Rethinking Legislative Intent

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Stephanie Collins & David Tan, Legislative Intent and Agency: A Rational Unity Account, 44 **Oxford J. Legal Stud.** 231 (2024).

Intentionalism in contemporary legal interpretation is unloved, at least in my United States. Textualists, purposivists, and dynamic interpreters disagree on much, but they tend to agree that any rich form of legislative intent is not a proper—or even possible—quarry for readers pursuing a statute's legal meaning. At most, they will concede that legislative authors have the minimal intent to *make law* when voting on the authoritative text.

Yet a moment's reflection raises worries about this consensus. Intentionalist legal and literary theorists contend, with plausibility, that all texts presuppose a communicating author; that is why you regard what you see on your screen as words, rather than stray marks that happen to fall into an uncannily familiar pattern. If that is so, and if legislative intent is out of bounds, we are either following statutes that have *no* author or whose authorship is attributable to the *interpreter* (who constructs the reasonable reader of legal English, the reasonable person pursuing reasonable purposes reasonably, or the chain novelist who makes the law the best it could be). Invoking authorless texts to impose damages, fines, jail, or death sentences is troubling. Treating the interpreter as the re-author, by contrast, raises worrisome problems about separation of powers and legislative supremacy. Hence, a kind of transcendental argument for the necessity of legislative intent.

But wishing does not make it so, and intention-skeptics have marshalled an army of arguments against legislative intent. We can stylize intentionalist challenges in three ways: (i) a "many minds" problem, which makes it hard, if not impossible, to aggregative individual legislators' intentions around a particular problem; (ii) a "one mind" problem of attributing a single, intending subject somehow wafting up from the collective group like a Hegelian mist; and (iii) a "no mind" problem, when it is likely that nobody in the legislature even considered a particular question. So, are we at an impasse?

Perhaps, but perhaps not. Enter Stephanie Collins (Monash University), David Tan (Deakin University) and their 2024 article Legislative Intent and Agency: A Rational Unity Account. (When you consider Australian academics Professors Collins and Tan alongside Richard Ekins (a Kiwi at Oxford), Jeffrey Goldsworthy (Monash), and Philip Pettit (once a longtime professor at Australian National University), it appears that the Antipodes are quite the hotspot for sophisticated theorization about legislative intention and group agency.)

Collins and Tan contend, persuasively, that the "debate about legislative intent has largely proceeded without recourse to philosophical debates about the agency of social entities" (P. 255, footnote omitted.) They highlight that we regularly attribute views, positions, and goals to things like universities and corporations—all of which require intentions. Yet we do not pause for a second to ask whether every individual member of the University of Notre Dame or General Electric has the same intention, that those intentions have to be aggregated in some complex fashion, or that there is some mystical, mysterious entity that arises from this grouping of individuals. How do we do it for these entities? And why can't we do it for things like legislatures?

As this insightful article demonstrates, there are a range of theories on offer at the intersection of philosophy of mind and social ontology. Collins and Tan offer one which they call the Rational Unity Account. Starting from a functionalist understanding of the philosophy of mind (while noting that their argument can work with other theories of mind), they contend that "an agent is any entity that has enough inter-defined mental states…to provide meaningful content to the entity's intentions" (PP. 236-237.) Importantly, these mental states "need not reside in brains, since mental states are defined functionally. A mental state is not defined biologically…but rather by the state's relation to other dispositions or properties" (P. 237.) An agent can have a rational point of view (RPOV), defined as an "interdependent web of mental states and action dispositions" (P. 237.)

If this sounds weird for individual persons (where else could mental states reside?), they seek to reassure by dropping a footnote referencing thought experiments dating back to Locke where a prince and a cobbler swamp "memories, beliefs, preferences" and the like (P. 237 n. 31.) If it makes sense to say the prince is trapped in the cobbler's body, mental states are not reducible to one brain. I am not a philosopher of mind, but I have to say I am not entirely convinced about that when it comes to individual persons. That said, something like an RPOV account could offer a promising understanding of group agents like legislatures.

As Collins and Tan tell it, legislative procedures and structures can demonstrate which mental states can be attributable to the group entity. In their example of the Australian legislature, the relevant procedures indicate that explanatory memoranda, ministers' second reading speeches, committee reports, text passed on the third reading, other statutes, and general contextual knowledge compose the minimal, relevant mental states to account for the legislature's intentions. (The first four items are a function of the procedural requirements to enact a law. Other statutes matter because a legislature extends over time and one presumes the agent does not contradict itself. Assumed general knowledge also goes to rationality: "it would be impossible for a legislature to enact reasoned legislation about topic *X* if generally known facts about *X* were not assumed" (P. 242.))

One could add to the list (legislative debates, interpretive canons) or subtract (perhaps eliminate all legislative history *a la* fellow intentionalist Richard Ekins), but Collins and Tan emphasize that it's not the particular list that matters, but the more general framework. A method grounded in a rational unity account selects which mental states matter, identifies relevant mental states that are *fixed* at the time of enactment, and which are attributable entirely to the legislature. And it does not require unanimous intentions, aggregation, or mystical attribution of a kind of legislative *Geist*.

To celebrate this article is to not say I agree with everything in it. I would need to think much more about their critiques of Richard Ekins' approach to legislative intention. And I am not yet sure whether the composite agent who has intentions that are attributable to no one person entirely reassures worries about the absence of authorial (and authoritative) legislative responsibility. Indeed, I am enough of an ingenue to learning and debates in social ontology that it's probably wise for me not to say more along those lines. What matters, however, is that there is an undiscovered theoretical country for interpretive theorists, especially those in the United States, stuck in a stalemate between original public meaning and more dynamic approaches to interpretation. Perhaps one could responsibly reject legislative intention and accept the worries that go along with that. But if one is going to head down that path, one should not do so based on oversimple philosophy about social groups. Collins and Tan provide an excellent entrance to those richer veins to mine.

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