ, *Legality* (Harvard University Press 2013).

Sharp GG and Galpin B, *Maxwell on the Interpretation of Statutes* (10th edn, Sweet & Maxwell 1953).

Skinner Q, 'Classical Rhetoric and the Personation of the State' in *From Humanism to Hobbes* (CUP 2018).

Soames S, 'What Vagueness and Inconsistency Tell Us About Interpretation' in A Marmor and S Soames (eds), *Philosophical Foundations of Language in the Law* (OUP 2011).

Solum LB, 'The Fixation Thesis: The Role of Historical Fact in Original Meaning' (2015) 91 Notre Dame Law Review 1.

Solum LB, 'The Interpretation-Construction Distinction' (2010) 27 Const Comment 95.

Solum LB, 'What Is Originalism? The Evolution of Contemporary Originalist Theory' in G Huscroft and B Miller (eds), *The Challenge of Originalism: Theories of Constitutional Interpretation* (CUP 2011).

Stavropoulos N, 'Legal Interpretivism', *The Stanford Encyclopedia of Philosophy* (2021).

Steyn J, 'Dynamic Interpretation amidst an Orgy of Statutes' (2004) 35 163.

Steyn J, '*Pepper v Hart*; A Re-Examination' (2001) 21 OJLS 59.

Strauss DA, 'Common Law Constitutional Interpretation' (1996) 63 University of Chicago Law Review 877.

Strauss DA, 'Living Originalism by Jack M Balkin' (2013) 32 Law and Philosophy 369.

Sullivan R, *Statutory Interpretation* (2nd edn, Irwin Law 2007).

Sumption, Lord, 'A Response' in NW Barber, R Ekins, and P Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing 2016).

Sumption, Lord, 'The Limits of Law' in NW Barber, R Ekins, and P Yowell (eds), *Lord Sumption and the Limits of the Law* (Hart Publishing 2016).

Sunstein CR, ‘Incompletely Theorized Agreements’ (1995) 108 Harvard Law Review 1733.

The Independent Review of Administrative Law (CP 407, March 2021), CP 407.

Thring, Lord, *Practical Legislation: The Composition and Language of Acts of Parliament and Business Documents Lord* (2nd ed, John Murray 1902).

Traynor RJ, ‘Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility’ (1977) 28 Hastings Law Journal 533.

Tur RHS, ‘Time and Law’ (2002) 22 OJLS 463.

Tushnet M, ‘Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty’ (1995) 94 Michigan Law Review 245.

Vermeule A, *Mechanisms of Democracy* (OUP 2007).

Vogenauer S, ‘A Retreat from *Pepper v Hart*? A Reply to Lord Steyn’ (2005) 25 OJLS 629.

Waldron J, *Law and Disagreement* (OUP 1999).

Waluchow WJ, ‘Authority and the Practical Difference Thesis: A Defense of Inclusive Legal Positivism’ (2000) 6 Legal Theory 45.

Waluchow WJ, ‘Constitutions as Living Trees: An Idiot Defends’ (2005) 18 Canadian Journal of Law and Jurisprudence 207.

Waluchow WJ, ‘Democracy and the Living Tree Constitution’ (2011) 59 Drake Law Review 1001.

Whittington KE, ‘Dworkin’s “Originalism”: The Role of Intentions in Constitutional Interpretation’ (2000) 62 The Review of Politics 197.

Whittington KE, ‘Originalism: A Critical Introduction’ (2013) 82 Fordham Law Review 375.

Whittington KE, ‘The New Originalism’ (2004) 2 Georgetown Journal of Law & Public Policy 599.

Whittington KE, *Constitutional Interpretation: Textual Meaning, Original Intent and Judicial Review* (University Press of Kansas 1999).

Xanthaki H, *Drafting Legislation* (Hart Publishing 2014).

Young AL, ‘*Ghaidan v Godin-Mendoza*: Avoiding the Deference Trap’ [2005] PL 23.

Zyl Smit J van, ‘The New Purposive Interpretation of Statutes: HRA Section 3 after *Ghaidan v Godin-Mendoza*’ (2007) 70 MLR 294.