

# CHARTING A NEW COURSE IN STATUTORY INTERPRETATION: A COMMENTARY ON RICHARD EKINS' *THE NATURE OF LEGISLATIVE INTENT*

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*Jettisoned by many modern scholars, legislative intent is a critical component of statutory interpretation, according to a recent book by Richard Ekins. In what has been called the most philosophically sophisticated work on the subject of legislative intention, Ekins describes the well-formed legislature as a group agent that enacts laws based on coherent and reasoned plans that represent the legislature's intent. In interpreting the laws, the duty of courts is to infer that intent, which requires judges carefully to consider the chain of reasoning that led to a particular legislative choice about means and ends. Professor Ekins thus charts a new course in the debates over statutory interpretation between textualism's focus on semantic meaning and a much more open-ended purposivism. This Article sets out Ekins' discussion of the central case of the well-formed legislature, and his compelling argument for courts to interpret statutes by inferring the reasoned plan adopted by the legislature and made known in the text. It then analyzes the opportunities and challenges arising in applying Ekins' analysis to litigated cases and flesh-and-blood legislative bodies by focusing on how, and where, courts should look for evidence of that intent. It concludes that a thoughtful use of legislative history, though discarded by a great deal of contemporary scholarship, including Ekins' work, can be an essential element of the search for a statute's meaning.*

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## INTRODUCTION

Can we interpret a statute without thinking deeply about the philosophical foundations of legislative authority? Legions of lawyers and judges do it all the time, as they reach into a conventional interpretative toolkit filled with canons, maxims, dictionaries, and other guides to statutory meaning.<sup>1</sup> Yet doing so, argues Professor Ekins, misses an essential point of *The Nature of Legislative Intent*.<sup>2</sup> A statute and its proper interpretation are, he argues, inextricably linked to the nature of legislative authority, an analysis that demonstrates that legislative intent is an essential element of statutory meaning.

In short, what legislation means is bound up with what it means to legislate. Professor Ekins delves into an impressive array of scholarship to show that the interpretation of every type of statute, from hypothetical parking regulations to actual domestic violence laws, requires an understanding of the power that law-making bodies possess, how that power is exercised, and how the resulting laws should be understood. In the end, he makes a powerful case for the role of intention—albeit a new version of intention—in the foundations of statutory interpretation. He thus creates a new pathway that takes the continuing debates between the “textualists” and the “purposivists” in an important new direction. This Article reviews Ekins’ complex and compelling analysis in the context of the model, well-formed legislature and then discusses how those insights can be applied to real-world legislation being interpreted by courts. It concludes that the judicious use of legislative history, which Ekins rejects, may be necessary to properly identify the legislature’s intent.

## I. A NEW APPROACH TO INTENT

“[L]egislative intent has traditionally been thought to be the central object of statutory interpretation,” asserts Ekins, citing Aquinas, Hobbes,

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<sup>1</sup> For a recent, lengthy tome on various methods of interpretation, see ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69–339, 415–24 (2012), where the authors discuss fifty-two canons and include an appendix specifically relating to the use of dictionaries.

<sup>2</sup> See RICHARD EKINS, *THE NATURE OF LEGISLATIVE INTENT* *passim* (2012).

Blackstone, and a raft of judicial opinions.<sup>3</sup> Yet, in many scholarly circles, “intentionalists” have lost the academic battles over statutory (and constitutional) interpretation following attacks by the legal realists and others, who argued that there was no way to read the minds of many legislators.<sup>4</sup> Instead, we have seen the rise of the textualists<sup>5</sup> (or “new originalists”<sup>6</sup> in American constitutional interpretation), who seek the original public meaning of the codified language rather than the legislators’ intentions.<sup>7</sup> Professor Ekins advances an argument about the source of legislative meaning that goes far beyond the classic battles between the intentionalists and the realists over the (im)possibility of determining a single intention of hundreds of legislators. These disputes, he argues, have merely scratched the surface because “to understand the legislature and its action, one must reflect on the philosophy of language and of social action, as well as political and legal philosophy,”<sup>8</sup> a mission he takes up with enthusiasm. Ultimately, Ekins seeks to show that “there are good reasons for the legislature to form and act on intentions, and that it is possible for it to do so and for these intentions to constitute the legislative intent” that is “central to how one should interpret the statutes the legislature enacts.”<sup>9</sup>

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<sup>3</sup> *Id.* at 1–2 (emphasis omitted).

<sup>4</sup> See, e.g., Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869–70 (1930). In the American constitutional setting, many have advocated a “living Constitution.” See, e.g., William J. Brennan, Jr., Assoc. Justice of the Supreme Court of the United States, *The Constitution of the United States: Contemporary Ratification* (Oct. 12, 1985), in 27 S. TEX. L. REV. 433, 435–36 (1986). There are, nevertheless, a few doughty intentionalists remaining. See, e.g., Larry Alexander, *Simple-Minded Originalism*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION* 87, 87 (Grant Huscroft & Bradley W. Miller eds., 2011); Stanley Fish, *The Intentionalist Thesis Once More*, in *THE CHALLENGE OF ORIGINALISM*, *supra*, at 99, 100. Moreover, strains of intentionalism can be found in those who take a purposive approach to statutory interpretation. See John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 122, 132.

<sup>5</sup> See John F. Manning, *What Divides Textualist from Purposivists*, 106 COLUM. L. REV. 70, 79–80 (2006) (“Textualists thus look for what they call “objectified” intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.” Because one can make sense of others’ communications only by placing them in their appropriate social and linguistic context, textualists further acknowledge that “[i]n textual interpretation, context is everything.” (quoting Antonin Scalia, *Common-Law Courts in a Civil Law System*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17, 37 (Amy Gutmann ed., 1997))).

<sup>6</sup> See Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalist Theory*, in *THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION*, *supra* note 4, at 12, 22–27; see also KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 35–36 (1999) (describing critical aspects of originalism); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 599–610 (2004) (tracing the development of originalism).

<sup>7</sup> See *supra* notes 5–6.

<sup>8</sup> EKINS, *supra* note 2, at 9.

<sup>9</sup> *Id.*

To achieve this goal, Professor Ekins first seeks to clear away the old notion of legislative intention as “an aggregation of the intentions of the many individual legislators,”<sup>10</sup> a formulation that has been critiqued by a host of skeptics, from Max Radin’s pithy comments of a century ago<sup>11</sup> to more recent works by Ronald Dworkin<sup>12</sup> and Jeremy Waldron.<sup>13</sup> All of this “withering criticism” is correct, says Ekins, but the critics are wrong to think that they have “refute[d] the possibility of *the institution itself forming and acting on intentions*, intentions which do not reduce to the aggregate of the intentions of each legislator, considered for his or her part only.”<sup>14</sup>

A great deal of Professor Ekins’ thesis turns on just what it means for a legislature to have an intention. If such an intention were to be “‘what someone has in mind and means to communicate by a vote,’” then it seems that “‘we must take as primary the mental states of particular people because institutions do not have minds.’”<sup>15</sup> This formulation, the “speaker’s meaning theory,”<sup>16</sup> obliges the interpreter to “worry about how to consolidate individual intentions into a collective, fictitious intention.”<sup>17</sup> Attempting to do so is essentially a fool’s errand, according to critics of intentionalism such as Dworkin,<sup>18</sup> and to Ekins as well. Rather, Ekins, following Dworkin,<sup>19</sup> asserts that the legislator (in Dworkin’s case, the ordinary legislator who does not control the drafting) “is like a signatory to a group letter,” a formulation that shifts “the focus of attention away from the mental states of each person considered independently.”<sup>20</sup> Ekins and Dworkin take that shared conclusion in very different directions, however. As Ekins argues, “Dworkin is driven to conclude that the document is the author, which is absurd (an author is a person who writes a document to convey something),” because he has assumed that the “institution does not act.”<sup>21</sup> Rather, the “joint intention on which [a] group acts”—and here Ekins explicitly focuses on a “well-

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<sup>10</sup> *Id.*

<sup>11</sup> See Radin, *supra* note 4; see also William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 642 (1990) (“To talk about the collective intent of a legislature is fiction compounded, not just by the greater number of people whose intent must be discovered, but also by the muteness of most of these people and the special conventions of the legislative process, such as the requirements that a bill must be passed in the same form by both chambers (bicameralism) and that it must then be presented to the President (presentment).”).

<sup>12</sup> See RONALD DWORKIN, *LAW’S EMPIRE* 313–54 (1986).

<sup>13</sup> See JEREMY WALDRON, *LAW AND DISAGREEMENT* 125–26 (1999).

<sup>14</sup> EKINS, *supra* note 2, at 9–10 (emphasis added).

<sup>15</sup> *Id.* at 19 (quoting DWORKIN, *supra* note 12, at 335–36).

<sup>16</sup> *Id.*; see also DWORKIN, *supra* note 12, at 315.

<sup>17</sup> DWORKIN, *supra* note 12, at 336.

<sup>18</sup> See *id.*

<sup>19</sup> See *id.* at 322–29.

<sup>20</sup> EKINS, *supra* note 2, at 25.

<sup>21</sup> *Id.* at 26.

formed group”— “is the plan of action that coordinates and structures the joint action of the members of the group.”<sup>22</sup>

For Ekins, who self-consciously follows “the classical understanding of social action found in Aquinas and restated by Finnis, Grisez, and Boyle,”<sup>23</sup> a “group is an association of two or more persons who unite in the coordinated pursuit of common purpose,” and “[g]roup action . . . is action by the members of the group on a group intention. That group intention . . . [is] the means to the shared end that defines the group.”<sup>24</sup> To “understand the nature of group intentions is to understand how they coordinate individual acts into a group action and how they relate to the reasoning of individual members.”<sup>25</sup> The concept that Ekins employs to understand that coordinated action is group agency: “The group that is structured to adopt reasoned plans, which are complete and consistent, forms an agent, which there is reason to think is likely to act rationally.”<sup>26</sup> Intention is essential to this approach to group agency because, for Ekins, the “foundation of this group agency is the joint intention to form and maintain a group that responds coherently to reasons.”<sup>27</sup> So he describes the “central case” (or what some social scientists would call the “ideal-type”) of the “well-formed legislature” as “an institution capable of reasoned choice.”<sup>28</sup>

Such a governing body is not only able to legislate based on good reasons but also better suited to rule than the people themselves. “The electorate’s preferences,” asserts Professor Ekins, “are not fit to govern”

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<sup>22</sup> *Id.* at 47.

<sup>23</sup> *Id.* at 64 (citing JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* 23–37 (1998); JOHN FINNIS ET AL., *NUCLEAR DETERRENCE, MORALITY AND REALISM* 120–23, 288–91, 344–47 (1987)). Ekins also relies on Bratman’s approach to interlocking intentions. *See id.* at 59, 63–64 (citing MICHAEL E. BRATMAN, *FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY* 107 (1999)).

<sup>24</sup> EKINS, *supra* note 2, at 52.

<sup>25</sup> *Id.* at 53.

<sup>26</sup> *Id.* at 73.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 77, 118. In discussing the “well-formed” legislature, Ekins has adopted the “central case” jurisprudential method, *see* JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 9–10 (1980), which Ekins describes as:

[A]dopt[ing] the perspective of the practically reasonable person to identify the ends, or objects, of fully reasonable human action and thence to understand more or less confused or in other ways rationally defective purposes, actions, and institutions. The central case of the legislature . . . is the form that the legislature has . . . when it is chosen and maintained by practically reasonable persons.

*Id.* at 118; *see also* FINNIS ET AL., *supra*, at 23 (“[O]ne’s descriptive explanation of the central cases should be as conceptually rich and complex as is required to answer all appropriate questions about [them]. And then one’s account of the other instances can trace the network of similarities and differences, the analogies and disanalogies . . . between them and the central cases.”). In developing the central case approach, Finnis cites both Max Weber’s “ideal-type” and Aristotle’s “focal meaning.” *Id.* at 20.

for at least two reasons.<sup>29</sup> First, economist Kenneth Arrow has shown that “no voting rule applied to a profile of individual preference orderings can guarantee a unique majority preference,”<sup>30</sup> and, second (and more importantly for Ekins), the preferences of the electorate “are not sufficiently responsive to the reasons for and against changing the law.”<sup>31</sup> In fact, the “point of the legislative process then is not to identify the ‘will of the people’ that exists apart from, and prior to, the legislature’s public deliberation and action.”<sup>32</sup>

The exercise of “legitimate [legislative] authority” is to “respond to reasons with reasoned action” and, thus, “[r]ational lawmaking is action to change the law in specific ways for (what the legislature takes to be) good reasons.”<sup>33</sup> In fact, the “legislature’s authority to direct others turns on whether there is good reason to expect its directives to be reasonable.”<sup>34</sup> Ekins acknowledges that not all of the legislators will “understand the full detail of the statutory text they vote to enact,” nor will they necessarily “grasp fully the reasons for the changes in the law the text introduces”; yet it would be “a mistake to think that this ignorance is necessarily unreasonable.”<sup>35</sup> Rather, the legislative process and its attendant bureaucracy—committees, factions, parties, and the like—help “legislators act reasonably despite limitations on their time” and presumably their abilities as well.<sup>36</sup>

The need to interpret legislative acts provides further support for the argument that “the legislature must respond to reason as an institution if it is to exercise legitimate authority.”<sup>37</sup> Returning to his introductory premise of the centrality of intention to the interpretative process, Ekins points out that “interpreters identify the legal changes that the legislature has [enacted] by understanding the intended meaning of the statutory text.”<sup>38</sup> To do so, they “understand what was intended by inference,

<sup>29</sup> EKINS, *supra* note 2, at 88.

<sup>30</sup> *Id.* at 85. See generally KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951). Ekins reads Arrow in light of Kenneth A. Shepsle, *Congress is a “They,” Not an “It”*: *Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992), as follows:

The argument from social choice theory establishes that the act of the legislature is not the direct expression of majority preferences, which (often) cycle, but is instead transformed by the institutional structure of the legislature, in which agenda-setting, limits on time, and strategic action (including logrolling) are of central importance.

EKINS, *supra* note 2, at 46.

<sup>31</sup> EKINS, *supra* note 2, at 88.

<sup>32</sup> *Id.* at 94.

<sup>33</sup> *Id.* at 112–13.

<sup>34</sup> *Id.* at 115.

<sup>35</sup> *Id.* at 113.

<sup>36</sup> *Id.* at 114.

<sup>37</sup> *Id.* at 116.

<sup>38</sup> *Id.*

which in turn requires reflection on why the [legislature] acted.”<sup>39</sup> Accordingly, if legislatures “were not structured to form reasoned decisions, it would be absurd for interpreters to infer what meaning was intended”; in that case, according to Professor Ekins, “legislators would be unable to communicate joint decisions by way of a statutory text.”<sup>40</sup>

There are, unfortunately, “many ways to fail to legislate well.”<sup>41</sup> A “hapless lawmaking body” could: “aggregate preferences rather than respond to reasons”; “make only the minimal decision to enact the text of the bill whatever its content”; or do just about anything other than make a “full, direct response to reason.”<sup>42</sup> Professor Ekins, however, is focusing on the central case of “legislating [as] centrally the making and promulgation of reasoned choice . . . [by a] well-formed legislative assembly . . . capable of such choice.”<sup>43</sup> The law, then, is not merely—or even primarily—the text but the “set of prepositions . . . [that] provides reasons for action for the members of the community whose law it is.”<sup>44</sup> “That is, a law is a prescription of practical reason promulgated by a legal authority . . . .”<sup>45</sup>

This formulation means that the “connection between the text and the legislative act is complex.” Therefore, “[S]tatutory texts . . . are both sources of law and the law itself.”<sup>46</sup> That is, “[S]imply restating the text . . . does not capture the legal effect of the statute. Rather, the legal effect of the statute is the set of legally true propositions that the statute stands for . . . .”<sup>47</sup> The statutory text does not exist in isolation but “is a contribution to an existing legal order, in which there are prevailing assumptions, antecedent rules, and general qualifying principles.”<sup>48</sup> It stands “together with other such acts [to] constitute[ ] a scheme of social coordination towards the common good.”<sup>49</sup> The “content of the law . . . is [thus] the set of normative propositions” that is “made known” by the statutory text.<sup>50</sup>

To illustrate how the well-formed legislature should function, Ekins addresses the case of a single legislator, the prince. The prince considers whether the law should be changed and “he will choose [a particular] proposal for the reasons that explain how it would serve the common

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 116–17.

<sup>43</sup> *Id.* at 117.

<sup>44</sup> *Id.* at 125.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 126.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 127.

good.”<sup>51</sup> So “the intentional act of the legislator in legislating is to direct others to act on a plan of action that he has chosen for them.”<sup>52</sup> It is, therefore, only possible to “understand[ ] how the legislator exercises his authority, and how one is directed,” by understanding “the means-end package on which he acts.”<sup>53</sup>

Some of the legislator’s reasoning may, however, not be relevant. “For example, the legislator might enact a certain public standard intending either to do his religious duty, to deter citizens from violent rebellion, to attract favourable comment from historians, or to indulge his capricious whims.”<sup>54</sup> Only “those intentions that constitute a publicly sufficient ground and justification for the . . . enactment” are, for Ekins, “determinative.”<sup>55</sup> “The legislator’s private intentions, and also his hopes and expectations,” are irrelevant “to members of the community seeking to ascertain how he has directed them to act.”<sup>56</sup> A good legislator will then “strive to ensure that the text manifests his choice as to what propositions shall be law. And he will accept . . . formalization of the interpretive process that deems the legislator’s reasonably apprehended intention to be his actual intention.”<sup>57</sup> This avoids making the interpretive process “a private game of ‘guess what was in my mind.’”<sup>58</sup>

Legislatures differ from the prince. “[W]hereas the prince reasons and chooses alone, lawmaking by assembly enables a microcosm of the community . . . to argue about what should be done,” and the duty of the “reasonable legislator” is “to contribute to the legislative process so that the assembly legislates well.”<sup>59</sup> Legislators should not, then, merely seek to act in accordance with the sections of the community they represent, but they should “exercise[ ] [their] own reason and judgment in the assembly in response to particular proposals.”<sup>60</sup> However, assembling a large number of these independent thinkers together makes it “difficult for an assembly to legislate well”—“[to] coordinate their joint action in such a way that they together respond to reasons with a unified, intelligent decision.”<sup>61</sup> It is the formal structure of legislative bodies that permits such a reasoned outcome.<sup>62</sup> In particular, the “two features that

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<sup>51</sup> *Id.* at 135.

<sup>52</sup> *Id.* at 136.

<sup>53</sup> *Id.* at 137.

<sup>54</sup> *Id.* at 138.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 139.

<sup>58</sup> *Id.* at 138.

<sup>59</sup> *Id.* at 151–52.

<sup>60</sup> *Id.* at 152.

<sup>61</sup> *Id.* at 161.

<sup>62</sup> *See id.* at 161, 167.



define modern legislative organization . . . offices and parties.”<sup>63</sup> For Ekins, “[t]hose who control the agenda, whether party leaders or independent officers, have a responsibility to put before the assembly well-formed proposals.”<sup>64</sup> “[D]eliberation and voting in open plenary session . . . is the central moment of the legislative process,” but “[t]he officers . . . enjoy a special place in that deliberation, retaining privileged control over the development and form of the proposal . . . . [T]his is all to the end of putting before the assembly as a whole a bill for its consideration . . . .”<sup>65</sup> Since these leaders “are likely to be more competent than other legislators, having been chosen as leaders by their peers . . . the legislature makes use of its internal resources to legislate well.”<sup>66</sup>

Some legislatures are better structured than others to legislate well. While both Washington and Westminster “are capable of reasoned action,”<sup>67</sup> the U.K.-like parliamentary system is better structured than a presidential system, such as the U.S.<sup>68</sup> Legislating can be frustrated by the “proliferation of veto-players” in Congress, whereas “the United Kingdom has unified, decisive majority control.”<sup>69</sup> Moreover:

[A] president’s direct election [may] tempt[ ] him to claim a popular mandate even when he may have only modest popular support . . . . He need not build a coalition of support to enjoy executive authority, as must a cabinet in parliament, and he may respond to deadlock with the assembly by resorting to unconstitutional action.<sup>70</sup>

In contrast, a parliamentary system requires the government “to maintain the confidence of a majority of legislators.”<sup>71</sup> “[I]t authorizes a salient subset . . . to set the agenda: those who also direct the government. [They] act with the support of a majority and may develop and advance reasoned, coherent proposals.”<sup>72</sup> Meanwhile, the Washington legislature “may enact legislation that is not fit to be chosen by a reasoning person, because it is rendered incoherent by the various riders insisted on by veto-players.”<sup>73</sup>

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<sup>63</sup> *Id.* at 167.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 168–69.

<sup>66</sup> *Id.* at 169.

<sup>67</sup> *Id.* at 173.

<sup>68</sup> *See id.* at 176–79.

<sup>69</sup> *Id.* at 173.

<sup>70</sup> *Id.* at 174.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 176.

### A. *Identifying the Legislature's Intent*

Whether parliamentary or presidential, the “legislature is . . . a deliberative body . . . . Legislatures deliberate in public and so are more likely to make sincere judgments, acting strategically less often than would otherwise be the case.”<sup>74</sup> Such public deliberation “narrows the range of possible argument, screening out arguments that plainly cannot withstand scrutiny, and forcing deliberators to appeal to the general rather than private interest.”<sup>75</sup> Once the legislature has completed its deliberations, their exercise of authority to change the law is “made known” via the language of the statute.<sup>76</sup> To understand how a change to the law is made known by the statutory language, Professor Ekins makes a foray into the philosophy of language. Rejecting the thesis that language can be fully explained in terms of linguistic conventions, he argues that “the use of language is an act, which means that it is undertaken for reasons. [Therefore,] [w]hat defines the communicative act is . . . the speaker’s intention to convey something . . . to his audience . . . .”<sup>77</sup> A successful communication occurs when that audience “understand[s] the speaker’s intention including its highly particular meaning-content, which the speaker intends the audience to identify.”<sup>78</sup> Because the “semantic content of a sentence underdetermines what a speaker may mean,”<sup>79</sup> it is “much thinner than ordinarily assumed.”<sup>80</sup> So the “literal meaning of the sentence is sometimes a candidate for what the speaker may intend to mean, although often it will be too sparse and uninformative to be a proposition the speaker has good reason to convey.”<sup>81</sup>

Context is also an important element in the search for meaning because it, along with semantics, “inform[s] inferences about what the speaker means.”<sup>82</sup> However, these two elements “could not together

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<sup>74</sup> *Id.* at 175–76.

<sup>75</sup> *Id.* at 176.

<sup>76</sup> *See id.* at 126–27.

<sup>77</sup> *Id.* at 194. In this section, Ekins takes on a number of proponents of the view that statutes have as their meaning the conventional or ordinary meaning of the words employed. *See, e.g.,* JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON* 284–85 (2009); FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 55–58 (1993); WALDRON, *supra* note 13, at 82–83. These arguments are complex, and they bear serious attention. In the end, Ekins concludes that these scholars fail to determine “whether conventions in fact explain (exhaustively or even sufficiently) how persons use language.” EKINS, *supra* note 2, at 193. For an argument that semantic meaning can, in practice, be underdeterminative, see Joel Alicea & Donald L. Drakeman, *The Limits of New Originalism*, 15 U. PA. J. CONST. L. 1161 (2013).

<sup>78</sup> EKINS, *supra* note 2, at 194.

<sup>79</sup> *Id.* at 196.

<sup>80</sup> *Id.* at 198.

<sup>81</sup> *Id.* at 202.

<sup>82</sup> *Id.* at 209.

constitute sentence meaning” because the “much more detailed, highly specific set of conventions” that would allow context to settle meaning does not exist.<sup>83</sup> Rather, Ekins notes, context is more likely one of several tools “to capture the best judgment of what the speaker is likely to have intended.”<sup>84</sup> In his view, the “primary reality of language use is the rational act of some person in order to convey his meaning to another”; thus, “A successful instance of communication occurs when the hearer identifies the intended meaning by recognizing the speaker’s intention to this effect.”<sup>85</sup> If the hearer does not get the intended message, “there is no third category of meaning, utterance meaning. There is just what the speaker meant and what the hearer wrongly but reasonably understood him to mean.”<sup>86</sup>

If the meaning of legislation were to be limited to the semantic meaning, interpreters would be stymied by cases when the language is ambiguous or otherwise poorly drafted: “Failures in precise, direct expression are likely to occur when legislators form and enact complex statutory texts . . . . Interpreters strive to grasp the meaning that the legislature intended to convey because they realize that what the legislature means does not reduce to what it says.”<sup>87</sup> Moreover, the “statutory text should be clear and clarity is not in general best achieved by exacting, exhaustive precision.”<sup>88</sup> In fact, “[T]he legislator has good reason to be brief and to rely on interpreters to infer correctly what he means.”<sup>89</sup> In Ekins’ vision, “the well-formed legislature often intends to convey meanings that depart from the semantic content of the texts it utters—in interpreting any statute interpreters should remain open to the possibility that the legislature uses language in this way.”<sup>90</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 210.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 215.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 216–17. Here, Ekins tacks in a very different direction than the new textualists. See, e.g., John F. Manning, *Textualism and the Role of The Federalist in Constitutional Adjudication*, 66 GEO. WASH. L. REV. 1337, 1341–42 (1998) (“Even if we cannot know the actual intent of the legislature, we can at least charge each legislator with the intention ‘to say what one would be normally understood as saying, given the circumstances in which one said it.’ Ascribing that sort of objectified intent to legislators offers an intelligible way to hold legislators accountable for the laws they have passed, whether or not they have *any* actual intent, singly or collectively, respecting its details. Textualists subscribe to this theory of intent.” (citations omitted) (quoting Joseph Raz, *Intention in Interpretation*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM* 249, 268 (Robert P. George ed., 1996))).

### *B. The Nature of Legislative Intent*

At this point, Ekins turns to the primary issue: the nature of legislative intent. The legislature has both a standing intention and a series of particular intentions. These intentions contribute to the “defining end of the assembly,” which is “the exercise of legislative capacity,” i.e., “to be in a fit state to legislate on particular occasions for the common good.”<sup>91</sup> The “standing intention . . . is to seek this end by means of a set of procedures that frame the group’s deliberation and decision-making and settle how or if the group is to legislate in particular cases.”<sup>92</sup> Then, when it does act, the legislature’s particular intention is the “intention on which it acts . . . which is both that for which it acts—changes in the law that are means to valuable ends—and the plan it adopts to introduce those changes—a complex set of meanings that expresses a complex set of propositions.”<sup>93</sup> The standing intention is essentially “to form an agent capable of reasoned choice” based on the concept that “each law-making act . . . [is] reasoned and coherent.”<sup>94</sup> The standing intention:

[E]ntails that the legislature’s particular intention in any legislative act is the plan that the bill set out for the community, which there is good reason to expect to be coherent and reasoned, as if chosen by a sole legislator . . . . Its intention in the particular legislative act is the reasoned choice that it was proposed that the assembly make.<sup>95</sup>

The point is that the legislature’s intention is not that of the majority that votes in favor of a particular piece of legislation. Rather, the standing intention—that the majority’s act is the act of the entire group—leads to a particular intention that is the reasoned choice represented by the act. It is possible that:

[A] corrupt or dysfunctional legislature . . . might vote for a statutory proposal without intending it to be enacted, instead intending only to earn a bribe, to impress the electors with a show of resolve, or to frustrate the minority . . . . However, in neither case would the legislature’s particular intention arise from the interlocking intentions of the majority . . . . [T]he majority[’s] vote

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<sup>91</sup> EKINS, *supra* note 2, at 219.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 220.

<sup>94</sup> *Id.* at 223.

<sup>95</sup> *Id.* at 224.

[is] understood by reference to the group's standing intention . . . .<sup>96</sup>

The majority does not enact a statute by itself; only the legislature as a whole enacts a statute.

Through the process of drafting and debate the legislation's meaning becomes available to all the legislators, whether they vote in the majority or not.<sup>97</sup> That is:

[T]he meaning that a reasonable sole legislator who attends to the context—including the overall statutory scheme, the rest of the law, especially that which he aims to change, and the nature of the mischief he addresses—would be likely to convey in uttering the semantic context of the section.<sup>98</sup>

Such an approach is fully consistent with the concept of legislative compromise, argues Ekins, although the legislature “should not choose an interpretive lottery”<sup>99</sup> by “‘deliberately leav[ing] some formulations of the bill open to conflicting interpretations, hoping that the interpretation they favor will eventually prevail.’”<sup>100</sup> Rather, “Reasonable legislators form and consider proposals to be capable of unified choice, which means they act . . . in a way that avoids internal contradiction or failure to decide.”<sup>101</sup>

### C. *The Nature of Interpretation*

Finally, Professor Ekins sets out to “explore the significance for statutory interpretation” of what he describes as “the truth that the well-formed legislature is a rational agent, which acts publicly to choose complex, reasoned schemes.”<sup>102</sup> “[W]ell-formed interpretive practice” is based on the central axiom that “the legislature is an institution that aims to act responsibly for the common good.”<sup>103</sup> Since the legislature “promulgates its lawmaking intention . . . by uttering the statutory text in the relevant context,” the meaning of a statute is “what one *reasonably* infers the enacting legislature intended.”<sup>104</sup> That is not to say that “interpreters may substitute their judgment of what the legislature in fact in-

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<sup>96</sup> *Id.* at 233.

<sup>97</sup> *See id.* at 236.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 238.

<sup>100</sup> *Id.* at 237 (quoting Andrei Marmor, *The Pragmatics of Legal Language*, 21 *RATIO JURIS* 423, 429 (2008)).

<sup>101</sup> *Id.* at 238.

<sup>102</sup> *Id.* at 244.

<sup>103</sup> *Id.* at 245.

<sup>104</sup> *Id.* at 246–47.

tended for what they think it would have been better for the legislature to have intended,” but, after a review of the “publicly available evidence,” the “interpreter’s best inference about what was in fact intended is decisive . . . even if this departs from what is in fact the legislative intent.”<sup>105</sup>

Understanding the legislature’s reasoned choice is particularly important in “cases where the legislature adopts an especially poor formulation of the propositions it acts to choose.”<sup>106</sup> That is:

[T]he focus of the interpretive inquiry is rightly on what it is plausible to infer Parliament intended in enacting the relevant statutory text—that is, what meaning-content it intended to convey . . . . The legislature acts for reasons and uses language rationally, which means that interpreters have good reason to reflect on the legislature’s likely chain of reasoning in order to determine the meaning that the legislature likely acted to convey.<sup>107</sup>

The statutory text is essentially “the conclusion of the reasoning.”<sup>108</sup>

Despite Ekins’ dedication to intention, and his concerns over the limits of using semantic meaning as proposed by the textualists, his work is not a brief for textualism’s principal opponent—a broad-based purposivism, in which the text must yield to what the court sees as the overarching legislative purpose. As Ekins notes, interpretation ought not to become too generally purposive “with the court taking one end for which the legislature acts, referring to it as the statutory purpose, and concluding that the statute creates the propositions the court thinks best attains that end.”<sup>109</sup> Doing so “fails to respect the structure of legislative action, in which the legislature selects a complex means . . . to some complex ends.”<sup>110</sup> That selection may not always be the best means to achieve the legislature’s end in the interpreter’s opinion, but, for Ekins, the authority of the legislature is “to choose, by a choice which may be mistaken or unsound and yet be authoritative.”<sup>111</sup> Rather than having interpreters focus excessively on statutory purpose, the “better approach is to reflect on the further ends for . . . which the legislature is likely to have acted in order to support inferences about the more particular ends and means for which it acted and hence the meaning it likely . . . intend[ed] to convey.”<sup>112</sup> In short, it is “wrong to conflate purpose and

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<sup>105</sup> *Id.* at 247.

<sup>106</sup> *Id.* at 248.

<sup>107</sup> *Id.* at 249.

<sup>108</sup> *Id.* at 250.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 251.

<sup>112</sup> *Id.*

meaning . . . . [Or] [t]o conflate meaning and application.”<sup>113</sup> Rather, “the legislature chooses . . . general rules . . . that employ open types and classes”; so the “scope of the legislative choice does not collapse to the assumptions or expectations any particular . . . legislators may have about the application of the chosen term or class.”<sup>114</sup>

In seeking the intended plan, the interpreters should consider the rich and complex context “the legislature exploits . . . to frame how interpreters infer what it means.”<sup>115</sup> That context “consists in what is known and of concern to legislature and community.”<sup>116</sup> In changing the law, the “legislature partly responds to context when selecting the semantic content it is to utter, intending thereby to make plain to citizens and officials some meaning-content, and hence its choice about how the law is to change.”<sup>117</sup> That change consists of a “complex scheme, which it intends to be read as a whole.”<sup>118</sup> Therefore, interpreters should seek the legislative intent by understanding “the mischief that [the legislature] acts to address.”<sup>119</sup> They are thus “infer[ing] what the legislature was likely to have meant by reference to what it would have been rational for it to decide,” while always presuming that “the legislature does not intend absurd or anomalous consequences,”<sup>120</sup> even if the legislature makes a mistake in its judgment.<sup>121</sup>

Canons of construction and other interpretive rules are useful elements of the process of interpretation, but they are “defeasible” presumptions, not binding constraints; they are “pointers towards legislative intent,” part of the “interpretive regime” but not “capable of replacing inference about what the legislature intends.”<sup>122</sup> Nevertheless, the “overwhelming importance” of canons and other aspects of context “confirm[ ] that one does not legislate just by stating explicitly what the content of the law shall be. Rather one makes clear how precisely one intends to change the law.”<sup>123</sup>

Turning to the question of whether legislative history is useful for inferring legislative intent, Professor Ekins argues that “intent is not dis-

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<sup>113</sup> *Id.* at 254.

<sup>114</sup> *Id.* at 254–55.

<sup>115</sup> *Id.* at 256.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 257.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* For a focus on the “mischief” rule in English law, and its applicability in the United States constitutional setting, see Daniel Frost, *Getting into Mischief: On What It Means to Appeal to the U.S. Constitution*, INT’L J. FOR SEMIOTICS L., July 19, 2014, <http://link.springer.com/article/10.1007/s11196-014-9387-4#>.

<sup>120</sup> EKINS, *supra* note 2, at 258.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 260.

<sup>123</sup> *Id.* at 261.

cerned only or even primarily (if at all) from some distinct body of evidence, gleaned from the legislative history, which falls to be weighed *alongside* the text, the context, and the statutory purpose.”<sup>124</sup> If there is a public record of the legislative proceedings, “legislative history is in principle relevant to interpretation,” but “one need not refer to the record, because the proposal . . . is transparent to the community.” Moreover, “[I]t is reasonable to presume that enactments are drafted (and considered, adopted) with the specific intention that the legislature’s intent . . . be sufficiently intelligible to any competent lawyer . . . without reference to the deliberative record.”<sup>125</sup> If the legislature “acts well,” there is no need for interpreters to turn to the historical record.<sup>126</sup>

Because “the legislative history is a record of only part of legislative deliberation and does not exhaust the reasoning of the legislators,” there is a risk that its use will cause interpreters not “to reflect carefully on what proposal was open to all legislators . . . and will instead take what some . . . legislators say, at some point in the process, to constitute the legislative intent.”<sup>127</sup> Only “what is open to be understood at third reading, which should be transparent to the community at large, is decisive.”<sup>128</sup> If possible, it would be better for interpreters to use legislative history only “when there was no other way to infer what the legislature has decided,”<sup>129</sup> but Professor Ekins would prefer to exclude it altogether.<sup>130</sup> In his view, for the central case of a well-formed legislature acting well, courts should be able to infer the reasoned action that comprises the group’s intent without referring to the legislative history.

## II. WHERE DOES THE NEW APPROACH LEAD?

### A. *Legislative Order or Chaos?*

In a considerable amount of recent scholarship discussing methods of statutory interpretation, especially by the textualists, we often read about concerns over lobbyists and log-rolling, agenda manipulation, strategic voting, and the myriad other ways in which politicians can fail to live up to our highest expectations. As John Manning has noted, promi-

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<sup>124</sup> *Id.* at 268.

<sup>125</sup> *Id.* at 270.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 271. See John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 676 (1997) (“[A]uthoritative legislative history makes it far too attractive for legislators to bypass the constitutionally proscribed process of bicameralism and presentment. By using legislative history as an authoritative source of legislative intent, the Court makes legislative self-delegation possible; Congress’s own agents can go far in determining the details of statutory meaning simply by declaring their own conception of legislative intent.”).

<sup>128</sup> EKINS, *supra* note 2, at 272.

<sup>129</sup> *Id.*

<sup>130</sup> See *id.* at 274.



nent textualists, such as Justice Scalia and Judge Easterbrook, “defended textualism, in part, by emphasizing a cynical view of the legislative process associated with a branch of political sciences known as *public choice theory*,” which led them to advance the “general claim that the legislative process is simply too chaotic, too path dependent, and too fraught with strategic behavior to yield a meaningful ‘legislative intent’ on any significant interpretive question.”<sup>131</sup> What Professor Ekins has accomplished is to remind us forcefully that this kind of cynicism should not displace those high expectations that we (should) have for the legislature. We elect our representatives to use their best-reasoned judgment to make policy decisions that will advance the common good. That they may not always perform their duties to the highest possible standards should not necessarily cause us to abandon, in every case, our expectations of a practicably reasonable plan—a thoughtful means-end choice—that represents the discernable intent of the legislature, even if the manifestation of that plan in the statutory text turns out to be, quite literally, open to interpretation.

That leaves the question of how we should account for the ideal view and the realistic (if not cynical) perspective at the same time. That is, since Professor Ekins has created such an intriguing case for understanding the nature of legislative intent in the context of well-formed legislatures making reasoned choices, it becomes important for us to reflect on how the central case of *The Nature of Legislative Intent* relates to our flesh-and-blood legislative bodies and how our courts should interpret the laws currently in our statute books. In short, how should we think about legislative intent in nature?

### B. *Seeking the Well-Formed Legislature*

We first need to ask whether our legislatures are likely to be formed well enough that we can apply Professor Ekins’ central case analysis to their actions. That his book was published at a time when public opinion of the British government was waning and the approval rating of the United States Congress was at or near historic lows<sup>132</sup> suggests that legislative bodies may not always exhibit the characteristics of women and

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<sup>131</sup> John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287, 1288 (2010). Manning observes that “[t]hese claims had a lot of intuitive ‘pop’ and attracted a great deal of attention from judges and scholars.” *Id.* Manning’s article points to a more recent appearance of “second-generation textualism,” in which “judges in our system of government have a duty to enforce *clearly worded* statutes as written, even if there is reason to believe that the text may not perfectly capture the background aims or purposes that inspired their enactment.” *Id.* at 1289–90.

<sup>132</sup> HANSARD SOCIETY, AUDIT OF POLITICAL ENGAGEMENT 9, at 39 (2012), available at <http://www.hansardsociety.org.uk/wp-content/uploads/2012/10/Audit-of-Political-Engagement-9-Part-One-2012.pdf>; *Congress and the Public*, GALLUP, <http://www.gallup.com/poll/1600/congress-public.aspx> (last visited Aug. 26, 2014); *U.S. Congress Receives Lowest Job*

men dedicated to promoting the common good through sound reasoning. For a philosopher as dedicated to careful thinking as is Professor Ekins, the legislative mandate to “respond[ ] coherently to reasons”<sup>133</sup> is quite a high standard and one that our politicians may struggle to meet. His volume highlights how difficult it is for even highly trained thinkers to achieve the necessary level of coherent reasoning when, in discussing various arguments in legal philosophy, he asserts that [Thomas] Hobbes is “wrong,”<sup>134</sup> Ronald Dworkin advances an “absurd” argument,<sup>135</sup> and Joseph Raz employs “faulty logic.”<sup>136</sup> If these great minds, acting individually, wander into such obvious error, it is not clear that our popularly elected politicians will, as a group and in the heat of debates over contentious issues, reason better than Oxford-trained, eminent philosophers. If there is a risk that an individual philosopher-prince will so clearly miss the mark of rationality, what hope is there for our ordinary elected officials?

Professor Ekins relies on structure to smooth out any rough patches in the reasoning of individual legislators to ensure that the body, as a whole, legislates well.<sup>137</sup> While this argument certainly seems plausible—after all, despite all our complaints and the negative poll data, we have not chosen fundamentally to change our legislative system—it would be interesting to consider how we could put the issue of whether our legislatures are well formed to an empirical test. If we were to analyze either Westminster or Washington, would we discover that actual decisions made by these popularly elected politicians were as well grounded in reasoning as they need to be to constitute a well-formed body acting well? If they do not meet this standard, then it is not clear how they can form the intentions that the central case posits.

For a potential solution to the case of the not-so-well-formed legislature, it might be useful to engage some of the scholarship surrounding the “wisdom of crowds.”<sup>138</sup> This literature suggests that groups as large as legislatures can find solutions to complex social problems. Scott Page, in particular, points to an even greater ability of large groups to solve social problems, than individuals or smaller groups, precisely be-

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*Approval Rating to Date*, GALLUP (Nov. 13, 2013), <http://www.gallup.com/video/165851/congress-receives-lowest-job-approval-rating-date.aspx>.

<sup>133</sup> EKINS, *supra* note 2, at 73.

<sup>134</sup> *Id.* at 162.

<sup>135</sup> *Id.* at 26.

<sup>136</sup> *Id.* at 193.

<sup>137</sup> *See id.* at 168–69.

<sup>138</sup> *See generally* SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2007); JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2004); *COLLECTIVE WISDOM: PRINCIPLES AND MECHANISMS* (Hélène Landemore & Jon Elster eds., 2012).

cause of the diversity of viewpoints.<sup>139</sup> Perhaps the size of the legislature alone will enable it to identify the most reasonable means-end package better than the three philosophers-in-error to whom Professor Ekins refers. If so, such groups could be well enough formed to enact legislation based on reasoned principles.<sup>140</sup>

Once we have decided that it is possible—in fact as well as in theory—for our legislative bodies to be well enough formed to promulgate laws reflecting a reasoned plan, the next question is whether we should assume that they are. Are some legislatures well formed and others not? Even well-formed legislatures may “fail to legislate well”<sup>141</sup> and, of course, the legislature may not be sufficiently well formed, especially in America where Congress “may enact legislation that is not fit to be chosen by a reasoning person,”<sup>142</sup> a conclusion undoubtedly embraced by many of Congress’ constituents as well as Professor Ekins, an Oxonian New Zealander. This is a critical factual point because, if legislatures are “not structured to form reasoned decisions”—and, presumably, if they do not *actually* form reasoned decisions—then Ekins concludes that “it would be absurd for interpreters to infer what meaning was intended.”<sup>143</sup> The nature of legislative intent is a reasoned choice, and the interpreter’s job is to infer what that intention was; without such a reasoned choice, the intention cannot be inferred. What, then, should an interpreter do when there is a genuinely open question as to whether the body adopting it met all of the requirements for the central case of a well-formed legislature acting well?

There seem to be three basic ways that this dilemma could be resolved. One would be to declare that an ill-formed legislature has no legitimate law-making authority. Professor Ekins leans in this direction— “[l]egitimate authority,” he says, is to “respond to reasons with reasoned action”<sup>144</sup>—but he does not discuss whether interpreters should have the power to annul laws on the grounds that the legislature was not

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<sup>139</sup> See PAGE, *supra* note 138, at 9. Page bases his work on a great deal of complex mathematical modeling, but his conclusions are simple:

When we say that diversity leads to better outcomes, what do we mean? Do we mean better solutions to hydraulic engineering problems? Do we mean better weather forecasts? Do we mean better government welfare policies? Yes, yes, and yes.

. . . .

Diverse perspectives increase the number of solutions that a collection of people can find by creating different connections among the possible solutions.

*Id.*

<sup>140</sup> In fact, there may be a risk that they are too well formed, as discussed *infra* notes 200–201 and accompanying text.

<sup>141</sup> EKINS, *supra* note 2, at 116.

<sup>142</sup> *Id.* at 176.

<sup>143</sup> *Id.* at 116.

<sup>144</sup> *Id.* at 113.

sufficiently well formed to be capable of acting on the basis of reasons. If legitimate authority exists *only* in the context of reasoned action, (purported) legislatures unable to achieve that standard may not have law-making power. Professor Ekins asserts that a “mistaken or unsound” legislative choice is still “authoritative,”<sup>145</sup> but it is not clear how interpreters should deal with the product of an unsound, ill-formed legislature and whether courts, in interpreting statutes, have a duty to inquire as to how well-formed the legislature was.

This second possibility—that the law itself would stand on some ground of authority other than reasoned action—would make it impossible for courts to infer the kind of intention that Professor Ekins believes forms the basis of sound interpretation. There being no reasoned plan of action (because the ill-formed legislature is not capable—or at least not necessarily capable—of generating one), the courts cannot infer what that plan was. Perhaps here courts would be presented with a statutory text and would then apply whatever interpretive tools seem appropriate to the judges in that context. It could be argued that this is exactly what courts generally do today.<sup>146</sup>

There may be other options for dealing with the risk of ill-formed legislatures, but it appears from *The Nature of Legislative Intent* that Professor Ekins selects a third approach: he seems to assume that real legislatures have been sufficiently close to his central case that he can apply his interpretive methodology to determine whether actual cases of statutory interpretation have been decided correctly. While many published disquisitions on legislative authority and statutory interpretation focus on what he calls “the jurisprudentially ubiquitous ‘no vehicles’ [in the park] rule,”<sup>147</sup> a hypothetical statute that has generated considerable philosophical disagreement,<sup>148</sup> Professor Ekins points to specific cases where he believes that courts have failed to construe a statute correctly because they have not properly inferred the legislative intent.

### C. *From Theory to Practice*

A prime example of applying an Ekinsian analysis to actual cases is the discussion of the 2011 United Kingdom case of *Yemshaw v. London*

<sup>145</sup> *Id.* at 251.

<sup>146</sup> See, e.g., STATUTORY INTERPRETATION STORIES (William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett eds., 2011).

<sup>147</sup> EKINS, *supra* note 2, at 255.

<sup>148</sup> See, e.g., Bernard W. Bell, “No Vehicles in the Park”: Reviving the Hart-Fuller Debate to Introduce Statutory Construction, 48 J. LEGAL EDUC. 88, 88 (1998); Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. REV. 1109, 1109 (2008). For the jurisprudential origins, see generally H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

*Borough of Hounslow*.<sup>149</sup> Professor Ekins cites this case as an instance of interpreters failing “to infer legislative intent when they are insufficiently attentive to the rationality of uttering the semantic content in question.”<sup>150</sup> The issue of statutory interpretation in this case was the meaning of “the word ‘violence’ in . . . the Housing Act 1996. Is it limited to physical contact or does it include other forms of violent conduct?”<sup>151</sup> Professor Ekins invokes the case primarily to describe the kind of purposive judicial decision that he believes improperly ignores the legislature’s intent in favor of an updated or otherwise judicially improved approach to realizing the legislature’s purpose.<sup>152</sup> He is particularly unhappy with Baroness Hale’s statement that the “purpose of the legislation would be achieved if the term ‘domestic violence’ were interpreted [to include] ‘physical violence,’ *threatening or intimidating behavior and any other form of abuse which, directly or indirectly, may give rise to the risk of harm.*”<sup>153</sup> For Professor Ekins, the “italicized words convey an unsound conclusion about the intended meaning [of the statute] (in fact it is no such conclusion at all, because Baroness Hale purports to ‘update’ the statute, which is in truth to amend it by judicial fiat).”<sup>154</sup>

Because *Yemshaw* presents a number of interesting interpretive issues, and since Professor Ekins has not only described it in his book but has also provided us with a subsequent case note analyzing the opinion in more detail,<sup>155</sup> it may be worthwhile to explore it further. The facts are straightforward: In August 2008, a married woman took her young children and left the home that had been rented in her husband’s name.<sup>156</sup> She had not suffered physical violence but was “‘scared that if she confront[ed] [her husband about infidelity] he may hit her,’” even though he had “‘never actually threatened to hit her.’” She was also “scared that he would take the children away from her . . . and that he would hit her if she returned home.”<sup>157</sup> In an interview with housing officers, she said that her husband did “not treat[ ] her ‘like a human’” and refused to provide “money for housekeeping.”<sup>158</sup> The question in the case was whether she was homeless under the terms of the Housing Act. The statutory history was complicated.

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<sup>149</sup> *Yemshaw v. London Borough of Hounslow*, [2011] UKSC 3 (appeal taken from Eng.).

<sup>150</sup> EKINS, *supra* note 2, at 264.

<sup>151</sup> *Yemshaw*, [2011] UKSC at [1] (Baroness Hale of Richmond).

<sup>152</sup> EKINS, *supra* note 2, at 264–65.

<sup>153</sup> *Id.* (quoting *Yemshaw*, [2011] UKSC at[28] (Baroness Hale)).

<sup>154</sup> *Id.* at 265.

<sup>155</sup> Richard Ekins, *Updating the Meaning of Violence*, 129 L. Q. R. 17 (2013).

<sup>156</sup> See *Yemshaw*, [2011] UKSC at [16] (Baroness Hale).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

As first adopted in 1977, the Housing Act stated that a person was considered homeless “‘if it is probable that occupation of [an accommodation] will lead to violence from some other person residing in it or to threats of violence from some other person residing in it and likely to carry out the threats.’”<sup>159</sup> This provision was subsequently consolidated with other housing-related legislation in the Housing Act of 1985. The statute was revised again in 1996, when the term “domestic violence” was introduced as follows:

It is not reasonable for a person to continue to occupy accommodation if it is probable that this will lead to domestic violence against him, or against—(a) a person who normally resides with him as a member of his family, or (b) any other person who might reasonably be expected to reside with him. For this purpose, “domestic violence” . . . means violence from a person with whom he is associated, or threats of violence from such a person which are likely to be carried out.<sup>160</sup>

This section was amended yet again in the Homelessness Act 2002. “[O]r other violence” was inserted in the first sentence after “domestic violence,”<sup>161</sup> and the second was revised as follows: “For this purpose ‘violence’ means — (a) violence from another person; or (b) threats of violence from another person which are likely to be carried out; and violence is ‘domestic violence’ if it is from a person who is associated with the victim.”<sup>162</sup> Baroness Hale, after referring to various House of Commons Home Affairs Committee reports and other reports on domestic violence in the early 1990s,<sup>163</sup> concludes that “whatever may have been the original meaning in 1977 . . . by the time of the 1996 Act the understanding of domestic violence had moved on from a narrow focus upon battered wives and physical contact.”<sup>164</sup> At this point in her argument, she could have looked to the reintroduction of the basic statutory plan in 1996 and 2002 to state that she was reasonably inferring Parliament’s intention, in light of evolving societal views about domestic violence, to adopt a broad definition when the provision was revised twenty years after it was first adopted. Such a reading, she could assert, is certainly a plausible reflection of the “meaning-content [Parliament] intended to convey.”<sup>165</sup> But, instead of resting her analysis on an inference about the

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<sup>159</sup> *Id.* at [2].

<sup>160</sup> Housing Act, 1996, c. 52, § 177 (Eng.).

<sup>161</sup> Homelessness Act, 2002, c. 7, § 10 (Eng.).

<sup>162</sup> *Id.*

<sup>163</sup> *Yemshaw*, [2011] UKSC at [21–23] (Baroness Hale).

<sup>164</sup> *Id.* at [24].

<sup>165</sup> EKINS, *supra* note 2, at 249.

legislature's increasingly "complex means . . . to . . . complex ends,"<sup>166</sup> as the provision was revised over the years, she seizes the interpretive reins more firmly and asserts, "But if I am wrong about [the legislative meaning of 'domestic violence' in the 1996 Act], there is no doubt that [the meaning] has moved on now."<sup>167</sup> It is "not for government and official bodies to interpret the meaning of the words which Parliament has used. That role," argues Baroness Hale, "lies with the courts."<sup>168</sup>

Baroness Hale did not take an Ekinsian approach. Does that mean her reading of the statute is wrong? Professor Ekins certainly thinks so, but it is worth noting that judges could conclude that he has endowed interpreters with an impressively broad degree of authority to act based on "what it is plausible to infer Parliament intended"<sup>169</sup> or on "what one *reasonably* infers the enacting legislature intended."<sup>170</sup> With such an interpretation being "decisive,"<sup>171</sup> even in cases where the court is wrong about the legislative intent, an especially powerful argument is needed to demonstrate that a court could not reasonably (not an especially high standard) or plausibly (perhaps an even lower standard) reach a particular conclusion.

"Much turns on how one infers a statute's purpose," writes Professor Ekins,<sup>172</sup> and he argues that the "purpose of s.177 . . . was to protect those at risk of physical violence."<sup>173</sup> He believes that "Parliament acted for this end . . . because physical violence is a clear category of harmful action that warrants immediate action on the part of public authorities."<sup>174</sup> Professor Ekins admits that his "inference may of course be wrong but it is consistent with and grounded in the structure and detail of Parliament's choice of language in s.177 and its precursors."<sup>175</sup> Accordingly, "it is not sound to move from other uses of the term 'domestic violence', in quite different contexts, to the meaning of this statutory term."<sup>176</sup> He then refers to the clause that "defines violence to be violence or threats of violence which are likely to be carried out, which strongly implies that Parliament used 'violence' to convey 'physical violence', for otherwise the reference to threats would be redundant."<sup>177</sup>

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<sup>166</sup> *Id.* at 250.

<sup>167</sup> *Yemshaw*, [2011] UKSC at [24] (Baroness Hale).

<sup>168</sup> *Id.* at [25].

<sup>169</sup> EKINS, *supra* note 2, at 249.

<sup>170</sup> *Id.* at 247.

<sup>171</sup> *Id.*

<sup>172</sup> Ekins, *supra* note 155, at 20.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

Professor Ekins' arguments are based on a very careful reading of the statutory language, and, had he embraced a strict textualist methodology, they could be winning ones.<sup>178</sup> A prior case limited the meaning of "violence" to physical violence,<sup>179</sup> and the use of the word "violence" to describe physical harm is older than other uses of the term.<sup>180</sup> The statutory language defining "domestic violence" as violence "from a person who is associated with the victim"<sup>181</sup> could simply mean, as Lord Rodger points out, that "the law does not give a discount to the perpetrator because of the domestic setting."<sup>182</sup> While not entirely free from doubt, the legislative language appears to favor Professor Ekins' reading. But does his own methodology lead to his preferred conclusion?

If Professor Ekins had been serving on the Supreme Court, his interpretation would certainly meet the standards of being a reasonable or plausible inference as to Parliament's reasoned response to the problem of homelessness caused by physical violence. However, it is not as clear that the decision reached by the judges in the *Yemshaw* case necessarily fails Professor Ekins' methodological standards. The judges could have pointed out that the statute dealt with the social problem of homelessness and, in particular, homelessness caused by people being forced from their homes by spousal abuse or other forms of violence. By the time of the statute's most recent reenactments in 1996 and 2002, the term "domestic violence" had, in many contexts, been used to include abusive behavior by domestic partners that did not necessarily include acts or threats of physical violence.<sup>183</sup> The judges could then reasonably and plausibly infer that the legislative intent includes such behavior within the mischief

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<sup>178</sup> But he is unwilling to limit the discussion to a semantic analysis. As Professor Ekins remarks in connection with Baroness Hale's semantic argument, "[T]he semantic possibility that 'violence' may sometimes be used to refer to intensity of emotion rather than physical injury hardly disposes of the central question, which is what was Parliament likely to have intended to mean when it used the term in 1996 and 2002 (and indeed in 1977)." *Id.* at 18.

<sup>179</sup> *Royal Borough of Kensington & Chelsea v. Danesh*, [2006] EWCA (Civ) 1404 [14] (Eng.).

<sup>180</sup> See *violence, n.*, OED ONLINE, <http://www.oed.com/view/Entry/223638?rskey=1gSIZD&result=1#eid> (last visited Aug 6, 2014), where the first definition (i.e., the oldest usage) is: "The deliberate exercise of physical force against a person, property, etc."

<sup>181</sup> *Yemshaw v. London Borough of Hounslow*, [2011] UKSC 3, [44] (Lord Rodger of Earlsferry) (appeal taken from Eng.).

<sup>182</sup> *Id.*

<sup>183</sup> The more recent "5.b." definition of violence reads as follows: "Undue constraint applied to nature, a trait, habit, etc. so as to restrict its development or use, or to alter it unnaturally." *Violence, n.*, OED ONLINE, <http://www.oed.com/view/Entry/223638?rskey=1gSIZD&result=1#eid> (last visited Aug. 6, 2014). Whether Baroness Hale's definition is more or less appropriate is unclear from earlier definitions of violence, cf. *supra* note 180, but it may be worth noting that the OED added a definition of "domestic violence" in March 2006: "violent or aggressive behavior within the home, esp. violent abuse of a partner." *Domestic violence, adj. and n.*, OED ONLINE, <http://www.oed.com/view/Entry/56663?redirectedFrom=domestic+violence> (last visited May 30, 2014).



addressed by the statute. The precise language may not have artfully captured this intention in its fullness, but, as Professor Ekins has pointed out, badly drafted statutes should not prevent interpreters from inferring the reasonable legislative intention by taking into account the overall context and the need being addressed. Therefore, it would seem that the judges might well have reached a correct interpretation (i.e., a plausible or reasonable inference) of the legislature's intent.

Perhaps the proper method of interpretation is to select the *most* reasonable reading, not just any plausible approach. If that is the case, then the next question is how to assess relative degrees of reasonableness or plausibility. Even if we set aside our natural tendency to consider as most reasonable whatever interpretation comports with our own public policy preferences, we are faced with the issue of how properly to read the text in light of various possible legislative contexts. Is the proper inference one that understands Parliament's intention to address physical violence only—and therefore the statutory language was crafted carefully to achieve that result—or, rather, to cover a broad range of abusive behavior, with the text inelegantly representing that particular reasoned choice about ends and means?

After Professor Ekins has so persuasively dismissed semantic meaning as an exclusive interpretive methodology, it is hard to assume that the approach he has taken in his *Yemshaw* analysis is correct on the basis of language alone. We need to return to the issue of whether “the mischief”<sup>184</sup> that the legislature acted to address with the particular means specified in the statute was narrowly “physical” or generally abusive behavior. In considering “what is known and of concern to legislature and community”<sup>185</sup> at the time the statute was adopted, was physical violence the (only) concern “that warrants immediate action on the part of public authorities,” as Professor Ekins argues in his article?<sup>186</sup> Is there not an equally good argument that the community and Parliament were concerned about abuse within families and how that abuse—physical and otherwise—affected homelessness?

In support of such a broader reading, it may be worth noting that, in the early 1990s, the British government signed a “United Nations . . . Declaration on the Elimination of Violence Against Women,”<sup>187</sup> which defined “violence against women” as follows: “[A]ny act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts,

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<sup>184</sup> EKINS, *supra* note 2, at 257.

<sup>185</sup> *Id.* at 256.

<sup>186</sup> Ekins, *supra* note 155, at 20.

<sup>187</sup> GILL HAGUE ET AL., MULTI-AGENCY WORK AND DOMESTIC VIOLENCE: A NATIONAL STUDY OF INTER-AGENCY INITIATIVES 4 (1996).

coercion or arbitrary deprivation of liberty.”<sup>188</sup> While this fairly broad definition may still leave open the question of whether psychological abuse alone would be included, the language of the 2000 Home Office’s Multi-Agency Guidance for Addressing Domestic Violence leaves no such doubt: “The term ‘domestic violence’ shall be understood to mean any violence between current or former partners in an intimate relationship . . . . The violence may include physical, sexual, emotional or financial abuse.”<sup>189</sup>

In connection with various governmental efforts to address the problem of domestic violence, a survey was commissioned specifically to determine how the housing authorities were implementing the laws discussed in *Yemshaw*.<sup>190</sup> The survey was completed in 2000, and one of the questions was whether the local housing authority usually included “[e]motional/psychological abuse” within the definition of domestic violence.<sup>191</sup> Respondents reported that 75% of the authorities included emotional/psychological abuse, compared to 70% that included “[t]hreat/fear of physical violence with no past violence.”<sup>192</sup> The Homelessness Act was adopted roughly two years after this survey. This indicates that, at the time of enactment, emotional and psychological abuse was treated as “domestic violence” under the 1996 statute at 75% of the housing authorities. Two years after the Homelessness Act, in 2004, government agencies adopted the following definition of domestic violence: “Any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality.”<sup>193</sup> The explanatory text observed that this “definition acknowledges that domestic violence can go beyond actual physical violence.”<sup>194</sup> Accordingly, in the social, political, and linguistic context existing around the time of the 1996 and 2002 legislation, it certainly seems reasonable (perhaps even likely) that the means-end equation intended by Parliament’s exercise of practical reason included a broad definition of

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<sup>188</sup> G.A. Res. 48/104 (I), U.N. Doc. A/RES/48/104 (Dec. 20, 1993).

<sup>189</sup> Home Office, *Multi-Agency Guidance for Addressing Domestic Violence*, THE NAT’L ARCHIVES (June 29, 2000) <http://webarchive.nationalarchives.gov.uk/20001110080900/http://www.homeoffice.gov.uk/domesticviolence/mag.htm>.

<sup>190</sup> Rebecca Morley et al., *The Impact of Changing Housing Policy on Women’s Vulnerability to Violence 2* (Mar. 10, 2005) (unpublished manuscript), available at <http://www.esrc.ac.uk/my-esrc/grants/L133251047/read>.

<sup>191</sup> *Id.* at 10.

<sup>192</sup> *Id.* (emphasis omitted).

<sup>193</sup> Anna Matczak et al., *REVIEW OF DOMESTIC VIOLENCE POLICIES IN ENGLAND & WALES 4* (2011) (citing The Crown Prosecution Service, *CPS Guidance for Prosecuting Cases of Domestic Violence*, CPS.GOV.UK, [http://www.cps.gov.uk/publications/prosecution/domestic/dmv\\_guidance.html#a02](http://www.cps.gov.uk/publications/prosecution/domestic/dmv_guidance.html#a02) (last visited Aug. 28, 2014)).

<sup>194</sup> *Id.*

domestic violence, much as it is plausible, following Professor Ekins' argument, that it did not.

#### D. *How to Choose Among Possible Intentions?*

When a legislature acts, it may well consider a range of reasonable solutions to various issues of interest to the community. The Ekinsian system grants interpreters—courts, in particular—an impressively broad license to infer, based on text and context, which of those solutions was intended by the legislature. Even when Professor Ekins cites *Yemshaw* as an instance where the court got both the method and the result wrong, a review of the various scenarios that could have constituted the legislative context suggests that both the Professor and the judges had good reasons to reach opposite conclusions. Yet, even though one of those inferences necessarily departs from the actual legislative intent, Professor Ekins' interpretive methodology could lead to the conclusion that, after a fair review of the statutory language and other relevant factors, courts are free to choose whichever reasonable inference about the legislature's intentions would seem best to the judges.

There are various arguments throughout *The Nature of Legislative Intent* that could be seen as leading toward this form of expansive judicial authority, which could result in the phenomenon of courts settling public debates by picking their preferred policies instead of the means-end choice adopted by the legislators. Some might call this degree of flexibility "judicial supremacy," while others would disagree.<sup>195</sup> However, this definitional issue is resolved by scholars (and Professor Ekins himself has argued strenuously in favor of legislative supremacy);<sup>196</sup> the

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<sup>195</sup> See, for example, the debate about what judicial supremacy means, and whether it is a good thing: Richard Ekins, *Judicial Supremacy and the Rule of Law*, 119 L.Q.R. 127, 127 (2003) (describing judicial supremacy as an "undesirable political assault on the Westminster Constitution") [hereinafter *Judicial Supremacy*]; Philip A. Joseph, *Parliament, the Courts, and the Collaborative Enterprise*, 15 K.C.L.J. 321, 321 (2004) (suggesting that parliamentary supremacy "enslaves constitutional debate" and ossifies judicial-legislative interaction); Richard Ekins, *The Authority of Parliament: A Reply to Professor Joseph*, 16 K.C.L.J. 51, 51–52 (2005) (arguing that "parliamentary sovereignty" is "descriptively unsound"). Irrespective of whether judges are declared supreme in the Ekinsian system (and clearly they are not), the degree of flexibility and finality in their decisions may lead to much the same result. Professor Ekins describes judicial supremacy in the following way: "First, under judicial supremacy it is the courts that decide how broad or narrow is the set of rights worthy of judicial protection. Second, judicial determinations as to rights will trump other considerations. The judiciary will be supreme because judicial decisions on rights will prevail over legislative decisions." *Judicial Supremacy*, *supra*, at 129. This kind of supremacy is most obvious when courts explicitly invalidate laws, but many of the same results may obtain when judges have a very broad, "decisive" ability, Ekins, *supra* note 2, at 247, to interpret the statutory language based solely on a plausible argument as to how the legislative intent should be inferred.

<sup>196</sup> According to Ekins, "the argument for judicial supremacy is an undesirable political assault on the Westminster constitution, and as such must be rejected by judges, officials and citizens." *Judicial Supremacy*, *supra* note 195, at 127. He would likely disagree with an

question is whether, as a practical matter, the Ekinsian approach—or, in fact, any purported search for legislative intent—is likely to result in judicial judgments being substituted for legislative ones. By size alone courts more closely resemble Professor Ekins’ paradigmatic prince than do legislatures. If the source of law-making authority is rooted in its reasonableness, and therefore must be “a prescription of practical reason promulgated by a legal authority,”<sup>197</sup> it may be difficult for the public to believe that their sometimes-raucous legislatures are deeply devoted to (or good at) practical reasoning. The size and complexity of legislative bodies, compared to an individual prince, actually create challenges for Professor Ekins, which he creatively addresses by identifying a “group intention.”<sup>198</sup> Nonetheless, he believes that Washington may not be able to achieve the Westminster standard.<sup>199</sup> Judges could conclude that, in light of the difficulties faced by legislatures to achieve Professor Ekins’ high standards, it would be better for the court to impute, rather than infer, an intention, irrespective of the legislature’s reasoning. If the legislature has not reasoned well—or has not reasoned at all—courts can reason on its behalf under the guise of interpretation.

At the same time, if the “wisdom of crowds” literature is accurate, legislatures may have the capacity to reason much better, or worse, than courts, which would then be incapable of fully comprehending the legislative intention. That is, the diversity of large legislative bodies allows them to reason about a significantly broader set of policy solutions than individuals or smaller, less-diverse groups, such as judicial panels. If this is true, the small group of judges may consider a more limited set of reasoned choices about policy solutions, and find it difficult to infer the reasoning that led to the outcome actually chosen by several hundred members of Parliament.<sup>200</sup> In such a case, judges could believe that they have correctly inferred the legislative intention, but that might not be the

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interpretation of his book that would lead to the broad judicial authority discussed in this section. My point is that, without additional ways to tie interpreters to the legislature’s actual intent, some judges may be tempted to conclude that a reasonable legislature would naturally have held the same views that the judge considers to be reasonable.

<sup>197</sup> See EKINS, *supra* note 2, at 125.

<sup>198</sup> See *supra* text accompanying notes 23–28.

<sup>199</sup> See *supra* text accompanying notes 67–73.

<sup>200</sup> Preference differences can complicate the problem-solving advantages of large, diverse groups. PAGE, *supra* note 138, at 255–84. As Page points out, “As identity diverse collections of people often contain both [fundamental preference diversity and diverse cognitive toolboxes,] they perform both better and worse than homogenous groups . . . . Put differently, identity diverse teams, cities, and societies *can* perform better, but they often fail to do so.” *Id.* at 299. The relevant point here is not whether the legislature performs better or worse than a smaller, more homogenous judicial panel, but that it could reason sufficiently differently than the court that the judges would be unable to infer the same chain of reasoning.

case.<sup>201</sup> Professor Ekins tells us that the court's conclusion is decisive in those situations, but, once again, there is a risk that the legislature's intention will have been incorrectly imputed rather than inferred.

### *E. Identifying Actual Intent*

Has Professor Ekins' brilliant analysis of legislative intent rendered that intent superfluous? In cases where the language and the context support multiple reasonable interpretations, does whatever the court believes the best-reasoned choice is become the law (as long as the judges can argue that they are plausibly inferring that the legislature could have made the same reasoned choice)? Ekins, who has devoted nearly his entire book to an analysis of legislative intent and authority, will likely see such an outcome as unattractive. Assuming that rule-by-judiciary is not an appropriate goal, it is possible to proceed in one of several directions. The easiest argument—and a fairly common assertion among those writing about statutory and constitutional interpretation—is that cases where the legislature's intent is so unclear that a court has this kind of broad flexibility in interpretation are likely to be rare; accordingly, such an argument is not a significant challenge to an otherwise good theory.<sup>202</sup> This is an empirical claim that would need to be tested with data, but there are good reasons to think that cases involving more than one possible understanding of how the legislature has applied practical reasoning will not be uncommon in litigated cases. Judges are asked to render a decision in such cases because, as in *Yemshaw*, there are (at least) two plausible approaches to inferring the legislature's intention. Not only is it possible for the text to be vague or ambiguous, but also, since citizens are often divided among a range of premises about the nature of the common good and the ideal society, equally sound chains of reasoning could proceed from different premises to competing conclusions. Therefore, a court that has identified one of the powerful arguments for a particular legislative response to a problem may not be doing so in the same way that the legislature did.

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<sup>201</sup> As one example, the three judges rendering the decision in *Yemshaw* were all over sixty-five years of age and educated at Oxford or Cambridge. *Hale of Richmond*, WHO'S WHO 2012: AN ANNUAL BIOGRAPHICAL DICTIONARY 964 (2012); *Former Justices*, THE SUPREME COURT, <http://www.supremecourt.gov.uk/about/former-justices.html> (last visited Aug. 20, 2014) (Lord Brown and Lord Rodger). The parliament enacting the 2002 statute discussed in the case contained hundreds of members exhibiting a considerably greater range of age, educational, and other diverse characteristics. See, e.g., THE TIMES GUIDE TO THE HOUSE OF COMMONS, JUNE 2001 (Tim Austin & Tim Hames eds., 2001).

<sup>202</sup> Professor Solum, for example, seeks to minimize (or erase) the difference between the constitutional approaches taken by New and Old Originalists by positing that it "is possible for intended meaning and public meaning to diverge, but in the case of a legal text, such divergence will be rare in practice." Solum, *supra* note 6, at 38. But see Alicea & Drakeman, *supra* note 77, at 1169 n.27.

These circumstances could lead Professor Ekins to make an argument gently hinted at by the number of times he cites Aquinas, Finnis, and other scholars writing in the natural law tradition. (Perhaps his title, *The Nature of Legislative Intent*, contains an intentional pun.) These are deep philosophical waters, and I will merely skim the surface to point out that there could be an argument to the effect that a proper attention to the principles of natural law will enable both legislatures and courts to identify the one best-reasoned choice that could be made,<sup>203</sup> so that competing claims about ways to serve the common good are either demonstrably wrong or clearly worse. This natural law foundation would bolster Professor Ekins' approach to how the courts should ascertain the legislative intent; although, it is worth noting that, even within the natural law community, there are considerable differences of opinion on policy issues.<sup>204</sup> At the same time, those who have not embraced a natural law approach might argue that any other approach—such as those proposed by John Stuart Mill<sup>205</sup> or John Rawls<sup>206</sup>—would be as good or better to serve as the final arbiter of a proper statutory resolution of a public policy issue.<sup>207</sup> The natural law foundational approach could pro-

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<sup>203</sup> See, e.g., Patrick J. Kelley, *Theories of Legislation and Statutory Interpretation: Natural Law and the Intention of the Legislature*, 1 WASH. U. JURISPRUDENCE REV. 97, 128 (2009) ("The theory of legislation developed following John Finnis's modern natural law social science methodology seems to be the most coherent explanation of legislation and the legislative process in the United States."). For an argument along these lines in the American constitutional setting, see Hadley Arkes, *The Natural Law Challenge*, 36 HARV. J.L. & PUB. POL'Y 961, 964 (2013) ("To take seriously again the deep principles of natural law is not to license judges to float untethered from the text . . . even when those principles are not mentioned in the Constitution."); Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 286 (1985) ("[R]eal morals . . . have a necessary place in the interpretation of any legal document."). But see Alex Kozinski, *Natural Law Jurisprudence: A Skeptical Perspective*, 36 HARV. J.L. & PUB. POL'Y 977, 978 (2013) (suggesting natural law may give too much discretion).

<sup>204</sup> See, e.g., Joseph Boyle, *Universal Principles, Global Cooperation, and Moral Disagreement: A Natural Law Account*, 19 THE GOOD SOC'Y, no. 2, 2010, at 66, 66: "Those who accept [natural law] ethic[s] . . . are not in full agreement about the precise sense and reference of the expression 'natural law' or about the specific moral norms justified by the principles of the natural law." See also Timothy Endicott, *The Irony of Law*, in REASON, MORALITY, AND LAW: THE PHILOSOPHY OF JOHN FINNIS 327, 341 n.43 (John Keown & Robert P. George eds., 2013) ("[T]he idea of a 'central case' does not imply that there is in any single context a single ideal recommendation; on Finnis's [natural law] approach, there may be multiple incommensurable respects in which different candidates may be preferable, so that there may be no rational ground for concluding that one potential candidate is preferable to another.").

<sup>205</sup> See JOHN STUART MILL, *UTILITARIANISM* (George Sher ed., Hackett Publ'g Co. 1979) (1861).

<sup>206</sup> See JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

<sup>207</sup> See, for example, the "Social Value Judgements" document published by the United Kingdom's National Institute for Clinical Excellence (NICE), the body responsible for recommending which medicines should be reimbursed by the National Health Service. See NAT'L INST. FOR HEALTH & CLINICAL EXCELLENCE, *SOCIAL VALUE JUDGEMENTS* (2d ed. 2008), available at <http://www.nice.org.uk/media/default/About/what-we-do/Research-and-development/Social-Value-Judgements-principles-for-the-development-of-NICE-guidance.pdf>. Noting the

vide a powerful resolution of numerous specific policy questions, but it would need to be accompanied by an argument for the authority of judges imposing natural law-based interpretations on statutes formed by legislatures either embracing other foundational philosophies or showing no visible signs of allegiance to any particular comprehensive doctrine.<sup>208</sup>

Yet another possibility for resolving the issue of excessively broad judicial decision-making discretion is to focus judicial interpretation more heavily on seeking further evidence of what the legislators were actually talking about. Reasonable interpretive efforts to increase the clarity of the legislature's actual intent have the potential to reduce the breadth of the courts' flexibility in imposing their own values and policy preferences in lieu of inferring the legislature's intent. The challenge in doing so is ascertaining what the entire legislative body had in mind. As the legal realists, Professor Ekins, and others have pointed out,<sup>209</sup> it is extremely difficult to figure out how to aggregate the individual intentions of hundreds of members of Parliament or Congress so as to assemble a composite group intention. Nevertheless, we can ask whether there is evidence that could guide the courts in assessing which of the possible policy choices was actually made by the legislature. Even if the legislators did not have the same intentions, motivations, or voting record, it is possible that they had a common understanding of what the statutory language was designed to accomplish. The evidence of this common understanding (if any) is most likely to be found in the legislative history.

It may be worth looking back at the statutes discussed in *Yemshaw* to see if any publicly available documents could assist interpreters in addressing the issue of whether the term "domestic violence" in the statute was understood by Parliament to refer only to physical violence or to include the kinds of emotional and psychological abuse discussed in the various governmental reports and employed in most housing authority offices. As it turns out, this exact question was raised in the House of

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philosophical issues at stake in such decisions, the NICE document states: "[H]ealthcare leads to the problem of 'distributive justice' . . . . There are, broadly, two approaches that can be taken to resolve such problems in publicly funded healthcare systems. The utilitarian approach . . . [and] the egalitarian approach . . . . There is no consensus as to which approach provides the more ethical basis for allocating resources." *Id.* at 9. For a third possibility, see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 161–65 (2d ed. 2011) (describing a theory of "general justice").

<sup>208</sup> Judges doing so could run afoul of Professor Ekins' dismissal of judicial supremacy. See *Judicial Supremacy*, *supra* note 195. To avoid that result, it may be important for the judges to take into account the philosophical context likely to have influenced the legislature when it enacted the statute being interpreted.

<sup>209</sup> EKINS, *supra* note 2, at 9; DWORKIN, *supra* note 12, at 320–21; WALDRON, *supra* note 13; Radin, *supra* note 4.

Lords. The overall tenor of the comments was that the handful of members participating in the debates generally wanted to avoid a narrow interpretation of the language. In discussing the words “domestic violence” in the bill that would become the 1996 Act, Lord Monkswell, from the Labour party, continued the inquiry, “[W]hat is meant by ‘domestic violence’?”<sup>210</sup> He continued as follows:

Do the Government include within that term psychological violence as well as physical violence? I bear in mind the recent successful court case where a stalker was prosecuted for psychological rather than physical damage. Is that now included in government thinking about the term ‘domestic violence’? Does it include psychological as well as physical violence?<sup>211</sup>

The statutory language had been introduced by Earl Ferrer, a Conservative, and Minister of State for the Department of the Environment, Transport and the Regions. He replied, “Obviously domestic violence takes a number of different forms and each case must be considered on its merits.”<sup>212</sup> Responding directly to Lord Monkswell’s definitional point, he stated:

He is worried about psychological violence . . . . He asks whether that is covered by these provisions. I cannot give him a very good answer. It is not ruled out, but psychological violence covers a very wide spectrum. It would depend on the nature of the violence. We do not rule out the fact that psychological violence could be covered.<sup>213</sup>

The debates in the House of Lords on these statutory provisions were brief, but it is notable that the definitional issue was directly addressed by two prominent members from the far reaches of the political spectrum. Lord Monkswell, known for speeches extolling the virtues of socialism<sup>214</sup> and “ordinary people,”<sup>215</sup> raised the issue of whether psychological violence—something other than just physical violence—would be covered by the provision. The bill’s sponsor, Earl Ferrer, called a “Wodehousian figure” by *The Telegraph*,<sup>216</sup> was more likely to

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<sup>210</sup> 574 PARL. DEB., H.L. (5th ser.) (1996) 72 (U.K.).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 72–73.

<sup>214</sup> See, e.g., 545 PARL. DEB., H.L. (5th ser.) (1993) 1768–69 (U.K.).

<sup>215</sup> 578 PARL. DEB., H.L. (5th ser.) (1997) 950 (U.K.); 581 PARL. DEB., H.L. (5th ser.) (1997) 1239 (U.K.).

<sup>216</sup> *Earl Ferrers*, THE TELEGRAPH (Nov. 13, 2012), <http://www.telegraph.co.uk/news/obituaries/politics-obituaries/9675982/Earl-Ferrers.html>.



speak on behalf of fox hunting and against women in Parliament, and he indicated that abuse other than physical violence could be included. With apparent agreement on a fairly broad definition of “domestic violence” from members representing both left and right, including the minister who introduced the bill,<sup>217</sup> and with no one speaking up to argue for restricting the language to cases of physical violence only, it would be reasonable to conclude that, at least in the House of Lords, the legislators believed that the use of the term “domestic violence” in the statute was meant to encompass at least some forms of psychological violence.

We have little guidance from the House of Commons until the debates in 2001, when the members discussed domestic violence in the context of the second reading of the Homelessness Act. While the specific issue of the definition of domestic violence was not discussed, the theme of virtually all of the comments was to broaden the bill’s protection to cover people forced from their homes even if they had not suffered abuse within the family.<sup>218</sup> Mr. Ainsworth raised the concern that the prior language, which only mentioned “domestic violence,” would be construed too narrowly:

The current legislation provides in general terms that a person is to be treated as homeless if it would not be reasonable for them to continue to live in their present home. There is specific provision concerning people who would face a risk of domestic violence if they continued to live in their present accommodation. [This] provision . . . is important, since every support must be given to those who are vulnerable because of domestic violence. However, on reflection, it could perhaps be construed rather narrowly as implying that while it would not be reasonable for someone experiencing domestic violence to remain in their home, it might be reasonable for someone to do so where faced with a different kind of violence. Of course that would be nonsense, but the possibility of that construction is a weakness in the current provisions.<sup>219</sup>

Ainsworth, a Labour MP serving as the Under-Secretary of State for the Environment, Transport and the Regions, had introduced the bill, and he

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<sup>217</sup> Professor Ekins, in describing the legislature’s ability to make reasoned choices (especially in parliamentary systems), places considerable emphasis on the important role of ministers “to set the agenda” and to “direct the shape of proposals” that are “often in response to detailed policy work by officials and widespread consultation . . . .” EKINS, *supra* note 2, at 174–75.

<sup>218</sup> See 362 PARL. DEB., H.C. (6th ser.) (2001) 951–58 (U.K.).

<sup>219</sup> *Id.* at 952–53.

argued that the act “must include not only domestic violence but all other forms of violence, including racially motivated violence.”<sup>220</sup> He, therefore, proposed to add “or other violence” after the words “domestic violence.”<sup>221</sup> The members of the House of Commons then made an effort to redraft the bill on the floor and in each case to broaden the bill’s coverage to include more individuals, as Mr. Ainsworth commented, for whom “it would not be reasonable . . . to continue to live in their present home.”<sup>222</sup> Conservative MP Sir Sydney Chapman agreed with Ainsworth’s position, but offered a drafting point:

Why is it necessary to add those words—I fully agree that the concept should be added—rather than deleting “domestic”? The new clause could just refer to violence, which could be domestic, racial or any other violence. I have a little campaign to try to ensure that legislation is no longer than it need be. In this case, that small point may just help.<sup>223</sup>

Mr. Ainsworth responded to this drafting point by asserting that it is important to mention “domestic violence” because of the need “to comply with the requirement for referrals under . . . the Housing Act of 1996, in circumstances in which it applies to domestic violence.”<sup>224</sup> Mr. Waterson, a conservative MP, described the committee discussions of the bill, noting that there was:

[G]eneral cross-party support for the proposal that we should be clear that we are addressing all types of violence. We agree with the Under-Secretary that it is certainly possible to put a narrow construction on the existing wording. As the hon. Gentleman said, it would be quite wrong for people to be disadvantaged in housing priority terms if they were in genuine fear of violence, whatever the cause of that violence was said to be.<sup>225</sup>

Mr. Waterson continued, “Antisocial behavior bordering on the violent, and sometimes turning into violence, is an increasing problem in estates, block of flats and so on across the country. We agree that no distinction should be made between different types of violence.”<sup>226</sup>

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<sup>220</sup> *Id.* at 953.

<sup>221</sup> *Id.* at 951.

<sup>222</sup> *Id.* at 952.

<sup>223</sup> *Id.* at 955.

<sup>224</sup> *Id.* at 957.

<sup>225</sup> *Id.* at 955.

<sup>226</sup> *Id.* at 956.

It thus appears that there is a fairly strong argument that the members of both houses of Parliament thought that “domestic violence,” when used in these bills, included some forms of abuse other than physical violence. Without looking at the recorded speeches, that possibility, based solely on the evidence offered by Baroness Hale, could easily be trumped by Professor Ekins’ approach of reading the text in light of what he posits to be an underlying public policy focus on physical violence. With the benefit of the legislative history, read in the context of the use of the term “domestic violence” throughout the housing authorities responsible for implementing the law, it appears that Baroness Hale’s conclusion may better align with what the legislators thought they were doing, even if their statutory language was infelicitously written to convey that message.<sup>227</sup> The issue is certainly not free from doubt, even after reviewing the legislative debates (nor does it address whether the facts in *Yemshaw* necessarily constituted the kind of psychological abuse encompassed within a broad definition of “domestic violence”), but it does raise the question of whether legislative history might reasonably be promoted at least to the level of “defeasible presumption,” along with canons and maxims, as “pointers towards legislative intent.”<sup>228</sup> Otherwise, it is not clear why a canon, a semantic rule of thumb (often expressed in Latin) that the legislators might not have had in mind, is more relevant evidence of legislative intent than the public record of their definitional discussions on the floor of the legislature. To be sure, as Professor Ekins notes, “The standing risk of using legislative history . . . is that the interpreter will fail to reflect carefully on what proposal was open to all legislators . . . and will instead take what some particular legislator or legislators say, at some point in the process, to constitute the legislative intent.”<sup>229</sup> This is a real risk, and interpreters should be cognizant of it,

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<sup>227</sup> Professor Ekins argues that it is “unsound to assume that what the legislature *truly* intends is best gleaned from the legislative history rather than the text uttered in context.” EKINS, *supra* note 2, at 270. He then asserts that the “legislature may act on a proposal that differs somewhat from that which interpreters reasonably infer it acted on, but this is a non-central instance, where the legislature deliberation has gone astray,” and, therefore, “legislative history is capable of making a difference only when what is intended is not otherwise clearly promulgated, which is a failure of legislative action.” *Id.* at 270–71. The difficulty with this formulation is that it would prevent us from employing the benefit of Professor Ekins’ thoughtful analyses to any but the clearest cases of interpreters ignoring the obvious meaning of the text in context in favor of the interpreter’s preferred policy outcome. The history of statutory (and constitutional) interpretation suggests that cases such as *Yemshaw*, where the text employs words whose definitions are in transition, are not infrequent.

<sup>228</sup> *Id.* at 260.

<sup>229</sup> *Id.* at 271. Professor Ekins advocates narrow usage of legislative history as follows:

The problem would be avoided if legislative history were only used when there was no other way to infer what the legislature has decided . . . . The landmark case of *Pepper v. Hart* attempts such a limitation, providing that [the record of legislative debates] may only be considered when the legislation is ambiguous, obscure, or leads to an absurdity.

but it is not, by itself, a powerful argument that we should, therefore, assume that the risk of misuse is so high that legislative history should be ignored in the interpretive process. There are times, as in *Yemshaw*, where a careful application of legislative history can help settle difficult definitional issues. And so, while it may not, by itself, stand for the legislative intent, the record of the legislature's discussion and debates may be a meaningful source of guidance as to the meaning of the vocabulary the legislature used in drafting the statutory text.

### CONCLUSION

Throughout *The Nature of Legislative Intent*, Professor Ekins has analyzed what it means for a model legislative body to act to change the law. In stating the central case of the well-formed legislature, he has meticulously crafted an argument that builds on an unusually broad array of critical insights from several branches of philosophy, political science, and economics. He links these various disciplinary strands together to form an impressively powerful chain of reasoned arguments in favor of a legislative intention based on just that—reasoned arguments. From the prince to the Parliament to the courts, the common theme is that the law is the coherent response to reason. Reason is the foundation of legislative authority; the basis of legislative action; and the source to be sought by interpreters when they infer the legislature's intent. Professor Ekins has thus argued both for and by the rule of reason. Such a *tour de force* should stand as an enduring example to modern scholars of the rarely fulfilled promise offered by making a deep commitment to intellectual inquiry unfettered by artificial disciplinary barriers.

In the central case of the well-formed legislature, judges have reflected authority; they can only infer the reasoned ends-means choices that the legislature—the home of law-making authority—intended to make. Even as we move to the peripheral cases of our own legislatures, operating in a real world not only of imprecise drafting (an issue for the textualists), but also of judges whose policy preferences may differ from those of the legislature (an issue for the purposivists),<sup>230</sup> Professor Ekins' argument for the nature of legislative intent moves the scholarly debates in an important new direction. Nevertheless, we may need to work harder than even Professor Ekins has so far suggested to consider how the courts can be tethered more tightly to the actual choices made by our

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*Id.* at 272. However, he is not convinced this level of discipline is possible. *See id.* My suggestion is that these concerns about the proper use of legislative history be addressed on a case by case basis, bearing in mind all of the relevant risks.

<sup>230</sup> Eileen Braman notes that “the dominant assumption in social sciences literature [is] that judges are primarily motivated by policy.” EILEEN BRAMAN, LAW, POLITICS & PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING 7 (2009).

elected representatives. It could be a thoughtful approach to using legislative history, as I have suggested here, or perhaps the rigid application of particular interpretive canons, it might instead be a fundamental commitment to interpreting laws exclusively in light of natural law reasoning or a quantitative application of the greatest-good-for-the-greatest-number principle. Professor Ekins has taught us what to look for: now we need to focus on where best to find it.

Legislative intent “in nature” may be more complicated than the central case allows, but we still need to keep the ideal in mind. When legislatures are acting as they should, there is a legislative intent consisting of a reasoned plan based on a thoughtful approach to achieving an important policy goal. *The Nature of Legislative Intent* has provided a compelling argument for placing that intention at the core of statutory interpretation in a manner that neither textualism nor purposivism can provide. Our task is to figure out how best to employ those insights to the interpretive issues arising in complex cases and controversies. A good place to start would be to ask what the legislators were actually talking about.

