International Review of Law and Economics

Volume 12, Issue 2, June 1992, Pages 239-256

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https://doi.org/10.1016/0144-8188(92)90043-Q

International Review of Law and Economics (1992) **12**, 239–256

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Legislative Intent as Oxymoron

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An oxymoron is a two-word contradiction. The claim of this brief paper is that legislative intent, along with military intelligence, jumbo shrimp, and student athlete, belongs in this category. Legislative intent is an internally inconsistent, self-contradictory expression. Therefore, it has no meaning. To claim otherwise is to entertain a myth (the existence of a Rousseauian great law giver) or commit a fallacy (the false personification of a collectivity). In either instance, it provides a very insecure foundation for statutory interpretation.

Unfortunately, much analysis of statutory interpretation seems transfixed by this oxymoron, resulting in a jurisprudential version of Gresham's law, viz., unsound speculation has driven out sound reasoning. Mashaw (1989:152) recently put it somewhat differently: "A normative theory of interpretation without a positive theory of politics may lead us simply to defeat our own ends."

To their credit, many legal scholars have sought a positive theory of politics, finding intellectual succor in a quarter-century's worth of research in public choice. While hardly mainstream in either political science or economics, much less in legal scholarship, this body of work enjoys a substantial influence in all three fields. In the first section below I establish this "public choice connection," suggesting that legal scholars have lamentably emphasized one of its variants at the expense of a possibly more relevant alternative. It is this other variant, the dilemma flowing from Arrow's famous impossibility theorem (Arrow, 1963), that I elaborate in section 2. In section 3 I trace out some of the implications of Arrow for the meaning one can attach to "legislative intent." In section 4 I defend the view that it is no embarrassment to fail to make sense from nonsense and suggest that statutory interpretation must rely on something other than intent. In the concluding section I summarize my argument.

A preliminary version of this article was presented as a talk in the Harvard Law School's Governance Seminar, December 1, 1988, organized by Professors Lance Liebman and Richard Stewart. Subsequently I benefited from conversations with and comments from Peter Aranson, Morris Fiorina, Jerry Mashaw, H. W. Perry, William Riker, and Barry Weingast. The article was delivered at the Conference on Collective Choice Theory and Constitutional Law, School of Law, Stanford University, CA, October 25–27, 1990.

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