Ralf Poscher

THE NORMATIVE CONSTRUCTION OF LEGISLATIVE INTENT

Legislative intent is as controversial in legal theory as it is crucial for the legitimation of constitutional and statutory law. It is crucial for the legitimation of large parts of modern legal systems which are dominated in ever-larger parts by legislation not only on the European Continent but also in the Anglo-American legal sphere. In modern legal systems, there is no escape from the administrative state which is ruled not by common law, but by statutes on different levels running from constitutions, to parliamentary legislation and administrative regulations down to municipal bylaws. All these legal rules receive their political legitimacy, from the personal legitimacy of the authorities that created them. Were they not created by democratically legitimate authorities, they would lack the component of their political legitimacy. However well founded in moral theory, promulgations of rules by a concerned moral philosopher would not acquire the necessary political legitimacy. Thus, from the perspective of legitimacy the often voiced theoretical skepticism regarding legislative intent is most worrying.

Were the legislature not capable of having intentions, the laws it passes would not receive their meaning from the legislator. The laws would have at most the formal legitimacy conferred by passing through a legislative process, but there could be no connection between the substance of the law and the legislature, since the legislature would not be capable of having substantive intentions. Legislation would become an unintentional process, a strange ritual by which we produce the content of our statutory legal texts unintentionally. Statutes would be more like the unintentionally produced order of bones in a shamanistic ritual, with the legislature – unlike the shaman – not even being in the position to interpret the signs.

But legislative intent is not important only for the legitimacy of large parts of the law. It is also central to an analytical reconstruction of legal hermeneutics. As amongst others the work of Paul Grice and Donald Davidson has highlighted, non-natural signs acquire their meaning only through the communicative intentions that are connected to them. No meaning, no interpretation and no hermeneutics of linguistic expressions can exist without communicative intentions, be they factual or fictive. Central to communicative intentions is an intentional subject. For the law, that means the legislator. Without a convincing reconstruction of legislative intent, the whole analytical reconstruction of legal hermeneutics fails to get off the ground.

301 Along with personal legitimacy based on inputs there are other sources of legitimacy like the out-come legitimacy that the statutory law produces by doing a good job at regulating its subject areas.
The strange consequences for a conceptualization of our legislative practice and for the consequent issues of legitimacy have never disturbed — and sometimes may even have inspired — a long-standing tradition of skepticism with respect to legislative intent. This skepticism has two roots: one theoretical, the other empirical. Initially, theoretical skepticism was at the forefront. The idea of legislative intent was already strongly challenged by so-called “objectivist” authors in the German methodological discussion at the end of the nineteenth century and later especially by realist authors in the Scandinavian and American tradition. In this line of critique, the idea of collective intention as such is criticized as philosophically dubious. It seems to presuppose collective minds, an assumption that does not sit well with a realist ontology. A collective intention of the legislature had to be at best an innocent fiction, or more likely a part of the mainstream legal ideology which had to be exposed. These skeptics discarded the idea of collective legislative intention already on a theoretical basis as a fiction or as philosophically unsound: Intentions are associated with mental states and only individuals are capable of mental states. Collective intentions and agency appear to be metaphysically and ontologically suspect.

On the other side of the recent debate, philosophers like Raimo Tuomela, John Searle, Margaret Gilbert and Michael Bratman have offered reductive accounts, which reconstruct collective intentions as complex sets of synchronized, interdependent intentions of individuals. These theories have inspired scholars aiming to free our ideas about legislative intent from suspect philosophical presuppositions like collective minds, which lurk


in the ontological background of the traditional defenders of legislative intent.

Empirical skepticism features more prominently in more recent discussions of the methodological status of legislative intent in legal interpretation. Even those who would accept some kind of philosophical reconstruction of collective intention under some reductive philosophical account are empirically skeptical about their applicability to the larger collective bodies, like parliaments or senates or city councils, involved in the creation of most of our statutory law. Authors like Ronald Dworkin,311 Heidi Hurd,312 and Jeremy Waldron313 do not question the metaphysical status of legislative intent as much as its empirical feasibility, at least under the conditions of the modern legislative process. They can point to the fact that at least in parliament, more often than not, most legislators have not even read the law they are voting on, and sometimes do not even have the faintest idea about it. In such situations, the legislators are instructed by party leaders and whips on how to vote on which bill, and most of the time the legislators do as they are asked, without getting involved in the substance. What sounds like a cynical description of modern lawmaking is simply a necessity, given the legislative workload, which calls for a division of labor in parliament, as in every other institution of modern complex societies.

The skeptics doubt that under these conditions the individual legislators’ intentions can ever correspond sufficiently to uphold the idea of a collective intention that satisfies the conditions of the reductive reconstructions. They can point to the fact that the reductive accounts were primarily developed for the collective intentions of small groups, like a couple taking a walk together or some lumberjacks collectively chopping down a tree, situations where there really might be corresponding and interlocking individual intentions. To suppose, however, that the same conditions hold for a several hundred legislators seems too farfetched for the skeptics. Even if something like collective intentions were theoretically feasible, it seems unclear how they could arise from the process of parliamentary legislation, with its many different players associating very different intentions with a legislative act, or even lacking any specific intentions regarding the content of the bill at all.

More recently, different reactions to this critique have evolved which rely on philosophical discussions of group agency. To counter the argument pertaining to the small-group setting, some defenders of legislative intent have drawn on the account of group agency of Christian List and Philip Pettit.314 Their approach relies on the organizational structure and rationalizing

procedures of some groups to reconstruct our practice of assigning agency to corporations, political parties, churches, and also legislators as nested group agents within the state as the encompassing group agent. At first glance, their theory seems highly attractive for defenders of legislative intent, since the legislature itself has an organizational structure and is governed by constitutional and parliamentary rules that look very much like those referenced by List and Pettit in defending their claim of group agency. A closer look, however, reveals that List and Pettit do not address the specific issues of legislative intent, which they presuppose, and that these issues are not addressed by philosophical theories of collective intentionality they refer to either, since these theories do not deal with large sized groups. This is not to say that theories of collective intentionality and group agency do not offer important contributions to our reconstruction of legislative intent and our talk of the legislature as a collective agent. However, they are very general in nature, and therefore do not address all the specific issues that will arise with some form of collective intentionality and group agency, although it might be a fair conjecture that many group agents other than the legislature present similar problems.

Part I will show that theories of group agency do not help to address the most basic issue of legislative intent, because they build on and presuppose collective intentions.

Part II reconstructs the possibility of an overlap between the actual individual intentions of legislators. It shows that, taking the anaphoric character of the actual intentions of each legislator into account, it might even be possible to find the necessary overlap with respect to some core elements of a bill, under favorable circumstances. However, first, given the huge number of participants, it will always be difficult to support such a scenario with the necessary epistemic certainty; second, it will only work – if at all – with respect to paradigmatic instances of the law and not for instances of semantic indeterminacy, when recourse to legislative intent is most needed.

Part III builds on the anaphoric reconstruction of the second, and shows where exactly our pervasive talk of legislative intent is infused with a normative construction. It tries to glean the content of the construction from evidence of our practices with respect to the legislative process and outcomes. One important finding lies in the epistemic character of the normative construction involved. This reconstruction is contrasted with and defended against alternative accounts.

Part IV briefly contrasts the epistemic normative construction underlying legislative intent with the substantive normativity involved in legal construction, which comes into play when legal interpretation on the basis of legislative intent leaves the law indeterminate for the case at hand.

The conclusion sums up the implications of the epistemic normative construction of legislative intent for our practice of legal interpretation and how it fits into the overall analytical reconstruction of legal hermeneutics.
I. LEGISLATIVE INTENT AND GROUP AGENCY

Let us address the problem top down: Let us ask what the idea of group agency requires, and then see whether these requirements can be met in the case of the legislature or whether there is still something missing to account for our pervasive talk of legislative intent.

List and Pettit’s theory of group agency is part of a larger theoretical project that tries to account for social phenomena along the lines of a Davidson-inspired supervenience account of psychological and social explanations. Just as chemical and biological explanations supervene on the causal relations of the microphysical elements described in an ideal physics, psychological explanations supervene on neurophysiological ones, and social explanations supervene on psychological, i.e. intentional, ones. Higher-order causal explanations, which ultimately supervene on the microphysical causal relations tracked by an ideal physics, have their irreducible explanatory value, since they reveal supervening regularities not traceable at the microphysical level.Davidson highlighted the value of causal explanations under different descriptions;Frank Jackson and Philip Pettit framed it in a program theory, according to which higher-order explanations reveal to which type of event some state of affairs is programed, irrespective of the different microphysical tokens that might realize the subsequent type.

Group agents supervene in this fashion on individual agents. They supervene, because the intentions ascribed to group agents are in certain respects independent of the intentions of the individual agents constituting the group: The group intentions are realizable with many different constellations of individual intentions, just as higher-order causal explanations are multi-realizable with respect to lower-order phenomena. Group agency is not ontologically independent of the intentions of the individual members – just as biological facts are not ontologically independent of microphysical ones – but they are epistemologically and thus explanatorily independent, in that they develop a life of their own, instantiated by different complex constellations of intentions that are difficult to track.

One theoretical reason for epistemological independence stems from theoretical issues with the aggregation function for group intentions. Were groups to rely on unanimity as an aggregation function, the intentions of the

group and the intentions of its individual members would always be in sync. Group intentions would thus never be independent of the intentions of its individual members. Unlike some juries, most groups do not rely on unanimity, because this would seriously impair their potential to form collective intentions at all. Under majoritarian aggregation functions, however, there is no strict relation between the intentions of the individual members and the aggregated intentions of the group.

This point is easily illustrated by a simple example of the so-called doctrinal paradox – or more generally the discursive dilemma – taken from Pettit and List: “For example, the group could be a university committee deciding on whether a junior academic should be given tenure, with three relevant propositions involved: first, the candidate is excellent at teaching; second, the candidate is excellent at research; and third, the candidate should be given tenure, where excellence at both teaching and research is necessary and sufficient for tenure.”

The group judgment on the case depends on whether the majoritarian aggregate function takes a premise-based or a conclusion-based approach. A majority vote on tenure would not support it, whereas majority votes on the two premises would.

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The same holds for decisions on legal cases. To take another example from List and Pettit. According to legal doctrine, obligation and action are jointly necessary and sufficient for liability; that is, the conclusion is true if and only if both premises are true. Suppose, as shown in Table 2.1, judge 1 believes both premises to be true; judge 2 believes the first but not the second premise to be true; and judge 3 believes the second but not the first to be true. Then each premise is accepted by a majority of judges, yet only a minority, that is, judge 1, individually considers the defendant liable. The ‘doctrinal paradox’ consists in the fact that the court’s verdict depends on whether it votes on the conclusion or on the two premises: a majority vote on the issue of the defendant’s liability alone would support a ‘not liable’ verdict, whereas majority votes on the two premises would support a ‘liable’ verdict.

319 Ibid., p. 92.
321 C. LIST & P. PETTIT, Group Agency, op. cit., p. 44.
Since groups are faced with the dilemma also diachronically, they are, due to the demand for consistency of group intentions, under high pressure to adopt a premise-based approach.\textsuperscript{322} Thus, groups will end up supporting conclusions that are not supported by the majority of its members. The positions of the group supervene on the intentions of its members in an epistemologically interesting way, since they follow a consistency of their own, instantiated by constellations of individual intentions that are difficult to track and to predict, and not necessarily shared by the majority of its members. This kind of independence from the consistency of individual intentions leads List and Pettit to ascribe an epistemological status of their own to group agents.

But not every aggregation of individuals is a group agent. There are basically two conditions that a number of individuals must satisfy to qualify as a group agent. The first condition is the existence of collective or joint intentions.\textsuperscript{323} Without joint intentions there is no group agency. Agents are intentional entities; entities to which we cannot ascribe intentions may respond to their environment, but are not agents in any pre-theoretical or theoretical sense. A vending machine reacts to the coin, but we cannot ascribe to it the intention of selling a product.\textsuperscript{324} If groups are to qualify as agents, they have to provide for intentions of their own, i.e. collective or joint intentions.

List and Pettit here rely on and presuppose a reconstruction of collective intentions along the lines of the positions in the theory of action, which provide a reductive account congenial to their overall supervenience approach. Without committing to it, they take – mainly inspired by Michael Bratman – from these discussions four conditions that the individual members of the group have to satisfy to form a collective intention:

- **Shared goal.** They each intend that they, the members of a more or less salient collection, together promote the given goal.

- **Individual contribution.** They each intend to do their allotted part in a more or less salient plan for achieving that goal.

- **Interdependence.** They each form these intentions at least partly because of believing that the others form such intentions too.

\textsuperscript{322} P. PETTIT, « Groups with Minds of their Own », \textit{op. cit.}, p. 175-178.


\textsuperscript{324} See \textit{ibid.}, p. 23.
Common awareness. This is all a matter of common awareness, with each believing that the first three conditions are met, each believing that others believe this, and so on.\textsuperscript{325}

Collective intentions can be reduced to a set of individual intentions that overlap and interlock as set out in these four conditions. In the case of our three judges, they form a collective intention with regard to the case – irrespective of the aggregation function adopted – because they share the goal of reaching a decision on that specific case under the voting rules adopted, they each intend to cast their vote according to these rules, they do so, because they believe that the other two judges do the same, and they are all aware of these circumstances; thus, their verdict fulfills the conditions for a collective intention.

List and Pettit’s point now is that collective intentions alone are not sufficient to ascribe group agency. They do not abstract from collective intentions as the basis for group agency, but require organizational and substantive standards that ensure a certain degree of synchronic and diachronic rationality and consistency in the formation of collective intentions across different issues and over time to ascribe group agency.\textsuperscript{326}

And the integrated collectivity can be relied upon to achieve a rational unity in the judgments and intentions endorsed, unlike the group that meets only the mutual-awareness conditions for forming collective attitudes. It satisfies the dual basis that is necessary for a collectivity to count as an intentional subject.\textsuperscript{327}

It has been stressed in the more recent literature on legislative intent that the legislator and the rules and regulations of legislative procedure warrant some optimism that the legislature satisfies this second rationality condition to count as a group agent.\textsuperscript{328} The reference to the organizational structure of the legislature and its rationalizing procedures, however, only concerns the second of the two conditions for group agency. Without meeting the first – the formation of collective intentions – the second condition can never be met.

Especially in the more recent literature, the critique of legislative intent, however, questions the first condition on empirical grounds. What is contested with regard to legislative intent is the intentional basis for collective intentions of large groups of lawmakers in representative assemblies. Even if we grant the premises of collective intentionality along the lines of a reductive account à la Bratman and of group agency à la List and Pettit, the factual skepticism based on what we know about the legislative process in modern legislatures remains to be addressed. In the German parliament, MPs are given written voting instructions by their parliamentary party leaders. If it is not in their area of expertise, it is not uncommon for MPs not to

\textsuperscript{325} Ibid., p. 5.

\textsuperscript{326} P. PETTIT, « Groups with Minds of their Own », op. cit., p. 180-184.

\textsuperscript{327} Ibid., p. 181 – not in original.

know what the bills they are voting on are about – except maybe the general topic. To ensure that MPs do not get confused, a well-known member of their parliamentary group is usually placed at the yes- or no-ballot box, so that they can make sure – and probably also control – that the instructions were understood. Nevertheless, it still happens that some members confuse different bills, usually leading to sharp criticism from their parliamentary leaders. In routine cases, this is not evidence of the depraved state of German parliamentarianism, but testifies to the division of labor necessary in modern parliaments, faced with an overload of highly complex and technical legislative projects.

The empirical reality of parliamentary practice relating to issues of legislative intent concerns the first of the two conditions for group agency: its intentional basis. It challenges the idea that the intentions of the individual representatives – and other officeholders involved – show the necessary overlap and interconnectedness required for collective intentions that could then in addition meet the rationality requirements postulated by List and Pettit for group agency. Since the second condition builds on the first, no procedural rules or regulations can compensate for the lack of collective intentions. The rules of legislative procedure might offer all the rationality safeguards that one could ask for; they would still not make up for a lack of collective intentionality, since they apply to the collective intentions of a group agent and thus presuppose them. That is why appeals to parliamentary procedure do not address the most pressing issue of legislative intent. Rational rules and procedures alone provide for neither group agency nor collective intent. They can build on the latter to provide the former, but cannot substitute for the intentional basis. They can only justify parliament being regarded as a group agent if we can come up with a credible reconstruction of instances of collective intent for that body.

Neither can the appeal to parliamentary procedures and their rationality presuppose a “rational legislature” independent of the intentions of the individual lawmakers, as Richard Ekins suggests. Parliamentary rules and procedures might guarantee a certain rationality of the “legislature”, but they do not explain how the collective intentions necessary to form a group agent like the “legislature” comes about. We cannot explain the emergence of a collective intent of the legislature by relying on a rational legislature. The argument from the “rational legislature” presupposes what it claims to explain.

If the skeptics about the collective intentions of the legislature are right, it would resemble a panel of judges in the above example, except that each of the three judges would have a different case in mind when casting her vote. Just as such a panel would never qualify for group agency, the legislature would not qualify for group agency if the intentions of the individual

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legislators would not be sufficiently synchronized. This point is not only independent of all procedural rationality safeguards, but also of the aggregation function. Even if the aggregation function were unanimity, it would require members of the group to cast their vote on the same issue. If the three members of the tenure committee had three different candidates in mind when casting their vote, it would not constitute a collective intention, even if each of them were in favor of her candidate on all points.

Also for List and Pettit’s account of group agency, the crucial question remains whether there is a sufficiently synchronized intentional basis for assuming a legislative intent and group agency. If we wish to justify our talk of legislative intent and group agency, we have to come up with intentions shared by the individual legislators and interconnected in one of the ways suggested by the theories of collective intentionality. The efforts in the theories of collective intentions and group agency have shown in which metaphysically- and ontologically-unsuspect sense we can talk about collective intentions and ascribe agency to groups. The theoretical sophistication of our talk of legislative intent and group agency thus addresses the mainly theoretical concerns about legislative intent voiced in some older lines of critique. They also describe more precisely what we have to look for if we want to assign collective intentions and agency, but they do not answer the question of whether these conditions obtain empirically in the case of the legislature.

II. LEGISLATIVE INTENT AND COLLECTIVE INTENTIONS

What is required for an actual legislative intent to obtain are overlapping and interlocking intentions of the individuals involved, along the lines of the reductive accounts described above. In the case of a parliamentary assembly we thus need individual intentions shared by the representatives voting on a bill.

A. The Minimal Collective Intent to Legislate

Joseph Raz pointed out that there must at least be a minimal collective intention, in the sense that each legislator casts her vote with the same intention – to pass a law.\(^3\) Raz admits that this is a rather sparse collective intention, which does not resolve any of the issues discussed in the methodological debates about legislative intent. But sparse as it is, Raz thinks that this is all that is realistically available. There are no collective communica-

tive intentions that could go beyond the conventional meaning of the text at the time of its promulgation.\textsuperscript{332}

Raz’s minimal intention is not nothing. The sparse collective intention of passing a law can at least explain our intuition that legislation is an intentional collective activity and not some happenstance. It also encompasses the intention to accept the majority rule set up for the institution, for the outcome of a vote on how the collective intention of the institution is to be determined. The individual legislators unanimously accept that the positive or negative vote will count as the collective intention of the legislative body to either accept or reject a proposal, even when the acceptance or rejection itself is not unanimous. The collective intention with respect to the outcome of the vote as the intention of the institution is not only the collective intention of the majority but the intention of all the members of the legislature.\textsuperscript{333}

In this, legislatures are no different than the tenure committee or the panel of judges in List and Pettit’s examples.

Raz’s sparse collective intention has found no critics. On the one hand, advocates of legislative intent see it as at least a starting point. From this perspective, it proves that there is in any case an undisputable collective intentional basis for legislative intent.\textsuperscript{334} On the other hand, skeptics of legislative intent do not seem to object, since it is for all practical purposes without any consequences. According to Raz, his reconstruction of legislative intent does not pertain to any content of the law, but only to the act of legislation as such. With respect to the legitimacy issues connected with the idea of legislative intent, the minimal Razian intention provides little comfort. Questions of the legitimacy of the law need to address its content. They are not answered by reference to the fact that the legislator wanted to pass a law, they also pertain to whether the content of the law can be traced back to a collective intent of the group of individuals we have invested with personal representative democratic legitimacy. If all we can come up with is the sparse Razian collective intention, it would be like the tenure committee that agrees to vote on a candidate but does not specify which candidate each member is voting on. Such a voting procedure would not even be regarded as rational, let alone convey legitimacy and group agency, which requires meeting rationality standards over time, would ever come out of it.

\textbf{B. The Anaphorical Structure of Legislative Intent}

A way to reach a richer legislative intent on the basis of Raz’s sparse conception might emerge if the intentional structure of the voting act is examined in more detail. What do legislators actually communicate when they vote on a bill? They do not communicate very much; they just say “yes” or “no” by either checking a yes- or no-box on a ballot, by raising their hand in

\textsuperscript{332} J. RAZ, « Intention in Interpretation », \textit{op. cit.}, p. 292; see also J. WALDRON, « Legislators’ Intentions and Unintentional Legislation », \textit{op. cit.}, p. 142-144.

\textsuperscript{333} R. EKINS, \textit{The Nature of Legislative Intent, op. cit.}, p. 222, p. 234.

\textsuperscript{334} V. NOURSE, « Elementary Statutory Interpretation: Rethinking Legislative Intent and History », \textit{op. cit.}, p. 1627-1628.
response to a yes- or no-call, by putting their voting card into the yes- or the no-box, or by some other voting mechanism, like the division of the assembly or the German “Hammelsprung”, a procedure where members of parliament enter the assembly hall through yes- and no-doors. But however the details of the voting procedure, all they communicate is “yes” and “no”. In particular, they do not communicate the whole text of the bill they vote upon, by e.g. collectively reciting it, as is sometimes done when a group makes a pledge – like the voters at some of Donald Trump’s rallies in the 2016 primary campaign.

The meaning of the utterance “yes” or “no” is not apparent without a point of reference. Linguistically, “yes” and “no” are propositional anaphors. They relate to a proposition that they affirm or reject. On some occasions, people might utter “yes” or “no” as an expression of joy or excitement or disbelief or frustration, but usually “yes” and “no” relate to another utterance with which propositional communicative intentions are connected. Just like the truth predicate, “yes” and “no” allow the speaker to endorse or reject propositions by uttering a single expression. If asked whether you want to go to the movies tonight, the answer “yes” means “I want to go to the movies tonight.” The same holds for the affirmation or rejection of other factual statements, like whether it is raining. Like the truth predicate, “yes” and “no” not only allow a speaker to endorse or reject a single proposition, but also complex sets of propositions. An attorney can deliver a complex description of some factual circumstance relevant to the trial and ask the witness if that is what happened. The witness can simply say “yes” or “no” to endorse or reject the whole set of propositions with which the attorney described the scene. It is this feature in particular that makes “yes” and “no” so attractive for legislation. With a simple “yes” or “no”, the legislators can endorse or reject highly complex sets of normative propositions. In the context of the reunification of Germany, the German parliament voted on the “Unification Treaty”, which comprised no less than a complete legal order for the former GDR and much more, with a single vote.

The anaphoric character of the vote supports the idea that there is some kind of actual collective intention established by the synchronized and interdependent intentions of all the legislators. They all say “yes” or “no” with respect to the same text. This idea is not threatened by the fact that some parliamentarians vote for and some against the bill. As in the case of the tenure committee, unanimity is not necessary, because they agreed on an aggregation rule. It is not the majority that passes the bill, but the whole legislature, as long – as in the case of the tenure committee – as they vote on

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the same subject. But this is where the trouble begins. Even taking into account the anaphoric character of their vote, the hundreds of legislators would have a collective intention with regard to the content of the law only if they associated the same communicative intention with the text they are voting on. But this is far from evident.

Most legislators will only have a clear idea what they are voting on in their areas of expertise and specialization. The rest will rely on the expertise of their colleagues and party leaders, and base their vote on their trust in them. One way out of the difficulty of reaching an actual collective intention based on actual individual intentions might rely on deferential intentions of the individual representatives. They might all defer to the intentions of the party leaders sponsoring a bill and thus reach an actual empirical collective intention. But there might be different interpretations of the text on the two sides of the aisle house, with some legislators deferring to the intention connected with the text by the majority leader and others to the different intentions of the minority leader. Since only a common intention can serve as a basis for collective intent, the communicative intention connected with it by the majority or its leader does not have any special status. The vote can only deliver a collective intention in as far as those rejecting the bill anaphorically also refer to the same communicative intention – only rejecting it on the basis of the content that the affirming majority also connects with it.

Further, there are many other candidates for a deferential anaphoric reference – to name but a few: the intentions the individual representative would have associated with the text, if she had read it, given her contextual knowledge, intentions that will vary from representative to representative; the intentions that a general reader would connect with it, contrasted with a reader versed in the field, a lawyer, a specialized lawyer, and so on. Things are further complicated by the fact that some members of the legislature might have actually read the bill and come to their own understanding of it and thus did not defer. And further, the meaning that different readers among the legislators attached to the text would most likely diverge in some detail.

There is little reason to be empirically confident that all the representatives had the same anaphoric propositional reference in mind – even though they all referred to the same text. Empirically it seems that the most that we can hope for are different propositional anaphoric references that overlap to some extent. What the sponsor of the bill had in mind overlaps, for paradigm cases, with the meaning that casual and experienced readers of the bill would associate with the text and this would lead to an overlap of the different deferential intentions of some of the lawmakers. This overlap might, in favorable circumstances, epistemically justify us in concluding that there is a core of an actual empirical collective intention of the legislature. So the combination of the anaphoric character of the vote and the overlap of the different – in part deferential – anaphoric references each legislator had in mind might – under favorable circumstances – provide for a minimal actual collective communicative intention. But it seems far-fetched to assume that the overlap of these actual collective communicative intentions could ever go beyond communicative intentions that cover paradigm cases of the semantic meaning – cum basic context – of the legislative text. Beyond those,
we can hardly have any epistemic confidence in associating actual collective communicative intentions with a legislative text.

For all those cases in which we need to revert to legislative intent, namely all cases of doubt and semantic indeterminacy, there is little epistemic reason to count on an actual empirical collective communicative intention. Thus, we might get a little bit further than Raz’s sparse collection intention to one that at least covers paradigm cases, but even under favorable conditions legislative acts are not provided with any meaning by the legislature that goes beyond paradigm cases of the semantic meaning of the text. Even if we were to be optimistic on some kind of overlap of intentions, there would be no reason to resort to legislative intent in cases of semantic doubt, where it is hermeneutically most needed. But, as it happens, the law does not rely on optimistic overlap scenarios to determine the intention of the legislature. This would be far too uncertain ground on which to found the legitimacy of the law. Remember: were the collective intention based on an actual empirical overlap of anaphoric propositional reference, it would falter if just one individual legislator’s intentions missed the mark. In a process involving hundreds of legislators, this would be a far too uncertain basis.

III. The Epistemic Normative Ascription of Legislative Intent

The law, however, rarely relies solely on actual communicative intentions in evaluating utterances of legal import. It does not rely on actual intentions, but on normatively ascribed ones. The law often has to balance the interests of utterers and the addressees of an utterance. It often best serves the utterer’s interest if the communicative intentions that she connects with her utterance are also taken as the legally significant content of her utterance. In cases where the semantic meaning of the utterance diverges from the meaning the speaker intended to communicate, it is equally apparent that the addressee of the utterance needs some legal protection when she takes the utterance at its semantic face value. Thus the content of a contract is determined by the communicative intentions that the law normatively ascribes to the parties, not necessarily by those each party actually had in mind. For example, the Second Restatement of Contracts under American Law relies strongly on an objective approach to contract formation. Parties are generally held to the semantic meaning of their utterances, not necessarily to what they intended.338

Similarly, we also normatively ascribe communicative intentions to individuals involved in the act of legislation independent of their actual intentions. The anaphoric structure of the vote demonstrates that the individual lawmaker is in a structurally similar position to the addressee of a contract

338 Restatement (Second) of Contracts §§ 201, 202 (1981); see L.M. SOLAN, « Contract as Agreement », Notre Dame Law Review, 83, 2007, p. 353-408, with a detailed critique of the overreliance on the objective perspective. Even though German law stresses the importance of the parties’ intentions (§ 133 BGB), it ascribes to the parties the intentions that could reasonably have been associated with a declaration (§ 157 BGB).
offer. The lawmaker is asked to endorse norms associated with the text of the bill. This rules out that the anaphoric reference is determined solely by the intentions that the sponsors of the bill actually had in mind. They must be determined by the intentions that an individual lawmaker can infer from the text and the context of the bill. If the sponsor of the bill idiosyncratically associated communicative intentions with the bill that could not have been deciphered by the lawmakers voting on it those idiosyncratic intentions would have to be disregarded, just as in a contract case.\textsuperscript{339} Just as in contract law, the text of the bill is only associated with normative propositions that each lawmaker could reasonably infer from the semantic meaning of the text and the content of the legislative process. Since lawmakers share the sparse Razian intention to vote on a law, and since voting is only a rational procedure of preference aggregation in as far as each vote has the same anaphoric reference, the anaphoric reference of the vote must be determined by an interpretation of the text that all lawmakers could at least in principle share. As in the case of contract law, idiosyncratic interpretations of the text of the bill by individual lawmakers must be discarded normatively.

That the normative ascription of the anaphoric reference of the vote is deeply rooted in the practice of legislative voting, and probably also of voting in general, emerges clearly from how we deal with errors in the voting act. The propositional content of the voting act is a three-layered phenomenon: The anaphoric content of the vote endorses or rejects a text and through the text a propositional content that is connected with the text. At each level the treatment of errors shows that the law does not rely on the actual intentions of the individual legislator, but on intentions that are normatively ascribed to her.

If a member of parliament does not pay attention and raises his hand for the “no-vote”, because he thought it was the “yes-vote” – he intended to communicate “yes”. His vote, however, will legally be counted as a “no”\textsuperscript{340} and he himself would hardly expect otherwise, but admit that he has been inattentive and made a – hardly excusable – mistake.

The same holds if the error does not pertain to the anaphoric content of the vote, but to the text it refers to.\textsuperscript{341} If a member of parliament thought she was voting on a tax law, though it was actually the new housing bill, her vote would count as a vote on the housing bill. The text her vote refers to in the sense of the law is not determined by her actual communicative intentions but is normatively ascribed by the procedural legal rules of the voting act. Voting is a highly formalized procedure. Like the procedure itself, the communicative intentions connected with it are determined by – mostly im-

\textsuperscript{339} Though theoretically the anaphoric “Yes” or “No” could also endorse, “whatever the author of the text meant”; just as a devote Catholic could state that everything the pope declares ex cathedra is true regardless all the pope’s past and future ex cathedra declarations.


\textsuperscript{341} See for the German law BVerfGE 16, 82, 88; H. SCHULZE-FIELITZ, Theorie und Praxis Parlamentarischer Gesetzgebung, Berlin, Duncker & Humblot, 1988, p. 353.
The Normative Construction of Legislative Intent – R. Poscsher

The normative construction of legislative intent ascribes the same communicative intention to each individual legislator, it does not seem to differ from a normative construction that does not rely on a plurality of legislators but ascribes a communicative intention to the legislature as a collective agent. Normatively ascribing parallel communicative intentions to everybody involved in the legislative process seems to be an unnecessary detour. We might as well normatively fictionalize a collective legislature with the same communicative intention. In both cases, it is the single fictive communicative intention that matters, whether we ascribe it to individual legislators or to some fictive collective legislature. But how could it be different? The phenomenon we want to reconstruct is our talk about legislative intent, which has to be a non-pluralistic notion in as far as it is supposed to help us in our hermeneutical enterprise. Thus there cannot be a difference in outcome, whether we rely on an ascription to individual legislators or to a collective legislature. The difference is not one of outcome but of theoretical penetration in at least two respects:

First, if we do not normatively ascribe the same anaphoric reference to each of the votes, legislative voting becomes – as we have seen – an irrational practice. If the vote of each legislator can be directed at a different law, voting as a preference aggregation mechanism loses its footing: since each legislator would be expressing their preference with respect to a different law, they could not be aggregated anymore – just as in the case of the hiring committee, if its members have different candidates in mind when they cast their yes or no vote. Voting is only a sensible practice if we can ensure not that every vote is the same, but that every vote is on the same issue. If we cannot ensure this rationality requirement factually by making sure that everybody actually has the same issue in mind, we have to revert to normative ascriptions as the law regularly does. But insofar only the ascrip-
tion to individual legislators is of help. Fictionalizing a collective agent, 
does not explain the voting behavior of its constituents.

Second, it concerns the ontology of collective intentions, which gave 
rise to their early theoretical critique. We can ascribe intentions to anything 
we like, even to a vending machine that “intends” to cheat us by taking our 
money but refusing to provide us with the merchandise, or to our personal 
computer, which “wants” to annoy us again. We can even ascribe intentions 
to nonexistent objects such as the thunder god, who demonstrates his dis-
pleasure with his loud roar. Theoretically, however, ascribing intentions to 
entities comes with ontological costs. Ascribing intentions to an entity 
comes with the ontological commitment to its existence. If we ascribe inten-
tions to the thunder god, we commit to belief in its existence. Ascribing in-
tentions too liberally can thus populate our ontology with dubious enti-
ties.\footnote{This is not to say that the costs are not worth incurring from a pragmatic perspective in some contexts. Whether certain animals are capable of intentionality is of little pragmatic importance, if ascribing beliefs, desires, or intentions helps us to deal with them. When we watch a dog chasing a cat up a tree, it seems to make the world easier to grasp for us, if we explain its barking at the bottom of the trunk by ascribing intentional states to it such as that it \textit{thinks} the cat is on the tree and that it \textit{wants} to catch the cat, D. DAVIDSON, « Rational Animals », in D. DAVIDSON (ed.), \textit{Subjective, Intersubjective, Objective}, Oxford, Oxford University Press, 2001, p. 95-106, p. 96-97. But the pragmatic question is distinct from the philosophical and factual question whether animals \textit{of} a certain species are actually capable of having intentional states. The pragmatic reasons could also hold for a vending machine.} If we ascribe intentions directly to collective entities such as the leg-
islature, we commit ourselves to the existence of collective minds capable 
of forming intentions. It was precisely this dubious ontological commitment 
that used to motivate theoretical resistance against the acceptance of legisla-
tive intent. The advantage of ascribing communicative intentions not direct-
ly to the legislature as a collective agent but to the individual legislators lies 
in the potential for reductively reconstructing our talk about legislative in-
tent without committing to dubious collective minds. We can thus recon-
struct our talk about legislative intentions in an ontologically less costly 
fashion. The only element we need for the reconstruction are normative 
rules for ascribing intentions to individual legislators that are not necessarily 
actually held. These normative ascriptions do not entail any ontologically 
dubious claims, since legislators are suitable targets for these ascriptions. As 
natural persons, they are capable of forming intentions in a theoretically un-
suspect way. The rules of ascription involve a fictive element but one with 
no ontological costs. Furthermore they are pervasive in the law. Even if they 
are not as explicitly stated for legislation as for contract law, they can be in-
ferrred from our practice in cases such as voting errors. Thus the seemingly 
circumlocutory construction of legislative intent via the normative ascrip-
tion of communicative intentions to each individual legislator theoretically 
better explains our hermeneutic practice, which relies on the legislature as 
the author of our statutory law.
A. The Diligent and Competent Lawmaker

If the propositions the vote refers to via the text of the law are normatively fixed, the crucial question is: according to what criteria? For these normative propositions there are almost as many candidates as there are individual lawmakers – already if we relate the text to different potential interpreters: the proposition that the man on the street would connect with the text, the specific addressees of the law, the legal expert, the legislative leader who sponsored the bill, an ideal doctrinally-versed lawyer such as Dworkin’s Hercules etc. – would in principle all qualify. Since the normative standards according to which the propositional reference of the vote is fixed are not explicitly stated but implicit in our practice, we have to look closely at this practice to determine them. They are not obvious and have to be reconstructed from clues that can be gleaned from the practice within each legal system. In detail they are specific to every legal system. It seems, however, that the core normative reasoning behind the implicit rules is an epistemic normative standard that runs along the following lines. When somebody votes on something, she is normatively supposed to have an idea of what she is voting on. We expect sufficient diligence and competence with respect to the object of the vote. This makes voting distinct from rolling a dice. It is similar to the way the signatory of an open letter is expected to have read it and is held accountable for the content that a careful reader with sufficient contextual knowledge could justifiably assign to it.\textsuperscript{343} Senator John McCain could not excuse signing the infamous letter to the Iranian government denouncing the President’s policy by pointing to the fact that “I sign lots of letters”\textsuperscript{344}. We also hold representatives in the process of legislation to this standard. In principle, they are expected to have diligently familiarized themselves with a bill and to have a good, competent understanding of its contents as discussed in the legislative proceedings.

Though this is a normative epistemic standard, it aims at a factual hypothetical: “What kind of normative propositions would a diligent and competent lawmaker assign to the text given the relevant legislative context?” In this, it is no different from other factual hypotheticals, like whether a driver with decent driving skills could have reached the scene of the crime in less than 15 minutes. Thus, the standard of the diligent and competent lawmaker preserves the factuality of intent. Just as the question of whether an individual had a certain intention is a factual question, the question of whether the legislators could associate a certain normative proposition with the text of a bill remains in essence a factual one, albeit one with normative epistemic parameters.

In the reality of modern legislatures, the standard of the diligent and competent legislator cannot be met by every representative for each and every vote. Modern parliaments have to rely on the division of labor to handle their enormous workload. But even though the standard cannot actually

\textsuperscript{343} See R. EKINS, The Nature of Legislative Intent, op. cit., p. 235, see also R.M. DWORKIN, Law’s Empire, op. cit., p. 322.

\textsuperscript{344} http://www.msnbc.com/rachel-maddow-show/mccain-second-guesses-his-support-sabotage-letter
be met, we impose it normatively by using it to determine the propositional reference of the vote. Lawmakers can make use of divisions of labor, but they cannot escape the rational standards for voting in general. The normative epistemic ascription thus achieves four things: first, it makes room for the necessary division of labor in legislative processes; second, it upholds the rationality of the vote; third, it guarantees the necessary overlap between the intentions of the individual lawmakers to normatively establish collective intentions; fourth, it thus provides for the collective intentional basis for the epistemic ascription of group agency, in the sense of List and Pettit, to the legislature. A fair reconstruction of the implicit standard for fixing the propositional reference of the vote thus relies on the diligent and competent representative, who reads the bill she is voting on carefully and familiarizes herself with the factual and legal as well as the legislative context of the bill.

The orientation towards the diligent and competent legislator is counterfactual, as it also applies to the majority of representatives who do not have the time and resources to invest the diligence and competence necessary to fully grasp the details or sometimes even the main idea of the bills they are voting on. But even though it is counterfactual with respect to many lawmakers involved, it is still a realistic normative ascription: First, it is realistic in the sense that there are – at least in most cases – actual representatives, those sponsoring the bill or those discussing it at the committee level, who actually invest the diligence, acquired the competence and who actually associate the normative propositions the implicit standard aims at with the bill. Second, it is realistic in the sense that every representative – given enough time and resources, like expert assistance – could in principle associate the normative propositions that the implicit normative standard ascribes to him with the text of the bill.

It is also realistic in the sense that it does not exclude ambiguities, vagueness, and other forms of indeterminacy, or even inconclusiveness of the legislative intent. Even for the diligent and competent lawmaker, the text and context of the bill will not render it determinate in every aspect. Usually the semantics of the text will be indeterminate for some borderline cases. Since legislative discussions center on paradigm constellations, they often give no further clues as to what kind of intention to connect with the text for borderline cases. Even if the borderline cases were discussed, the context of the deliberations might be conflicted. Two different interpretations of the text with respect to a borderline case might have been debated, without the dispute on the different interpretations being resolved – for instance because the discussion moved on to other aspects. But the discussion may also have left it purposely indeterminate in some respects to spare the legislators the burdens of further precisification, or to allow for what Carl Schmitt succinctly called a “dilatory formal compromise”, where the parties involved agree on a formulation knowing that they associate different meanings with it.\footnote{C. SCHMITT, Constitutional Theory, trans. J. Seitzer, Durham, Duke University Press, 2008, p. 85-87.}

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B. Legislative Intent and Semantic Meaning

A reconstruction of the implicit propositional reference of the vote along these lines explains our practices for dealing with the laws produced in the legislative procedures better than alternative accounts. One obvious alternative would be to rely not on the diligent and competent lawmaker, but on the addressees of the law, who more or less just know the text of the law. It is a peculiarity of a legal bill that it addresses two different audiences at two different stages of the process: First it is addressed to the individual legislators voting on the bill, but at the second stage – if the vote is positive – it addresses the public as a law that everyone is bound by. Thus it does in a sense seem natural to take the public, which is finally addressed by the law, and its diligent understanding of the law as the relevant normative standard. In constitutional law, the “original public meaning” school promotes this standard for the American Constitution.346 It would fix the propositional reference of the vote to the semantic meaning cum basic context of the law.347

Special cases aside – and the Constitution of the United States might be one – such a reconstruction does not really map the implicit normative standards we employ. It would not provide space for the tension that we often assume in dealing with the law between the legislative intent and the semantic meaning of the law. If the propositional reference of the vote were fixed by the semantic meaning alone, there could never be a tension between the legislative intent and the semantic meaning of the law, because they would be identical. Even though there may be controversy about how the tension is to be resolved in the different type of cases in which it arises, the fact that we have these controversies alone cannot be explained by a reconstruction of legislative intent that identifies it with semantic meaning.

One practically marginal but very telling case is the practice and discussion of scrivener’s errors in legislation.348 The very idea of scrivener’s error relies on a tension between what someone intended to say and what he actually said – on a tension between speaker’s meaning and semantic meaning. If we were to equate semantic meaning and legislative intent, we would not be able to explain the idea of scrivener’s error for the legislature. Yet in the practice of different legal traditions, the case law and literature are full of discussions of the treatment of scrivener’s errors in the legislature.


347 J. Raz, «Intention in Interpretation», op. cit., p. 286-289, 298 and J. Waldron, «Legislators’ Intentions and Unintentional Legislation», op. cit., p. 142-146 are two prominent examples for views that at least amount to such a reconstruction.

That there can be discrepancies between the two standards, however, does not imply that the perspective of the addressees does not play a role. Also, in legislation semantics are not up for grabs. Legislation is aimed at guiding the behavior of the addressees of the law. Thus, in general legislators have to express their normative propositions in a way that can be understood by the addressees of the law on the basis of the text and the context that is known to them. But it is not only in cases of scrivener’s error that this ideal might not always be achieved to the fullest extent. Laws cannot be expressed in a cryptic code, but this does not prevent occasional deviations and discrepancies at the margins between what the diligent lawmaker could associate with the text and what is apparent to its addressees.

The most common and most interesting case from the perspective of legal methodology is that in which the proposition associated with the text in the legislative process is more precise than could be gathered by the addressees from the text alone. Legislators may have complex regulatory intentions and have to balance the precision with which they formulate them with the need to design concise provisions. From the perspective of the addressees of the law these formulations might be vague or ambivalent with respect to certain semantic borderline cases, though it was clear to anyone following the legislative process how these were intended to be dealt with. Besides legislative glitches, these cases provide for the typical discrepancies between legislative intent and semantic meaning, which are discussed so enthusiastically in theories of legal interpretation.

Even though rule of law arguments favor the semantic meaning of the law in cases where the semantic meaning is determinate, one should not rush to the same conclusion in cases of semantic indeterminacy. In cases in which a clear legislative intent is paired with semantic vagueness, we must choose between relying on a predetermined intention of the legislator, who has strong democratic credentials, or conferring doctrinal discretion on judges to amend the law, after the fact. Since rule of law objectives like the predictability of the law cannot be achieved either way, we could make a democratic and an impartiality argument in favor of legislative intent. Even though these discussions are highly controversial, we could not even make sense of them if we fixed the propositional reference of the vote to the semantic meaning of the law.

In general, we can treat laws as we treat all other forms of communication, where we can generally differentiate between what someone intended to say and what she said, between speaker’s and semantic meaning. Our legal practices show that we do not evict the legislator from the realm of our general conception of communication.

351 Ibid., p. 215.
352 Strongly defending this point also R. EKINS, The Nature of Legislative Intent, op. cit., p. 205-211.
C. A Substantively Rational Legislature?

Another alternative would be to opt not only for an epistemic, but for a substantive normative standard with respect to the content of the law. An extreme solution would be to rely on an idealized legally- and maybe even factually-omniscient legislator along the lines of a Dworkinian Hercules, who could anticipate and balance all the difficulties that the application of the future law might run into. Such an idealized normative ascription, however, would result in a wholly unrealistic legislative intention, which also conflicts with our practice of recognizing the indeterminacy or inconclusiveness of legislative intent.

Much less extreme is the standard of the “rational legislature” that Richard Ekins proposes. Leaving aside the theoretical issue that the emergence of the collective intent cannot be explained by an appeal to the “legislature”, this also entails an over-rationalization of legislative intent. It is not entirely clear how far Ekins wants to take his substantive normative standard. However, he eschews the idea of formal dilatory compromises as an “interpretative lottery” on the grounds that a rational legislature “avoids internal contradiction and failure to decide”.

It might be that a fully “rational legislature” would avoid dilatory compromises. Nevertheless, they are part of legislative reality, as they are sometimes necessary to forge legislative majorities. We could not even perceive them as such if we were to rule them out as basis for an indeterminate collective intent. The normativity at play in our implicit ascriptions is not a substantive normativity with respect to the content of the proposal, but an epistemic normativity and rationality with respect to the legislative process. It does not have the normative goal of achieving a rational content of the legislative intent, but merely the constructive goal of securing the collective intention that most realistically mirrors the actual legislative dynamics. The realities of the legislative process, however, may very well fall short of a fully rational legislature. The substantial normative standard of the fully rational legislature is not the standard we employ to construct legislative intent, but to hold legislative intent accountable. We need the epistemic normative standard to make the substantive normative standard worthwhile, since otherwise we would not be able to construct a collective intention to measure against the substantive standard.

D. Standing deferential intentions?

We might, though, normatively ascribe another kind of intention to the lawmakers that takes care of the indeterminacies and inconclusiveness of the normative propositions ascribed to the vote. Each lawmaker knows that the laws she passes will necessarily be indeterminate in unforeseen and unforeseeable cases, and that it might even have been left indeterminate for foreseeable ones for the reasons mentioned above. She also knows that the

353 Supra at fn. 30.
law enters a legal system with, first and foremost, a hierarchy of courts, but also a whole armada of other institutions, like administrative agencies, the bar, law firms, law schools and legal expert panels, to grapple with and resolve the indeterminacies of the law, within a culture of adjudication that has developed over millennia to apply the law to new or borderline cases. Given this knowledge, these institutions, and these traditions, it might seem fair to normatively ascribe a general standing intention to the individual lawmaker to defer the resolution of indeterminacy to the institutions traditionally and constitutionally designated to deal with them, i.e., ultimately to the courts.

Normatively ascribing such a standing deferential intention to the lawmakers also has some realistic credentials. Anyone who has ever engaged in designing a regulation of some complexity will know that it cannot be designed in such a way as to cover all foreseeable cases. Some fringe phenomena must be left for the courts to decide, if the regulation is not to lose all its conspicuousness and the task is ever to be brought to completion. Sometimes legislative materials will testify to this fact by explicitly deferring certain issues to the courts. But normatively ascribing such an implicit general deferential intention to the lawmakers is of little import, since the deferral of the decision on legal indeterminacies is already ratified by the explicit norms underpinning the institutional system of the administration of the law. As plausible as it might seem, there is no need for such a general normative deferential ascription to reconstruct our legal practice of resolving indeterminacies of the law by legal construction.

E. The Relevant Context and Materials

Pointing to the diligent and competent lawmaker still leaves many aspects open, which not only depend on the institutional and procedural design of the concrete legislation, but which are in part also highly controversial. The diligent and competent lawmaker will rely on the semantic meaning of the text of the law, the factual and legal regulatory context, and the context and materials of the legislative process to determine the normative propositions that the vote refers to. While the semantic meaning of the text of the law is a rather uncontroversial input for the normative construction of legislative intent, the exact nature and importance of the other two factors will be a much more contested topic, and far more subject to the idiosyncrasies of a specific legal system.

As for the factual and legal regulatory context, much speaks in favor of a dynamic approach, which adjusts to the specific bill in question. The idea is that the normative construction of the communicative intentions of the legislator would at least have to presuppose sufficient knowledge of the factual and regulatory context of the bill to make sense of it and of the legislative discussion. Thus a highly technical regulation on highly technical issues would have to presuppose technical knowledge that is not to be presupposed when the bill addresses a general principle of tort law which covers the same issue.

Traditionally, the importance of legislative materials is highly controversial. Here much will depend on the tradition and practice of each legal system. It has to take into account not only how far it wants to take the ide-
alization of the diligent and competent legislator, but also the risks of manipulation involved in giving great weight to certain materials at least. Especially because of the latter, the general normative approach outlined above can only serve to designate the outer limits of the legislative context that might be taken into account. Following the general idea of the diligent and competent legislator, the legislative context cannot comprise information or materials that are not available to her according to the rules of legislative procedure. Whether this includes committee and subcommittee protocols, however, will not only depend on their availability, but also on how far a legal culture wishes to stress the idealization of the diligent and competent legislator, and how high it judges the risks of manipulation involved.

But however legal cultures decide on the direct relevance of legislative materials, they can always have circumstantial evidentiary value in as far as they provide contextual information on how a diligent lawmaker would have understood the relevant text, materials, and context at the time of the vote. In this circumstantial sense, any legislative material is as good as any other contemporary source – newspaper articles, pamphlets, law journal articles etc. – to elucidate the context of a bill.

Due to the singular and often idiosyncratic character of the processes that lead to the adoption of a new constitution, legislative intent is especially contested in the area of constitutional interpretation. The idea of the diligent and competent lawmaker would advise one to focus on the individuals who cast the decisive vote. This may be the people or it may be a special assembly created or designated for the purpose of elaborating and voting on a constitution. Often, however, the process of elaboration of and the decisive vote on the constitution diverge. In these cases, the main legislative work fell to the body that elaborated the constitution and the decisive assembly or assemblies only had a yes-or-no-vote. In these cases, much will depend on how the information on the elaboration of the constitutional text was communicated to the assembly or assemblies that held the decisive vote. If their members did not even have the chance to read them, a normative stipulation relying on the materials of the elaboration process would amount to delegating constitutional powers to those involved in this process.

**F. Legislative Intent and Legal Hermeneutics**

The ascription of legislative intent is normative in an epistemic sense. It ascribes the anaphoric reference to the vote of each legislator that would have been connected with the text of the bill by a diligent and competent legislator in the context of the legislative procedure. The standard makes assumptions on the epistemic qualities of the legislators with respect to the legislative procedure and the subject matter. It establishes a reliable basis for collective legislative intent and thus for communicative interpretation of legislative acts and for treating the legislature, or at least representative bodies at the core of the legislature, as a group agent. The normative construction of legislative intent is an epistemic construction, though, not one with respect to the evaluative substance of the bill.

In this respect, it is unlike legal construction in cases of interpretative indeterminacy. When the epistemic construction of legislative intent does
not provide for a determinate answer for a case at hand, courts have to resort to legal construction to amend the law on a case-by-case basis. This kind of construction, however, is not of an epistemic, but of a substantive normative nature. The courts have to amend the legal rule by drawing on substantive normative reason within an overall hermeneutic justification.\(^\text{355}\) The hermeneutic restrictions on legal construction distinguish it also in a second aspect from the construction of legislative intent. The hermeneutic character of legal construction is guaranteed by the relation that legal construction has to keep with the text of the law. It has to present itself as a communicative intention that could have been connected with the text. This separates legal construction from the substantive amendment of the law by legislation.\(^\text{356}\) Unlike legal construction, the normative construction of legislative intent is not inferred from a legal text – even though it aims at a condition of possibility for the interpretation of one. In providing the collective author of the text the construction relies on rational standards for the aggregation of interest in voting procedures, which require the identity of the object of the vote, and an interpretation of the normative practices by which the identity is secured in a specific legal system. Thus legal hermeneutics rely on two kinds of construction that are distinguished by the kind of normative standards and the kind of hermeneutics involved.

IV. CONCLUSION

However the details of the normative construction of legislative intent play out in different legal systems, the communicative intentions that correspond to the epistemic reference point of the diligent and competent legislator are ascribed to every individual lawmaker involved in the legislative process. By this epistemic normative ascription, they provide for a collective intention in the sense that is presupposed in the respective theories of collective intentionality and agency. The ascription provides for the overlap of intentional content required by these theories. The normative ascription of legislative intentions is not in any way more or less suspect than the ascription of intentions in other areas of the law, such as contract or tort law. Thus there is some truth to the skeptical attitude towards actual empirical collective intentions of the legislature. But the law has a well-tested solution for these factual shortcomings: It ascribes communicative intentions normatively, as in many other areas of the law.

The normative construction of legislative intent shows how a sufficient overlap of individual intentions can be achieved for large groups. It relies on epistemic normative ascriptions familiar to the law. But the legislator is not the only large body for which group agency is discussed. Consider faculties, universities and corporate boards, religious congregations etc. In all these cases, establishing an actual empirical overlap of the intentions of all indi-


\(^\text{356}\) Ibid.

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individual group members in voting procedures will face the same or at least similar issues as in the case of the legislature. The analysis of the normative construction of collective intentions in the legislature suggests that similar normative mechanisms are also at work in these other cases, to establish a collective intention as the basis for group agency. As in the case of the legislature, the precise content of the implicit epistemic norms have to be gleaned from the practices of each group. The normative mechanism, however, will most likely be the same. Thus the analysis of the normative construction of legislative intent can also provide a missing element for a general theory of group agency for larger groups.

With the epistemic normative construction of legislative intent in place, legal hermeneutics can maintain the general distinction between speaker’s and semantic meaning for the law as well. The normative construction of legislative intent allows for the tension between legislative intent and semantic meaning, which is deeply rooted in the legal traditions and reflected in the classical canons of legal hermeneutics since Savigny. Legal interpretation aims at the legislative intent. Semantic meaning serves as the most important stepping stone to infer the intentions of the legislature. The normative construction of legislative intent also allows for the distinction between legal interpretation and legal construction which is equally deeply rooted in the methodological tradition of both Continental and Anglo-American law.\textsuperscript{357} Legal interpretation does not necessarily determine the content of the law. There are several scenarios in which legal hermeneutics have to go beyond legal interpretation. The most common are cases of interpretative indeterminacy. Since the standard of the diligent and competent legislator is only epistemic with respect to the communicative intentions attributed to the bill, it leaves room for indeterminacies of legislative intent. In these cases, legal hermeneutics has the task of amending the law on a case-by-case basis via legal construction. A much rarer scenario is a conflict between legislative intent and semantic meaning. Here rule of law values favor a legal construction relying on the semantic meaning of the law making it predictable for its addressees. A widely accepted – and telling – exception to this general rule are cases of scrivener’s error, in which the epistemic construction of legislative intent trumps the semantic meaning of the law.

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