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INTENTIONALISM JUSTICE SCALIA COULD LOVE

THE NATURE OF LEGISLATIVE INTENT. Richard Ekins.¹ Oxford: Oxford University Press. 2012. Pp. xiv + 303. \$70.00 (cloth).

*Hillel Y. Levin*²

INTRODUCTION

For generations intentionalism was the touchstone of statutory interpretation among common law jurists (pp. 1–3). The thrust of intentionalism is that the original intent of the legislature is the core of the statute’s meaning and the key to its application (p. 2).³ In recent decades, however, this approach has come under withering attack from scholars and judges and fallen into relative disfavor, particularly in the United States (p. 3).

Although many courts continue to pay rhetorical fealty to intent and to cite to legislative history, the intellectual energy among dedicated originalist scholars and jurists has moved toward textualist interpretation. According to textualists, a statute means what its words say, and those words are to be understood only by reference to what the community of people who voted on it would reasonably have understood it to mean at the time it was enacted.⁴ The move from intentionalism to textualism in the context of statutory interpretation thus parallels the relative decline of original intent jurisprudence and the rise of original public meaning jurisprudence in the constitutional context.

Comes now Richard Ekins, in a book adapted from his Oxford doctoral thesis, to rehabilitate intentionalism. Grounded

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3. F.A.R. BENNION, BENNION ON STATUTORY INTERPRETATION 469 (5th ed. 2008).

4. See ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012).

in political philosophy, language theory, and the characteristics of group dynamics and decision-making, Ekins maintains that there is such a thing as legislative intent, that it is discoverable, and that the job of a judicial interpreter is to give effect to it.

Scholarship may be judged on a variety of metrics. Does an article or book provoke further thought and inquiry? Does it teach the reader something new? Does it contribute to the further development of ideas? Is it intellectually rigorous? On any of these metrics, *The Nature of Legislative Intent* is an astonishing success and required reading for any student of statutory interpretation.

But there is another metric according to which legal scholarship may—should!—be judged. Can it change how legal actors behave in the real world? I do not mean, of course, to endorse the view of our current Chief Justice that most legal scholarship is useless because judges pay no attention to it.⁵ What judges choose to read is irrelevant as an assessment of the quality and potential contribution of the work. Instead, I mean to ask whether the work, on its own terms, offers some practical upshot. Thus, if a judge read it, was convinced by its arguments, and inclined to heed its advice, could she change her behavior in any way?

By this measure—one that is surely controversial, but at least fair in assessing a work that the author offers as having practical value—I'm afraid that this book is something of a disappointment. In the end, the intentionalism that Ekins offers, namely, intentionalism without legislative history, has precious little to distinguish it from the textualism practiced in the United States. Any American judge who might find it persuasive is already doing what Ekins wants under the label of textualism; and any judge who isn't engaged in textualism will not be convinced by his case for intentionalism.

In this essay, I first identify the common critiques of intentionalism. I then summarize Ekins' philosophical defense of and affirmative case for intentionalism and review his proposed interpretive methodology. Finally, I show why this version of intentionalism is, as a practical matter, more or less the same as Justice Scalia's intentionalism while at the same time unpersuasive to non-textualists.

5. Bryan A. Garner, *Interviews with United States Supreme Court Justices: Chief Justice John G. Roberts, Jr.*, 13 *SCRIBES J. LEGAL WRITING* 5, 37 (2010).

I. THE DECLINE OF INTENTIONALISM

Intentionalism is likely the original theory of legal interpretation. As Ekins notes, its pedigree can be traced far back in history, at least to Aquinas, through Hobbes, and to Blackstone (pp. 1–2). Treatises and judicial opinions throughout common law countries adopted its central tenets (pp. 2–3). In American jurisprudence, intentionalism found broad acceptance and expressed itself in opinions that carefully scrutinized statutes’ legislative history to locate the legislature’s actual or constructive intent as to an ambiguous provision’s meaning.⁶ The idea was that the best way to determine the legislature’s intent was to see what the legislators told us and each other they meant.⁷

Over time, a loose hierarchy developed among sources of legislative history. Committee reports are the gold standard, because they are at once the most authoritative (the legislators most familiar with the bill, or rather their staffers, produce the legislative history) and the most accessible to other members of the legislature. Next on down the line are statements by drafters and supporters of the bill, which other Members of Congress may view as authoritative but are less accessible than committee reports. And so on.⁸

This approach has long had its detractors,⁹ but over the past three decades in particular it has fallen into disfavor as a result of a sustained attack led by textualists. There are at least eight critiques of classical intentionalism as practiced by American judges:

1. There is no such thing as legislative intent because a multi-member body can never have a single intent (pp. 4–5);
2. A *legislature* in particular cannot have any intent because members who vote for the bill may themselves have different intentions and ends in mind (p. 5);¹⁰

6. Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1009-11 (1992).

7. See James M. Landis, *A Note on “Statutory Interpretation”*, 43 HARV. L. REV. 886, 888 (1930).

8. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 636–40 (1990).

9. See generally Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

10. *Id.* at 870.

3. The multiplicity of sources of legislative history make it impossible for judges to identify an intent (even if such a thing could exist) (p. 6);¹¹

4. The multiplicity of sources invites unprincipled judges to impose their own views onto a statute and then rationalize their ruling by pointing to legislative history that supports that view;¹²

5. Intent, even if it exists and is identifiable and adequately constrains judges, is irrelevant to the meaning of the statute because only the words enacted by the legislature carry the force of law;¹³

6. Reference to legislative history discourages careful statutory drafting and deliberation on the part of the legislature because legislators understand that judges will look beyond the statute's text to divine its meaning;¹⁴

7. Manipulative legislators will produce a paper trail in the statute's legislative history, which is never voted on by the larger body, for friendly or credulous judges to follow;¹⁵ and

8. The public will not be able to understand what the law requires of them because they have neither access to the reams of legislative history nor the ability to understand it.¹⁶

In the face of these attacks, intentionalism's luster wore off among legal scholars and, to a degree, among judges.

Textualism has risen in its place, at least among statutory originalists. Like intentionalists, textualists believe that a statute's meaning and correct application is fixed at the time of the statute's enactment. Unlike intentionalists, though, textualists generally (though not always) reject the use of legislative history to divine statutory meaning and application.

Instead, textualists interpret a statute by asking what a reasonable legislator voting on the bill would most likely have

11. *Id.* at 870–71.

12. See Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 448–49 (1990).

13. See Eskridge, *supra* note 8, at 654; see also Easterbrook, *supra* note 12, at 444.

14. See Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 813–14 (1998).

15. See Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 61 (1994), see also Note, *supra* note 6, at 1016–17.

16. See Kozinski, *supra* note 14, at 813.

understood it to mean.¹⁷ Individual words and phrases are typically to be understood according to their most common meaning, dictionary meaning, specialized meaning, or established legal meaning.¹⁸ Also of central relevance to the textualist inquiry are the textual and contextual canons of interpretation, the interconnected parts of the statute, and the pre-existing law at the time the statute was enacted.¹⁹ Focusing on these sources alone, maintain the textualists, prevents the harms that intentionalism invites and pays fealty to the law. That is, judges may be adequately restrained, legislators are properly incentivized to perform their jobs with care, the public can more likely understand the law, and the law itself is properly restored to the words of the statute.

To be sure, not everyone is convinced by the critique of intentionalism or by the alternative offered by textualists. Some intentionalists remain; or, at least, intentionalist rhetoric remains in use and judges sometimes still justify their opinions by reference to legislative history. Moreover, some theorists and judges maintain that originalism of either sort—intentionalist or textualist—does not hold all of the answers to statutory interpretation. That is, a statute’s meaning and proper application may be indeterminate at the time of enactment and may even change over time.²⁰ (More about these heretics later.²¹) But it is fair to say that the past decades have seen a broad move away from intentionalism and toward textualism in the pages of law reviews and those of judicial opinions. And it is even fairer to say that no one has offered a sustained defense of intentionalism in recent years.

II. THE REHABILITATION OF INTENTIONALISM

Into this breach steps Richard Ekins. The first part of his case for intentionalism, which takes up the bulk of the book and offers its richest philosophical insights, focuses on those critiques identified above, specifically, the first, second, and fifth, that deny the relevance or possibility of legislative intent.

17. See HILLEL Y. LEVIN, *STATUTORY INTERPRETATION: A PRACTICAL LAWYERING COURSE* 116 (2014).

18. See *id.*

19. See *id.*

20. See, e.g., Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103, 1105 (2012).

21. I am such a heretic. I argue elsewhere that Justice Scalia might be one too. See *id.*

Ekins begins his affirmative argument by drawing on political theory to assert that the purpose of having a lawmaker is for it to act as the agent of the polity to change the law when there is good reason for change (pp. 123–25). No matter who the lawmaker is—an individual prince or a multi-member, representative legislative body—it must undertake rational, careful, and complex deliberate process that considers the pre-existing law, identifies the problems with it, and chooses the means of changing and improving it through detailed legislation (pp. 128–29). The legislature structures its decision-making process by adopting procedural rules that enable it to accomplish these ends (pp. 161–69).

He further argues that the pure semantic or literal meaning of the statutory language enacted by the legislature cannot capture the legislature’s highly intentional process and therefore underdetermines the intent (pp. 211–17). For this proposition, he refers to a rich body of language philosophy and demonstrates its application to actual legislation (pp. 196–205).

This description of the nature of the legislative task and the capacity of language is mostly uncontroversial (though I am aware of no other work that so carefully and accessibly makes the case, which is itself a testament to the value of this work). Even textualists, who as we will see are not to be conflated with literalists, if any exist, might agree to it. They would simply maintain that the text of the statute, though not capable of reflecting the depth of the legislative process and the intent of the speaker, is nevertheless the full extent of the actual law, and thus the alpha and omega of the interpretive process, at least for judges.

It is therefore Ekings’s next move, which strikes me as both enormously insightful and ultimately persuasive in its attack on textualist theory, that is critical in setting his account apart. Because the legislature is the agent of the polity and its very purpose is to engage in the deliberative and legislative process, neither the legislature nor the polity could rationally accept a mode of statutory interpretation that ignores that intentional process (pp. 250–51). In other words, in order for the legislature to accomplish the job assigned to it, interpreters *must* take account of legislative intent. The legislative *act* cannot be divorced from the legislative *intent*. Here, of course, lies the dividing line between the intentionalist and the textualist.

Ekins must still answer the critique that a multi-member body cannot have a single intention behind its acts. His response is elegant and nicely sets up his practical interpretive methodology. It is a fundamental mistake, one made by critics of intentionalism and intentionalists alike, to equate the legislative intent with that of any individual legislator or of a majority of legislators. On this score, he mostly accepts the textualist critique. Indeed, he agrees that individual legislators' intent is irrelevant, whether secret or expressed (pp. 230–36).

Instead, according to Ekins, legislative intent is that plan which is proposed for legislative action and that which the legislators jointly intend to enact through a positive vote. It is therefore at the time of the final vote on a bill that the legislature's intent is expressed. At that moment, if the vote is positive, the legislature's intent is expressed, and the intent it conveys is to respond to the social problem by changing the underlying law through the means of the statutory scheme as a whole and as informed by the larger body of law into which the new one nests (p. 230).

This move also responds neatly to the remaining critiques of intentionalism identified above, because it renders legislative history unimportant in the search for legislative intent. Ekins makes explicit that this is what he means later in the book when he concludes that legislative history, though arguably relevant to the interpretive project, should be rejected in order to maintain the integrity of the careful legislative process (pp. 268–71). By excluding legislative history from the judicial inquiry into legislative intent and statutory meaning, Ekins thus sidesteps all of the criticisms of intentionalism that arise due to its use.

In his final chapter Ekins offers a practical methodology for judges engaged in statutory interpretation. The core of his approach entails careful consideration of the full context within which a particular statutory provision appears. That context includes, first, the entirety of the statutory text, which is to be read as a coherent whole according to well-known canons of interpretation (avoiding surplusage, the rules of consistent usage and meaningful variation, and so on) (pp. 247–48, 257). Second, the meaning of a law is informed by the broader context, namely the surrounding body of law, meaning related statutes and other sources of law as well as the pre-existing law that the new statute changed (p. 257).

Third, judges should carefully consider the mischief that gave rise to the need for new legislation. The factual context that relates to the statute's enactment, or at least those facts and concerns that were known to the legislature, are highly relevant to the statute's proper interpretation and application because it is based on those facts and concerns that the legislature intends to legislate (pp. 257–58).

Finally, Ekins allows for what he calls equitable interpretation in a small universe of exceptional, unforeseen cases, where the legislature's intention is inconsistent with the legislative text (pp. 275–76). In such cases, Ekins maintains that the legislature's intent controls, primarily because the context within which the legislature acted did not allow it to predict the new circumstances. As such, the legislature intends that an unwritten statutory proviso be understood to qualify the statute. Recognizing that the possibility for such equitable interpretation potentially opens the door to substantial judicial mischief, Ekins is at pains to limit the kinds of cases to which it might apply (pp. 277–78).

In sum, Ekins's intentionalism instructs judges to locate legislative intent in the words of the relevant statutory provision, the statute as a whole, and the broader legal and social context. Together, those sources convey the legislature's intent, which itself constitutes the law.

III. WHAT IS LEFT OF INTENTIONALISM?

This account of intentionalism is an alluring one, but it rejects the central intentionalist tool that, as a practical matter, distinguishes intentionalism from textualism (as actually practiced by judges), namely resort to legislative history. Indeed, there is likely not a modern textualist in the United States who would reject the contextual methodology that Ekins proposes.

To understand why this is so, let us reduce Ekins's account of intentionalism to its barest essence: a statute means what an informed legislature would have intended it to mean at the moment of enactment in light of the full context in which the statute is enacted. Justice Scalia, the Supreme Court's resident avatar of textualism, would likely take issue with only one word in that description, "intended." He would simply substitute the word "understood." As a matter of political philosophy and language theory, these words might put Ekins and Scalia at some distance from one another. But practically speaking, because

Ekins rejects the use of legislative history in the search for legislative intent, he and Scalia propose essentially identical methodologies.

The one potential area of practical disagreement between Ekins and the textualist would be Ekins's allowance for equitable interpretation. I suppose it is possible that some textualists would take issue with Ekins's methodology and conclusions in such cases, but that possibility does not put much practical space between the two theories, for two reasons. First, as already mentioned, Ekins emphasizes that equitable interpretation applies to only a narrow, exceptional group of cases. Therefore, we are talking potentially about only a handful of cases in which Ekins's approach has practical implications. A handful is not nothing, but it also isn't much, and I suspect that Ekins intends his theory to have more purchase than that.

Second, and much more importantly, I suspect that a judge applying textualism could easily arrive at the same result in the few cases in which his vision of equitable interpretation applies as Ekins does. That is not to say that *every* textualist must arrive at the same decision, but a textualist inclined toward it has enough tools to work with that she need not resort to this type of intentionalism. For example, Ekins suggests that a statute prohibiting vehicles in the park does not apply to an ambulance entering the park to save an injured person even if such a proviso is not expressed in the statute. In his understanding, the act of the legislature in enacting this statute must be tempered by its obvious intention not to apply these words to ambulances, because they did not think of it (pp. 276–77).

It is hardly the case, however, that a textualist must necessarily disagree. Rather, she might apply the rule against absurd results to arrive at the same conclusion. Or, more likely, she would find related statutes in the broader legal context that privilege ambulance drivers, emergency situations, and human life above traffic laws as a general matter. (The classical intentionalist would chuckle to himself and observe that resorting to legislative history would only make this case all the easier, and that there is therefore little reason to categorically reject its use.) This example underscores that, in some set of cases, textualism is indeterminate: an insight that some textualists would cringe at,

but also one that non-textualists (at least) take to be self-evident.²² And the same holds true for most, and possibly all, of the few examples of equitable interpretation that Ekins approvingly cites.

I suspect that one reason that Ekins's methodological approach does less to distinguish itself from textualism as practiced by judges than he seems to think is that he conflates textualism with semantic literalism (pp. 180–81). He would hardly be the first student or scholar of statutory interpretation to do so, but the truth is that textualism, whether one fully embraces it or not (I do not), is far more attuned to legislative context and the surrounding body of law than Ekins acknowledges.

A more charitable explanation for Ekins's imperfect account of textualism is that he situates himself and his discourse more in England than in the United States. It could be that textualists there are more inclined toward literalism than are textualists here. I am not prepared to assess that possibility, because I am hardly expert in that *milieu*, so I simply acknowledge the possibility that Ekins's account of intentionalism may have greater practical relevance across the Pond. If so, then good for him, but he ought to have been more careful to distinguish the contemporary American textualist tradition from whatever it is that he is taking on.

If *The Nature of Legislative Intent* has little of practical consequence to offer the textualist (or at least the modern American textualist), then what about for the non-textualist? Could Ekins potentially change the minds and behaviors of judges who embrace pragmatic, eclectic, and other non-originalist approaches to interpretation like those offered by Richard Posner,²³ Bill Eskridge,²⁴ Einer Elhauge,²⁵ or me?²⁶ Unfortunately, Ekins declines to address the central critiques of these non-originalist interpretive theories, thus making it unlikely that he can convince them to reject their approaches in favor of his. Further, because these non-intentionalist, non-textualist theorists' allowance for legislative history in the interpretive process is not tied to a search for legislative intent, he is unable to

22. See generally Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC, (Aug. 24, 2012), <http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism>.

23. See generally RICHARD A. POSNER, *HOW JUDGES THINK* (2008).

24. See generally WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994).

25. See generally EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* (2008).

26. Levin, *supra* note 20.

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persuade, without having said much more, that they should reject legislative history as well.

To be clear, I do not mean that the choice not to engage these approaches is any great crime or even that Ekins should have written a longer book that tackles all of these theories. He is entitled to begin with whatever *a priori* assumptions he wishes, including the one that dominates among originalists—namely, that originalism is all there really is. But it is unfortunate for us and for him that he has chosen not to do so. It is unfortunate for us, because we miss the prospect of having our ideas directly assessed and challenged by someone with his cogent style, keen insight, and fresh ideas. It is unfortunate for him, because he forecloses the possibility of a greater practical impact.

CONCLUSION

There is something useful, indeed beautiful, about a work that carefully and eloquently explores a new idea or reexamines an old one. *The Nature of Legislative Intent* is therefore useful and beautiful, and it offers much of philosophical value for textualist and non-textualist alike. But it offers little of practical consequence and is therefore unlikely to advance the ball outside of the halls of academia, not simply because of the failure of judges to take legal scholarship seriously (which is their loss, as well as society's), but because on its own terms it cannot.