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Collective Mental Action: Turning Texts into Statutes

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ABSTRACT

How exactly do we know that a text is a law? This paper argues that purely legalistic explanations are inadequate because they do not explain why certain voting rules possess the authority to alter the statute book. Rejecting the modern tendency to view legislatures as a "they, not an 'it'," I critically examine Michael Bratman's proceduralist theory, which draws on the traditional idea of a single legislative author. Bratman holds that statutes express the legislature's collective intentions, understood as the outcome of legislators' shared preferences regarding procedural matters. I argue that Bratman's approach overemphasizes rational coherence and confers undue power on individual minority legislators. To address these concerns, the paper revises Bratman's framework to a) incorporate a majoritarian rule of aggregation and, b) conceive of legislation as a mental act involving the formation of a collective policy "will" rather than a collective policy "intention." This conceptual shift relaxes the rationality threshold for legislative action and aligns Bratman's framework more closely with the pragmatic realities of legislative assemblies.

KEYWORDS: Legal Interpretation; Statute Law; Positive Political Theory; Legislative Studies; Michael Bratman; Group Agency

What makes it the case that certain policies and not others have been legislated? At least when applying legislation, lawyers and judges routinely invoke the will or intention of the collective legislature.[1] But contemporary theorists have sown a variety of doubts about the reality of an institutional author. The most famous source of doubt is Kenneth Arrow's impossibility theorem, with which he showed that there could be no procedure for aggregating individual preferences that could exhibit each of a set of intuitively attractive characteristics.[2] Today, the dominant view among legal philosophers and political scientists could be described as "legislature-skepticism"—the view that a legislative assembly is a "they, not an 'it'."[3] Doubts about collective agency have made significant inroads in the theory of the nature of legal meaning, where they are often expressed as an objection to accounts that prioritize legislative intent.[4] After describing the

[1] Richard Ekins and Jeffrey Goldsworthy, "The Reality and Indispensability of Legislative Intentions," *Sydney Law Review* 36, no. 1 (2014).

[2] Kenneth J. Arrow, *Social Choice and Individual Values* (Yale University Press, 1951).

[3] Kenneth A. Shepsle, "Congress Is a 'They,' Not an 'It': Legislative Intent as Oxymoron," *International Review of Law and Economics* 12, no. 2 (1992).

[4] See, e.g., Kenneth Hayne, "Statutes, Intentions and the Courts: What Place Does the Notion of Intention (Legislative or Parliamentary) Have in Statutory Construction?," *Oxford University Commonwealth Law Journal* 13, no. 2 (2013); John F. Manning, "Without the Pretense of Legislative Intent," *Harvard Law Review* 130, no. 9 (2017); Andrew Burrows, *Thinking About Statutes: Interpretation, Interaction, Improvement* (Cambridge University Press, 2018).

superficiality of legislature-skeptical theories of statutory enactment, I build on recent work by Michael Bratman to sketch a new variation on the traditional understanding that statutes are those texts authored by the legislative assembly.

I begin by showing how legalistic explanations of the identity of the statute book are likely to be unsatisfying (Part I). I then set out Bratman's alternative explanation, which foregrounds individual legislators' procedural preferences (Part II). I proceed to criticize Bratman's account for imposing an unduly onerous standard of legislative rationality and for ascribing a veto to individual legislators. To better accommodate familiar features of our political practice, I rework Bratman's account to characterize legislators' procedural preferences as the determinants of a more robustly collective agency, one that issues in a legislative will rather than an intention (Part III).

I. SHALLOW EXPLANATION

Following Arrow himself, legislature-skeptics accept the commonsense observation that a stable, identifiable set of texts represents the exercise of a jurisdiction's legislative power, providing "a clear, impartial, and acceptable view of the status quo."[5] Crucially, they reject the legal practitioner's invocation of the "will of congress/parliament" as a mere façon de parler, that is, as something that exists only "by a figment, and for the sake of brevity in discourse."[6] Rather, to avoid any ontological assumption that is unnecessary to explain our commitment "to the truth of action sentences whose subject terms refer to groups,"[7] legislature-skeptics attribute legislative output strictly to legislators' individual interactions with the operation of a mandated procedure. On this view, any legislation ascribed to a collective is but "a summary of [attitudinal] ascriptions to its individual members,"[8] into which the collective ascription may be "factored down."[9] Theorizing these factors is no small task, however.

Just as lawyers converge in identifying the contents of the statute book, political scientists converge in identifying the legislator favored by members of the assembly's majority party as the ultimate controller of its (majoritarian) voting agenda. But the question *why* some set of texts or procedures count as legislative remains significant—just as significant to legal and political theory as the question of the nature of dark energy or dark matter is to astrophysics. An intellectually ambitious legislature-skepticism must offer some account of how an enactment procedure might come to be mandated. Put differently, jurisprudence owes us disclosure of the "handbill" by which it is supposed that texts are recognized as legislative.[10]

For this purpose, ascribing legislative procedure to a mysterious "procedural state of nature"[11] will not do. Consider that the positing of group agents that act independently of their members is roundly rejected in modern social theory: "The organismic view of government is untrue because it is based upon a mythical entity: a state which is a thing apart from individual men."[12] The

[5] Kenneth J. Arrow, "Questions about a Paradox," in *The Oxford Handbook of Political Economy*, ed. Donald A. Wittman and Barry R. Weingast (Oxford University Press, 2006), 974.

[6] John Austin, *Lectures on Jurisprudence, or The Philosophy of Law*, 3rd ed., ed. Robert Campbell (London: John Murray, 1869), 364.

[7] Kirk Ludwig, "Collective Intentional Behavior from the Standpoint of Semantics," *Noûs* 41, no. 3 (2007): 357.

[8] Abraham Sesshu Roth, "Shared Agency," in *The Stanford Encyclopedia of Philosophy*, Summer 2017 ed., ed. Edward N. Zalta, https://plato.stanford.edu/archives/sum2017/entries/shared-agency/.

[9] James M. Buchanan, "The Domain of Constitutional Economics," *Constitutional Political Economy* 1, no. 1 (1990): 7.

[10] 'When bounty hunters go searching, they are searching for a person and not a handbill. But they will not get very far if they fail to attend to the representational properties of the handbill on the wanted person. These properties give them their target, or, if you like, define the subject of their search. Likewise, metaphysicians will not get very far with questions like: Are there *K*s? … in the absence of some conception of what counts as a *K*': Frank Jackson, *From Metaphysics to Ethics: A Defence of Conceptual Analysis* (Oxford University Press, 1998), 30–31.

[11] Daniel Diermeier, Carlo Prato and Razvan Vlaicu, "Procedural Choice in Majoritarian Organizations," *American Journal of Political Science* 59, no. 4 (2015): 867.

[12] Anthony Downs, *An Economic Theory of Political Action in a Democracy* (Harper, 1957), 17; similarly, James M. Buchanan, "Social Choice, Democracy, and Free Markets," *Journal of Political Economy* 62, no. 2 (1954): 116; John R. Searle, "Collective Intentions and Actions," in *Intentions in Communication*, ed. Philip R. Cohen, Jerry Morgan and Martha E. Pollack (MIT Press, 1990), 406.

notion of a primordial voting rule is no less opaque. It would treat enactment procedure as a brute fact and would encumber the explanation of legislation with a seemingly ad hoc assumption.

In principle, it should be more attractive to treat an institution's operative procedure as just one more legal fact. Unfortunately, in the case of the legislature, such a strategy is unavailable.

Ideally, perhaps, the constitution that invests legislative power would also specify "rules of enactment … [that] giv[e] the legislature the authority to convert its myriad individual preferences (or hopes, dreams, etc.) into a statute."[13] In light of their constitutional underpinning, legislators could be "deemed to have accepted these mechanisms or structures by virtue of accepting their seats."[14] The complication is that, in practice, constitutions do not stipulate any legislative voting rule. To be precise, they fail to state any procedure that specifies not only the necessary final vote tally—for example, majority assent—but also how control over the voting agenda is to be distributed.[15] For instance, the US Constitution specifies bicameralism and presentment, and indicates that the House and Senate will adopt their own internal rules of procedure. What it does not do is stipulate a rule by which disagreements over the voting agenda are to be resolved. So, by what legal authority do we find ourselves compelled to say that the text on which legislators vote, the "bill," is eligible to record the exercise of the relevant legislative power?

An alternative suggestion is that we might consider a legislature's enactment procedure to be imposed, not by a constitution (or rule of recognition), but as a matter of customary law,[16] whereby the procedure applies in virtue of a sufficiently settled practice. This suggestion seems initially promising. We may find evidence of sustained continuity in the practices of a given legislative assembly and, perhaps, of striking similarities across the practices of different assemblies: "The voice of the majority decides; for the *lex majoris partis* is the law of all councils, elections, &c., where not otherwise expressly provided."[17] Continuity and similarity cannot be guaranteed to persist into the future, however. Legislators' acceptance of a procedure over which, ex hypothesi, all legislators exercise some measure of influence, but which ensures predictable (policy) losses for many of their number, calls for further explanation. A theory of legislation should not settle for a "just so" story; it should offer predictions that reckon with the full range of possibility.

The existence of any particular legal custom is necessarily a contingent matter. The explanatory challenge in ascribing an enactment procedure to custom is that we lack any straightforward way to know if the (customary) law of procedure changes and, with it, the relevant procedure for identifying changes to the statute book. But there is always the possibility of the emergence of an alternative procedural custom that would alter the sorts of statutes that are likely to be enacted. Thus, any assumption that a legislature's enactment procedure is a fact determined by legal custom calls for an account that sets out why the criterion for customary change is unlikely to be met. Notably, it would have to explain why those who would stand to lose out in the enactment of disfavored policies would fail to disrupt the relevant custom.[18] It is not immediately clear what such an account would look like.

Similarly, in respect of any newly established legislature that lacked a stipulated voting rule, it would be an open question what custom, if any, might govern legislative procedure. There would

[13] Matthew D. McCubbins and Daniel B. Rodriguez, "Statutory Meanings: Deriving Interpretive Principles from a Theory of Communication and Lawmaking," *Brooklyn Law Review* 76, no. 3 (2011): 984–85; similarly, Frank H. Easterbrook, "The Role of Original Intent in Statutory Construction," *Harvard Journal of Law and Public Policy* 11, no. 1 (1988): 64–65; Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press, 1999), 27; Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999), 127; John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press, 2012), 64.

[14] Elizabeth S. Anderson and Richard H. Pildes, "Expressive Theories of Law: A General Restatement," *University of Pennsylvania Law Review* 148, no. 5 (2000): 1523; similarly, Cheryl Boudreau, Arthur Lupia, Matthew D. McCubbins and Daniel B. Rodriguez, "What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation," *San Diego Law Review* 44, no. 4 (2007): 960; Victoria F. Nourse, "A Decision Theory of Statutory Interpretation: Legislative History by the Rules," *Yale Law Journal* 122, no. 1 (2012): 84; Corrado Roversi and Alessio Sardo, "Ekins on Groups and Procedures," *American Journal of Jurisprudence* 64, no. 1 (2019): 85.

[15] Keith Krehbiel, "Legislative Organization," *Journal of Economic Perspectives* 18, no. 1 (2004).

[16] Jon X. Eguia and Kenneth A. Shepsle, "Legislative Bargaining with Endogenous Rules," *Journal of Politics* 77, no. 4 (2015); Keith Krehbiel, "Majoritarianism, Majoritarian Tension and the Reed Revolution," in *Governing in a Polarized Age: Elections, Parties, and Political Representation in America*, ed. Alan S. Gerber and Eric Schickler (Cambridge University Press, 2017).

[17] Thomas Jefferson, *A Manual of Parliamentary Practice for the Use of the Senate of the United States* (Washington: Government Publishing Office, 1801), 78, cited by Krehbiel, "Majoritarianism, Majoritarian Tension and the Reed Revolution," 333.

[18] Compare William H. Riker, "Implications from the Disequilibrium of Majority Rule for the Study of Institutions," *American Political Science Review* 74, no. 2 (1980).

then be no obvious way of determining what counts as a change to the statute book; with lawyers left unable to say with confidence which texts qualified as newly enacted, we would have to predict some degree of confusion, if not chaos. Accordingly, with the establishment of any new constitution, "a clear, impartial, and acceptable view of the status quo"[19] ought to remain out of reach until firmly defined legislative customs have had time to evolve organically. But such eventualities would seem historically inaccurate.

A general worry about these criticisms of the notion of a customary rule of legislation is that, in H. L. A. Hart's device of the (ultimate) rule of legal recognition, any such notion has a formidable companion-in-guilt. In explaining the existence of laws and legal systems, theorists are broadly content to invoke a rule of recognition based in long usage and tradition. Indeed, in specifying that such a rule emerges and is maintained with the support of a group able to secure the acquiescence of the wider population, we can say that Hart provided the handbill by which it is supposed that certain sorts of social organization are recognized as legal in character. For this reason, theorists have often seen the rule of recognition as representing a philosophical advance on Hans Kelsen's notion of the "basic norm,"[20] a device that might fruitfully be applied to effective legal systems, but which is not intended to explain how a rule system might attain such status.[21] One might wonder, therefore, why, if appeal to a customary rule of recognition is acceptable, appeal to a customary rule of enactment is not. The difference is the existence of a (recognized) institutional context.

Ex hypothesi, there is no legal institution that brings the rule of recognition into being. A rule of recognition instead depends on whether a pre-legal, political fact obtains, namely, whether, for the time being, the rule is accepted as the best way "to identify what is to count as law" by some subset of the population whose status produces "general … acquiescence in these identifications."[22] The emergence and maintenance of any particular rule of recognition thus depends, in part, on a society's balance of physical force. For this reason, we are not reduced to "saying darkly" of the customary rule of recognition that its continuance is "assumed but cannot be demonstrated."[23] *Within* legal institutions, in contrast, nothing depends in any way on physical force. We cannot identify an institution's output by reference to the procedure that is accepted as best by a subset of the membership whose status produces "general … *acquiescence* in such identifications."[24] Conversely, without any reference to a pre-legal, political fact that supports adherence to the proposed customary rule of enactment for the time being, we are left with the mere fact that it has been thus-and-so for such-and-such a period. In itself, that falls short of providing any explanation of why it continues to obtain. It fails, thus, in a way that the device of the ultimate rule of legal recognition does not, to answer the sort of questions posed above: why the custom ought to be taken to endure; and why this new institution ought to be taken to have developed any such custom. Accordingly, as an explanation of the statute book, a customary rule of legislative enactment cannot be analogized to the explanation of the legal system supplied by a customary rule of legal recognition.

Any theory that posits that a legislature's enactment procedure is either a brute fact or a custom forfeits explanatory ambition. Reconsider, instead, the traditional alternative to such shortcuts: the idea that legislatures exhibit a kind of collective agency. Of the many ways of cashing out this idea, Michael Bratman's recent suggestion that we prioritize legislators' preferences over procedure offers an important advance. In the next section, we explore Bratman's idea and develop two possible lines of criticism.

II. THE LEGISLATURE'S INTENTION

The demand for a deeper explanation of legislation might be met in a variety of ways. In principle, it might be met by an ontologically parsimonious account that eliminates talk of group agents

[19] Arrow, "Questions about a Paradox," 974.

[20] 'The basic norm which is the reason for the validity of a legal order, refers only to a constitution which is the basis of an effective coercive order': Hans Kelsen, *The Pure Theory of Law*, 2nd ed., trans. Max Knight (University of California Press, 1967), 46–47.

[21] Leslie Green and Thomas Adams, "Legal Positivism," in *The Stanford Encyclopedia of Philosophy*, Winter 2019 ed., ed. Edward N. Zalta, https://plato.stanford.edu/archives/win2019/entries/legal-positivism/.

[22] H. L. A. Hart, *The Concept of Law* (Oxford University Press, 1961), 108.

[23] Ibid.

[24] Ibid., 108 (emphasis added).

altogether by imagining legislators as agreeing on a particular procedure, each for their own part.[25] Alternatively, we might consider accounts that treat legislatures as agents of different sorts. For instance, following the social choice tradition, we might characterize legislation as the expression of legislators' majority policy preference,[26] thereby allowing the legislature's contribution to depend in a transparent way on member contributions. Equally, we might treat legislation as the act of a quasi-autonomous collective, whose agency depends on that of its members, in the opaque way that an individual's attitudes depend on the state of their neuronal substrate.[27] I will confine myself here to the conclusory suggestion that these options preclude certain possibilities—a polarized membership, an ignored floor majority, and a series of legislative reversals, respectively—that we might nevertheless wish to accommodate.[28] Instead, I will review a new departure, that of explaining legislation as a collective product of members' procedural preferences.

On the standard Davidsonian account, an individual's agency is a function of a coherent constellation of attitudes. The individual acts according to their desires and their beliefs about how to achieve them—and, as Michael Bratman has persuasively shown—in line with their plans, that is, their intentions. The standard account thus presents rationality as key to individual agency. Acts are determined "on the basis of an overall practical assessment of [one's] options and opportunities."[29] Consistently with this constraint, for instance, we do not regard an individual as truly legislating if their vote is merely a drunken accident.[30] It might seem natural to extend the Davidsonian account of agency to the theory of collective *institutional* agency,[31] that is, to the legislature itself. On the other hand, it is not clear whether we would stand to lose anything by instead treating individual and group agency, respectively, as subcategories of agency to which different standards of rationality might apply: "a unified account of collective action proves challenging because groups are very different from individuals."[32] Bratman develops this second line of thought, suggesting that "perhaps there can be intentional agency on the part of an institution … without being subject to a strong constraint of holism [of manifesting a rational web of attitudes]."[33]

If, in the case of groups, our model of agency relaxes the strong rationality constraint it applies to individuals, then worries about the possibility of conflicting member majorities[34] recede. We may then begin to develop an account of how texts come to be statutes that appeals in a fairly straightforward way to the aggregation of legislators' procedural preferences. In recent work, Bratman has done just this. I will suggest that Bratman's specific suggestion would benefit from a) strengthening the connection between the enactment procedure and the governing constitution, and b) weakening the rationality constraint on groups even further.

Adapting the device of the rule of recognition to the intra-institutional context, within which a procedure cannot be anchored to any pre-legal, political fact, Bratman hypothesizes that the legislature works according to "social rules," in which many member legislators believe, and with which other members have specific, institutional reasons to "go along."[35] Bratman conjectures that "the output of some such … social procedural rule within the legislature will normally function in

[25] See, e.g., Ludwig, "Collective Intentional Behavior."

[26] See, e.g., Daniel A. Farber and Philip P. Frickey, "Legislative Intent and Public Choice," *Virginia Law Review* 74, no. 2 (1988).

[27] Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012).

[28] For an elaboration of this argument, see Brian Flanagan, "Intentional Legislation: What Makes a Text a Statute?," in *Conversations in Philosophy, Law, and Politics*, ed. Ruth Chang and Amia Srinivasan (Oxford University Press, 2024).

[29] George Wilson and Samuel Shpall, "Action," in *The Stanford Encyclopedia of Philosophy*, Summer 2012 ed., ed. Edward N. Zalta, https://plato.stanford.edu/archives/sum2012/entries/action/.

[30] See, e.g., John Gardner, "Some Types of Law," in *Common Law Theory*, ed. Douglas E. Edlin (Cambridge University Press, 2007), 56; Joseph Raz, "Intention in Interpretation," in *Between Authority and Interpretation* (Oxford University Press, 2009), 284.

[31] See, e.g., Philip Pettit, "The Reality of Group Agents," in *Philosophy of the Social Sciences: Philosophical Theory and Scientific Practice*, ed. C. Mantzavinos (Cambridge University Press, 200); Kirk Ludwig, *From Plural to Institutional Agency: Collective Action II* (Oxford University Press, 2017).

[32] Sara Rachel Chant, "Collective Responsibility in a Hollywood Standoff," *Thought* 4, no. 2 (2015): 83.

[33] Michael E. Bratman, review of *From Plural to Institutional Agency: Collective Action II*, by Kirk Ludwig, *Notre Dame Philosophical Reviews*, August 2, 2018, https://ndpr.nd.edu/reviews/from-plural-to-institutional-agency-collective-action-ii/.

[34] Christian List and Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford University Press, 2011).

[35] Michael E. Bratman, "Intentions, Procedures, and Social Rules," in *Conversations in Philosophy, Law, and Politics*, ed. Ruth Chang and Amia Srinivasan (Oxford University Press, 2024), 542.

intention-like ways and so constitute a legislative intention, functionally speaking."[36] By expressing the legislature's "intention," a text represents the collective exercise of legislators' shared legislative power and hence, qualifies as a statute that creates legal rights and obligations. Notably, Bratman's account promises an explanation of the statute book that introduces neither any deus ex machina, in the form of either a brute fact or just-so custom, nor any new addition to our social ontology. Indeed, it offers an attractive unity with Hart's general legal theory. On inspection, however, the account fails to do justice to either the contentiousness or the durability of legislative activity.

Ex hypothesi, a constitution reserves legislative power to the group comprising all elected legislators (rather than to a rump). As Richard Ekins has put it, "The majority has no authority to legislate."[37] For this reason, any theory of the legislature that "refer[s] only to some large subset of the group in question"[38] will offer no account of legislation at all. Bratman himself makes a similar point when he observes of Kirk Ludwig's individualistic theory of social action that to say that we do not talk about the agency of all officials "when we talk about the actions of the state" seems "an odd result."[39] Conversely, it appears only sensible to assume that no given enactment procedure will be to every legislator's political taste. Realism suggests that, if we are truly to explain legislation by reference to legislators' procedural preferences, a condition of unanimity will be overly demanding.

Reconciling common sense with the principle that any theory of legislation must ascribe statutes to all member legislators, Bratman posits the existence of "alienated legislators."[40] Such legislators exhibit a willingness to participate in the enactment procedure because of the "personal benefits to going along and personal costs to bucking the trend," such as their salary, and, possibly, "moral considerations of fair play."[41] Unfortunately, such reasons might be thought inadequate to transcend the breadth of members' policy disagreement.

Bratman expressly develops his picture of the alienated legislator from Scott Shapiro's discussion of the possibility that judges might participate in a rule of legal recognition even while "accept[ing] their appointment to the bench simply in order to collect their paychecks."[42] As Bratman put it in an earlier reflection on Shapiro's analysis:

> It is natural … to say that the authority's [the higher-court judge's] orders still provide reasons for the subject [the lower-court judge] because the subject has, by taking on the relevant role, assured the authority and others or (anyway) intentionally given them the reasonable expectation that he (the subject) would treat the orders in this way.[43]

The judicial and legislative contexts are relevantly different, however. As a general matter, legislators take no official instructions in the exercise of their authority, whereas a judge takes an oath faithfully to apply the law to the cases before her. In the absence of any constitutional obligation on legislators to employ some particular enactment procedure, they are within their rights to decline to agree to a procedure preferred by the bulk of their colleagues. Legislation is not like a game of chess,[44] a competition that takes place in virtue of a shared, overriding preference to achieve a chess game result. In the legislative analogue, a result usually already exists in the form of the policy status quo, such that legislation may be less like playing a game and more like inviting one's winning opponent to go best-of-three.

Consider that, as a matter of policy, an elected legislator might prefer the legislation currently on the books. They might see no merit in agreeing on any general enactment procedure with a new majority of a different, reformist political persuasion, let alone on the standard sort of assembly procedure that heavily concentrates control over the voting agenda among members of the

[36] Ibid., 544.

[37] Ekins, *Nature of Legislative Intent*, 52.

[38] Scott J. Shapiro, "Massively Shared Agency," in *Rational and Social Agency: The Philosophy of Michael Bratman*, ed. Manuel Vargas and Gideon Yaffe (Oxford University Press, 2014), 283.

[39] Bratman, review of *From Plural to Institutional Agency*.

[40] Bratman, "Intentions, Procedures, and Social Rules," 542.

[41] Ibid., 543.

[42] Scott J. Shapiro, *Legality* (Harvard University Press, 2011), 108.

[43] Michael E. Bratman, "Shapiro on Legal Positivism and Jointly Intentional Activity," *Legal Theory* 8, no. 4 (2022): 517.

[44] Contra Victoria F. Nourse, "Elementary Statutory Interpretation: Rethinking Legislative Intent and History," *Boston College Law Review* 55, no. 5 (2014): 1639.

majority. In thus acting to retain the policy status quo, the legislator would simply be doing the job to which they were elected, namely, using their office to make the statute book hew as closely as possible to their policy convictions (or to those of their constituents).

With the legislator acting fully in accordance with the constitution, there would be no means to remove their salary, and no justification for doing so. For this very reason, their assumption of the role of legislator would not have given other legislators the reasonable expectation that they would agree to the latter's preferred procedure. To assign no constitutional obligation to legislators in respect of their choice of enactment procedure would be to assign them a veto. We could not then complain if they used it. The trouble is that, on Bratman's account, legislators might not merely be alienated, but might be irredeemably so. His account's explanation of legislation is therefore hostage to the election of such legislators, in a way that threatens its general applicability.

If this first limitation stems from the freestanding role attributed to individual legislators' preferences, then the second arises from the degree of rationality expected of the collective legislature.

In speaking of collective legislative "intention," Bratman uses a vocabulary that is familiar within legal theory and lawyerly argument alike. Bratman, however, gives salutary scrutiny to what, exactly, this vocabulary entails in the legal context. Having first established the fundamental role played by temporally extended intentions—that is, by plans—in producing individual acts,[45] Bratman has since offered an important account of cooperative group agency—for example of painting a house or performing a symphony—that also gives a central role to intentions, in this case, to shared, interlocking intentions. Lately, he has extended this theory to encompass also the agency of groups that endure through changes in membership, notably, institutions.[46] Again, plans that extend through time are crucial to this picture. Our own interest here is confined strictly to the theory's application to the agency of the legislature. In this particular domain, giving a role to intention, as that notion is formally understood, might seem to generate difficulties.

In treating a legislature's procedurally determined outputs as intentions, Bratman appeals to the "basic functional roles of intention, where these include characteristic forms of downstream framing of and guidance of thought and action."[47] This starting point entails that the enactment procedure in question will

> involv[e] a cross-temporal structure of interconnected shared policies and penumbras, and … persis[t] in the face of certain changes in participants and associated changes in the underlying shared policies. … There will normally be similarities in the contents of relevant procedure-favoring attitudes at different times. Further, these diachronic similarities will not just be a coincidence but will instead manifest some sort of inter-dependence: normally, the social psychology at a given time will be to some extent explained by the earlier social psychology and will be set to help explain the later social psychology. Further yet, there will normally be implicit references within the social psychology at a given time to corresponding social psychologies at earlier and later times. Such connections, continuities, and inter-dependencies will support the temporally extended functioning of the social rule of procedure, and thereby stand ready to support the temporally extended intention-like functioning of its outputs.[48]

Legislation does indeed extend through time. The challenge is that, taken together, these features may create a theoretical apparatus that is both too complex and too delicate to reasonably support a text's status as a statute. Consider first how many distinct determinants must fall within a particular value range—i.e., "normality"—to issue in an instance of legislation.

If a text's continued status as a statute were subject to the vagaries of the connections between the values of social psychologies of different eras, then we would sometimes expect highly nuanced answers to the question of its statutory standing—and consequent disagreement over it. The remote scenario in which a statute has become "obsolete" through long disuse suggests that,

[45] Michael E. Bratman, *Intention, Plans, and Practical Reason* (Harvard University Press, 1987).

[46] Michael E. Bratman, *Shared and Institutional Agency: Toward a Planning Theory of Human Practical Organization* (Oxford University Press, 2022).

[47] Bratman, "Intentions, Procedures, and Social Rules," 541.

[48] Ibid., 543–44.

conceivably, some sort of continuum might sometimes develop as to a text's continued status as legislation. In nearly all cases, however—including in that of many centuries-old statutes—a statutory provision's existence will be a binary property that is immediately transparent and the subject of general agreement. Questions of legal interpretation can sometimes, if only rarely, be hard. But the question whether some text succeeds in repealing or amending a statute or, instead, leaves it entirely intact, is perhaps never a difficult question. Indeed, if it were posed with any frequency, it would cast doubt on the legal system's continued existence.

There is then the issue of stability. Consider the turnover in legislators and, by extension, the turnover in the legislature's politics and its associated procedural preferences. After a general election, a legislature's composition might change significantly. Where there was once a large majority favoring the concentration of agenda control in the leader of a left-wing party, there may now be an equally large majority that favors agenda control by her counterpart, the leader of the right-wing party. The "contents of relevant procedure-favoring attitudes"[49] of the majority of legislators at these two times are very different indeed. But, unless and until a vote is taken, there will be no question that the legislation passed prior to the general election will remain valid for all purposes. If a text that qualified as a statute before the election expresses the legislature's collective intention just in virtue of a cross-temporal structure of attitudes favoring the relevant enactment procedure, then it is not clear how we might explain the text's continued status as such. Insofar as a legislature's intention must be sustained by an enactment procedure whose identity depends on the shifting sands of electoral politics, an account that treats legislation as the expression of an intention will struggle to accommodate legislative stability.

In Part III, I offer some ideas that might address these problems. Adopting Bratman's starting point of an account that invokes in a straightforward way the aggregation of legislators' procedural preferences, I suggest an approach that is both more strongly collectivist and less rationally demanding. Specifically, I propose, first, that we should prefer an account that treats the constitution as implicitly imposing the enactment procedure that, in virtue of its relation to current members' procedural preferences, will disclose any collectively legislated policy. Second, I suggest that we double down on Bratman's suggestion that group agency need not share the strong rationality constraint of individual agency.

III. THE LEGISLATURE'S WILL

The benefit of a theory that derives legislation from legislators' procedural preferences is that it promises to meet the reality of a legislative practice that is characterized by concentrated control over the voting agenda and the potential for successive statutory U-turns. An important advantage of Bratman's account is that it accommodates the legislator who is indifferent as to the success of their fellow legislators in changing the status quo. Such a legislator has no preference over different enactment procedures but is persuaded to go along with the prevalent approach, and thereby contributes to the formation of the legislature's intention.

Two limitations emerged, however. It seems unrealistic to make legislation in any way contingent on continuity between legislators' current political preferences over agenda control and the political preferences of future legislators. Equally, it seems implausible to suppose that a legislator positively opposed to change would, as an outnumbered partisan of the status quo, surrender control of the voting agenda to "the majority of the majority."[50] The solution may lie in lowering the threshold for collective institutional agency, while conditioning such agency's dependence on individual members.

A. What is the act of collective legislation anyway?

The theory of action emerges in two parts: the theory of agency, which addresses the capacities exercised in the performance of any act; and act typology, which includes both the theory of particular act types (e.g., striking and promising) and of their broader categorization (e.g., movement

[49] Ibid., 543.

[50] Margaret Hartmann, "Scandal Kills the 'Hastert Rule'; Congressional Gridlock Expected to Survive," *Intelligencer*, June 2, 2015, https://nymag.com/daily/intelligencer/2015/06/scandal-kills-hastert-rule-gridlock-survives.html.

and speech). Certain acts, for instance, "must always be speech acts."[51] For example, communication is intrinsic to a confession; one cannot secretly confess to something. Equally, to make a law is surely to perform a speech act: law, as a command, "is a *signification* of desire."[52] The association with speech is also clear in Lon Fuller's famous elucidation of the criteria of the rule of law, which includes constraints concerning a law's expression, to wit, that it be publicly promulgated and understandable.[53] It does not necessarily follow, however, that an *assembly's* collective contribution to the making of law is a speech act.

Unlike an individual, a collective institution cannot speak for itself in the ordinary, literal sense. Equally, it seems odd to imagine, as acts of the collective itself, the acts of document creation and transmission undertaken by non-member officials. Likewise, an assembly's legislative power is ordinarily inalienable and cannot be delegated to individuals who might otherwise perform speech acts on the assembly's behalf. Subtle treatments of such puzzles have been proposed.[54] But a simple analysis is also available. Rather than imagining an assembly somehow performing a speech act, we might alternatively suppose that the making of a law always consists, at least in part, of a speech act by some individual official, be it the signature of a head of state, or the creation by a clerk of "some official certificate … taken as sufficient proof of due enactment."[55] This makes sense of the intrinsically communicative nature of law, while allowing for the assembly to make its respective contribution to legislation merely by forming the right sort of collective attitude—a will.

Not all acts involve movement or speech.[56] Take forgiveness. If one forgives another, it is normal to tell them so. But—unlike confession—actually expressing one's forgiveness to the subject, or anyone else, is inessential. One can forgive someone in the privacy of one's own thoughts. Forgiving, just like hypothesizing, fantasizing, repenting, or wishing, is a mental act that one performs simply by forming the appropriate will. Perhaps an assembly's contribution to legislation might similarly be understood as its performance of a mental act? For one thing, ascribing a collective will does not seem to require any additional theoretical apparatus beyond that required to support the ascription of any collective attitude, such as a collective intention or belief. Crucially, by treating legislation, not as the formation of a collective intention, but as the formation of a collective *will*, we reduce the rationality demanded of the legislature to a level consistent with political and legal practice.

As Bratman explains, treating a statutory provision as the expression of a legislature's intention means understanding it as a plan, one that extends through time until the legislature signals a change of plan through the provision's amendment or repeal. We argued earlier that deriving such a plan from the operation of an enactment procedure means positing a cross-temporal social psychological structure that is too complex and too fragile to account for the real-world role of statute law. If, instead, we understand a statutory provision as a reflection of a legislature's will—much as we understand the assertion, "He has forgiven you," as a reflection of the subject's act of forgiveness—no cross-temporal social psychological structure is required.

Rather, the relevant official, on identifying the legislature's will through the pertinent vote tallies, performs the appropriate speech act, and a law is made that will remain valid without further input from those who made it. What makes a text a statute is that it captures the legislature's will, and it need not concern the lawyer what changes in individual legislators' procedural attitudes the future may hold. After the vote, the enactment, qua officially recorded mental act, has a life of its own.

[51] John R. Searle, "Speech Acts and Recent Linguistics," *Annals of the New York Academy of Sciences* 263, no. 1 (1975): 349.

[52] John Austin, *The Province of Jurisprudence Determined*, 2nd ed. (London: John Murray, 1861), 5–6 (emphasis added).

[53] Lon L. Fuller, *The Morality of Law* (Yale University Press, 1964).

[54] See, e.g., Kirk Ludwig, "Proxy Agency in Collective Action," *Noûs* 48, no. 1 (2014); Miguel Garcia-Godinez, "Institutional Proxy Agency: A We-Mode Approach," in *Tuomela on Sociality*, ed. Miguel Garcia-Godinez and Rachael Mellin (Palgrave Macmillan, 2023).

[55] Hart, *Concept of Law*, 96.

[56] See, e.g., Matthew Soteriou, "Mental agency," in *The Routledge Handbook of Philosophy of Agency*, ed. Luca Ferrero (Routledge, 2022).

B. Locating legislators' procedural obligation

Pivoting from collective intention to collective will offers an account of legislation that seems to get more aspects of our practice right. But the problem of the irredeemably alienated legislator remains. How do we ascribe legislation to legislators who might prefer the policy status quo to the likely alternatives, and who have no interest in facilitating further legislation by operating any candidate enactment procedure? One solution would be to assign all members an obligation that arises in virtue of their membership itself.

Suppose that either the constitution or the rule of recognition assigns legislative power to a collective institutional agent, namely, one comprising all elected legislators. Suppose, furthermore, that the will of such an agent depends in a systematic way on the aggregation of members' attitudes. It follows that legislators, in virtue of their membership, assume an implicit obligation to operate the enactment procedure that is apt to disclose the legislature's will by revealing the relevant distribution of attitudes. On this understanding, an individual legislator's attitudes towards policy change are rendered immaterial; their participation in the relevant enactment procedure is simply a concomitant of their good standing as a member of the collective. By implying that some mechanism has priority owing to its relation to the agency of the group invested with the power, the constitution provides a basis on which members might indeed be "deemed to have accepted" the mechanism "by virtue of accepting their seats."[57]

A possible advantage in developing this collectivist approach is our earlier decision to prioritize members' procedural attitudes. It is true that, for the most part, efforts to "catc[h] the essence of the intuitive idea of conventional choice"[58] have studied the rule best suited for establishing which policy is the most popular. In such a project, preferences over procedure play no role. Robert Dahl's notion of a procedural democracy is an exception.[59]

Rather than treating the collectively legislated policy as the central policy preference, Dahl's model identifies the collective policy as that which satisfied the democratically preferred procedure for resolving policy disagreement. It does not assign an equal direct input to all members over policy but, rather, an equal input over the rule of aggregation by which policy disagreement is to be resolved. In this context, it suffices to note a possible implication of Dahlian procedural democracy for the theory of legislation.[60] Specifically, his model appears to provide scope for a theory of collective legislative agency that derives an assembly's collective contribution in a transparent way from its members' procedural preferences, thereby accommodating the practical reality that the voting agenda is determined by the politics of the majority party of legislators. On such an understanding, each legislator would form a shared attitude—a will—that a particular policy be legislated, which would derive from the application of the majority-preferred procedure and which would sit atop members' varying individual policy preferences. Many details of what it might be for a legislator to form a shared will would have to be filled in, for example: whether it is dispositional or occurrent, and whether it might refer to attitudes formed by others (e.g., drafters/managers). One would hardly be starting from scratch, of course. In principle, an account of the formation of a shared will to legislate could exploit the rich theoretical apparatus that has been developed in the theory of legal *interpretation* to explain how legislators combine to imbue a statute with an intended or public meaning.[61]

Earlier, we noted the implausibility of supposing that an outnumbered partisan of the status quo would simply hand over control of the voting agenda to would-be agents of legislative change. On that score, it is better to retain the idea of the legislature as truly collective, such that legislators are obligated, just in virtue of their membership, to operate the enactment procedure that is apt to

[57] Anderson and Pildes, "Expressive Theories of Law," 1523.

[58] Arrow, *Social Choice and Individual Values*, 28.

[59] Robert Dahl, "Procedural Democracy," in *Philosophy, Politics and Society: Fifth Series*, ed. Peter Laslett and James Fishkin (Blackwell, 1979).

[60] For a broader discussion of the value of Dahlian procedural democracy to the theory institutional action, see Brian Flanagan, "A Dilemma for Proceduralist Theories of Democracy: Elected Delegates or Elected Monarchs?," *American Journal of Jurisprudence* 69, no. 3 (2024).

[61] See, e.g., David Tan, "Defending Aggregated Legislative Intent," *Canadian Journal of Law & Jurisprudence* 37, no. 2 (2024); Lawrence B. Solum, "The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning," *Boston University Law Review* 101, no. 6 (2021).

disclose its will. Moreover, connected to a Dahlian theory of collective agency that assigns priority to the aggregation determined by the majority preferred procedure, this idea implies that all legislators are obligated to participate in the enactment procedure to which political science duly ascribes an assembly's operation, to wit, that on which the majority party agrees. By thus qualifying the enactment procedure's dependence on individual legislators by reference to a *conceptually* defined rule of attitude aggregation, we preserve legislators' shared obligation to acknowledge the procedural output of that rule.

IV. CONCLUSION

We have no need of a method for locating statutes. We know just where they are, just as we can determine the enactment procedures that produced them. But we remain without a theory of why it is that a certain sort of enactment procedure is privileged. Here we have reflected on what seems to be most promising approach, namely, a focus on the distribution of legislators' procedural preferences, specifically, on Michael Bratman's recent analysis of legislation as a collective legislative intention. But the concentration of this analysis on inter-legislator procedural agreement, albeit a potentially grudging sort of agreement, and its ascription of cross-temporal, inter-generational procedural preference structures, introduced difficulties.

Proposing an approach that is both more strongly collectivist and less rationally demanding, I have offered ideas that might address these two shortcomings. By understanding the constitution to invest legislative power in the legislature as a collective rather than in a pool of individuals, we buttress our account against the possible elusiveness of inter-legislator agreement. Likewise, by pressing further Bratman's fruitful suggestion that group agency need not share the strong rationality constraint of individual agency, we can relax the requirement that the enactment of a statute be directed by a collective intention. On doing so, we can understand collective legislation as purely a matter of the formation of a collective will, duly supplemented by relevant individual speech acts, and thereby avoid the need to posit social procedural psychologies that would extend with legislative intentions through time.

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