

The Best of All Possible Congresses

By Timothy W. Grinsell

Review of **THE NATURE OF LEGISLATIVE INTENT**, by Richard Ekins

Oxford University Press, 2012

Critics accuse Indiana's newly enacted Religious Freedom Restoration Act of allowing discrimination against gays and lesbians. Some of the law's defenders, including Indiana Governor Mike Pence, have expressed surprise at this accusation. They argue that Indiana's law is based on similar laws around the country, including the federal RFRA. Why should Indiana's law attract such criticism while similar laws do not?

The answer, as Richard Ekins demonstrates in his excellent *The Nature of Legislative Intent*, is that legislative intent matters. Ekins argues for a conception of the legislature as an intentional, rational agent and for the centrality of legislative intent in statutory interpretation. In Indiana's case—where the law was enacted as a backlash to the gay rights movement—this means that RFRA does in fact allow anti-gay discrimination, even though similarly worded laws passed in other contexts do not.

Ekins thus sets out to defend the scholastically unpopular position that legislative intent is neither a contradiction nor a useful fiction, but a necessary part of lawmaking. In order to mount this defense, Ekins confronts three questions: does legislative intent exist, what is it like, and how do we find it? In answering the first question, at least, Ekins has made a fresh contribution to a debate that had almost gone stale. His two most important

additions are a defense of the legislature as an intentional group and a linguistically informed treatment of intention in communication.

The argument against the existence of legislative intent, embraced by many philosophers but also by lawyers and judges like Antonin Scalia, is intuitive. There are many legislators' intents, and there is no clear way to add them together. Therefore, there is no legislative intent. In political scientist Kenneth Shepsle's memorable phrase, "Congress is a 'they,' not an 'it.'"

Ekins persuasively responds that trying to add intents together is the wrong way to think about legislative intent. Rather, relying on work in the philosophy of agency, Ekins argues that groups like the legislature have intent because they coordinate in particular ways. "Group action is the coordinated pursuit of a common purpose by means of a jointly accepted plan of action" (53). Translating from Oxfordese (in which most of the book is written, alas), this means that members of an intentional group share a goal, they each intend to do their agreed-upon part to achieve that goal, and they agree to refrain from frustrating other group members in the pursuit of their allotted tasks. For example, two people agreeing to make sausage together might form an intentional group. One person grinds the meat, one person stuffs the casings, and they try not to get in each other's way.

The work of the legislature is like complex sausage making. In Ekins's telling, the legislators unanimously agree to a particular goal: to change the law when there is reason to do so. They also agree to use certain procedures (like majority vote and the committee

system) to organize and direct their law-changing. Do legislators refrain from frustrating each other's lawmaking? Observers of the legislative condition should be skeptical. At a high level of generality, though, Ekins may be right. Legislators do not usually frustrate the ability of other members to be ready to change the law by, for instance, insisting that another member's vote does not count.

The view of the legislature as an intentional agent yields several important conclusions. First, it establishes the possibility of legislative intent. Legislative intent is, Ekins says, "the plan that the bill sets out for the community, which there is good reason to expect to be coherent and reasoned, as if chosen by a sole legislator" (224). In other words, it is possible to treat the legislature as single agent (the "sole legislator") and to treat the intent behind a legislative act as a single agent's intent to change the law for certain reasons. Second, legislative intent is irreducible to the intent of any subset of legislators (including the majority). The bill was open to *all* legislators for consideration, and each legislator agreed to make it law if it gained 50.1% of the vote. A notable corollary to this point is that the "plan" embodied in a bill is imputable to all members of the legislature, including those who voted against the bill and those ignorant of the bill's contents.

Ekins's second important contribution to the debates over legislative intent is a linguistically informed view of communication. His argument goes like this: only intentional agents can communicate with language; the legislature communicates its commands through language; therefore, the legislature is an intentional agent.

The heavy lifting concerns the first premise. In many “textualist” traditions, for instance, it is assumed that language is something like a code. Meaning is encoded in linguistic forms, transmitted, and then decoded. The intention of the encoder is rarely, if ever, relevant. From the standpoint of a linguist, this is hogwash, and Ekins ably shows why.

Suppose you receive a letter of recommendation for some job applicant that reads, in total, “Hubert is always punctual.” You will conclude that Hubert is not a good applicant. This conclusion follows not from the meaning “encoded” in the text but instead from an inference to the writer’s intention. If the writer intended to communicate cooperatively, she would have given you all the relevant information. If “all the relevant information” includes only Hubert’s punctuality, then you are right to think something else is going on. In particular, you are licensed in making the negative inference that Hubert’s other qualities (like his fitness for the job) are lacking. And there is reason to think that this sort of reasoning about speaker’s intention (and speaker’s reasoning about hearer’s inferences, etc.) happens almost always and nearly automatically. (Natural) Language use and interpretation must therefore be conducted by intentional beings. Ekins provides several examples from UK law that suggest this sort of reasoning is commonplace in statutory interpretation.

At times, however, Ekins’s aggressive pursuit of a rational and coherent legislature gets him into trouble. For example, he grounds his model of communication on cooperation (196). It is not clear, though, that this model should govern the case of the legislature addressing the citizenry, in which obedience—not merely cooperation—is expected. (The reason lawyers tell their clients to say no more than necessary when under interrogation is

precisely because an interrogation is not cooperative). Likewise, his view of coordination in the legislature is much too rosy. He argues, for instance, that legislators should change their votes in order to maintain group rationality. To respond in decidedly non-Oxfordese: not bloody likely.

Indeed, a little cynicism about the legislature would have helped make the answers to his final two questions—what is legislative intent like, and how do we find it—more plausible. Ekins contends that the legislature is not only intentional, but also rational, and that features of legislative organization (like a small number of “veto-players,” members with the capacity to block proposals) are structured to improve legislative reasoning. For example, Ekins claims that Parliament is set up to reason better than Congress in part because the latter has too many veto-players, and “the more widely veto power is distributed, the more difficult it is to enact legislation” (173).

This makes sense in theory, but it is questionable. In a study of the 2013-14 biennium, political scientist W. Mark Crain examined legislative output in 49 state legislatures. He found that legislatures in which *more* committees had veto power passed more legislation. Moreover, legislatures with (proportionally) more committees were more productive, but so were legislatures with committees with unequal workloads. Putting these findings together, the most productive legislature is one with many committees, each of which has veto power, and few of which actually do anything. This may or may not be right, but it illustrates the very different conclusions that Ekins would have reached had he attended to political fact rather than political theory.

Ekins's occasional blindness to institutional realities ultimately undermines the idea that we can find legislative intent, at least in legislatures that fall short of Ekins's demanding standards. In a telling passage, he confronts what he calls "the argument from compromise," an argument purporting to show that compromise can lead to irrational legislation. In one form, the argument explains that legislatures will "often choose to enact contradictory propositions, rather than a compromise position," in effect asking courts to find the compromise in a post-enactment "interpretive lottery" (237). Ekins responds that the legislature "should not choose an interpretive lottery" (238).

This is no counterargument, and Ekins does not have much to offer the interpreter facing a lottery-playing legislature. He does not, in fact, have much to offer the interpreter facing a dysfunctional (irrational, unreasonable) legislature of any kind. He addresses this point by noting that he only considers the "central case" of a well-formed legislature (118). Unfortunately, this central case is so idealized—Ekins states that the legislature "will over-represent virtue"—that it surely does not exist. In a world of non-central case legislatures, Ekins central case method tells us little.

Ekins's view of the legislature is Panglossian, but it is one of the best statements of the Panglossian position. It is therefore valuable to adherents and detractors alike. He provides a serious defense of legislative intent as integral to the lawmaking process, and his closely reasoned book will make the debates over legislative intent richer, livelier, and more rigorous.

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