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The search for legislative intent

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BOOK REVIEW

The Search for Legislative Intent

Richard Ekins (2012) Oxford University Press. I.S.B.N. 978-0-19-964699-9

If you believe, as I do, that statutes are changes in the corpus juris intended by the legislature. If you believe, as I do, that interpreting statutes must be a search for the legislature's intended meaning of the statutes' texts. And if you believe, as I do, that the second proposition above follows from the first – given the assumptions that the legislature has the authority to change the corpus juris, and that its authority is superior to the authority of interpreters – then you, like me, will be delighted with Richard Ekins's *The Nature of Legislative Intent*. For Ekins makes a brilliant case in support of intentionalism in statutory interpretation.

Ekins's book is a veritable treasure trove of points about legislatures, legislating, and language. He argues that the legislature's basic function is to enact changes in the body of laws that promote the common good.¹ He has interesting points to make about the well-known obstacles to fulfilling that function: the 'discursive dilemma,' where the reasons endorsed by a majority of legislators do not match the proposal endorsed by the majority,² and Arrow's theorem, which proves the impossibility of guaranteeing a stable set of majority-preferred policies.³

My favorite chapters are four ('Legislating Without Reasoning') and seven ('Language Use and Intention'). Ekins's basic point is to reject 'mindless' legislation. Mindless legislation is inconsistent with the function of the legislature, which is to enact reasoned changes in the laws. But treating statutes as if the legislature had only the 'thin' intention to adopt a particular text and disregarding the legislature's intended meaning of that text is both to misunderstand language use and to render legislation a mindless rather than reasoned process.⁴ Ekins attacks the positions of Waldron, Raz, Marmor, and Schauer, all of whom seem to believe in semantic autonomy, the idea that the meaning of a text is determined by conventions rather than by the meaning intended by the text's author.⁵ But if linguistic conventions rather than authorial

1 Richard Ekins, *The Search for Legislative Intent* (Oxford University Press, 2012) 14, 90, 119- 35, 143. 2 Ibid 66-76. The discursive dilemma can be easily described. Suppose that A, B, and C act by majority vote. And suppose they all agree that they should engage in act X only if reason R1 and reason R2 exist. A believes R1 but not R2 exists and thus votes against X. B believes R2 but not R1 exists and also votes against X. C believes both R1 and R2 exist and votes for X. X loses two to one, but both R1 and R2 were deemed to exist by a two to one margin. There is a mismatch between the majority approved reasons (R1 and R2) and the majority approved action (~X). Ekins acknowledges the problem but merely counsels legislatures to arrange matters to avoid it. Ibid 75-76. 3 Arrow's theorem is illustrated by examples in which different majorities prefer different policies. If, for example, there are three policy options, A, B, and C, and a majority prefers A over B, a different majority prefers B over C, and a still different majority prefers C over A, no choice of A, B, or C is stable in the absence of an arbitrary restriction of the agenda (such as forbidding any proposals to substitute or amend after three votes). Ekins sees Arrow's theorem as a reason not to view legislatures as aggregators of preferences. Ibid 88-90. But, of course, Arrow's theorem applies equally to decisions about which proposal best furthers the public good. 4 See also Steven D. Smith, 'Law Without Mind' (1989) 88 Michigan Law Review 104. 5 Ekins, above n 1, 181-96.

intentions determined the meaning of statutes, changes in the law would be mindless because they would reflect only the choice of words rather than the choice of how the law should change. Moreover, semantic autonomy wrongly assumes language can be decoded algorithmically and neglects ambiguity, implicature, implicature, and the like.⁶ Ekins, like me, views language use as an attempt by the author to convey an idea to an audience. The audience's job is to try to understand what idea the author intended to convey to it. This is particularly true when the author has authority over the audience in the sense that the author's chosen norms bind the audience.

Take the prosaic example of a father telling the children, 'I want you in bed by 9 o'clock.' At 9:15 he finds the children in the living room watching television. When he reminds them of his instruction, they reply truthfully that they were in bed by 9 but then got out of bed at 9:05. If one takes the semantic autonomy position, the children are on solid ground. But, of course, they have disobeyed the father and done so knowingly.

Ekins, following linguistic philosophers Neale,⁷ Soames,⁸ and Bach,⁹ asserts the 'undetermination thesis': The semantic content of a sentence is not capable of settling what a speaker means in uttering the sentence.¹⁰ Not only are natural languages replete with ambiguities, but the meaning of sentences employing even unambiguous language will be opaque in the absence of reference to the utterer's intent. The examples of this are legion. To take only a few of the many Ekins employs, consider the statements 'I have two children' and 'I have two beers in the fridge.'¹¹ Normally, we infer that the speaker of the first sentence has exactly two children, whereas the speaker of the second has at least two beers. But the sentences would be literally true if the first speaker had six children and the second exactly two beers. Or consider these examples of Ekins, where the words in parentheses are not uttered but are what the speaker likely means:¹²

'I haven't had breakfast (today).' 'John and Mary are married (to each other).' 'They had a baby and they got married (in that order).' 'Robin ate the shrimp and (as a result) got food poisoning.' 'Everybody (in our pragmatics class) solved the riddle.'

And many similar examples are found in statutes, such as:¹³

'All drug shops 'shall be closed ... at 10 pm on each and every day of the week' (and shall stay closed until morning).'
'It is an offense 'to stab, cut or wound' any person (with a weapon or instrument).'

⁶ Ibid 193-211. Implicatures are what is implied by the act of saying what is said in the context in which it is said. Implicatures are what is implied in what is said and are part of what is said. ⁷ Stephen Neale, 'Pragmatism and Binding' in Zoltán Gendler Szabó (ed), *Semantics vs. Pragmatics* (Oxford University Press, 2005). ⁸ Scott Soames, *Philosophical Essays, Volume I: Natural Language: What It Means and How We Use It* (Princeton University Press, 2008). ⁹ Kent Bach, 'Context ex Machina' in Szabó, above n 7. ¹⁰ Ekins, above n 1, 196-205. ¹¹ Ibid 199. ¹² Ibid 200. ¹³ Ibid.

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Ekins has many other examples demonstrating the impossibility of semantic autonomy and the necessity in understanding language use to seek out the Gricean speaker's intended meaning, the meaning the speaker intends as the uptake of his audience.¹⁴ The key chapter on this point, Chapter Seven, is alone worth the price of the book.

But, of course, if the legislature's intended meaning is the proper quarry for statutory interpretation, as Ekins and I both contend, then a familiar problem looms. Legislatures are comprised of multiple legislators. They are groups. And there are no group minds. Therefore, while we can easily refer to the intentions of legislators, how can the legislature itself have intentions?

One approach, which I and others have suggested in the past, is to aggregate the intentions of the individual legislators. If enough legislators – perhaps a number sufficient to enact a statute – share the same intended meaning, then that meaning is the meaning of the statute. If, however, a majority votes in favor of the statute, but there is no shared intended meaning among enough legislators voting 'aye' to make a majority, what are we to say is the statute's intended meaning? If we have recourse to some mechanical rule selected to handle such situations, the statute will be the product of a mindless process rather than a product of reasoned deliberation about the public good. Alternatively, we could say that the statute has no meaning. It is gibberish, an inkblot, and has no legal effect. In my opinion, the latter outcome is preferable to the former; no legal change is better than mindless legal change. But neither outcome is a happy one.

Ekins, however, wants to avoid both outcomes. He does so by rejecting the premise that led to them, namely, that legislative intent must be the aggregate of individual legislators' intents.¹⁵ Instead, he argues that legislative intent is the product of the interlocking intentions of the legislators.¹⁶ What he means by this seems to be captured by this account of legislators' intentions when they vote to enact a law:

I intend that we enact this proposal, which consists of certain propositions directing citizens (or officials) to act in certain ways that will further ends I and we perceive to be valuable.¹⁷

The key part of this account is the 'I intend that we enact.' For, as Ekins points out, it is the legislature, the we, that enacts laws, not the individual legislators, the I.

All this is true, but does it solve the problem? I cannot see how it does. For what is 'this proposal' that we are enacting? If legislator 1 means by 'this proposal' do X, and legislator 2 means by 'this proposal' do Y, then their references to 'this proposal' masks a disagreement over what the proposal is that they are both in favor of enacting.

There are countless ways of illustrating this, but let me give two examples. The first is a case of patent ambiguity. City is governed by a three person council, which enacts ordinances by majority vote. Two events have gotten the attention of the council. When a political rally was held on the bank of the river that runs through City, a portion of the bank gave way, and two people nearly drowned. And when a political rally was held in front of City's bank, customers were deterred from entering the bank to transact business. In response, council member A proposes an ordinance that bans 'all rallies by the bank.' He has in mind the river bank. Council member B believes the proposal refers to the financial institution, not the edge of the river. He supports the proposal. Council member C is a fervent free speech advocate who opposes the proposal no matter which meaning of bank it employs. With A and B voting in favor

¹⁴ See generally Paul Grice, *Studies in the Way of Words* (Harvard University Press, 1989). ¹⁵ Ekins, above n 1, 10. ¹⁶ *Ibid* 52-66, 219-36. ¹⁷ See, eg, *ibid* 232-33.

and C against, the proposal becomes law. A, in voting, intended that we, the city council, enact the proposal to ban rallies by the river bank. B, in voting, intended that we, the city council, enact the proposal to ban rallies by the financial bank. What proposal did we enact?

Of course, the ambiguity could and should have been resolved before the vote, in which case it is possible no proposal would have been enacted. But that did not happen, and now City's code contains a ban on 'rallies by the bank.' So it seems fair to ask, if that ban is not gibberish, what is its intended meaning?

Or consider a case of latent ambiguity. The city council has received complaints about dogs brought into restaurants disturbing other patrons. A proposes an ordinance banning dogs in restaurants. A intends by this to ban all dogs, including service dogs, and he would oppose it were it to exempt service dogs. (He believes companion dogs are just as important to people as service dogs.) B, on the other hand, believes that the proposed ban surely excludes service dogs. He would vote against it if it did not. And C, a libertarian, opposes any ban and believes the restaurants can decide for themselves whether and which dogs to allow. The ban passes two (A and B) to one (C). But 'the proposal' A intended that we enact is different from 'the proposal' B intended that we enact. And neither proposal was favored by a majority. So what is the legislative intent with respect to the ban on dogs in restaurants?

Ekins's model of a legislature is the House of Commons, and he details its elaborate procedures for enacting statutes.¹⁸ Those procedures would most of the time eliminate the kinds of misunderstandings that plague my hypothetical city council. So when MPs vote and thereby intend that we, the House of Commons, enact this proposal, it is quite likely in most cases that everyone has the same proposal in mind.

But bear in mind 'the proposal' is not an autonomous text, the meaning of which is mindlessly constituted by linguistic conventions. 'The proposal' is the intended meaning of the text. So it is crucial that when we as a legislature enact a proposal, there is a single intended meaning of the proposal. Otherwise, it would be not a single proposal but a multitude of proposals cloaked by a single text. The elaborate procedures of the House of Commons cannot guarantee a single intended meaning; at best, they can make a single intended meaning highly likely. In the U.S., bicameralism and the requirement of executive assent reduce that likelihood.¹⁹ And for legislatures such as city councils, which lack the elaborate procedures of Parliament or Congress, the likelihood of single intended meaning behind enactments is even less likely.

In the end, even if Ekins is correct that legislatures can have intentions and has given a good account of what that entails, I do not think he has allayed the worries of those like me who believe that ultimately one must seek congruence among individual legislators' intended meanings. For if Ekins is correct – and I believe he is – that we must interpret statutes the way we generally interpret rational language use by speakers, then we are left with the task of seeking a single intended meaning that may not exist. And that will leave us with the unhappy choice between statutes as mindless changes in the law and statutes as gibberish. And as I said, put to that unhappy choice, I would reluctantly choose gibberish.

¹⁸ See *ibid* 161-79. ¹⁹ Should we expect that even if all 100 senators have the same understanding of the complex proposals they vote on, all 435 members of the House will have the same understanding of it, and that their understanding will be the same as the senators'? And will the President also understand the proposal in all its complexity the same as the Senate and House understand it?

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Still, my pessimism does not dampen my enthusiasm for this brilliant book. No one interested in the interpretation of legal texts can afford not to read it.

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