Richard Ekins
Balliol College
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**Legislative Intent and Group Action**

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Abstract

Jeremy Waldron argues that legislative intent cannot exist because the legislative assembly is a group rather than an individual. He suggests we should conceive of legislation by assembly to have been produced by a voting machine rather than chosen by a reasoning agent capable of forming and acting on intentions. I argue instead that the assembly does form and act on intentions, which may be termed the legislative intent. Purposive groups in general form and act on intentions, not by summing the intentions of each member of the group but instead by forming plans of action that coordinate the action of the members of the group to the shared end that defines the group. Legislatures exist to fulfil the legislative function, which is to oversee and change the law as appropriate. The sole legislator fulfils this function by reasoning and choosing what should be done. The legislative assembly fulfils the function by acting like a sole legislator and thus adopts proposals that are reasoned and presumptively coherent. Waldron's alternative explanation – that the group acts like a voting machine – cannot explain how the legislative function is fulfilled and is thus unpersuasive.

Readings

The paper that I will present outlines the central argument of my MPhil thesis. The extracts that follow are from that thesis. I have included the table of contents, for context, together with three chapters, the first outlining Waldron's position, the second explaining the inadequacy of a certain approach to group intention in general (and to legislative intent in particular), and the third setting out my argument that Waldron's model of legislative action is inconsistent with the legislative function. The full thesis is available on request (email me at richard.ekins@law.ox.ac.uk); please do not cite to or quote from the paper without permission.

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## II. Waldron on legislative intent

Legal theorists have long been sceptical of legislative intent. Waldron's argument belongs to a tradition of scepticism that he takes to have been largely successful in discrediting legislative intent. Indeed, he has gone so far as to say that legislative intent – which he terms 'the idea of appealing beyond the statutory text to independent evidence of what particular legislators are thought to have intended'[3] – has been so powerfully criticised 'that one is surprised to find it appearing again in anything other than a trivial form in respectable academic jurisprudence.'[4] I shall approach Waldron's theory by first considering, briefly, the criticisms that predate his work.

Many arguments have been advanced against legislative intent. One central argument, however, has been advanced in some form or other by all of the leading sceptics of legislative intent, namely that the legislature is a group rather than an individual and therefore cannot truly form or act on intentions. It follows that legislative intent does not exist. This argument has been advanced by Max Radin,[5] Ronald Dworkin,[6] and Kenneth Shepsle,[7] among others. Radin frames the critique in this way:

> The least reflection makes clear that the law maker, *der Gesetzgeber*, *le législateur*, does not exist, and only worse confusion follows when in his place there are substituted the members of the legislature as a body. A legislature certainly has no intention whatever in connection with the words which some two or three men drafted, which a considerable

[3] Waldron (n 1) 119
[4] ibid
[5] M Radin 'Statutory Interpretation' (1930) 43 Harvard L Rev 863
[6] R Dworkin *Law's Empire* (Hart Publishing Oxford 1998)
[7] K Shepsle 'Congress is a 'They,' Not an 'It': Legislative Intent as Oxymoron' (1992) 12 Intl J of L and Economics 239

> number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.[8]

Dworkin arrives at a similar conclusion:

> It seemed a metaphysical mistake to take the "intention" of the legislature itself as primary so long as Hermes[9] was in the grip of some mental-state version of the speaker's meaning theory of legislative intent. So long as we think legislative intention is a matter of what someone has in mind and means to communicate by a vote, we must take as primary the mental states of particular people because institutions do not have minds, and then we must worry about how to consolidate individual intentions into a collective, fictitious group intention.[10]

These extracts suggest that this sceptical argument against legislative intent consists of two distinct claims. The first is that no group, including a legislature, is able to form and act on intentions. The reason for this is that there are no group minds. The sceptics take intentions to be mental states that exist only in the minds of individual persons and as it is uncontroversial that there are no group minds so it is said to follow that groups, including the assembly, cannot form intentions: true intention is, and may only be, individual.

The second claim is that whatever may be the case with other groups the legislature is a group that is characterised by radical disunity amongst its members and as such is unable to form and act on intentions. It may be unclear why, other than as an alternative argument, the sceptics would advance this second claim: if the first is made out then the second seems redundant (and indeed absurd). The reason may be that despite the intuitive appeal of the conclusion that group mental states do not exist, we persist in

[8] Radin (n 5) 869-70
[9] Hermes is the poor cousin of Hercules J (Dworkin's famous device to explain law as integrity) and is used by Dworkin to set out the various reasons to reject legislative intent in statutory interpretation.
[10] Dworkin (n 6) 336

talking of groups choosing and acting and intending. This feature of our discourse requires an explanation. The sceptics' explanation, which is consistent with their denial of group minds and true group intentions, is that the intentions that are said to be (but cannot truly be) those of the group are in truth either individual intentions that have been attributed to the group or individual intentions that have been aggregated.

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

It should now be clear how the second claim operates. The sceptics argue that while there are rules to enable the legislature to act, namely procedures to introduce and vote on certain texts, there are no rules to authorise the attribution of the intentions of particular legislators to the group or to enable individual legislators' intentions to be aggregated into a corporate intent. This absence of rules is unsurprising as the legislature is characterised by intense disagreement amongst individual legislators, who, accordingly, do not all hold the same, or even similar, intentions in respect of legislation.[11] Therefore, the sceptics argue, to construct a legislative intent, an interpreter must, as the term suggests, fabricate an intention from a set of disparate and incompatible individual intentions. That is, the interpreter must choose whose intentions to count towards the construct and which of their intentions to count.[12] These choices are arbitrary and may not, of course, be constrained by reference to the legislature's true intent, for no such intent exists. Thus, the sceptics conclude, legislative intent does not exist.

Waldron's argument is a reformulation and an extension of this second claim, although he also accepts the first and cites Dworkin's general critique with approval.[13] Waldron's argument is distinctive, however, in that he draws on a close analysis of the features of the modern legislative assembly to establish that legislative intent is inconsistent with the point and structure of the assembly and therefore does not exist.

[11] Shepsle (n 7) 244-5, 248-9
[12] Dworkin (n 6) 318-27, 329-35
[13] Waldron (n 1) 43, 119

The structural features that define the legislative assembly are, Waldron contends, 'size, diversity and disagreement, together with the institutional arrangements that frame decision making in that context – party organization, deliberative structure, formal debate, rules of order and voting.'[14] The size and internal disunity of the assembly are not incidental to its nature. The very point of an assembly is to bring together diverse persons (to represent a divided community) to decide what is to be done. To function, the assembly must be able to act despite disagreement amongst its members. Formal rules of procedure, majority voting, and a focus on a specified text are necessary to enable action despite internal disagreement. Any true theory of the nature and authority of legislation, Waldron argues, must account for these features of the legislative assembly. And these features he takes to distinguish the assembly from a sole legislator, like a monarch.[15]

The sole legislator acts free from the internal disunity of the assembly and his enactments therefore have the coherence that follows from having been selected by a single intentional agent, who has a will and acts for reasons. Waldron seems to accept that if the legislature is a single person his intentions may be relevant to the scope and meaning of his enactments.[16] Indeed, he does not dispute Hobbes' observation that one ought to conform to the will of the law-maker, rather than the letter of his instruction.[17] However, Waldron contends that this approach is relevant only to a very simple polity. In the modern world, the legislature is an assembly marked by internal disunity and he argues it

[14] ibid 24-25
[15] ibid 41-5, 49-51, 67-8
[16] ibid 120
[17] ibid

is therefore wrong to transpose references to the will or intention of the single legislator to the assembly, in which there is no one coherent, directing mind.

The legislative assembly, Waldron says, acts in spite of the disagreement amongst its members by conforming to formalised rules of deliberation and action and by voting to reject or adopt specific textual proposals.[18] The detailed rules of procedure that guide the interaction of members of the legislature are all that enable the legislature to act. And the procedures prescribe only that the legislature may enact a specified text as law. The legislators have to focus on a highly specified text as they agree on nothing else (or at least cannot assume agreement on anything else). Waldron argues that there are no shared intentions underlying the text: legislators act despite their disagreement by just accepting or rejecting the text alone, not by adopting the same intention as to the meaning and point of each text.[19] Each legislator will of course vote for or against a statutory text for certain reasons and he may hope or expect that the application of the text will have certain consequences. But so will every other legislator. It follows from the internal disunity of the assembly that the legislators will not share any intention with respect to the text, either as to the reasons why it was enacted (each legislator has his own reasons), or even as to whether it should be law at all (a minority always votes against).

Waldron concedes that there may be cases in which a statute may be understood to be the product of a particular legislator's intention. These cases are, however, exceptional and

[18] ibid 75-82
[19] ibid 142-5

so cannot determine how we understand legislative action generally.[20] The central case of the action of a legislative assembly, Waldron argues, is where legislators enact a text despite their disagreements over whether or why it should be enacted or what it will achieve. The legislature is able to act despite the disagreement amongst its members only because the text is sufficiently specific to focus disagreement and because it is clear that the majority's vote for a text means the legislature enacts that text as law. Waldron contends that the procedures enable the legislature to act but not to form intentions.

If Waldron is right, interpreters who purport to perceive some purpose or will that informs and directs the statute are peddling a fiction. The fiction is repugnant because prioritising a false group intention over the plain meaning of the statutory text is to ignore the act of the assembly and to undermine the integrity of the legislative process. Individual legislators participate in that process by reference to a specified text and their meaningful participation in the process is compromised if interpreters take the text to be subject to an imaginary group intention.[21] Waldron's position is clear. The actions of the legislature are determined by the structure of the legislative process; that structure has no room for legislative intent and it follows that legislative intent cannot exist.

Waldron identifies and articulates two possible objections to his argument.[22] The first objection is that legislating appears to be an intentional act. The second is that the nature of language seems to require reference to author's intent. Waldron addresses both objections by arguing that the legislative process may be understood to be a voting

[20] ibid 121
[21] ibid 145
[22] ibid 124-5, 128-9

machine, in which legislation is generated within an intentional system but is not defined or directed by any particular intention.

The voting machine model is based on Wollheim's famous democracy machine[23] and is an intentional system into which particular legislative contributions are fed and out of which issues legislation enacted by the assembly but not intended by any legislator. The machine is expected to work in the following way. Individual legislators put forward possible statutory provisions. The legislators then vote on each provision, either in sequence or simultaneously. From an original list of ten provisions, let us say, four may survive majority vote and these four provisions are the statute. Each legislator had reasons for his votes, just as the legislators who put forward the particular provisions had reasons for so doing. The assembly as a whole, however, does not act on any coherent set of reasons. And indeed the set of provisions that emerges from the machine is very unlikely to conform to any one legislator's choice of what should be done. Therefore, legislation is the set of provisions that happens to result from the voting system, which is not structured to produce a set of provisions united by a coherent purpose or intention.

Waldron posits The Vehicles in the Park Act 1993 as an example of legislation that the voting machine might produce. The Act consists of a rule that there shall be no vehicles in the park together with the provisos that (a) the rule shall not apply to bicycles, (b) the rule shall not apply to ambulances, and (c) the rule shall apply to state and municipal parks. Three factions in the legislature voting on each of these provisos might well have

[23] R Wollheim 'A Paradox in the Theory of Democracy' in P Laslett and W Runciman (eds) *Philosophy, Politics and Society* (3rd series Blackwell Oxford 1967) 75-6

produced a statute that did not correspond to anyone's preference.[24] That is, no faction may have wanted the legislature to enact the Act in its final form, yet this is what follows from the majority vote. The Act is the product of the votes of the legislators but does not conform to the intention of any legislator. Hence, 'It is perfectly possible… that our imagined Vehicles in the Park Act, considered as a whole, does not reflect the purposes or intentions of any of the legislators who together enacted it.'[25] Waldron concludes that statutes cannot be conceived of as coherently intended, because to assume that the legislature chooses like a sole legislator is to ignore how the legislature acts.[26] Individual legislators reason and intend, but because the legislature acts on the aggregation of their votes it cannot act on intentions.

There is a possible rejoinder to the model, which Waldron anticipates. The rejoinder is that after various possible amendments have been voted on, that is after the machine has determined the content of the bill, legislators will vote on the overall package – so 'even if they initially disagree, the enacted statute will at least reflect the intentions of a majority at that last stage, taking into account their awareness of what was politically possible.'[27] Waldron's response is to claim that this final reading 'is purely an artefact of our particular parliamentary procedures'.[28] There is no reason, he asserts, why in our system general debate could not conclude with voting on each possible provision, the

[24] Waldron (n 1) 125-126
[25] ibid 125
[26] ibid 127
[27] ibid 126
[28] ibid

pattern of the votes determining the content of the statute without a final reading. (I shall return to this rejoinder, and Waldron's response, in detail later.[29])

As for the second objection, that a text cannot be understood without reference to the intentions of its author,[30] Waldron agrees that we need some basis on which to determine the meaning of statutes (we need a reason to believe the statute is written in English for example), but he argues that the structure of the voting machine provides this basis.[31] That is, the designer(s) of the voting machine intended that the various texts on which the assembly would vote would be understood to be a set of English sentences, in accordance with linguistic convention and perhaps also with specific legal conventions. It follows, Waldron argues, that statutory provisions may have a fixed meaning without reference to the intentions of any particular language user.[32]

If the voting machine model is sound, then the legislature acts without intending and legislation cannot rightly be understood to be the coherent choices of an intentional agent. Instead, statutes are to be seen as sets of isolated provisions, having no purpose beyond what follows from the conventional meaning of the text, and not having been intended for a certain end. Waldron notes that the model is to some extent artificial but he maintains that it does capture the nature of the legislative process:

> Of course, this is just a model: in the real world, statutes are never produced exactly like that. But also, in the real world, statues are never produced exactly as the product of one

[29] text to n 115
[30] A Marmor *Interpretation and Legal Theory* (OUP Oxford 1992) 29-34
[31] Waldron (n 1) 127
[32] ibid 128-9

> person's coherent intention. The interesting question is which picture is more helpful for our thinking about the intentionality of statutes under modern legislative conditions. Given the large part that is played by compromise, logrolling, and last-minute amendments in contemporary legislation, my money is on the machine.[33]

It is clear that Waldron believes that while there may be particular instances in which the legislative process operates other than as the voting machine model prescribes, the model is a largely accurate explanation for how legislative assemblies act. In other words, he takes the voting machine model to be the central case of the action of a modern legislative assembly. In section VIII, I shall argue that the voting machine is not the central case and that the legislature is in fact structured to replicate the action of a sole legislator. Waldron's work poses the following challenge for my argument: I must explain how an account of legislative action to which legislative intent is central is consistent with the internal disunity of the assembly, the use of majority voting, and the other features of the legislative process that Waldron is rightly concerned to explain.

[33] ibid 127

## IV. Summative accounts of group action

It might be that a group's intention is just an intention held by each member of the group. On this approach, group intention is the sum of the intentions of most or all members of the group.[49] The group may thus be a convenient way of referring to many individuals, who share some characteristic or other, and who perhaps somehow act together, but may itself have no distinct existence or capacity for action. Margaret Gilbert has termed accounts of this kind 'summative'.[50] There are two variants: the first provides that a group has a certain intention if all or most of its members hold that intention; the second provides that all or most members must hold that intention and this must be common knowledge. On either variant, this approach provides that group intentions are mere shorthand to enable us to refer to the intentions of many individuals at once. For example, to say that the working class intends to vote Labour is just to say that most or all members of the working class intend to vote Labour.

The first variant of the summative accounts is plainly false as a general explanation for group intention. The following example shows why.[51] Several people seated in a park may all run for the same shelter in the event of rain, each intending for his part to shelter there from the rain. Here, there is no group intention and no group act. But if the persons form part of an outdoor dance company and run for the shelter intending to perform a particular choreographed movement then there is a group act. The difference

[49] A Quinton 'Social Objects' (1975) 75 Proceedings of the Aristotelian Society 67
[50] M Gilbert *On Social Facts* (Routledge London 1989) 19
[51] J Searle 'Collective Intentions and Actions' in P Cohen, J Morgan and ME Pollack (eds) *Intentions in Communication* (MIT Press Cambridge Mass 1990) 401, 402-403

lies not in the bodily movements but in the content of the intentions of the relevant persons. In the former case there is a mere coincidence of intention; in the latter there is coordination. The example shows that a group's intention is not just the sum of the isolated intentions of individual members of the group. The intentions of the various members cannot yield or support a group intention unless they are, in some way yet to be explained, connected to the intentions of other members of the group. Thus, the simple fact that all members intend to perform an act cannot establish that there is a group intention to that effect.

The second variant is somewhat more plausible, but remains in the end unconvincing. The fundamental problem is that the addition of common knowledge still does not enable us to distinguish the intention of a group from a series of unconnected, even if publicly known, individual intentions. The insufficiency of common knowledge is made clear by Gilbert, who points out that one set of individuals may adopt different group intentions in their capacity as members of different groups.[52] If common knowledge were decisive, this would not be possible. Michael Bratman provides an interesting counter-example to this variant. He imagines two painters who set out to paint the same house, who are aware of the other's presence and intention, but who use different coloured paint and paint over one another's work. The painters, Bratman contends, do not constitute a group that intends to paint the house. They each intend to paint the house but there is no joint intention: they do not intend to paint the house together.[53] The painters do not form a

[52] Ibid
[53] M Bratman *Faces of Intention* (CUP Cambridge 1999) 109-29

group that acts intending to paint the house. Intentional group action requires cooperation not mere common knowledge.

The central objection to all summative accounts is that they fail to distinguish coincident intention from jointly held intention. That is, summative accounts are false because group action cannot be explained by pointing to the fact that several individuals acted in a certain way, unless those individual actions are in some way coordinated, cooperative, and understood by the individuals involved to constitute a group action. No strategy of noting isolated individual intentions can explain how those individuals act together. And the strategy cannot be salvaged by stipulating common knowledge because the sum of many individual intentions is just many individual intentions, not a group intention.[54]

The summative accounts may derive what plausibility they have from an ambiguity in the term 'group'. We use group to refer either to sets of individuals who share a common feature (the group of taxpayers earning over £100,000 per annum, the group of all men on death row in the United States, etc.) or to associations united by their coordinated pursuit of a common purpose.[55] Summative accounts explain our attribution of intention or action to groups of the first type only. And they succeed in this way only because groups of the first type do not form intentions or act together. There is no harm in speaking of them as having intentions when that is understood as a shorthand reference to what is common amongst members of the group. In no sense however does the group act together (if it did it would be a group of the second type). Its members do not seek to

[54] Searle (n 51) 402-6
[55] J Finnis *Natural Law and Natural Rights* (OUP Oxford 1980) 150-3; D Ruben *The Metaphysics of the Social World* (Routledge London 1985) 21

coordinate their actions towards some end and therefore they do not form group actions or intentions. It is groups that are able to act – purposive groups – that are of central interest to social action theory and it is for this reason that the summative accounts fail.

Sceptics of legislative intent, including Waldron, commonly assume that those who talk of legislative intent employ some form of summative account, with the intentions of individual legislators being aggregated, or summed, into a corporate intent. My argument for legislative intent will not rely on a summative account of group action. However, it is certainly true that some defenders of legislative intent, including Gerald MacCallum[56] and Andrei Marmor, have relied on a modified summative account. The detail (and ultimate failure) of Marmor's argument is instructive.

Marmor's defence of legislative intent begins with the observation that the sceptics are wrong to assume that a group may not have intentions in the absence of attributive conventions (he accepts there are no group minds). The sceptics, he contends, have ignored the possibility of shared intention:

> Even the sceptic would probably agree that many people can have the same (or very similar) intentions. Arguably, this is often what we mean when we attribute intentions to a group in a non-representative manner. In saying, 'the Nation aspires to independence', for instance, we mean that the relevant intention is shared by all or most individual members of the group in question. Similarly, we often attribute intentions to political parties, minority groups, artistic genres, sports clubs, and the like.[57]

[56] G MacCallum "Legislative Intent" in R Summers (ed) *Essays in Legal Philosophy* (Blackwell Oxford 1970) 237, 252-3
[57] Marmor (n 30) 162

An intention held by all or most members of the group, he says, may be attributed to the group, the shared intention being the group intention. Marmor appreciates, however, that there must be some connection between the identity of the group and the intentions shared by most or all of its members. He puts the requirement this way: 'An additional element must obtain, establishing a non-accidental connection between the identification of the group and the pertinent intention.'[58] Thus, the members of the group are said to share an expectation that they will all hold a particular intention and it is this expectation (which partly determines the identity of the group) that makes the intention significant for all members. By contrast, some other intention common to all members of the group, say an intention to eat strawberries, may be unconnected to the group's identity and so does not count as a shared intention to eat strawberries.

Marmor argues that legislators may share intentions in respect of the law they have enacted. Those intentions are connected to the legislators' identity as a group because the legislature exists to make law. However, while with most groups the intention that is to be shared must be held by most or all members, the shared intention of the legislature, he contends, needs to be held only by a majority of legislators, because this 'is in accord with the rules which determine whose actions, and in what combination, count as an act of legislation.'[59] Just as the actions of the majority suffice to enact statutes, so too, he asserts, the legislative intent need only be held by a majority of legislators.[60] Marmor is

[58] ibid
[59] ibid 163
[60] ibid 163-5; compare MacCallum (n 56) 252-3 who claimed, ambitiously, that even most sceptics concede that majority intent would be decisive. A similar idea, in which the majority is said to have intention votes, is raised in P Brest 'The Misconceived Quest for the Original Understanding' (1980) 60 Boston U L Rev 204, 212-3

conscious of the problem of conflicting majorities, which is where the majority that votes for enactment is not continuous with the majority that held the relevant intention.[61] Such cases are problematic, Marmor contends, and have no obvious resolution save to accept that sometimes there is no legislative intent. However, it obviously does not follow that intent cannot exist. And indeed, he suggests the legislative process, in which a majority usually wants and achieves a certain change, would be quite mysterious if a majority of legislators never shared intentions.

This account is summative to the extent that it takes the coincidence of individual intention to amount, somehow, to a group intention. The difficulty this approach causes is evident in Marmor's attempts to exclude certain of the legislator's intentions, such as the intention to be re-elected, from the scope of what is shared.[62] However, Marmor's account is also much more plausible than the pure summative accounts in that he insists there be a connection between the identity of a group and the shared intention of its members. His argument to this effect is undeveloped, both in general and in its application to the legislature in particular. Marmor does not explain how members of a group are to form the necessary expectation or identity. And without further argument, the sheer fact that each individual intends to act in a certain way is insufficient to establish that the group does likewise.

Marmor's general account of group intention is thus at best incomplete. Two particular problems are also evident in its application to legislative action. The first is that it is the

[61] ibid 164
[62] ibid 168

assembly that acts to make law, not the majority. The vote of the majority is of course decisive as to whether the assembly adopts or rejects the text in question, but the vote concerns the action of the assembly. The majority has no authority in its own right to legislate.[63] It is a mistake to take the importance of majority voting within the legislative process to establish that the majority has legislative authority such that intentions that are shared amongst its members count as the legislative intent.

The second problem is that Marmor depicts individual legislators as having an open choice as to the intentions that they form with respect to statutes, which, if shared by the majority, will be the intent of the legislature. Individual legislators have no such free choice. They cooperate to formulate legislation and no one legislator is free to stipulate what the statute shall mean or do. It would be irrational for the individual legislator to form novel intentions if the only effect his intention may have is if it is shared by others. Thus, coincident legislative intent is unreal. Legislators will cooperate to form and adopt statutes, and their intentions with respect to statutes will be shaped and limited by that cooperation. Dworkin too makes this point: legislators are not like independent novelists but are instead authors of a text they did not choose alone.[64]

The summative accounts fail because the fact of coincident intention does not explain how individuals cooperate to act as a purposive group. Marmor's account fails because it does not explain how individual legislators cooperate by means of majority voting procedures to exercise the group's legislative authority. A different approach is

[63] In this I agree with Waldron: Waldron (n 1) 143-4.
[64] Dworkin (n 6) 322

necessary, one that explains how individuals cooperate to act with others. This I attempt in the following chapter.

## VIII. Legislation by assembly

I must now determine how a legislature that is a group acts to fulfil the legislative function. My claim is that the central case of legislative action by an assembly is where the assembly is structured to act like a sole legislator and not where the assembly is set up to be a voting machine. I contend further that in fact legislative practice seems to be structured to this end. I offer no detailed explanation yet for how the legislators cooperate to act like a sole legislator; that task I defer to section IX.

To understand legislation by assembly, it is necessary to understand why a group rather than an individual may be authorised to legislate. There are two likely reasons. The first is that a group may be a more competent legislature than an individual: widening the circle of participation in legislating may ensure that better decisions are made. This may be the case either because the various legislators have considerable pooled expertise or because the discipline of having to persuade and defend legislative proposals to others improves decision-making. The second reason is that a group may represent the various interests within the community, so that citizens may participate indirectly in the law-making process. The value of democratic equality provides good reason to vest legislative authority in a representative group, and the institution's representative character in turn supports its perceived legitimacy, which helps maintain its de facto authority. These two reasons justify authorising an assembly to legislate and are likely to have been influential in the common historical shift from a monarch alone to a wider legislative council and then to a fully representative assembly.

The representative nature of the legislative assembly may be relevant to how it legislates. Part of what it is for a legislature to be representative is for it to have many members, drawn from diverse backgrounds, who disagree strongly about what should be done. Waldron argues that the act of legislating in these conditions must be starkly different to the simpler case of monarchical legislative action: specifically, it must be more like the operation of a voting machine then the intentional choice of a reasoning agent. I disagree and contend that despite its internal disunity the assembly aims to act like a sole legislator. There are thus two alternative explanations for how, in the central case, the assembly legislates. The first is Waldron's voting machine model and the second is my argument that the assembly chooses like a sole legislator.

My position is that the assembly succeeds in fulfilling the legislative function by replicating the action of a sole legislator, that is, by making intentional choices that are likely to be coherent. The size and diversity of the assembly make it difficult for the legislature to choose and intend like a sole legislator, but the legislative process is set up to enable the group to do so nonetheless. The reason for this is that reasoned, coherent choice is central to fulfilment of the legislative function, and while the assembly is to be representative, it exists to fulfil the legislative function. We vest legislative authority in a representative assembly to change who it is that legislates not what it is to legislate. Waldron may disagree. However, the burden would then be on him to establish that the legislative function is different in kind in a democratic community. I find this

implausible – all communities need legislative authority – and I therefore assume that the legislature's mode of appointment is irrelevant to its function.

I argued in section VII that to discharge the legislative function the legislature must exercise voluntary control over the content of the law and act on a chain of reasoning as to what should be done. That is, the acts of the legislature cannot be randomly generated but must instead be responsive, somehow, to the reasoning and action of the person or persons in whom legislative authority is entrusted. It is the duty of the legislator or legislators to respond to relevant reasons and to change the law as appropriate. This I doubt Waldron would deny. Where we differ is that his account provides that individual legislators reason and choose but the assembly itself does not. Instead, he takes the assembly to enact the various isolated provisions, each defined by strict conventional interpretation, that follow from the aggregation of the votes of the individual legislators. Legislation is thus "produced" rather than chosen. In my view, the voting machine is not a true account of the central case of legislative action because an assembly that acted like a voting machine would be unable to provide the reasoned, authoritative direction that the community requires: it would be a group unable to discharge its function.

The voting machine is plainly not set up to enable the legislature to choose coherent plans. Indeed, the model provides that majority voting on various provisions in isolation cannot be presumed to yield a set of provisions that all form part of a coherent plan. And this is true. It means, however, that the statutes[127] the assembly enacts may be internally

[127] Were the logic of the voting machine to be strictly applied, the legislature would not enact distinct statutes but would instead enact just a string of isolated provisions.

inconsistent, either by containing directly contradictory provisions or by containing provisions that work against one another. There is and can be no mechanism within the voting machine to resolve such inconsistencies; the adoption of mechanisms to ensure coherence would be to step away from what defines the machine. The upshot is that the machine may yield contradictory provisions and the legislature is thus likely to produce defective standards that cannot direct action to good ends.

Waldron does not make entirely clear how the machine is to operate and specifically whether voting on the various proposed provisions is to be sequential and public, such that each legislator knows the result of the preceding vote, or simultaneous or secret, so that he does not. If the former, then legislators will (and should) try to game the machine, conceiving the full pattern of provisions they want the legislature to adopt and then voting tactically aiming to realise that pattern. This would be an extremely difficult and fraught process given that one's vote on a particular provision earlier in the sequence would often rightly turn on the eventual outcome of a vote later in the sequence. The ability of individual legislators to choose rationally under these circumstances would be in grave doubt. The situation would be even worse were the voting to be simultaneous. Here, even the saving mechanism of rational legislators striving to avoid adopting incoherent and contradictory provisions would be removed. The legislators would have to vote and take their chances. The legislation produced by the machine would very often be contradictory, with provisions that would otherwise (that is, had they been put forward in one proposal) never have been adopted together, forming part of what the community is then enjoined to regard as an authoritative plan of action. Not many plans

generated under these circumstances will be able to coordinate citizens in patterns of conduct that serve as means to, or instantiations of, valuable states of affairs.

If the assembly acts by aggregating votes on a series of provisions then it cannot provide standards that fit together into a coherent response to a need in the community. It may on occasion generate such standards but this will be a happy accident. The group is structured not to choose a plan of action (a means-end package) for the community but instead to produce plans that are not reasoned and that are likely to be incoherent and possibly self-contradictory. Again, the individual legislators will reason but the voting machine will work against legislative authority being exercised on any such coherent chain of reasoning. The reason for this is that the group has no opportunity to adopt an open plan that will define its action. Instead, the plan on which the group is taken to have acted is generated by the pattern of votes. The structure of the voting machine works to preclude legislators from adopting a coherent, reasoned plan of action. Yet the community needs such a plan to provide coordination to valuable ends and it is the legislators' duty to select and enact that plan. It follows then that an assembly structured to act like a voting machine would be unable to fulfil the legislative function.

There is another way in which the voting machine frustrates legislative action. The problem is that the machine relies on the determinacy of linguistic conventions to fix the meaning of possible provisions and thereby generate statutory provisions with a certain legal meaning and effect. However, linguistic conventions alone are insufficient to

enable language users to determine meaning.[128] Instead, language users interpret each text by reference to what they perceive to be the intentions of its author. If the relevant provisions are not taken to have been intended by any person or body, then they will not only lack coherence but will also be indeterminate. Legislators are unlikely to be able to coordinate their disagreement by reference to bare conventional meanings alone (because there will be no settled meaning to accept or reject, only a loose range of possible meanings) and the community will have to seek official clarification of the indeterminate statute (which will be in effect further legislation) to know how to act. Thus, I dispute Waldron's claim that the textuality of statutes (as opposed to a focus on a determinate text that is taken to state a presumptively coherent plan of action) is capable of grounding legislative practice.[129]

Further, legislators acting in a voting machine would lack one very valuable and common method of exercising legislative authority, namely to adopt a set of provisions that together constitute a coherent plan that may be understood to be a means to certain ends and is intended to be read as a whole. This feature of the voting machine compounds the more general difficulty that legislators face in attempting to coordinate to legislate by means of a structure that expressly seeks to preclude coordinated purposive group action. The basic problem is that on Waldron's account there is no group act of legislating.

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[128] This claim is controversial but has widespread support. Useful examples are found in J Evans, 'Questioning the Dogmas of Realism' in R Bigwood (ed) *Legal Method in New Zealand* (Butterworths Wellington 2001) 283, 295: 'Without some concept of legislative intent we could not know that "a public reserve" was not a covenant in an agreement to run a fencing tournament, that "milk", as used in the Dairy Board Act 1961, does not include coconut milk, and – to adapt an example from a US writer – that when the US Constitution says "No person except a natural born citizen … shall be eligible to the office of the president," it does not disqualify those born by caesarean section.'

[129] Note that Waldron has no theory for how to deal with an ambiguous statute: W Eskridge 'The Circumstances of Politics and the Application of Statutes' (2000) 100 Columbia L Rev 558, 565-6.

Legislators may only legislate by the artificial means of aggregating their votes on a series of provisions. The assembly constitutes the voting machine but within the machine, particular legislative acts are not the act of the group. The voting machine is structured not to enable the legislators to act to legislate together, which is to select and adopt a unified coherent plan that may be of some use to the community, but instead to act as individuals, to contribute a vote to the aggregation, rather than to participate in a group legislative act. The legislative function calls for reasoned, coherent choice and an assembly that cannot choose in this way is unable to fulfil that function.

I take the failure of the voting machine to support my alternative explanation for how the assembly fulfils the legislative function, namely that it is structured to form and act on intentions like a sole legislator. It is clear that if the assembly were able to act in this way then it would be able to fulfil its function. My argument now is that salient features of legislative practice suggest the assembly is indeed structured to act in this way.

The focus of deliberation and action within the assembly is a bill that is put forward as a plan of action that the legislature may choose to enact. That is, the legislators debate and vote on a package of many provisions that are taken to form one presumptively coherent proposal. This is not to say that the package may not be internally inconsistent or that legislators may not focus only on particular provisions. The point is that the legislators consider and adopt or reject an entire, complex proposal for legislative action. They will debate the detail of particular provisions in the course of discussing the merits of the entire package. But the final decision as to how the legislature is to act is not a series of

votes on each discrete provision, it is instead a vote on the package as a whole, with the vote settling whether the group will or will not enact this proposal. The difference is significant. The package of provisions is presumed to be to be underpinned by consistent purposes and to be coherent, so that it is not contradictory and the import of one part informs the meaning of another. What this means is that legislators consider and adopt the legislative proposal on the footing that it is to be understood as if it were the coherent choice of a sole legislator.

Legislators understand that they are in the business of choosing plans of action for the community, which plans should be consistent, coherent and reasoned. The legislators obviously disagree about which plans should be enacted but in deciding what plan to adopt they understand that their legislative act should be understood to be a rational, unified choice of the type that a sole legislator would make. This understanding informs how they approach particular proposals and conditions the procedures they adopt to structure their deliberation and action. The procedural feature that most plainly indicates that the legislative process is concerned to replicate monarchical action has already been mentioned, namely that the legislature acts on the basis of a final vote to adopt one legislative proposal that is made up of many particular provisions that are taken to be united by a common purpose and structure.[130] The legislature does not act by means of a series of votes on each provision, with the statute being the outcome of that series of votes: the legislature chooses whole proposals that are presumed to cohere.

[130] contrast Waldron's analysis of this feature: Waldron (n 28)

The interpretation of statutes confirms this understanding of the legislative process. Statutory provisions often have a different meaning if enacted together with certain other provisions than would be the case had those other provisions not been enacted. Bennion puts the general point in this way:

> An Act or other legislative instrument is to be read as a whole, so that [a particular proposition] within it is not treated as standing alone but is interpreted in its context as part of the instrument.[131]

This feature of interpretation confirms that particular provisions are understood to be part of a complex, presumptively coherent plan. It should not be thought that this feature is a judicial invention that has no grounding in legislative action. Legislators are concerned to direct action and therefore aim to make transparent choices. Citizens and officials assume that statutes are internally coherent (as well as presuming consistency with long-standing legal principles, etc.) because they understand the legislature to be an authority that purports to direct their action. To realise valuable patterns of social coordination, the plan of action that is the statute should be the coherent choice of one authority, rather than a cobbled together set of inconsistent provisions. Thus, the legislators' concern to fulfil the legislative function gives them reason to debate and adopt sets of provisions as if they were to be chosen by a sole legislator. In short, the group aspires to rational unity.

The nature of language, specifically the primacy of the author's intentions in determining the meaning of any text, further supports the claim that legislators organise to act like a sole legislator. Legislators avoid the indeterminacy of strict convention, which would be

[131] FAR Bennion *Statutory Interpretation* (3rd edn Butterworths London 1997) 897

fatal to their coordinated efforts to enact a legislative proposal with a certain meaning, because they approach the bill as if it had been written by one author. The various provisions that make up the whole are thus understood (presumptively) to follow from a unified set of purposes, that is, by one rational (not necessarily reasonable) response to the relevant reasons. The use of legislative preambles (now uncommon) and purpose provisions (increasingly common) supports the claim that legislators approach proposals in this way.[132] Statutory language is taken not to be a literal text but rather to be the communication of reasoned choices, of an intention that the law be thus.

The final vote on the complete legislative proposal is the centrepiece of the legislative process. The assumption that guides that final vote, namely that the legislative proposal is capable of being chosen by a sole legislator, is supported by various other features of the legislative process. The legislators act together by means of procedures that help steer formative legislative proposals, which may be initially contradictory or incoherent, towards a final vote in which the proposal is in the requisite form. Thus, the committee stage at which the detail of the various parts of the proposal are examined, together with the control that promoters of legislation and party whips exercise over the stages of debate and the content of the proposal, help ensure that the bill resembles a coherent plan rather than an assemblage of isolated provisions. The Westminster model relies in particular on the coordinating function of the government to advance proposals that are cohering plans.[133] Thus, the subset of the assembly that is the government drafts detailed

[132] ibid 742-6
[133] Sir D Limon and W R McKay (eds) *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (22nd edn Butterworths London 1997) 269-70

legislative proposals in advance, introduces and steers proposals through to the final vote, and exercises control over the course of debate.

Legislators have good reason to enact coherent plans of action that may serve the common good. However, in the same way that the choices of a sole legislator need not be fully coherent (although they are very likely to be minimally coherent), so too in the central case of legislative action proposals may be enacted that do not rest on only one set of reasons, whether because the legislators choose to attempt a partial experiment, are mistaken in their reasoning, or are responding to political pressure (to compromise, to fudge the issue). That the assembly aspires to act like a sole legislator by no means entails that its proposals are always fully coherent. Further, in the absence of the various procedures outlined above the assembly might act without understanding particular provisions to form part of larger, coherent plans and this may be the default position that the various features of the legislative process already noted exist to avoid.

My conclusion is consistent with the historical development of many assemblies. The UK Parliament, for example, developed from, first, a gathering of notables to give consent to the legislation of the King (the King legislating with the consent of lords and commons), to second, an active assembly that cooperated with the King to legislate (the King-in-Parliament, with the King often in dispute with lords and commons), to finally, an assembly that legislates with the consent of the King (still formally the King-in-Parliament but now usually just termed Parliament).[134] Parliament thus arose to support but subsequently subsumed the monarch's at first exclusive exercise of legislative

[134] J Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (OUP Oxford 1999) 229-30

authority. Statutes have held the same basic status in the legal system throughout, and the structures noted above, which condition and direct the interaction of legislators, may be seen to be mechanisms that enabled the assembly first to participate in the monarchical legislative act and then to replicate entirely the coherent choice of a sole legislator.

If I am right then the legislature is often structured to act like a sole legislator rather than to conform to the voting machine model. It follows that Waldron's account does not fit the features of legislative practice. I concede, however, that certain legislative assemblies may act somewhat in accord with the voting machine model. Most notably, the US Congress on occasion enacts legislation that more closely resembles an ad hoc assemblage of provisions (where, for example, an unconnected array of provisions are bundled together in an omnibus bill) than the choice of a coherent plan. Further, I agree that an assembly that acted without adopting procedures to act like a sole legislator might well conform to the voting machine. And I think there is one advantage in such conformity, namely that the group decision as to what shall be law is highly responsive to the views of the legislators, each of whom has a say in the enactment of each particular provision. However, the voting machine model fails to explain the central case of legislative action because an assembly that conformed to the voting machine would be unable to fulfil the legislative function.

I should note that Pettit takes the view that legislatures may but need not be structured to reach decisions like a rational individual.[135] That is, he effectively argues that the explanations Waldron and I advance may simply apply to different types of legislature. Pettit suggests that the Westminster model reserves only an "approve or reject" role for the legislature, so that its actions may be seen to be akin to a referendum on government policy, in which the legislature does not itself adopt or avow intentional states, whereas the Washington model empowers the legislature to develop its own proposals and to reach reasoned decisions. In my view, his conclusions have to be reversed. Waldron's model may describe how the US Congress acts on occasion. The structure and action of the UK Parliament, by contrast, is more plainly concerned to enable the legislators to choose and reason like a sole legislator. Pettit's mistake, in my view, is to take the government in the Westminster system to be a force external to the legislature, rather than to see it as a subset of the assembly that is authorised to act to help the legislature enact reasoned, coherent legislation.

I have not yet established that the legislature may form and act on intentions. But I have shown that the central case of legislation by assembly, which is consistent with the legislative function and fits the features of legislative practice in Westminster systems, is intentional action like a sole legislator rather than aggregation like a voting machine. It may yet prove to be impossible for an assembly to act like a sole legislator. This would be surprising, however, because it would entail that legislative practice is futile and that assemblies are unable to fulfil their function. In the next chapter, I seek to explain how individual legislators may cooperate to act like a sole legislator.

[135] Pettit (n 94) 'Deliberative Democracy, the Discursive Dilemma, and Republican Theory' 150-1