

Legislation is sometimes vague or ambiguous. For this reason – and perhaps for others – it is often claimed that there is no single objective and determinate way to apply legislation to particular cases or issues. This indeterminacy creates obvious problems for those required to interpret legislation: they must decide whether to apply legislation in cases of indeterminacy, and if they decide to apply it, there may be more than one way to do so.

There are a number of different views about the methods that interpreters should use, but a view commonly called ‘intentionalism’ has traditionally been the most influential.¹ Intentionalism can be described as the view that a piece of legislation should be interpreted in accordance with the intentions of the legislature that produced it.² Although influential, this view has been subject to a great deal of critical attention. Perhaps the most significant problems for the view concern how to identify the conditions that must be satisfied for legislatures to have intentions, whether legislatures commonly have intentions that are helpful for legislative interpretation, and whether interpreters could reasonably come to know what those intentions are. These

¹ John F. Manning claims that intentionalism was the “orthodoxy” amongst federal judges for much of the last century, though textualism has been increasingly influential recently (‘Textualism and Legislative Intent,’ *Virginia Law Review* 91 (2005): 419-450). Amongst academics, intentionalism may not have been the orthodoxy, but it has certainly had adherents – for a recent defense, see Lawrence M. Solan, ‘Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation,’ *Georgetown Law Journal* 93 (2005): 427-486.

² Particularly when applied to the constitutional interpretation, this view has also been called ‘originalism,’ or more recently, ‘original intent originalism.’ All of these terms, however, are at times used for different views. ‘Originalism,’ for example, has also been taken to refer to the view that a piece of legislation should be interpreted in accordance with the public meaning of the text at the time it was written. Confusingly, even ‘intentionalism’ has sometimes been used for views that stress the importance of other states besides intentions (such as purposes or aims), although – as Gerald C. MacCallum notes – this may be because these other states are conflated with intentions (see MacCallum, ‘Legislative Intent,’ *The Yale Law Journal* 75 (1966): 754-787).

problems are interrelated in various ways – whether legislatures can have intentions, for example, depends heavily upon the nature of the conditions that they must satisfy to do so. Because of their interrelations, I shall refer to these problems together as ‘the metaphysical and epistemological problems’ for intentionalism.

In this paper, I propose a modification of intentionalism that significantly mitigates the severity of these problems. My argument begins with the observation that, in almost all cases, legislation is not written by an entire legislature or even by a majority party; instead, legislation is written by individuals or small groups *on behalf of* a majority party (or sometimes, on behalf of a coalition of parties that form a majority). After considering what it is for one agent or group to act on behalf of another, I argue that the reasons why legislation should be interpreted in accordance with the intentions of the majority party or legislature are also reasons why legislation should be interpreted in accordance with the intentions of a subgroup or individual, when that subgroup or individual wrote or determined the content of the legislation. This is significant because the subgroups or individuals that produce legislation are much more likely to have intentions than majority parties or legislatures, and we are more likely to know about their intentions or to be able to infer them from legislative history.

Because I argue that legislation can be interpreted in accordance with the intentions of proxy groups acting on behalf of the majority party or legislature, the view defended here is not strictly a form of intentionalism; instead, it would perhaps be more accurately termed ‘proxy intentionalism.’³

1. THE M&E PROBLEMS

The metaphysical and epistemological (M&E) problems are three distinct but interrelated ways of casting doubt on the view that legislation can be interpreted in accordance with a legislature’s intentions. It seems to

³ One issue that cannot be considered in detail here is that of the content of the intentions that are thought to be relevant for interpretation. Intentions that are commonly referred to include intentions concerning how a piece of legislation is to be understood, and intentions concerning what a piece of legislation is to bring about it. Different views on this issue are implied by the various different reasons for being an intentionalist, as discussed in section four, but it will not be possible to make the views explicit here.

be assumed by those who have presented these problems previously that legislatures can have intentions – at least in theory. The problems begin once that assumption has been granted.

1.1. THE DETERMINATION PROBLEM

The first problem is that, even if legislatures can have intentions, we may not be able to determine what conditions must be satisfied for them to do so. In a recent survey article on legislative interpretation, Natalie Stoljar presents this problem as follows:

In many cases of passing legislation, a majority in parliament assents to the legislation, but individuals within the majority have different aims and intentions in mind. How should the individual intentions be combined to form a group intention that is plausibly the intention ‘behind’ the legislation? Different ways of combining individual intentions may generate different group intentions. Moreover, in some cases, the resulting legislative intention reflects none of the individual intentions that are represented.⁴

In short, the problem concerns how to get from a number of intentions had by individuals to a single intention had by the legislature. As I shall explain, recent work on what is required for a group of people to share an intention may provide one way to respond to this problem, but the response only serves to emphasize the severity of the next two problems.

1.2. THE SATISFACTION PROBLEM

The second problem is that, even if we can determine the conditions that legislatures must satisfy to be attributed intentions, legislatures will seldom – if ever – satisfy those conditions. The severity of this problem, of course, depends upon what the conditions are, but it is generally accepted that whatever the conditions are for a legislature to have an intention, they must at least require that most or all of the members of the legislature have that intention. It is then argued that members of legislatures vote for bills for all sorts of

⁴ Natalie Stoljar, ‘Interpretation, Indeterminacy and Authority: Some Recent Controversies in the Philosophy of Law,’ *The Journal of Political Philosophy* 11 (2003), p. 479.

reasons. Members might vote in favor of a bill because they think that enacting the bill will make the world a better place, or to help secure their reelection, or to secure reciprocal support for another bill, or simply because others have told them to vote in favor of the bill, or because they always vote along party lines, or for a wide variety of other reasons. Members may not even know anything about the bill before voting on it; they may not have read the bill, or they may have been misinformed.⁵ For these reasons, one might argue that it is very unlikely that a majority of the members of a legislative body will have the same intentions concerning any particular bill.

1.3. THE EPISTEMOLOGICAL PROBLEM

Finally, the third problem is the simplest. It is claimed that even if a majority or all of the members of a legislature do have the same intentions in some cases, we cannot know what those intentions are. While it might be plausible to suppose that a person's actions and statements can count as evidence of that person's intentions, often such evidence will be unavailable, or the evidence that is available will leave two or more possibilities open.

Of course, the members of legislatures do discuss bills, often for long periods of time. But, commonly, only a few members of a legislature will be involved in a discussion, and they will only discuss certain aspects

⁵The claim that legislators sometimes do not read the bills that they vote on is not just unsupported cynicism. In an op-ed piece for the *Washington Post* (27 November 2004, p. A31), U. S. Congressman Brian Baird asserts:

If forced to tell the truth, most members of Congress would acknowledge that they did not fully or, in many cases, even partially read bills before casting their votes.

Indeed, Baird claims that in many cases members of Congress are not even given the chance to read bills fully. Although rules require that a bill be made available to all members of Congress at least three days before the vote is scheduled, those rules are often overridden. As he explains:

The Medicare prescription drug bill, the energy bill, the intelligence bill and the defense authorization bill... total more than 2,900 pages of text and authorize more than \$1 trillion of spending. Yet, collectively they were available to members for less than 48 hours total for reading.

of a bill. Cases in which most or all of the members of a legislature discuss most or all of the content of a bill must be very rare – perhaps nonexistent.

1.4. THE FRAMEWORK FOR A RESPONSE

To respond to all three of these problems, the first thing to do is to determine the conditions that must be satisfied for a legislature to have an intention. The simplest view here would be to simply assert that a certain proportion of the members of the legislature must themselves have the intention. This is roughly the view that Paul Brest asserts in his famous article on originalism.⁶ Brest claims that whatever proportion of the members of a legislature must vote in favor of a bill for it to be enacted, that same proportion must each have an intention in order for an intention with that content to be attributed to the legislature. So, for example, if two thirds of the members of a legislature must vote in favor of a bill for it to be enacted, then two thirds of the members of the legislature must each have an intention that X for an intention that X to become an intention of the legislature.

Brest's proposal may identify a necessary condition for a legislature to have an intention, but that condition is not sufficient. This can be seen by considering the more general issue of what is required for any kind of group to have an intention attributed to it. Consider a case in which the majority of the members of a philosophy department each intend to work to help the Democratic candidate in an upcoming election. Suppose that the department is in a heavily Republican county, and so each member plans to work to help the Democratic candidate in low-key or anonymous ways, to avoid negative repercussions for the department. Indeed, the members of the department are so anxious about potential repercussions that they do not even mention to one another that they plan to work to help the Democratic candidate. In this case, a majority of the members of the philosophy department each have an intention to help the Democratic candidate, but the department itself does not have that intention. Indeed, even if every member of the department had the intention, that would not be enough; at the least, the members must also know of one another's intentions.

⁶ Paul Brest, 'The Misconceived Quest For the Original Understanding,' *Boston University Law Review* 60 (1980): 204-238.

In recent years, a number of accounts have been proposed that present sufficient conditions for a group of people to share a single intention. These accounts support the idea – developed in the example above – that it is not enough simply for the members of the group to each have the intention. Michael Bratman’s account, for example, proposes two further necessary conditions. Bratman phrases his account of shared intention to apply to cases with just two participants – you and I. As he explains, for any shared activity *J*, you and I share an intention to *J* if and only if the following three conditions are satisfied:

1. (a) I intend that we *J* and (b) you intend that we *J*.
2. I intend that we *J* in accordance with and because of 1a, 1b, and our meshing subplans of 1a and 1b; you intend that we *J* in accordance with and because of 1a, 1b, and our meshing subplans of 1a and 1b.
3. 1 and 2 are common knowledge between us.⁷

To illustrate this with an example, suppose that all of the members of a legislature intend to reduce violent crime by passing a new bill to increase prison terms for those convicted of violent offences. If each member of the legislature has this intention, each member intends to satisfy the intention by voting in favour of the bill, and each member knows that this is true of all the other members, then the legislature shares an intention. But suppose that just one of the members does not believe that the new bill will lower violent crime; instead, she is voting for the bill only because she knows that the members of her electorate heavily favour it. This member will not vote for the bill with the intention to reduce violent crime, and so that intention cannot be attributed to the legislature, or so Bratman’s account would imply. Since the members of a legislature are very unlikely to all vote for a bill for the same reasons, this latter situation will be very common.

Of course, Bratman only considers cases of shared intention involving two people. Perhaps if his account were broadened to apply explicitly to cases involving larger numbers of people, the conditions would be weakened – perhaps only most or almost all of the members of a group would have to satisfy the conditions he lists. But what Brest’s and Bratman’s account show, more generally, is that even if the

⁷ Michael Bratman, *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge, UK: Cambridge University Press, 1999), p. 121.

determination problem can be resolved, the resolution will only make the satisfaction and epistemological problems more acute. If most or almost all of the members of a legislature must share an intention for that intention to be attributed to the legislature, then legislatures will not often have intentions, and we will almost never know when they do. In the next two sections, I shall present and argue for a variation on intentionalism that mitigates the severity of these final two problems by replacing the intentions of legislatures or majority parties with the intentions of subgroups or individuals acting on behalf of the larger groups.

2. ON BEHALF OF

To argue for the significance of the fact that sometimes subgroups and individuals within a legislature act on behalf of larger groups, it will first be necessary to explain in more detail what it is for one person or group to act on behalf of another.

It will be helpful to start by considering very simple and straightforward cases in which one person does something on behalf of another. Suppose that Brian is paid a fee to bid on Andy's behalf at an auction. Usually, if a person makes a bid at an auction, and the bid is successful, then that person has an obligation to pay the amount of the bid, and in return he or she is entitled to receive the item on which he or she bid. If, however, Brian bids on behalf of Andy, then Brian does not take on the obligation or entitlement that results, but Andy does. Andy has an obligation to pay for the item and an entitlement to receive the item; indeed, in all relevant respects, it is *as if* Andy bid, even though he did not.

Consider a second case, in which the members of a parent teacher association (PTA) take a vote on whether to hold a bake-sale at the local fair. They agree that each person who votes in favor of the bake-sale will bring at least one item and will also spend some time staffing the bake-sale stand. If they all vote in favor of the bake-sale, then each person has an obligation to participate in it. Now suppose that Claire is unable to attend the PTA meeting, but she asks Debbie – a close family member – to go in her place. At the beginning of the meeting, the other members agree that Debbie can vote on Claire's behalf. If Claire has heard about the bake-sale and tells Debbie to vote in favor of it, then when Debbie raises her hand to vote, it is *as if* Claire voted for the bake-sale. The motion will pass and the members will each have an obligation to bring an item,

but importantly, Debbie will *not* have an obligation to participate in the bake-sale; instead, that obligation will be incurred by Claire.

Both of these examples illustrate the same general point about the implications or consequences of one person acting on behalf of another. Abstracting away the details, the point is that when X does A on behalf of Y, then X does whatever is required to A, but it is *as if* Y did A – in particular, the normative implications or consequences are what they would be if Y had done A. So, as in the above examples, any obligations, duties, entitlements, or rights are incurred by Y, not by X.

This describes what results when one agent acts on behalf of another, but it does not describe how one agent comes to act on behalf of another. In most cases, one agent is *granted* the authority to act on behalf of another, often as the result of an agreement. In the auction example, Andy might have asked Brian explicitly to bid on his behalf, in return for a pre-arranged fee. Once they have settled on the details, the agreement grants Brian the authority to act on behalf of Andy. In the bake-sale example, Debbie might vote on Claire's behalf as a favor or an act of kindness, without receiving anything in return. But in some other cases, agents do not need to be granted the authority to act on behalf of others; sometimes the *relationship* between two people is such that one person can act on behalf of the other. As an example, a parent does not need to be granted authority by his or her young child to act on that child's behalf – to administer a trust fund for the child, perhaps, as the nature of the relationship between the two is often such that the parent already has that authority.

So for one person to act on behalf of another, that person must either be granted the authority to do so, or that person must possess the authority by virtue of his or her relationship to the other. For ease of reference, I shall label the person who acts on behalf of the other 'the proxy.' It is important to note that the proxy is almost never granted *carte blanche* authority to act on behalf of the other person, as there are almost always constraints – either explicitly stated or else determined by context-sensitive norms. If the proxy violates those constraints, then the other person may not incur the normative implications of the proxy's action. To illustrate this point with the auction example, it would be natural for Brian to be told an amount that he cannot go beyond. If the constraints are violated – if Brian goes beyond the specified amount – then Andy does not incur all of the normative implications of Brian's action. Andy cannot be required to pay the amount Brian has bid. If possible, Brian should cancel the bid, and if he cannot, he must come to another

arrangement with Andy. Perhaps Brian will offer to pay part or all of the amount overbid, if Andy pays the rest of the amount of the bid.

Finally, it is important to note that there is a distinction to be made between acting *on* behalf of a person or group and acting *in* behalf of a person or group. One acts *on* behalf of a person or group according to the account provided above, but one acts *in* behalf of a person or group simply when one acts to benefit that person or group.⁸ As an example, suppose Eric overhears someone saying something nasty or defamatory about a friend of his; if Eric decides to defend his friend, then he is speaking *in* behalf of his friend. In this case, Eric is not acting *on* behalf of his friend, because his friend has not authorized Eric to act on his behalf, nor would his friend have to take on the normative consequences or implications of Eric's action. If Eric had been authorized to speak for his friend – perhaps at a meeting – then Eric could speak *on* behalf of his friend there (indeed, he could even speak *in* behalf of his friend while speaking *on* behalf of his friend). Unfortunately, this distinction is not commonly observed today; instead, people frequently use the locution 'on behalf of' to refer to both notions. Here, however, it will be important to keep the two distinct, so 'on behalf of' will be used in the traditional sense only.

3. SUBGROUPS AND AUTHORITY

This notion of a person or group doing something *on* behalf of another can be applied in a number of different ways to the actions of legislatures. Legislatures may do many things, but their most important function is, of course, to produce bills and then enact them as legislation.

⁸ Dictionaries commonly separate these two meanings, though they sometimes list both as meanings of the 'on behalf of' locution. The *American Heritage Book of English Usage* clearly states clearly that this is a recent development:

A traditional rule holds that *in behalf of* and *on behalf of* have distinct meanings. Accordingly, you should use *in behalf of* to mean "for the benefit of," as in *We raised money in behalf of the earthquake victims*. And you should use *on behalf of* to mean "as the agent of, on the part of," as in *The guardian signed the contract on behalf of the child*. But as the two meanings are quite close, the phrases are often used interchangeably, even by reputable writers.

The first point to note here is that, while it might be natural to speak of legislatures producing bills, it is obviously impractical and extremely uncommon for an entire legislature to be involved in the writing process. Instead, bills are typically written by subgroups within a legislature.⁹ When a bill is written by a subgroup, there are two different ways in which it can be enacted. First, it occasionally happens that the members of a subgroup will decide to produce a bill, and others will decide to vote for it only after the bill has been written. Perhaps the members of the subgroup will persuade others to vote for it, in one way or another, or perhaps if they are well enough placed – if they are important members of the majority party, for example – persuasion will not be necessary. More commonly, though, the decision to produce a bill is not made by the members of the subgroup that writes the bill; instead, the subgroup will be assigned or given the bill to write, after a party process produces the decision to write the bill. Perhaps someone in the party will argue that a bill is needed and other important figures will agree, or a committee assigned to investigate an issue will recommend a bill, or recent circumstances or events will make it clear that new legislation is required on a certain issue.

When a subgroup is assigned a bill to write as the result of a party process, at the very least the topic or purpose of the bill will already have been determined. Perhaps, for example, the majority party will decide that a new bill is necessary to institute tougher legal standards on motorcycle helmets. The subgroup will then determine the details for the tougher standards. In other cases, some of the major details of the bill might have been determined before the subgroup is assigned the bill. To continue the same example, suppose that circumstances have made it clear that polystyrene is not suitable as the major component of motorcycle helmets. A subgroup might then be assigned the bill with that detail already determined, but the members of the subgroup will have to determine lesser details, such as whether any polystyrene should be allowed and, if so, how much. Perhaps there are also cases in which the major details and some or most of the minor details have already been decided before the subgroup receives the bill. Perhaps a study has made it clear that any

⁹ It will be helpful to use the term ‘subgroup’ in a stipulative sense, such that a subgroup can consist of only one person. This is helpful because, while it is certainly possible for only one person to write a bill, the locution ‘subgroup or individual’ is unwieldy.

more than one inch of polystyrene is dangerous, for example, but that less than one inch of polystyrene is not.¹⁰

The general point is that when subgroups are assigned or given bills to write, they standardly determine some or all of the details. They do not just write the bill, they also determine content. Indeed, even if *all* of the details of a bill are determined before it is sent to the subgroup, unless the exact wording is also determined, the subgroup will determine aspects of the content in settling the wording. Once the subgroup has written the bill, other members of the majority party may need to approve some or all of the details before it is agreed that the party will enact the bill, or the bill might just be enacted.

When legislation is produced in this way, the subgroup is acting on behalf of the majority party, but exactly what the subgroup is doing on behalf of the majority party depends upon the details. Whatever the case, the subgroup has been given the authority to write the bill on behalf of the majority. If the other members of the majority party allow the subgroup to determine some or all of the details, without a requirement of approval, then the subgroup has also been given the authority to determine those aspects of the content of bill on behalf of the majority. Indeed, even if the other members of the party determine all of the details, so long as they understand that leaving the wording to the subgroup will allow the members of the subgroup to determine some aspects of the content, then an argument could be made that the party members grant the subgroup members an authority to determine aspects of the content whenever subgroups write legislation.

When a subgroup is assigned a bill, then, the subgroup is given the authority to write the bill and also the authority to determine some of the content of the bill on behalf of the majority party. But if the bill will be enacted by the members of the majority party, without any expectation of further consideration and revision,

¹⁰ It should be mentioned at this point that it is common for the members of a subgroup, in cases such as this, to have others perform services to assist them in writing the bill. Staff might be hired or assigned to do research, or to complete some of the more tedious aspects of the process, for example. I suspect that these staff seldom determine significant aspects of the content of a bill on their own, but when they do, it seems safe to assume that they are working on behalf of the members of the relevant subgroup.

and if that is understood when the subgroup is given the bill, then the subgroup has not just been given the authority to write and determine the content of a bill, the subgroup has been given the authority to produce legislation.¹¹

4. REASONS FOR BEING AN INTENTIONALIST

The significance of the authority granted to subgroups to write and determine the content of legislation becomes apparent once arguments for interpreting legislation in accordance with the legislature's intentions are considered.

To claim that legislation should be interpreted in accordance with the intentions of the legislature is to claim a special status for the legislature's intentions. Some fact about the legislature or the legislature's intentions must give the intentions this special status. Arguments for intentionalism tend to take one of three different views about what the relevant fact is; in this section, I shall consider each of the views in turn.

4.1. THE AUTHOR VIEW

The first view is that a statute should be interpreted in accordance with the legislature's intentions because the members of the legislature are the authors of the statute.¹² Arguments based on this view often claim that it is necessary to consider the author's intentions when interpreting any text, because the author's intentions are essential to determining the text's meaning. Ronald Dworkin explains a version of this argument as follows:

¹¹ Of course, bills are commonly discussed by legislatures before they are passed, but often there is little or no possibility of the discussions leading to revisions – sometimes that is not even the purpose of the discussions. The opposition party might just want to get on record its opposition to the bill, for example, or the sponsors of the bill might want to explain why it is necessary.

¹² For further examples of arguments of this type, see Stoljar, 'Interpretation, Indeterminacy, and Authority.' In her discussion of arguments for intentionalism, Stoljar categorizes the arguments as either conceptual or normative. The first, second, and fourth conceptual arguments that she lists all rely upon the status of the legislators as authors.

Any reader of anything must attend to semantic intention, because the same sounds or even words can be used with the intention of saying different things. If I tell you... that I admire bays, you would have to decide whether I intended to say that I admire certain horses or certain bodies of water. Until you had, you would have no idea what I had actually said even though you would know what sounds I had uttered.¹³

The general thought here is that a text is not just a series of marks on a piece of paper, it has a certain semantic content, or meaning. If the author's intentions are necessary to determine that meaning, then that is a strong argument for intentionalism.

If the legislature's intentions acquire their status for this reason – because of the role of the members as authors of the text – then the significance of the observation that subgroups often write legislation should be obvious: when a subgroup writes a piece of legislation, the subgroup is the author (or perhaps, more accurately, certain members of the subgroup are the authors of separate parts – more on this below). In such cases, whatever reasons or arguments are given for interpreting in accordance with the legislature's intentions *because* of the legislature's role as the author will also be reasons or arguments for interpreting the legislation in accordance with the intentions of the subgroup. Of course, the members of the subgroup do write the piece of legislation on behalf of the majority party, but they are the authors – just as, when Brian bids on behalf of Andy at an auction, Brian is still the bidder. One might argue that what is written only becomes legislation because of the members of the majority party, but that is to appeal to the second view about why the legislation should be interpreted in accordance of the legislators' intentions.

4.2. THE AUTHORITY VIEW

The second view is that statutes should be interpreted in accordance with the intentions of the legislature not because of the legislature's relationship to the statutes, but simply because of the *authority* of the legislature.

To present an example of an argument that relies on this view: in democratic countries, the members of a

¹³ Dworkin, 'Comment,' in Antonin Scalia (ed.), *A Matter of Interpretation: Federal Courts and the Law* (Princeton, NJ: Princeton University Press, 1997), pp. 115-128.

legislature are the elected representatives of the people; one might claim that the fact that they have been elected by the people to produce legislation grants them the authority to produce legislation. If judges (or other interpreters) diverge from the legislature's intentions, then judges are legislating – something which they have not been granted the authority to do.¹⁴

If the legislator's intentions acquire their status for this reason – because of a special authority granted to the members of the legislature – then the observation that sometimes subgroups write and determine the content of legislation on behalf of the majority party is especially significant. As explained above, to do something on behalf of another agent is to be granted an authority by that agent. When the members of a subgroup legitimately write and determine the content of a piece of legislation on behalf of the majority party, they have been given the authority to do so. Again, in such cases, whatever reasons or arguments are given for interpreting in accordance with the legislature's intentions *because* of the authority granted to the legislature will also be reasons or arguments for interpreting the legislation in accordance with the intentions of the subgroup.

It is also significant that if the intentions of the authors do form part of the content of legislation – as claimed above – and the members of the subgroup are given the authority to determine some or all of the content of a piece of legislation on behalf of the majority party, then that would naturally include an authority to determine the intentions that are part of the content – at least so long as it is common knowledge to both parties that intentions can form part of the content.

At this point, one might object that to focus on the subgroup's authority to write a bill and determine its content is a mistake. Even if that is something that the members of a subgroup can be granted the authority to do, they cannot be given the authority to enact a bill. For a bill to be enacted, a majority of the members of the legislature – commonly the members of the majority party – must vote in favor of the bill. The members

¹⁴ This is based on Stoljar's third normative argument against intentionalism ('Interpretation, Indeterminacy, and Authority,' p. 476). The third conceptual argument that she lists also relies upon the authority of the legislature.

of the subgroup cannot be given the authority to enact legislation on behalf of the majority, because they cannot be given the authority to vote on behalf of other members of the majority. If the authority to enact legislation is what it is about legislatures that makes their intentions matter, then the intentions of the subgroup cannot be claimed to matter for the same reason.

The problem with this objection is that it accords too much significance to the authority to enact legislation. That authority is only relevant when it gives the possessor a power to determine the content of legislation. To illustrate this point, it will be helpful to consider a case in which the authority to enact legislation and the power to determine the content of legislation are entirely separate. It could be argued that this is a constitutive feature of all Westminster systems of government, but to pick one, I shall focus on the British system. In this system, the Sovereign has the authority to enact legislation, because she must give her assent to a bill before it becomes law. In modern times, however, the Sovereign has no real choice but to assent (presumably, if she began to withhold her assent – which has not happened since 1708 – her authority would be taken from her). Because the Sovereign has no real choice, Parliament has all of the power to determine the content of legislation – any bills that the Parliament passes will become legislation when the Sovereign (inevitably) assents to them.

As a contrast, in the American system, the President has the authority to enact legislation: when he signs a bill sent to him by Congress, it becomes the law. But unlike the Sovereign, the President has a choice – he can choose to veto a bill rather than signing it (indeed, he often does). When the President vetoes a bill, Congress must pass the bill with a super-majority or reach a compromise with the President. Because the President has this influence, he has a part of the power to determine the content of legislation – a power the Sovereign lacks.

Now, because the Sovereign lacks any part of the power to determine the content of legislation, the intentions of the Sovereign are not the intentions that are relevant for legislative interpretation. Instead, the intentions that matter are the intentions of the body that does have the power to determine the content of legislation – the Parliament. But when a subgroup is granted the authority to produce legislation on behalf of

a legislative body (such as the Parliament), the subgroup receives the power to determine the content of legislation. Whatever the subgroup writes, the legislative body will pass, just as whatever the Parliament passes, the Sovereign will enact. So, all that is retained by the majority is a power that is akin to the Sovereign's, not a power or authority that is relevant for legislative interpretation.

4.3. THE CONSEQUENCE VIEW

Finally, the third view is that statutes should be interpreted in accordance with the intentions of the legislature simply because there would be negative consequences if statutes were interpreted in accordance with some other method.¹⁵ An obvious argument here is that if judges can interpret laws in accordance with their own beliefs and desires, that would be dangerous, because in many cases judges are not accountable to the people in same way that legislators are. If judges are not accountable to the people, then they have less reason to interpret legislation in whatever way is in the best interests of the people – or so one might claim.¹⁶ Another argument of this kind would be that legislators have a kind of knowledge or expertise that others do not.

¹⁵ Attorney General Edwin Meese III gave an argument of this form in his famous speech defending the view that the U.S. Constitution should be interpreted in accordance with the original intentions of the framers ('Speech Before the American Bar Association, in Steven G. Calabresi (ed.), *Originalism: The Quarter-Century of Debate* (Washington, DC: Regnery Publishing, 1985), pp. 47-54). Perhaps the most relevant passage is the following:

A jurisprudence seriously aimed at the explication of original intention would produce defensible principles of government that would not be tainted by ideological predilection. This belief in a jurisprudence of original intention also reflects a commitment to the idea of democracy... To allow the courts to govern simply by what it views as fair and decent is a scheme of government no longer popular; the idea of democracy has suffered. The permanence of the Constitution has been weakened.

¹⁶ As Jeremy Waldron notes, the interpretations of appellate judges are the most important, and appellate judges are not elected. Even when judges are elected, they "are seldom regarded by voters (and hardly ever regard themselves) as popular representatives in the same way that legislators are." See Waldron, 'Legislator's Intentions and Unintentional Legislation,' in Andrei Marmor (ed.), *Law and Interpretation: Essays in Legal Philosophy* (Oxford, UK: Clarendon Press, 1995).

Because of their knowledge or expertise, the consequences will generally be better if legislation is interpreted in accordance with the legislature's intentions.¹⁷

If the argument is that legislation should be interpreted in accordance with the intentions of the legislators for reasons of this kind, then presumably the same argument can be made about the intentions of subgroups. Subgroups within the legislature are made up of individuals who have been elected by the people, and they are accountable to the people who elected them. If, as sometimes happens, staff hired by the legislators become involved in the writing process, then they are supervised and guided by legislators who are accountable to the people. Whether legislation is written by legislators or by their staff members, those who do the writing are often chosen because they are especially well-suited to produce the bill – perhaps because of their expertise or history. If anything, then, the consequences should be even better when legislation is interpreted in accordance with the intentions of subgroups – there are at least no reasons for thinking that the consequences will be worse.

4.4. AN APPLICATION TO THE M&E PROBLEMS

The conclusion to draw at this point is that the reasons commonly given for interpreting legislation in accordance with the intentions of legislatures are also reasons for interpreting legislation in accordance with the intentions of subgroups for cases in which subgroups write legislation, determine the content of legislation, and form intentions on behalf of the majority party.

I have claimed that this is important because the M&E problems are less significant when applied to the intentions of subgroups. It is now possible to explain why. The satisfaction problem claims that legislatures will seldom have intentions, because for them to do so requires a high degree of conformity amongst the intentions of the members of the legislature. It is then claimed that there will seldom be that much conformity, because the members of legislatures generally have many different reasons for voting in favor of legislation as well as different understandings of the legislation. However, it is much more likely that the

¹⁷ Andrei Marmor presents a much more sophisticated argument of this form in *Interpretation and Legal Theory* (Oxford, UK: Clarendon Press, 1992) – especially Chapter 8.

members of a subgroup will be familiar with the details of the legislation and will have the same understanding of it, along with the same purposes and goals. This is both because they are a smaller number of people and because they will presumably have had to come to some kind of agreement or mutual understanding to determine the content prior to the writing process. For these reasons, it is much more likely that the members of the subgroup could have shared intentions.

Another possibility here is that the subgroup could delegate certain members or staff to write different parts of the legislation on behalf of the subgroup. 'On behalf of' relationships are often iterated or nested in this way – in corporations, for example – and so long as it is a recognized and accepted practice, it would be difficult to argue that it violates the constraints of the authority granted to the subgroup.

In this way, the majority party might determine parts of the content – perhaps the general purpose of the legislation and the means to be used to achieve the purpose – a subgroup granted authority by the majority might determine further parts of the content, and finally, the details and the precise wording would be determined by individuals granted that authority by the subgroup. Since it is the specific details on which the members of the majority would be least likely to have the requisite conformity of intentions, this approach to the production of legislation would seriously mitigate the severity of the satisfaction problem.

The epistemological problem (which claims that even if legislatures have intentions, we cannot know them) is also mitigated when subgroups act on behalf of the majority. To explain, defenders of intentionalism often accord a great deal of significance to the legislative history of statutes (generally consisting of the various documents and statements that are made by those who draft or sponsor the bills). At least to a degree, this approach seems misguided if the intentions that are thought to be relevant are those of the legislature as a whole, as the intentions of those who draft or sponsor the bill may not be the same as the intentions of those who enact it. On the approach taken here, however, the focus on legislative history is entirely appropriate, as that will often be a very reliable way to find the intentions of those who wrote or determined the content of the bill, because those people are usually the ones that produce the bulk of the legislative history.

5. CONCLUDING REMARKS

At this point, one might object that all that has been shown is that there are intentions that can be used to interpret the law in a wider range of cases than previously thought; so both intentionalism and proxy intentionalism are inadequate as theories of legislative interpretation, because there remain cases to which they cannot be applied. But to object in that way is to misunderstand the intentionalist's position. If there are good reasons for believing that legislation should be interpreted in accordance with the intentions identified here, those reasons are not invalidated simply because the intentions are not always present. Instead, all that is established is that some other method – a second-best method – must be used when the relevant intentions are not present. Intentionalism is attacked because it is thought that there will seldom or never be relevant intentions; if the argument presented here is successful, that claim can no longer be made.