

# TAMING A DRAGON: LEGISLATIVE HISTORY IN LEGAL ANALYSIS

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“A dragon is no idle fancy. Whatever may be his origins, in fact or invention, the dragon in legend is a potent creation of men’s imagination, richer in significance than his barrow is in gold. Even to-day (despite the critics) you may find men not ignorant of tragic legend and history, who have heard of heroes and indeed seen them, who yet have been caught by the fascination of the worm.”

–J.R.R. Tolkien, from *Beowulf: The Monster and the Critics* (1936).<sup>2</sup>

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<sup>2</sup> J.R.R. Tolkien, *Beowulf: The Monster and the Critics*, in *BEOWULF: A VERSE TRANSLATION* 103, 113 (Daniel Donoghue ed., Seamus Heaney trans., 2002).

## I. INTRODUCTION

One of the most intense jurisprudential debates in modern American law is about the use of legislative history in statutory interpretation and analysis.<sup>3</sup> Judicial decisions and law review articles almost beyond count have been written, all trying to provide theoretical approaches when confronted with legislative history. How successful have these efforts been? In terms of producing a very rich set of materials detailing the arguments and positions of the debaters, quite successful; in terms of producing any actual consensus on the use of legislative history, far less so. One hopes for a future where the dispute is finally resolved, where harmony is attained. Yet, when surveying the theoretical landscape, it appears unlikely to be resolved—the debate keeps rolling along.<sup>4</sup>

The theoretical stalemate is understandable in light of how the differing approaches to the use of legislative history embody important values when it comes to statutory interpretation; the primacy of the legislative text as the law on the one hand, while on the other, the nature of language and the need for context to help guide the application of the words in the statute provided by the legislature. Because the values undergirding each approach are embedded and enduring in light of the practical application of statutes to cases in controversy, the failure of any one theory to obtain hegemony over the others is unsurprising. It reflects not so much the poverty of the theories offered as it does the inherent limitations of theory in describing and crafting normative rules the prudential and often messy endeavors of legal argument, analysis and adjudication.

The use of legislative history in statutory interpretation and analysis remains a critical part of the broader picture of legal analysis. With the theoretical world remaining in a state of diverse conversation regarding the use of legislative history in statutory interpretation, the legal writer is faced with another: the increasing availability of legislative history online. As legislatures and legal research websites have placed increasing amounts of legislative history data online, the monetary and temporal costs of undertaking legislative history have plummeted. While the legal research world is far from being a place where all legislative history data is available online, that world is becoming more of a reality over time. As a result, the issue of the use of legislative history in statutory analysis and interpretation is unlikely to go away. From the perspective of a legal writer, this is not due

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<sup>3</sup> See Kenneth R. Dortzbach, *Legislative History: The Philosophies of Justices Scalia and Breyer and the use of Legislative History by the Wisconsin State Courts*, 80 MARQ. L. REV. 161, 161 (1996); Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rules*, 122 YALE L.J. 70, 72 (2012).

<sup>4</sup> See Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753, 770 (2013); Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479, 480 (2013) (“The field continues to develop and its participants continue to disagree about how to read statutes.”).

as much to ideological or theoretical consensus, but to the continuing effects of technology resulting in the reduction of barriers to access. The internet is driving availability, and availability is driving usage. As the information becomes increasingly accessible to citizens and lawyers, legislative history will continue to be part of legal and public policy arguments. The dragon of legislative history becomes ever more resistant to being caged.

The thesis of this article is that practice and technology are shifting the grounds upon which many of the terms in the debate over legislative history have been based. Practice at the Supreme Court level has moved in the direction of legislative history holding an established, although constrained, position in statutory interpretation and application. This position, when combined with the increasing availability of legislative history through low-cost online legal research makes legislative history research an essential part of the legal analyst's toolkit, particularly in regard to discerning contextual information about statutory enactments. With the embrace of legislative history comes a need to keep the information from the legislative record in proper perspective. This information is evidence of legislative intent and background, rather than as something to be conflated with the law itself.

## II. STATE OF THE DEBATE

### *A. Legislative History and Legislative Intent*

Given the long-established role of statutes in American law, statutory interpretation and application in both the state and federal legal systems is a critical driver in legal analysis. At both the state and federal levels, enacted law largely drives the legal system.<sup>5</sup> While common law cases still occur in great number, the vast bulk of the work of the courts, particularly the federal courts, involves statutory interpretation.<sup>6</sup> As one author has put it, America is “a statutory society.”<sup>7</sup> In such a world, statutory interpretation by the courts, and the effect that such interpretation has on parties, lawyers, and legal analysts in cognate fields, is a subject of considerable importance. Not just the theory, but also the practice of statutory interpretation can affect the outcome of cases, and in turn, affect the kind of advice and strategy that lawyers and other professional advisors provide to clients: “few topics” as William N. Eskridge, Jr. and Philip P.

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<sup>5</sup> Ellen Ash Peters, *Common Law Judging in a Statutory World: An Address*, 43 U. PITT. L. REV. 995, 998 (1982) (commenting on the centrality of statutes to both the law and the work of the courts).

<sup>6</sup> See Judith S. Kaye, *State Courts at the Dawn of a new Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 18–19 (1995); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 372 (1987); see also *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–43 (1981) (discussing the highly limited nature of federal common law); *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 339–47 (1981).

<sup>7</sup> Edward Heath, Essay, *How Federal Judges use Legislative History*, 25 J. LEGIS. 95, 95 (1999).

Frickey write, “are more relevant to legal craft and education than the interpretation of statutes, now our primary source of law.”<sup>8</sup>

Owen M. Fiss has observed, “[a]djudication is interpretation.”<sup>9</sup> It is part of the work of judges, in Fiss’s view, “to understand and express the meaning of an authoritative legal text and the values embodied in that text.”<sup>10</sup> If Fiss is correct, it is of some concern, but no surprise that there is currently no one single approach or method to using legislative history in the American court system. There has been a wide-ranging and robust debate within the scholarly<sup>11</sup> and judiciary communities<sup>12</sup> about the proper use of legislative history in statutory interpretation. The debate over the use of legislative history is not simply a discussion between academics and jurists—it has practical, real-world consequences for legal writers involved in client-centered representation and public policy analysis.

Further complicating the argument over legislative history’s place in statutory interpretation and application is the idea that statutory interpretation seeks to effectuate the intent of the legislature,<sup>13</sup> while being governed by the plain meaning of statutory language.<sup>14</sup> Even if the concept of legislative intent is viewed skeptically,<sup>15</sup> even as a legal fiction,<sup>16</sup> it continues to loom large in the practical work of legal analysis and argument.<sup>17</sup> The principle of looking for legislative intent is generally considered to be the starting point in the endeavor of statutory interpretation.<sup>18</sup> As a consequence, the use of legislative history is of

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<sup>8</sup> William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 321 (1990).

<sup>9</sup> Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 739 (1982).

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

<sup>11</sup> See Fritz Snyder, *Legislative History and Statutory Interpretation: The Supreme Court and the Tenth Circuit*, 49 OKLA. L. REV. 573, 573 (1996) (“Well over a hundred law review articles have appeared on this topic in the last ten years.”). Given that Snyder wrote that line 17 years ago, one hazards to guess how many articles have added to that number since. See *id.*

<sup>12</sup> Dortzbach, *supra* note 3, at 161.

<sup>13</sup> *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267–68 (1977); *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *United States v. Am. Trucking Ass’ns, Inc.*, 310 U.S. 534, 542–43 (1940); see also WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 221–26 (2d ed. 2006); WILSON HUHN, *THE FIVE TYPES OF LEGAL ARGUMENT* 37–38 (2002). For an argument separating the value of legislative history in statutory interpretation from the notion of legislative intent, see Bernard W. Bell, *Legislative History Without Legislative Intent: The Public Justification Approach to Statutory Interpretation*, 60 OHIO ST. L.J. 1, 34 (1999).

<sup>14</sup> See ROBERT BENSON, *THE INTERPRETATION GAME: HOW JUDGES AND LAWYERS MAKE THE LAW* 8–9 (2008).

<sup>15</sup> See William N. Eskridge, Jr., *The Circumstances of Politics and the Application of Statutes*, 100 COLUM. L. REV. 558, 564 (2000).

<sup>16</sup> See Starr, *supra* note 6, at 378.

<sup>17</sup> See M.B.W. Sinclair, *Statutory Reasoning*, 46 DRAKE L. REV. 299, 300–03 (1997); cf. Blum v. Stenson, 465 U.S. 888, 896 (1984) (“Where, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear.”); *United States v. N.E. Rosenblum Truck Lines*, 315 U.S. 50, 53 (1942) (“The question here, as in any problem of statutory construction, is the intention of the enacting body.”).

<sup>18</sup> See Sinclair, *supra* note 17, at 300–03; cf. *N.E. Rosenblum Truck Lines*, 315 U.S. at 53; *Blum*, 465 U.S. at 896.

practical concern to legal analysts, advocates, and jurists.<sup>19</sup> Skepticism regarding the validity of the idea of legislative intent does not undermine the validity of discerning the goal or, to use Justice Felix Frankfurter's term, "aim"<sup>20</sup> of a statute. As Justice Frankfurter noted, even if the terminology of "legislative intent" is avoided because of its imprecision, the concept of legislation having a purpose or goal cannot be shunned.<sup>21</sup> Karl Llewellyn expressed similar thoughts.<sup>22</sup> Legislative history, even when sparse, can serve as evidence in evaluating statutory arguments.<sup>23</sup>

Looking at the approach commonly used within the federal courts,<sup>24</sup> the text is the starting point of any examination of a statute.<sup>25</sup> If a statute's language proves vague or ambiguous, courts may use a variety of approaches to resolve the difficulty with the statutory language.<sup>26</sup> Specific tools include looking at similar statutory provisions to try to determine meaning, precedent to see how courts have interpreted the statute in prior cases, custom and usage, tradition, dictionary definitions, and legislative history.<sup>27</sup> There is a diversity of views regarding the use of legislative history, and not all judges and scholars are convinced it is necessary to find an ambiguity in statutory language before resorting to inspection of the legislative record.<sup>28</sup> Adding to the complexity in using legislative history in

<sup>19</sup> See A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71, 76 (1994).

<sup>20</sup> Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538 (1947).

<sup>21</sup> *Id.* at 538–39; see also Eskridge, Jr., *supra* note 15, at 564–65 (discussing "three levels of generality" in legislative intent).

<sup>22</sup> Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About how Statutes are to be Construed*, 3 VAND. L. REV. 395, 400 (1950).

<sup>23</sup> *E.g.*, *Harbison v. Bell*, 556 U.S. 180, 190–93 (2009).

<sup>24</sup> *E.g.*, *McNeill v. United States*, 131 S. Ct. 2218, 2221 (2011). State courts may vary considerably in their approach to the use of legislative history in statutory interpretation and application; see *Spence v. Terry*, 340 N.W.2d 884, 886–87 (Neb. 1983); *State v. Gaines*, 206 P.3d 1042, 1050–51 (Or. 2009); *Portland Gen. Elec. Co. v. Bureau of Labor and Indus.*, 859 P.2d 1143, 1146 (Or. 1993); *Seals v. H & F, Inc.*, 301 S.W.3d 237, 250 (Tenn. 2010); *N. Coast Air Servs. v. Grumman Corp.*, 759 P.2d 405, 410 (Wash. 1988). Compare *Boykin v. State*, 818 S.W.2d 782, 785–86 (Tex. Crim. App. 1991), with *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 681 N.W.2d 110, 128–37. (Wis. 2004) (Abrahamson, C.J., concurring); see generally Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the new Modified Textualism*, 119 YALE L.J. 1750 (2010).

<sup>25</sup> See *McNeil*, 131 S. Ct. at 2221; *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 584 (1995) (Thomas, J., dissenting) (citing *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985)); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994); see also *Nat'l Small Shipments Traffic Conference, Inc. v. Civil Aeronautics Bd.*, 618 F.2d 819, 831–32 (1980) (plain language of a statute controls absent "any clear evidence of a congressional intention" otherwise); *City of Seattle v. Burlington N. R. Co.*, 41 P.3d 1169, 1171 (Wash. 2002) (discussing the general federal approach to the use of legislative history) (citing *City of Auburn v. U.S.*, 154 F.3d 1025, 1029 (9th Cir. 1998) (quoting *Burlington N. R.R. v. Okla. Tax Comm'n*, 481 U.S. 454, 461 (1987))).

<sup>26</sup> See Hillel Y. Levin, *Contemporary Meaning and Expectations in Statutory Interpretation*, 2012 U. ILL. L. REV. 1103, 1105–14 (2012); see also ESKRIDGE, JR., ET AL., *supra* note 13, at 219–47.

<sup>27</sup> See Heath, *supra* note 7, at 95.

<sup>28</sup> See Bart M. Davis, Kate Kelly & Kristin Ford, *Use of Legislative History: Willow Witching for Legislative Intent*, 43 IDAHO L. REV. 585, 586–92 (2007).

Materials that may constitute legislative history include floor debates, planned colloquies, prepared statements on submission of a bill, statements in committees by relevant executive branch administrators, committee reports, transcripts of

legal analysis, materials may vary considerably from jurisdiction to jurisdiction,<sup>29</sup> both in terms of the level of detail in the legislative record and in terms of the relevance of the material found in the record.

### *B. Basic Argument for the Use of Legislative History*

The use of legislative history has a respectable pedigree in the federal courts.<sup>30</sup> At the Supreme Court, Chief Justice John Marshall, who set the stage for the judiciary's role as the branch of government that establishes the meaning of the law, advocated an approach to statutory interpretation that is open to the use of virtually any tool or source that can assist a court in discerning the meaning of the text.<sup>31</sup> As he famously observed, "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived."<sup>32</sup> This aphorism by Marshall was relied upon by the Court to defend the practice of looking at legislative history in *Wisconsin Public Intervenor v. Mortier*.<sup>33</sup> As Justice Byron White noted in writing for the Court, legislative history should not be placed off-limits to judges engaged in "a good-faith effort to discern legislative intent."<sup>34</sup> Rather, the examination of legislative history as an aid in statutory interpretation had an established history in the Court's practice, reaching back to the case of *Wallace v. Parker* in 1832.<sup>35</sup> At the end of his discussion, White rather dryly observed that the use of legislative history was unlikely to fade away.<sup>36</sup>

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discussions at committee hearings, statements and submissions by interested persons, committee debates on "mark-up" of bills, conference committee reports, analyses of bills by legislative counsel and administrative departments, amendments accepted and rejected, executive branch messages and proposals, prior and subsequent legislation dealing with the same subject matter, recorded votes, and other relevant actions taken by the legislature prior to a bill's enactment.

Jose R. Torres & Steve Windsor, *State Legislative Histories: A Select, Annotated Bibliography*, 85 LAW LIBR. J. 545, 546 (1993); see also Kalal, 681 N.W.2d at 131–36 (Abrahamson, C.J., concurring) (providing a "nonexhaustive list" of the types of legislative history available in that state); Richard A. Danner, *Justice Jackson's Lament: Historical and Comparative Perspectives on the Availability of Legislative History*, 13 DUKE J. COMP. & INT'L L. 151, 163–71 (2003); Reed Dickerson, *The Legislative Process: Statutory Interpretation: Dipping Into Legislative History*, 11 HOFSTRA L. REV. 1125, 1130–34 (1983); HUHN, *supra* note 13, at 107–10 (discussing approaches to ranking different types of legislative history).

<sup>29</sup> Torres & Windsor, *supra* note 28, at 546–47; see also Davis, Kelly & Ford, *supra* note 28, at 586–87.

<sup>30</sup> Penn Mut. Life Ins. Co. v. Lederer, 252 U.S. 523, 537–38 (1920); Starr, *supra* note 6, at 374–75. But see ANTONIN SCALIA, A MATTER OF INTERPRETATION 30 (Amy Gutmann ed., 1997); Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149, 187 (2001); David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1659–60 (2010).

<sup>31</sup> United States v. Fisher, 6 U.S. 358, 386 (1805).

<sup>32</sup> *Id.* For an overview of statutory interpretation on the early Supreme Court, see John Choon Yoo, Note, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607 (1992).

<sup>33</sup> Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 609–12 (1991).

<sup>34</sup> *Id.* at 610 n.4, 611–12.

<sup>35</sup> *Id.* (citing Wallace v. Parker, 31 U.S. 680, 687–90 (1832)).

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

Judges often reach for legislative history to resolve questions of ambiguity that arise during the statutory application process.<sup>37</sup> Beyond ambiguity, the search for congressional intent has had a place in the interpretation of statutory language, even if, as Justice Powell once noted, the statutory language in question is unambiguous.<sup>38</sup> In an opinion written by Justice Thurgood Marshall, *Train v. Colorado Public Interest Research Group, Inc.*,<sup>39</sup> the Court urged that legislative history be regularly consulted in statutory interpretation. *Train* deals with the scope of the Environmental Protection Agency's authority to regulate nuclear waste discharge into national waterways as "pollutants" under the Federal Water Pollution Control Act ("FWPCA").<sup>40</sup> When the case came before the court of appeals, the court addressed the issue solely by looking at the language of the FWPCA.<sup>41</sup> Marshall, writing for the Court, took exception to this method of statutory application, finding fault with the appellate court's refusal to examine the legislative history of the statute, even if the language of the statute appeared dispositive:

To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA in discerning its meaning, the court was in error. As we have noted before: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" <sup>42</sup>

Marshall took a similar approach in writing the decision in *United*

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<sup>37</sup> See *Bilski v. Kappos*, 130 S. Ct. 3218, 3248 (2010) (Stevens, J., concurring); *Blum v. Stenson*, 465 U.S. 886, 896 (1984); *Penn. Mut. Life Ins. Co. v. Lederer*, 252 U.S. 523, 537–38 (1920); *Recovery Grp., Inc. v. Comm'r of Internal Revenue*, 652 F.3d 122, 125 (1st Cir. 2011) (citing *Carcieri v. Salazar*, 555 U.S. 379, 386–88 (2009)); *United States v. Vidal-Reyes*, 562 F.3d 43, 50–51 (1st Cir. 2009); *In re Hill*, 562 F.3d 29, 34 (1st Cir. 2009); *Mullane v. Chambers*, 333 F.3d 322, 330 (1st Cir. 2003); see also Barbara Luck Graham, *Supreme Court Policymaking in Civil Rights Cases: A Study of Judicial Discretion in Statutory Interpretation*, 7 ST. LOUIS UNIV. PUB. L. REV. 401, 401 (1988) ("The problem of statutory interpretation lies within the ability of judges to ascertain the objective, purpose, motivation, or intent from statutes that are ambiguous."); Eskridge, Jr., *supra* note 15, at 558.

<sup>38</sup> *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 524 (1985) (Powell, J., dissenting) (quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981)).

<sup>39</sup> See *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 3–25 (1976).

<sup>40</sup> See *id.*

<sup>41</sup> See generally *Colorado Pub. Interest Research Grp., Inc. v. Train*, 507 F.2d 743 (10th Cir. 1974).

<sup>42</sup> *Train*, 426 U.S. at 9–10 (quoting *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543–44 (1940). But see *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011) (finding no need to examine legislative history where the Court's interpretation of a statute was "the only interpretation supported by the text and structure of the [statute]");

The best evidence of [a statute's] purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous – that has a clearly accepted meaning in both legislative and judicial practice – we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.

*West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98–99 (1991) (citations omitted).

*States v. Dion*, dealing with the abrogation by Congress of Native American hunting rights under the Eagle Protection Act.<sup>43</sup> The language in the statute, as the Supreme Court recognized, is “sweepingly framed” with detailed information regarding prohibited acts to thwart any harvesting or selling of eagles, dead or alive, whole or in part.<sup>44</sup> The Court noted that the statute does contain provisions allowing the Secretary of the Interior to provide permits for Native Americans to engage in prohibited actions under the Act, so long as they were for religious or otherwise narrowly allowed purposes.<sup>45</sup> Despite the broad prohibitory language in the statute, and the express exceptions for narrow usage permits for Native Americans, the Supreme Court undertook an examination of the legislative history of the original Act and its amendments to determine if Native American tribes were included under the ambit of the prohibitory language. The Court found that it was “plain” that the statute, after an examination of the legislative history behind it, supported the view that Congress sought to end the general right of Native Americans to hunt eagles.<sup>46</sup>

Of the current members of the Supreme Court, Justice Stephen Breyer has written strongly in favor of the use of legislative history in statutory analysis. Prior to his nomination to serve on the Supreme Court, he published a law review article defending the use of legislative history,<sup>47</sup> arguing that it is a necessary part of the appellate judge’s toolkit in resolving questions of statutory meaning.<sup>48</sup> In the article, Breyer explains the value of legislative history in statutory construction with vigor, although he limits his defense to using legislative history to instances where “statutory language is unclear (for few other cases raise serious problems on appeal).”<sup>49</sup> Breyer contends that legislative history is useful in statutory construction in five key circumstances:

- Avoiding an absurd result when following the literal language of a statute would so result.<sup>50</sup>
- Correcting a drafting error in the statute, even in the absence of an ambiguity or absurd result.<sup>51</sup>
- Providing information regarding specialized meanings that particular statutory terms may have.<sup>52</sup>

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<sup>43</sup> *United States v. Dion*, 476 U.S. 734, 735–36 (1986).

<sup>44</sup> *Id.* at 740 (quoting *Andrus v. Allard*, 444 U.S. 51, 56 (1979)).

<sup>45</sup> *Id.* at 740.

<sup>46</sup> *Id.* at 744.

<sup>47</sup> Stephen Breyer, *The 1991 Justice Lester W. Roth Lecture: On the Uses of Using Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 84548 (1992).

<sup>48</sup> *Id.* at 845.

<sup>49</sup> *Id.* at 847.

<sup>50</sup> *Id.* at 84849.

<sup>51</sup> *Id.* at 850–51.

<sup>52</sup> *Id.* at 851–53.

- Understanding the “reasonable purpose” underlying “a particular statutory word or phrase serves within the broader context of a statutory scheme.”<sup>53</sup>
- “Choosing among reasonable interpretations of a politically controversial statute.”<sup>54</sup>

On the bench, Breyer has advocated an expansive use of legislative history beyond the use of legislative history to resolve questions of clarity or ambiguity in a statute’s language. For example, in *Koons Buick Pontiac GMC, Inc. v. Nigh*,<sup>55</sup> Justice Breyer joined in a concurrence by Supreme Court Justice Stevens to a “common sense” approach to interpreting statutes:

In recent years the Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress’ true intent when interpreting its work product. Common sense is often more reliable than rote repetition of canons of statutory construction.<sup>56</sup>

Such an approach is about as strong of a position in favor of the use of legislative history in statutory interpretation and analysis. Legislative history is useful, not only when addressing difficult questions of ambiguity or absurdity, but whenever a statute factors into a decision coming before a court and it is helpful to discern legislative intent. In short, the use of legislative history is “always appropriate.”<sup>57</sup>

### C. *Textualist Corrective*

Textualism, as a theory of statutory interpretation, can best be thought of as a corrective approach to analyzing and applying statutes that seek to pull courts towards a more restrained view of dealing with the actual words used in a statute.<sup>58</sup> Instead of seeking layers of meaning for statutory enactments in the legislative record, textualism seeks to resolve questions of interpretation by looking toward the plain meaning of statutory text in order

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<sup>53</sup> *Id.* at 853–56.

<sup>54</sup> *Id.* at 856.

<sup>55</sup> *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 65–66 (2004) (Stevens, J., concurring).

<sup>56</sup> *Id.* (footnote omitted); see also Davis, Kelly & Ford, *supra* note 28, at 590–91 (discussing the different approaches to statutory interpretation taken by the different justices deciding that case).

<sup>57</sup> *Nigh*, 543 U.S. at 65 (Stevens, J., concurring).

<sup>58</sup> See John David Ohlendorf, *Textualism and Obstacle Preemption*, 47 GA. L. REV. 369, 376–77 (2013) (describing textualism as arising “in the mid-1980s as a reaction against these more robust purposivists”).

to discern meaning and legislative intent.<sup>59</sup> As a result, a clear and strong distinction should be drawn between the text and its background, avoiding the dragon's teeth of conflating legislative history with legislation. As one former federal judge commenting on the use of legislative history puts it, "[u]nder democratic theory, the statute rather than extrastatutory materials governs the nation."<sup>60</sup> In order to honor the democratic process of compromise that leads to specific statutory language, the task of the legal analyst faced with a statute is to "strictly adhere to clearly worded statutory texts rather than pursue the legislature's supposed background aims."<sup>61</sup>

The emergence of textualism in the modern period is usually identified with the work of Justice Antonin Scalia,<sup>62</sup> but the move towards imposing restraint on the impulse to reach for legislative history appears before his tenure on the Supreme Court.<sup>63</sup> The textualist critique of the use of legislative history is grounded in a multiplicity of concerns regarding the proper role of judges in relationship to the legislature.<sup>64</sup> These include:

- The competency and authority of judges, particularly to undertake the kind of historical analysis required to use legislative history.<sup>65</sup>
- The temptation of judicial activism and arbitrary action on the part of judges with resort to legislative history.<sup>66</sup>
- Using legislative history to discern legislative intent not readily apparent from a statute's language conflates a judge's common law judging role with the role appropriate for the judiciary in dealing with a statutory source of law provided by a co-equal branch of government,<sup>67</sup> leading to an empowering imperial judiciary.<sup>68</sup>

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<sup>59</sup> Robert John Araujo, S.J., *Method in Interpretation: Practical Wisdom and the Search for Meaning in Public Legal Texts*, 68 MISS. L.J. 225, 250–58 (1998); Earl M. Maltz, *The Legacy of Griggs v. Duke Power Co.: A Case Study in the Impact of a Modernist Statutory Precedent*, 1994 UTAH L. REV. 1353, 1353 (1994) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring)); see, e.g., HUHNS, *supra* note 13, at 19–22; see also Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1998).

<sup>60</sup> Starr, *supra* note 6, at 375.

<sup>61</sup> Ohlendorf, *supra* note 58, at 380.

<sup>62</sup> See generally SCALIA, *supra* note 30. For a concise summary of his views regarding legislative history, see *id.* at 29–37.

<sup>63</sup> See Dickerson, *supra* note 28, at 1138–40 (describing some of the efforts to limit the use of legislative history prior to Justice Scalia's appointment to the Supreme Court by President Reagan); see also Dortzbach, *supra* note 3, at 165–68; Law & Zaring, *supra* note 30, at 1661; Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1, 3 (1998).

<sup>64</sup> See Alex Kozinski, *Should Reading Legislative History be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 812–14 (1998) (summarizing the arguments against the use of legislative history); see also Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369, 377–81 (1999).

<sup>65</sup> Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 444 (1990).

<sup>66</sup> Schacter, *supra* note 63, at 7–9.

<sup>67</sup> *Id.* at 8.

<sup>68</sup> See *id.*; cf. Graham, *supra* note 37, at 405–06 ("The problem of statutory interpretation lies not so much with the unreliable nature of legislative history as evidence of congressional intent as it does with the discretionary use of legislative history in achieving specific policy results.").

- The possible erosion of discipline on the part of legislators, with legislative history used as what one commentator characterizes as “cheap legislation.”<sup>69</sup>
- The sheer difficulty in discerning legislative purpose, given the motivations of individual legislators as a consequence of the nature of political work.<sup>70</sup>

Even if one concedes that legislative intent should be discerned as part of statutory interpretation, in such a system, legislative history may often be of limited utility in discerning that intent.<sup>71</sup> When faced with the less-than-helpful legislative record in one case, Justice Robert Jackson quipped that the “[l]egislative history here as usual is more vague than the statute we are called upon to interpret.”<sup>72</sup> More recently, Justice Kennedy has written about problems with poor clarity in legislative history, rendering it “murky, ambiguous, and contradictory.”<sup>73</sup> The ambiguity and vagueness that can be found within the legislative record can lead to its own version of the infinite regress problem: legislative history that is supposed to aid in the interpretation of a statute itself has to be interpreted and purified in order to produce clarity, and at that point, much of the clarity asserted looks more like artifice than a proper divination of legislative intent.<sup>74</sup> Making matters worse, the legislative materials themselves may be subject to distortion through efforts to color the interpretation of the statute. Far from being a reliable, objective indicator of statutory meaning, the legislative record is, to quote Justice Scalia, “eminently manipulable.”<sup>75</sup> Rather than entering into the political tangle of legislative history, textualism seeks to maintain a neutral stance and follows the words in the text.<sup>76</sup>

Richard I. Nunez provides one of the most developed criticisms of the use of legislative history to determine legislative intent.<sup>77</sup> Nunez casts doubt on the reliability of legislative history as a vehicle for understanding legislative intent to understand the specific language in a statute.<sup>78</sup> Nunez argues that while legislative intent can be a valid concept to employ when

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<sup>69</sup> Paul Killebrew, Note, *Where are all the Left-Wing Textualists?*, 82 N.Y.U. L. REV. 1895, 1906 (2007); see also John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 687–88 (1997).

<sup>70</sup> *Edwards v. Aguillard*, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting).

<sup>71</sup> See, e.g., *Jones Apparel Grp., Inc. v. Maxwell Shoe Co., Inc.*, 883 A.2d 837, 847 (Del. Ch. 2004).

<sup>72</sup> *United States v. Pub. Utils. Comm’n*, 345 U.S. 295, 320 (1953) (Jackson, J., concurring). For an overview of some of the specific problems with legislative history that justify “extreme caution” in its use, see *State v. Martin*, 614 P.2d 164, 177 n.2 (Wash. 1980) (Rosellini, J., dissenting).

<sup>73</sup> *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

<sup>74</sup> *Randolph*, *supra* note 19, at 74.

<sup>75</sup> *Aguillard*, 482 U.S. at 638 (Scalia, J., dissenting).

<sup>76</sup> *Easterbrook*, *supra* note 65, at 450. For an additional view of textualism’s independence from conservative political commitments, see Killebrew, *supra* note 69, at 1898.

<sup>77</sup> See Richard I. Nunez, *The Nature of Legislative Intent and the Use of Legislative Documents as Extrinsic Aids to Statutory Interpretation: A Reexamination*, 9 CAL. W. L. REV. 128, 128 (1972).

<sup>78</sup> *Id.*

discussing statutes,<sup>79</sup> it is not a useful concept to use when discussing the specific meaning of a term within a statute.<sup>80</sup> Nunez's skepticism about the usefulness of legislative history to provide meaning for specific words and phrases arises from a concern about the reliability of the legislative record to provide accurate information.<sup>81</sup>

Using the concept of "hardness" to classify legislative evidence,<sup>82</sup> Nunez finds that the best evidence to use to determine specific statutory meaning is the statute in question itself, "such as the definition section, the preamble, or the explicit recitals of policy."<sup>83</sup> The least reliable form of evidence in Nunez's view is what he terms "non-legislative evidence," material "not produced by the legislative process," including such sources as scholarly articles, administrative agency interpretations, and restatements of law.<sup>84</sup> In the middle falls legislative materials, but as Nunez contends, there are a number of reasons to be highly restrained in their use.<sup>85</sup> The legislative records may be extensive, but the information they provide is evidence not of the collective mind of the legislature, but rather its "thinking process," including the "persuasive arguments" relevant to the proposed legislation and "not clear statements of legislative intent."<sup>86</sup> Given these realities, Nunez concludes that while the idea of legislative intent may have merit, use of legislative materials has "no inherent value as evidence of [such] intent."<sup>87</sup>

### III. ACCESS TO LEGISLATIVE HISTORY

#### *A. Availability and the Argument About Legislative History*

One of the practical objections that have been raised to the use of legislative history in statutory interpretation and analysis revolves around the ability of advocates and jurists to get the documents from the legislative record.<sup>88</sup> Justice Scalia, in his book on legal interpretation, draws on his pre-judicial work with the Justice Department to contend that an inordinate amount of time can be spent on legislative history research and reading.<sup>89</sup> As he wrote, "[t]he most immediate and tangible change that the abandonment of legislative history would effect is this: Judges, lawyers, and

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<sup>79</sup> *Id.* at 130.

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

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

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

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

<sup>84</sup> *Id.* at 130–31.

<sup>85</sup> *Id.* at 130–35.

<sup>86</sup> *Id.* at 133.

<sup>87</sup> *Id.* at 135.

<sup>88</sup> *See, e.g.,* Dickerson, *supra* note 28, at 1141.

<sup>89</sup> SCALIA, *supra* note 30, at 36–37.

clients will be saved an enormous amount of time and expense.”<sup>90</sup>

In the past, whichever side in the accessibility debate had the better argument involved a prudential judgment. It is possible that, in an overwhelmingly print-oriented research environment, the benefits of using legislative history might outweigh the costs in a specific case.<sup>91</sup> While the overall expense, in both time and money, of engaging in legislative history could result in a burdensome increase in cost for the legal system, with not enough in the way of substantive improvement in legal analysis to justify the additional expense.<sup>92</sup> Nowadays, this particular aspect of the debate over the use of legislative history is being rendered increasingly less relevant by changes in the legislative process and technology. As long ago as the early 1970s, one commentator observed that legislative history was becoming more accessible due to improvements in legislative record keeping.<sup>93</sup> With the advent of the internet and rise in online availability of legislative materials, availability is becoming less of an issue. Writing at the end of the 1990s, Michael H. Koby wrote of the “promise” held by the internet to make legislative history documents “almost universally available.”<sup>94</sup> While a considerable amount of legislative history is not yet (and the word “yet” should be emphasized) available online, the practical objection stemming from a lack of access to legislative history is becoming ever less compelling. It is akin to a Dark Ages pilgrim looking at a recently uncovered fossil and mistaking it for the remains of the dragon that he fears lurks in the mountains.

One of the consequences of increased access to legislative materials is increased use.<sup>95</sup> As legislative history becomes more easily accessible, advocates are going to reach for it to argue cases. Invariably, in cases where statutes predominate, and the legislative history is available, that legislative history will favor one side in a dispute, and prudent advocates and analysts will incorporate legislative history into legal research and writing. As Eskridge and Frickey have explained, most lawyers follow an “eclectic” approach when examining statutes, using the tools at hand to discern the likely approach that a court may take when applying the law.<sup>96</sup> If the only tool a lawyer has is a hammer, as the saying goes, every problem is a nail. But if the toolkit expands, then different approaches to problem solving and analysis become possible, then helpful, then eventually necessary. As

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<sup>90</sup> *Id.* at 36.

<sup>91</sup> Breyer, *supra* note 46, at 870.

<sup>92</sup> See Heath, *supra* note 7, at 102 (quoting REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 150–51 (1975)); Start, *supra* note 6, at 377–78; Nourse, *supra* note 3, at 136–38.

<sup>93</sup> Nunez, *supra* note 77, at 132.

<sup>94</sup> Koby, *supra* note 64, at 371.

<sup>95</sup> *Id.* (“The increased availability and accessibility of congressional documents also contributed to growth in citations to legislative history.”).

<sup>96</sup> Eskridge, Jr. & Frickey, *supra* note 8, at 321.

legislative history becomes more and more accessible, attorneys will turn to it to look at the legislative record to see what dwells within it, to either help or hinder their clients. The dragon's horde becomes all the more alluring. As legislative history enters into the mix, and becomes more and more available, that process is likely to accelerate with the standard of practice shifting as a result.

Researching legislative history in print sources is still with us, and is unlikely to disappear anytime soon. Utopia (or dystopia, depending on one's perspective) has not yet arrived. However, technology is making legislative history more and more accessible and, as a result, more likely to be employed in legal writing and analysis. For the foreseeable future, legal analysts delving into legislative history will likely function in both print and online research sources. However, the books are being inexorably supplanted by the spread of computer-assisted legal research. Internet-based legal research is changing the conditions under which legislative history research is undertaken, by increasing the ease and comprehensiveness of the research that can be done from the comfort of a researcher's office or local coffee shop. Far from being locked away in distant archives or regional libraries, legislative history is becoming more and more accessible by the day. Whether chained or not, the dragon of legislative history is slowly moving onto the field.

### *B. Internet Sources for Legislative History Research*

A number of legal research sources are available online that provide access to legislative history materials. Online resources are becoming ever more common, not only at the federal level but at the state level as well. Barring some unforeseen technological disaster, online materials are only going to become more extensive as legislative history materials are added online going forward. A simple, non-exhaustive list of existing online research sources for legislative history includes:

- Subscription-based sources like WestlawNext<sup>97</sup> and Lexis Advance,<sup>98</sup> that provide detailed legislative history materials through their web-portals.
- Free legal research sources online for federal legislative history, such as the Library of Congress Thomas website,<sup>99</sup> Congress.gov: United States Legislative Information,<sup>100</sup> and the U.S. Government Printing Office Federal Digital System.<sup>101</sup>

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<sup>97</sup> WESTLAWNEXT, <http://next.westlaw.com> (last visited Mar. 17, 2014).

<sup>98</sup> LEXIS ADVANCE, <http://advance.lexis.com> (last visited Mar. 17, 2014).

<sup>99</sup> THOMAS, THE LIBR. OF CONGRESS, <http://thomas.loc.gov> (last visited Mar. 17, 2014).

<sup>100</sup> CONGRESS.GOV: U.S. LEGIS. INFO., <http://www.congress.gov> (last visited Mar. 17, 2014).

<sup>101</sup> FEDERAL DIGITAL SYSTEM, U.S. GOV'T PRINTING OFF., <http://www.gpo.gov/fdsys> (last visited Mar. 17, 2014).

- Webpages for individual houses of Congress<sup>102</sup> and the state legislatures.<sup>103</sup>
- Search engines such as Google,<sup>104</sup> Bing,<sup>105</sup> and Yahoo.<sup>106</sup>

In addition to these established avenues of legislative history research, with the rise of mobile technology such as tablet computers and smartphones, a whole new aspect of researching legislative history online has emerged. No longer constrained to a desktop or laptop computer, legislative history materials are available not only through the internet browsers on mobile devices, but also through specialized applications (“apps”) used on both phones and tablets. Looking through some of the apps available on the two dominant mobile computing platforms at the time of this writing, Apple’s iOS operating system and Google’s Android operating system, there are several legal research apps available that could be used to research legislative history. On iOS, both WestlawNext<sup>107</sup> and Lexis Advance are available for the iPad,<sup>108</sup> with Lexis Advance also available for the iPhone.<sup>109</sup> The Congressional Record itself is available as a free app from the Library of Congress for use on either the iPad or the iPhone, providing access to volumes beginning in 1995.<sup>110</sup> On the Android platform, WestlawNext is available as a proprietary application.<sup>111</sup> In both platforms, smartphones and tablets come with internet browsers that allow navigation of the world wide web from the device.<sup>112</sup>

Not every piece of the legislative record is yet available online, and

<sup>102</sup> U.S. HOUSE OF REPRESENTATIVES, <http://house.gov> (last visited Mar. 17, 2014); U.S. SENATE, <http://senate.gov> (last visited Mar. 17, 2014).

<sup>103</sup> See, e.g., WASH. ST. LEGIS., <http://leg.wa.gov> (last visited Mar. 17, 2014); CAL. ST. LEGIS., <http://legislature.ca.gov> (last visited Mar. 17, 2014); OREGON STATE LEGISLATURE, <http://leg.state.or.us> (last visited Mar. 17, 2014); MONT. LEGIS., <http://leg.mt.gov/css/default.asp> (last visited Mar. 17, 2014); N.D. LEGIS. BRANCH, <http://legis.nd.gov> (last visited Mar. 17, 2014); NEB. LEGIS., <http://Nebraskalegislature.gov> (last visited Mar. 17, 2014); MISS. LEGIS., <http://legislature.ms.gov> (last visited Mar. 17, 2014); VA. GEN. ASSEMBLY, <http://virginiageneralassembly.gov> (last visited Mar. 17, 2014); N.Y. ST. ASSEMBLY, <http://assembly.state.ny.us> (last visited Mar. 17, 2014); N.Y. ST. SENATE, <http://nysenate.gov> (last visited Mar. 17, 2014); THE 188TH GEN. CT. OF THE COMMONWEALTH OF MASS., <http://malegislature.gov> (last visited Mar. 17, 2014); ME. ST. LEGIS., <http://www.maine.gov/legis> (last visited Mar. 17, 2014).

<sup>104</sup> GOOGLE, <http://www.google.com> (last visited Mar. 17, 2014).

<sup>105</sup> BING, <http://www.bing.com> (last visited Mar. 17, 2014).

<sup>106</sup> YAHOO!, <http://www.yahoo.com> (last visited Mar. 17, 2014).

<sup>107</sup> *WestlawNext for iPad on the iTunes App Store*, iTUNES, <http://itunes.apple.com/us/app/westlaw-next/id380675076?mt=8> (last visited Mar. 17, 2014).

<sup>108</sup> *Lexis Advance for iPhone, iPad, and iPod Touch on the iTunes App Store*, iTUNES, <http://itunes.apple.com/us/app/lexis-advance/id409136268?mt=8> (last visited Mar. 17, 2014).

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

<sup>110</sup> *Mobile Apps from the Library of Congress*, LIBR. OF CONGRESS <http://www.loc.gov/apps/> (last visited Mar. 17 2014); *How to . . . find the Congressional Record*, U.S. SENATE, [http://www.senate.gov/reference/common/faq/how\\_to\\_congressional\\_record.htm](http://www.senate.gov/reference/common/faq/how_to_congressional_record.htm) (last visited Mar. 17 2014).

<sup>111</sup> *Stay Connected . . . with the Android App*, WESTLAWNEXT, <http://info.legalsolutions.thomsonreuters.com/westlawnext/mobile-ipad/android-app/default.aspx> (last visited Mar. 17, 2014).

<sup>112</sup> *Apple – Safari – Browse the web in Smarter, more Powerful ways*, APPLE, <http://www.apple.com/safari> (providing information on Apple’s internet browser for that company’s devices) (last visited Mar. 17, 2014); *Chrome*, GOOGLE, <http://www.google.com/intl/en/chrome> (last visited Mar. 17, 2014).

there are significant variations in what is available online from jurisdiction to jurisdiction through governmental websites. At the time of this writing, federal legislative history materials available online through the Thomas research website vary depending on the document sought. Congressional Record materials go back to the 101st Congress (1989–1990),<sup>113</sup> and Committee Reports go back to the 104th Congress (1995–1996).<sup>114</sup> There are state-by-state variations in the online availability of legislative records as well.<sup>115</sup> Moving forward, as legislative materials are added to state and federal databases, accessibility issues will likely continue to fade.

### C. Example: *The Washington Law Against Discrimination*

While federal legislative history research online is an increasingly viable option, what about online legislative history research regarding state statutes? It is outside the limits of this particular article to provide a fifty-state survey of the state of online legislative history research. However, this article will demonstrate how efficient and effective online legislative history research can be at the state level by walking through an example from the Washington Law Against Discrimination (“WLAD”).<sup>116</sup> WLAD provides protection to individuals against discrimination based on a variety of characteristics or traits.<sup>117</sup> The current statutory provisions include protection against discrimination based on “the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability.”<sup>118</sup> Originally, the statute did not include a definition of the term “disability,” but the legislature provided a fairly broad definition in 2007. The 2007 revision further defines “impairment” under the law, with a similarly sweeping understanding of that term.<sup>119</sup>

<sup>113</sup> See *Search the Congressional Record – 101st Congress – THOMAS*, LIBR. OF CONGRESS, <http://thomas.loc.gov/home/legislatedata.php?&n=record&c=101> (last visited Mar. 17, 2014).

<sup>114</sup> See *Search Committee Reports – 104th Congress – THOMAS*, LIBR. OF CONGRESS, <http://thomas.loc.gov/home/LegislativeData.php?&n=Reports&c=104> (last visited Mar. 17, 2014).

<sup>115</sup> See, e.g., Stacey L. Gordon & Helia Jazayeri, *Lost Legislative Intent: What will Montanans do when the Meaning isn't Plain?*, 70 MONT. L. REV. 1, 15–20 (2009); Phill Johnson, *Using the 'Net to Research Illinois Legislative History*, 91 ILL. B.J. 147, 147 (2003); *Researching Legislative History*, ILL. LEGIS. REFERENCE BUREAU, <http://www.ilga.gov/commission/lrb/lrbres.htm> (last updated Jan., 2013); *Montana Legislative History Guide*, ST. L. LIBR. OF MONT., <http://courts.mt.gov/library/default.mcp> (last updated Sept. 5, 2007); *Legislative Intent and Legislative History*, UTAH ST. ARCHIVES, <http://www.archives.utah.gov/research/guides/legislative-history.htm> (last updated Apr. 14, 2009); *Minnesota Legislative History – Step by Step*, MINN. LEGIS. REFERENCE LIBR., <http://www.leg.state.mn.us/leg/leghist> (last visited Sept. 22, 2013); *Washington State Legislative History*, GALLAGHER L. LIBR. AT THE U. OF WASH. SCH. OF L., <https://lib.law.washington.edu/content/guides/washleghis> (last updated Sept. 11, 2013); *Florida Legislative History Research Using Internet Sources*, SUP. CT. OF FLA. LIBR., [http://www.floridasupremecourt.org/library/LegislativeHistoryInternetResourcesHandout\\_0609.pdf](http://www.floridasupremecourt.org/library/LegislativeHistoryInternetResourcesHandout_0609.pdf) (last visited Mar. 17, 2014).

<sup>116</sup> WASH. REV. CODE ANN. §§ 49.60.010–401 (West 2008).

<sup>117</sup> *Id.* § 49.60.010.

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

<sup>119</sup> *Id.* § 49.60.040(c)(i)(ii).

The background regarding the level of detail and the broad scope of the 2007 statute's disability and impairment definitions provide an interesting overview of the relationship between the courts and the legislature when it comes to statutory interpretation. A 2006 case before the Supreme Court of Washington, *McClarty v. Totem Electric*,<sup>120</sup> involved protections against discrimination on the basis of disability under the previous version of the statute, and was lacking extensive definitional material.<sup>121</sup> In *McClarty*, the plaintiff filed a complaint against his former employer arguing disparate treatment on the basis of disability.<sup>122</sup> The Supreme Court of Washington's decision focused on the definition of "disability" under WLAD.<sup>123</sup> Looking at the statute, the court noted that WLAD acted to create an exception to the generally recognized right of an employer to terminate an employee at-will, carving out a variety of exceptions to that rule resulting in an inability of employers to rely on "race, sex, disability, and other enumerated characteristics from providing a basis for hiring or discharge."<sup>124</sup> The court recognized that WLAD forbids an employer from taking an adverse employment action against an employee based on disability, but looked at the general history of WLAD, applicable federal law, and the interplay of WLAD's requirements with both court precedent and state regulations that provide protection for individuals with disabilities.<sup>125</sup>

The court then provided a definitive definition for the term "disability" as used in WLAD, beginning its effort by noting that "WLAD speaks in terms of 'disability,' not of 'medical condition.'"<sup>126</sup> The court adopted the definition from the federal Americans with Disabilities Act ("ADA") to use when interpreting WLAD, holding that a plaintiff can establish the presence of a disability under the state statute if the following conditions are met: plaintiff "(1) has a physical or mental impairment that substantially limits one or more of his major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment."<sup>127</sup>

The court continued to specify "[a] physical or mental impairment that is substantially limiting impairs a person's ability to perform tasks that are central to a person's everyday activities, thus are 'major life activities.'"<sup>128</sup> In support of its decision, the court stated that such an approach comports with "the plain meaning of the term 'disability' as

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<sup>120</sup> *McClarty v. Totem Electric*, 137 P.3d 844 (Wash. 2006).

<sup>121</sup> *Id.* at 845–46.

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

<sup>123</sup> *Id.* at 847.

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

<sup>125</sup> *Id.* at 848–52.

<sup>126</sup> *Id.* at 850.

<sup>127</sup> *Id.* at 851.

<sup>128</sup> *Id.* at 852 (citing *Toyota Motor Mfg., Ky., Inc., v. Williams*, 534 U.S. 184, 195 (2002)).

utilized by the legislature and the history underlying the WLAD.”<sup>129</sup> The holding also has the added virtue of following the federal definition under the ADA.<sup>130</sup> Finally, the court’s definition limited the kind of cases that can be brought under the disability protections of WLAD, keeping frivolous claims at bay.<sup>131</sup> As the court’s opinion puts it, such a definition conserves “scarce judicial resources [to focus on] those most in need of the WLAD’s protections, rather than persons with receding hairlines.”<sup>132</sup>

Soon after the *McClarty* decision was handed down, the legislature moved to amend WLAD’s protections regarding disability, leading to the current statutory language.<sup>133</sup> In early 2009, the question of the effect of that new language on the Supreme Court of Washington’s previously announced definition of disability was resolved in *Hale v. Wellpinit School District No. 49*.<sup>134</sup> *Hale* brought a challenge to the applicability of the new statutory language to a disability case that was dismissed after *McClarty* was decided, but prior to the enactment of the new language by the legislature.<sup>135</sup> In making its decision, the court noted that the legislature’s amendment of WLAD after *McClarty* was designed to reject that case’s definition of the “disability,” and that the new definition is to be “applied retroactively.”<sup>136</sup> The court examined the formal findings included with the statute by the legislature, textual differences between the previous version of WLAD, operative at the time of the *McClarty* decision, and the revision of the statute’s disability definition provisions post-*McClarty*.<sup>137</sup> The court rested its analysis on the new text of WLAD, rather than the legislative history relevant to the revision of the statute, finding that under the new text of the statute, the definition of “impairment” was significantly broadened and that the new definition “eliminate[s] the requirement that the plaintiff demonstrate that the allegedly disabling condition limits ‘one of his major life activities.’”<sup>138</sup> The court held that the statute expressed the legislative intent to provide a different definition than the one adopted by the court in *McClarty*, and that it was permissible for the legislature to craft the new definition to apply retroactively.<sup>139</sup>

The plain language along with the legislative findings of the revised statute answered the question for the court in *Hale*. Assume, for the sake of discussion, that a lawyer wants to see if there was anything in the legislative

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

<sup>130</sup> *Id.* at 847.

<sup>131</sup> *Id.* at 852.

<sup>132</sup> *Id.*

<sup>133</sup> *Hale v. Wellpinit Sch. Dist. No. 49*, 198 P.3d 1021, 1024 (Wash. 2009).

<sup>134</sup> *Id.* at 1021.

<sup>135</sup> *Id.* at 1023–24.

<sup>136</sup> *Id.* at 1023.

<sup>137</sup> *Id.* at 1024–25.

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

<sup>139</sup> *Id.* at 1028.

record that might confirm the Supreme Court of Washington's reading of the revised version of WLAD, or provide contextual information to assist in understanding the purpose or aim of the statute's definition of "disability." Perhaps the lawyer needs additional information to persuade a recalcitrant client or an obstinate senior partner regarding the substantive correctness of the *Hale* court's determination of the revised statute's purpose and effect. So, off that lawyer goes to inspect the legislative history behind the revised text of WLAD.<sup>140</sup> She can carry out the legislative history research using print resources, or the lawyer can head to a local coffee shop, fire up her laptop, and research the legislative history online.

The Washington state legislature homepage has legislative materials of varying comprehensiveness available from 1991 to present.<sup>141</sup> Using the Senate Bill information for the disability provisions in the revised WLAD provided in the *Hale* case,<sup>142</sup> it is easy enough to find the formal bill summary on the state legislature website using the website's Detailed Legislative Reports search function.<sup>143</sup> After navigating to the materials for the 2007 legislative session (the year WLAD was revised), one merely has to add the official bill number for the then-proposed statute.<sup>144</sup> In addition to online versions of the House and Senate Journals, a search of the official state legislature homepage reveals a significant amount of legislative history information for the revision of WLAD's provisions regarding disability protection.<sup>145</sup>

Textually, earlier versions of the bill that would eventually be enacted are available, as is a procedural history relevant to the bill that was formally passed and enacted by the legislature, Senate Bill 5340.<sup>146</sup> Documentary sources include a broad selection of materials dealing with the text, purpose, and intent of the legislature in enacting the revision.<sup>147</sup> Bill documents, bill digests, and bill reports—including a detailed formal analysis of the bill by the state House of Representatives—are easily found through links provided on the webpage.<sup>148</sup> Amendments to the bill, with

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<sup>140</sup> For an overview of the process of researching legislative history for Washington State, see *Washington State Legislative History*, GALLAGHER L. LIBR., <http://lib.law.washington.edu/content/guides/washleghis> (last visited Mar. 17, 2014). For an overview of Washington State legislative history research using both books and internet sources, see JULIE HEINTZ-CHO, TOM COBB & MARY A. HOTCHKISS, *WASHINGTON LEGAL RESEARCH* 151–68 (2d ed. 2009).

<sup>141</sup> See *Washington State Legislative History*, GALLAGHER L. LIBR., <http://lib.law.washington.edu/content/guides/washleghis> (last visited Mar. 17, 2014).

<sup>142</sup> *Hale*, 198 P.3d at 1023.

<sup>143</sup> *Detailed Legislative Reports*, WASH. ST. LEGIS., <http://dlr.leg.wa.gov/home> (last visited Mar. 17, 2014).

<sup>144</sup> See *Bill Summary*, WASH. ST. LEGIS., <http://dlr.leg.wa.gov/billsummary> (last visited Mar. 17, 2014).

<sup>145</sup> *Detailed Legislative Reports – Bill Summary, History of Bill: SB 5340*, WASH. ST. LEGIS., <http://dlr.leg.wa.gov/billsummary/default.aspx?year=2007&bill=5340> (last visited Sept. 22, 2013).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

clear indication of whether the amendment was passed or rejected, are included, with links to the texts of the amendments.<sup>149</sup> Included as well are links to video recordings of relevant House and Senate committee meetings.<sup>150</sup> An examination of the Substitute House and Senate Bill Reports, available through the website, demonstrates that the legislature very clearly drafted WLAD to alter the law to more strongly protect the rights of people with disabilities.<sup>151</sup> The legislative history also evidences the intent for WLAD's revision to apply retroactively.<sup>152</sup>

State legislative history materials are becoming increasingly available online with the march of time and technology. While there is less uniformity regarding availability of state legislative materials compared to federal ones (a consequence of living in a federal system with multiple jurisdictions), access is becoming less and less of an issue, just as it is at the federal level. The rise of online availability of legislative history information, combined with the decreasing intensity of the broader theoretical dispute regarding the use of legislative history at the federal level, leads to a need for a clearer view of the role of legislative history in legal writing and analysis.

#### IV. TOWARDS A MIDDLE PATH FOR THE USE OF LEGISLATIVE HISTORY

##### *A. Confirmatory and Purposive Uses on the Supreme Court*

The debate regarding the use of legislative history may be undergoing a prudential realignment on the Supreme Court as justices shift towards a middle approach between textualism and an open-ended use of legislative history in statutory interpretation and analysis.<sup>153</sup> While the broader theoretical dispute between the two approaches to using legislative history remains in play, practical considerations in legal decision-making may be moving the discussion in a prudential direction—where the strengths of each side's positions are incorporated into legal analysis—resulting in a more restrained but still robust use of legislative history in statutory interpretation and application.

That textualism has been unable to win the field has been conceded for some time by some of the leading judicial figures within the textualist

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> H.B. Rep. SSB No. 5340, at 2–3 (Wash. 2007), <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bill%20Reports/House/5340-S.HBR.pdf> (downloaded on Aug. 2, 2013); S.B. Rep. SSB No. 5340, at 3 (Wash. 2007), <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bill%20Reports/Senate/5340-S.SBR.pdf> (downloaded on Aug. 2, 2013).

<sup>152</sup> H.B. Rep. SSB No. 5340, at 2–3; S.B. Rep. SSB No. 5340, at 3.

<sup>153</sup> John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287, 1307 (2010) (proposing that the Supreme Court has not decided to exclude legislative history entirely from its decisions, it has reached “an equilibrium that greatly tempers judicial reliance on legislative history as a source of evidence while enhancing judicial attention to the text”).

camp. In a 2008 interview with the ABA Journal,<sup>154</sup> Justice Scalia pointedly admitted this in the course of providing advice to appellate advocates within the course of the interview.<sup>155</sup> While holding fast to textualism, Scalia noted that his approach was “distinctive” and that the balance of the justices then on the Supreme Court is interested in using legislative history.<sup>156</sup> As a result, a prudent advocate should tailor his or her arguments accordingly.<sup>157</sup> “[I]t does make a difference to my colleagues,” Scalia told the interviewer.<sup>158</sup>

In 1990, Judge Easterbrook noted the continued durability of inquiring into legislative history, observing that “[n]o degree of skepticism concerning the value of legislative history allows us to escape its use.”<sup>159</sup> He also proposed that judges look to legislative history not expansively, but to provide a sense of the area that the statute is meant to govern, “the domain of the statute.”<sup>160</sup> In a 1998 law review article, Alex Kozinski of the Ninth Circuit Court of Appeals, another leading textualist judge, suggested that Congress consider creating “an official legislative record—generated jointly by both houses” to provide formal guidance to the courts regarding statutory application.<sup>161</sup>

As John F. Manning proposes, textualism appears to have entered into a second phase, acknowledging the value that legislative history brings to statutory interpretation while continuing to insist on following “closely to the terms of a clear text.”<sup>162</sup> In Manning’s view, textualism has developed into a basic approach to statutory construction, holding “that judges must respect the level of generality at which the legislature expresses its policies.”<sup>163</sup> This “newer textualist position,” as Manning calls it, places priority on the statutory text, but does not posit an ideological hostility to the use of legislative history.<sup>164</sup> “Rather, it requires only the conclusion that legislative history should not trump statutory text when both speak clearly but send conflicting signals.”<sup>165</sup>

One particular use of such an approach is when the Supreme Court examines legislative history, not to supplant or supplement a statute’s plain meaning, but as evidence to support its reading of the plain language of a

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<sup>154</sup> Richard Brust, *Scalia Interview Transcript*, A.B.A. J. (May 1, 2008, 8:00 AM), [http://www.abajournal.com/magazine/article/scalia\\_interview\\_transcript](http://www.abajournal.com/magazine/article/scalia_interview_transcript).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

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

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

<sup>159</sup> Easterbrook, *supra* note 65, at 444.

<sup>160</sup> *Id.* at 448.

<sup>161</sup> Kozinski, *supra* note 64, at 820.

<sup>162</sup> Manning, *supra* note 153, at 1315.

<sup>163</sup> *Id.* at 1315–16.

<sup>164</sup> *Id.* at 1315.

<sup>165</sup> *Id.*

statute and to ensure that such a reading comports with legislative intent. Such a use of what is referred to as “confirmatory legislative history,”<sup>166</sup> has found support from justices normally considered to be in different ideological wings of the Court: Justice Samuel Alito writing for the Court in *Zedner v. United States*<sup>167</sup> and Justice Breyer writing for the Court in *Rowe v. New Hampshire Motor Transport Association*.<sup>168</sup> *Rowe* is of particular interest. In *Rowe*, the Court found that federal law preempts state governments from effectuating policies regarding “a price, route, or service of . . . motor carrier[s],” including airlines.<sup>169</sup> The Court grounds its opinion in the plain language of the statute, and then supports its reading of the statute with material from the legislative record, consulting the legislative history for three critical pieces of information confirming its approach to the statutory text:

- That Congress acted with knowledge of an earlier decision by the Supreme Court when it enacted the statutory text operative in *Rowe*.<sup>170</sup>
- That permitting a “state regulatory patchwork is inconsistent with Congress’ major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace.”<sup>171</sup>
- Explaining the Congressional approach in excluding a specific term from the operative language of the statute before the Court, “despite having at one time considered” including such language.<sup>172</sup>

That the Court’s decision was justified by the plain meaning of the statute without recourse to the legislative history is demonstrated by Justice Scalia’s concurrence, where he makes the point that the recourse to legislative history was unnecessary in the case.<sup>173</sup> Scalia’s observation is quite correct; the use of legislative history did nothing to provide unique substance to the Court’s ruling. However, it provides confirmatory support for the Court’s reading of the plain language of the statute. And the decision, written by Breyer, does so with support from a wide constellation of justices<sup>174</sup> from across the ideological spectrum on the Court.

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<sup>166</sup> James J. Brudney, *Confirmatory Legislative History*, 76 BROOK. L. REV. 901, 901 (2011); see also Dickerson, *supra* note 28, at 1134–37.

<sup>167</sup> See *Zedner v. United States*, 547 U.S. 489, 501 (2006); see also Elliot M. Davis, Note, *The Newer Textualism: Justice Alito’s Statutory Interpretation*, 30 HARV. J.L. & PUB. POL’Y 983, 984–85 (2007) (discussing, in detail, Justice Alito’s opinion in *Zedner v. United States*). *But see Zedner*, 547 U.S. at 509–11 (Scalia, J., concurring) (criticizing the use of legislative history to confirm a reading of an unambiguous statute).

<sup>168</sup> *Rowe v. New Hampshire Motor Transport Association*, 552 U.S. 364 (2008).

<sup>169</sup> *Id.* at 364.

<sup>170</sup> *Id.* at 370.

<sup>171</sup> *Id.* at 373.

<sup>172</sup> *Id.* at 374.

<sup>173</sup> *Id.* at 378 (Scalia, J., concurring in part).

<sup>174</sup> *Id.* at 366 (majority opinion). Chief Justice Roberts, Justice Stevens, Justice Kennedy, Justice Souter, Justice Thomas, Justice Ginsburg, and Justice Alito all supported Justice Breyer’s decision. *Id.*

This moderation towards the limited use of legislative history should not be read to mean that textualism has failed to influence the way non-textualist justices on the Supreme Court approach statutory interpretation. Commentators note that Justice Scalia has an effect on his colleagues, likely moving the Court towards a more textually respectful orientation when evaluating and interpreting statutes.<sup>175</sup> As John Ohlendorf observed:

Justices whom one does not associate with textualism have donned their “grammarian’s spectacles” and given pride of place to the text in their more recent efforts at statutory interpretation, turning to background purposes and legislative history only after exhausting available textualist arguments, and, even then, almost with an air of diffidence.<sup>176</sup>

Textualism has served and continues to serve an important function, guiding the Court away from an over-reliance on legislative history towards a more grounded and limited use of legislative records. Indeed, in many ways, textualism, albeit in what Ohlendorf describes as “a weak form,” may now be considered to be “the dominant interpretive methodology” at the Supreme Court.<sup>177</sup>

The success of textualism at the Supreme Court has not resulted in non-textualists abandoning the use of legislative history altogether. The textualist critique has resulted in a welcome refocusing on the statutory language; this approach has been incorporated into—rather than supplanting of—another approach to the use of legislative history, purposivism. As initially identified by Hart and Sacks,<sup>178</sup> and explained by John F. Manning, purposivism is grounded on a three-fold idea; that legislation has a purpose, that in the American system the legislature acting within constitutional boundaries is the primary policy-maker when it comes to law, and that statutory interpretation should show deference to the policies chosen and enacted by the legislature.<sup>179</sup> Not eschewing recourse to legislative history, purposivism sees the legislative record as one, but not the only, tool available to discern the purpose behind a statutory enactment.

As Manning notes, there has been a move in the direction of the purposivist approach in the use of legislative history at the Supreme Court

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<sup>175</sup> See, e.g., Koby, *supra* note 64, at 392; see also John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 113–16 (2011).

<sup>176</sup> Ohlendorf, *supra* note 58, at 371 (footnotes omitted) (quoting *West Virginia Univ. Hosps., Inc., v. Casey*, 499 U.S. 83, 113 (1991) (Stevens, J., dissenting) (superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1074, as recognized in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994))).

<sup>177</sup> *Id.* at 372 (citing Manning, *supra* note 153, at 1307); see also Pojanowski, *supra* note 4, at 480.

<sup>178</sup> Manning, *supra* note 175, at 117–18.

<sup>179</sup> *Id.* at 117–18.

level under the tenure of Chief Justice John Roberts; however, this recent embrace of purposivism has been more attentive to enacted statutory text than the traditional purposivist approach exemplified by the Supreme Court decision in *Holy Trinity Church v. United States*.<sup>180</sup> “If a statute frames the relevant command in a crisp and precise way, the Court now takes Congress to have defined the relevant statutory purpose with specificity.”<sup>181</sup> The justices, as Manning writes, by and large “accept the constraints of the statutory text,”<sup>182</sup> giving priority to the language used in the statute “even when doing so produces results that fit poorly with the apparent purposes that inspired the enactment.”<sup>183</sup>

While legislative history is not discarded in this new approach to purposivism, Manning sees the Supreme Court using legislative history for confirmatory purposes, and “only rarely [used in] a dispositive role in the Court’s opinions, even for purposes of resolving ambiguity.”<sup>184</sup> The approach Manning describes has both overlap with and some divergence from the traditional approach to the use of legislative history. It continues on with openness to looking at the legislative history to “resolve indeterminacy” in statutory interpretation, but the Court “will not do so to vary the meaning of a clear text.”<sup>185</sup> Practice is leading, if not to consensus, then perhaps to “some equilibrium”<sup>186</sup> resulting not in the banishment of legislative history from the Court’s pattern of statutory analysis, but its restraint in favor of the text as enacted by the legislature; as Manning puts it, “[w]hen the statute is clear and precise, ulterior purpose counts for little. When a statute is vague and open-ended, ulterior purpose can be dispositive.”<sup>187</sup>

## B. Legislative History as Contextual Evidence

### 1. Background and Purpose

The textualist critique, particularly when informed with the insights Nunez provides is highly persuasive regarding the use legislative history as a source of meaning for individual terms in a statute, outside of considerations of ambiguity and absurdity.<sup>188</sup> But as an objection to the use

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<sup>180</sup> *Id.* at 113–16.

<sup>181</sup> *Id.* at 132–33.

<sup>182</sup> *Id.* at 140; see also Pojanowski, *supra* note 4, at 485–87 (discussing the Supreme Court’s decision in *Astrue v. Ratliff*, 560 U.S. 586 (2010) as an example of textual analysis triumphing over a strong purposivist approach to examining a federal statute).

<sup>183</sup> Manning, *supra* note 175, at 114–15.

<sup>184</sup> *Id.* at 165–66.

<sup>185</sup> *Id.* at 166.

<sup>186</sup> *Id.* at 165.

<sup>187</sup> *Id.* at 165–66, 181; Pojanowski, *supra* note 4, at 485.

<sup>188</sup> See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568–69 (2005); *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98–99 (1991); *Humphrey’s Ex’r v. United States*, 295

of legislative materials as evidence of purpose, background and as a verification of the meaning of statutory text, it is far less persuasive in light of historic Supreme Court practice.<sup>189</sup> As Nunez states, legislative history can provide a record of the legislature's "thinking process."<sup>190</sup> Such information is, as the textualist critique powerfully contends, not law, but it may be highly relevant to understanding the context, background, and purpose of a statutory enactment.

One of the challenges writing about a legal rule, derived from a statute rather than a court rule, regards the lack of contextual information that permits for a fully developed discussion of a legal rule. One possible approach to compensating for this lack of information is to look at the formal legislative history to try to fill in the contextual information that is critical in a fully developed discussion of a rule. By looking at the statutory text along with information found in the legislative history, the purpose of the statute, the events that may have brought the subject of the statute to the legislature's attention, considerations involving the proper legislative response to an identified problem, and the like, can be discerned if the legislature has compiled an extensive record of its deliberations in regard to the statute discussed.<sup>191</sup>

Statutes, like all written documents, are a form of literature, and literature embodies principles of language that reference meaning beyond the simple words that are put on a page. As James Boyd White observes, while it is "absurd to say that . . . there is no meaning in the text itself, or that 'meaning' is simply a word for what we in our wisdom happen to agree about at the moment," it is also "absurd to speak as if the meaning of a text were always simply there to be observed and demonstrated in some quasi-scientific way."<sup>192</sup> To read a text is to engage, as White explains, in a "shared process" that is bounded by the norms of a specific interpretive culture, handed on from reader to reader.<sup>193</sup> Reading literature, including legal literature, is "inherently communal" and is "an activity of the mind and imagination[;] a process that requires constant judgment and creation,"<sup>194</sup>

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U.S. 602, 626 (1935); *Caminetti v. United States*, 242 U.S. 470, 485 (1916); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 318–19 (1897).

<sup>189</sup> See, e.g., *Humphrey's Ex'r*, 295 U.S. at 625–26.

While the general rule precludes the use of [Congressional] debates to explain the meaning of the words of [a] statute, they may be considered as reflecting light upon [the] general purposes and the evils which it sought to remedy.

Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the Congressional intent . . . .

*Id.* at 625 (citation omitted).

<sup>190</sup> Nunez, *supra* note 77, at 133.

<sup>191</sup> Frankfurter, *supra* note 20, at 538–39.

<sup>192</sup> James Boyd White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415, 417 (1982).

<sup>193</sup> *Id.* at 415.

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

carried out with awareness of the way others within the interpretive community are reading the texts.<sup>195</sup> Law shares in these characteristics of language, as White explains, “[l]aw is in a full sense a language, for it is a way of reading and writing and speaking and, in doing these things, it is a way of maintaining a culture, largely a culture of argument, which has a character of its own.”<sup>196</sup>

Once this understanding of the nature of legal text and legal communication is in play, the value of legislative history to understand statutory enactments becomes more focused. Far from being a mechanistic exercise, statutory interpretation, analysis, and application calls on lawyers to function within an interpretive culture that includes not only lawyers but also legislators to ascertain the meaning of words that arise from specific circumstances and concerns. Statutes are not just rules, they are “responsible findings of fact and expressions of [the] felt needs of society.”<sup>197</sup> A strict application of the textualist or plain-meaning approach limits the ability of lawyers and jurists to fully discern both the “political and legal context” in which legislation is drafted.<sup>198</sup> Honoring the legislative compromise that leads to clear statutory text is a laudable principle for legal writers and analysts to embrace, but the very process of legislative compromise can lead to muddled text. No less a scholar than Edward H. Levi observes, that in the process of coming to agreement within a legislature, “one element which makes compromise possible” is “through escape to a higher level of discourse with greater ambiguity.”<sup>199</sup>

Adding to this already bedeviling complexity is the increasing number and complexity of federal statutes enacted since the New Deal, an increase which one commentator notes “made it increasingly necessary for the [Supreme] Court to interpret statutory language and to rely on legislative history.”<sup>200</sup> Advocates, judges, and legal analysts have to make sense of all that. While strict construction of enacted legal texts can be a valuable interpretive approach in order to constrain mischief by judges, advocates, and analysts, such strict construction of enacted law may not comport with the intention of the drafters of the law. Russell Kirk put it well when commenting on the related topic of constitutional interpretation: “‘literal interpretation’ and ‘original intent’ may not always coincide.”<sup>201</sup>

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<sup>195</sup> *Id.*

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

<sup>197</sup> Willard Hurst, *The Content of Courses in Legislation*, 8 U. CHI. L. REV. 280, 291 (1941).

<sup>198</sup> Barbara Child, *What does “Plain Meaning” mean These days?*, 3 SCRIBES J. LEGAL WRITING 1, 16 (1992).

<sup>199</sup> EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 31 (1948); see also Jonathan Uffelman, *Caliban’s “Grace”: A Statutory Interpretation of Shakespeare’s Monster*, 23 SETON HALL J. SPORTS & ENT. L. 69, 76–77 (2013).

<sup>200</sup> Koby, *supra* note 64, at 371 (footnote omitted).

<sup>201</sup> RUSSELL KIRK, RIGHTS AND DUTIES: REFLECTIONS ON OUR CONSERVATIVE CONSTITUTION 24 (Mitchell S. Muncy ed., 1997).

Limitations on the plain meaning approach are well understood and applied by the courts. Even Justice Scalia writes in support of the use of legislative history to help avoid an absurd result in interpreting statutory language. In *Green v. Bock Laundry Machine Company*, he writes that when faced with statutory language, “if interpreted literally, produces an absurd, and perhaps unconstitutional, result,” resort to examination of the “public materials” behind the statute, including its legislative history and background, is “entirely appropriate” in order “to verify” the meaning the legislature intended to convey through its chosen terminology in the statute.<sup>202</sup> The limits of a strict approach to plain language do not undermine the significant insights that textualism can offer to legal writers and analysts who engage with the legislative record for information to aid in statutory analysis. It serves as a standing reminder of the normative status of statutory text. When seeking to effectuate legislative intent, the best expression of that intent is to be found in the words of the statute itself.<sup>203</sup>

Statutory interpretation is not a mechanistic process, though, and there are times when the legislative record may be of assistance in discerning legislative intent, background, and purpose. Context counts in interpreting statutes, and underestimating the importance of context is a critical error.<sup>204</sup> “[I]nterpretation is,” as one scholar notes, “essentially a messy business,” and this is nowhere more true than when dealing with statutes.<sup>205</sup> As another author puts it, statutes reflect a deep reality within the legislative process, a reality that calls not for rote thinking but for creative engagement:

Statutes reflect underlying principles, purposes, and policies that explain or justify the rules they provide. They are the product of a process of legislative study, negotiation, and compromise and often culminate a series of enactments. The express terms of a statute often reflect its underlying policies imperfectly; developing arguments based on those policies calls for creativity on the part of counsel.<sup>206</sup>

At the end of the day, at least in some cases, the need for context, particularly in regard to hard cases—which are the kind most likely to end up being the subject of legal analysis and judicial action—is evident.<sup>207</sup>

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<sup>202</sup> 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

<sup>203</sup> BENSON, *supra* note 14, at 9.

<sup>204</sup> RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT 261 (2012); *cf.* Abner S. Greene, *The Missing Step of Textualism*, 74 FORDHAM L. REV. 1913, 1913–14 (2006).

<sup>205</sup> Gerald Graff, “Keep off the Grass,” “Drop Dead,” and Other Indeterminacies: A Response to Sanford Levinson, 60 TEX. L. REV. 405, 410 (1982).

<sup>206</sup> Robert F. Williams, *Statutes as Sources of Law Beyond Their Terms in Common-Law Cases*, 50 GEO. WASH. L. REV. 554, 590 (1982) (footnote omitted).

<sup>207</sup> See, e.g., *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006); *United States v. United Auto. Workers*, 352 U.S. 529, 530 (1957) (“Appreciation of the circumstances that begot this statute is

Textualism is not ignorant of this need, and textualists, such as Justice Scalia and Justice Thomas, have recognized the importance of context in understanding statutory language.<sup>208</sup> As Justice Scalia writes, “the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.”<sup>209</sup> The need for context does not in and of itself mandate the conclusion that the only way to discern context is by the use of legislative history.<sup>210</sup> Textualists generally look at the implications of language and context provided by the statutory text itself.<sup>211</sup> Given the need for context in statutory analysis, it is difficult to see why legislative history should be excluded for evaluation as evidence of a statute’s broader context and purpose. Treated with caution, yes, but cabined off in all but a few circumstances? Prudence would seem to argue in favor of a legal analyst looking at the legislative record in order to discern its context, of the “deals reached” within the legislature that resulted in the statute.<sup>212</sup>

When faced with new and changing circumstances, legislative history can serve as a tool for lawyers and judges to use when the legislative record proves reliable and helpful in discerning context for the statute,<sup>213</sup> not as a substitute for the statute’s text, but as an aid to understanding its purpose and to confirm the meaning of its normative language.<sup>214</sup> From information the legislative history provides, the legal writer and analyst can strengthen his or her assurance regarding the importance of the text’s language.<sup>215</sup> It is in this way that legislative history can serve to provide texture to analysis of the law, not a substitute for its content, but as a way of understanding the situations from which the law arose.

## 2. Example: The Guam Judicial Structure Act

Committee Reports can provide significant information regarding statutory background, particularly the need for a specific piece of legislation.<sup>216</sup> A good example of this value in legislative history for legal writing and analysis can be found in examining a relatively recent revision of the court system in the U.S. Territory of Guam. Guam is an unincorporated territory of the United States, and as such, its governmental

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necessary for its understanding, and understanding of it is necessary for adjudication of the legal problems before us.”).

<sup>208</sup> Ohlendorf, *supra* note 58, at 428.

<sup>209</sup> *Id.* at 432 (quoting *Smith v. United States*, 508 U.S. 223, 241 (1993) (Scalia, J., dissenting)).

<sup>210</sup> *See, e.g.*, *McNeill v. United States*, 131 S. Ct. 2218, 2222 (2011); *see generally* *Costello v. INS*, 376 U.S. 120 (1964).

<sup>211</sup> Ohlendorf, *supra* note 58, at 428–29.

<sup>212</sup> Eskridge, Jr., *supra* note 15, at 567.

<sup>213</sup> *See* Ohlendorf, *supra* note 58, at 427–30.

<sup>214</sup> *See, e.g.*, *United States v. Allery*, 526 F.2d 1362, 1366 (8th Cir. 1975) (utilizing legislative history as part of an effort to determine both the legislative intent and the scope of applicable statutory language).

<sup>215</sup> *See, e.g.*, Child, *supra* note 198, at 14.

<sup>216</sup> *United States v. Dion*, 476 U.S. 734, 742 (1986).

structure is created by, and operates under, a federal statute that serves as the fundamental law of the territory.<sup>217</sup> This statute is the Guam Organic Act (“Organic Act”), originally passed in 1950 and amended since.<sup>218</sup>

A recent statute governing Guam’s court system is the 2004 Judicial Structure of Guam Act (“Judicial Structure Act”).<sup>219</sup> The Act revised the Organic Act’s provisions regarding the court system in the territory, specifying the different judicial levels in the territory (federal district, territorial supreme court, superior court, and other lower courts as established by local law), the court rules for the Supreme Court of Guam, Superior Court, and other lower courts that may be established, specifying the courts of record in the territory, detailing the jurisdiction and powers of the local courts, and providing that the qualifications of the judges of the courts outside the Guam Federal District Court are under local control.<sup>220</sup> The statute is fairly short, but contains considerable detail.<sup>221</sup> What it does not contain is any set of findings, a purpose or intent section, or any information providing the background and context that led Congress to enact the Judicial Structure Act.<sup>222</sup>

Fortunately, the legislative history for the Judicial Structure Act contains information regarding the purpose of the statute and the underlying considerations that moved Congress to enact the amendment.<sup>223</sup> The House Report from the Committee on Resources provides an overview of both the bill and its background.<sup>224</sup> Making clear that the aim of the statute is “to amend the Organic Act of Guam for the purposes of clarifying the local judicial structure of Guam,” the House Report discusses the legislative and judicial considerations that lead to the need to revise the Guam judicial structure in order to provide for local appellate review of trial court decisions in the territory by a supreme court that is “a coequal branch of [the territorial] government,” protected from “changes based upon shifts in control of Guam’s executive and legislative branches.”<sup>225</sup> The House Report also details local reactions to the prospect of the reform of the judicial structure on Guam.<sup>226</sup> The procedural history of the amendment is provided,

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<sup>217</sup> See 48 U.S.C. §§ 1421, 1421a (2006). For an online version of the Organic Act of Guam and other federal laws applying to that territory’s government, see *The Organic Act of Guam and Related Federal Laws Affecting the Governmental Structure of Guam*, U.S. DEP’T OF JUST. (Oct. 30, 2004), <http://www.justice.gov/gu/CompilerofLaws/GCA/OrganicAct/Organic%20Act.pdf>.

<sup>218</sup> 48 U.S.C. § 1421a (2006).

<sup>219</sup> Judicial Structure of Guam, Pub. L. No. 108-378, § 1, 118 Stat. 2206, 2206 (2004), available at <http://www.gpo.gov/fdsys/pkg/PLAW-108publ378/pdf/PLAW-108publ378.pdf>.

<sup>220</sup> *Id.* § 1(e), 118 Stat. at 2207.

<sup>221</sup> See *id.* § 1, 118 Stat. at 220607.

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

<sup>223</sup> H.R. REP. NO. 108-638, at 1-2 (2004), available at <http://www.gpo.gov/fdsys/pkg/CRPT-108hrpt638/pdf/CRPT-108hrpt638.pdf>.

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

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

<sup>226</sup> *Id.* at 2.

as is a statement of constitutional authority for the congressional action, a statement on costs and funding, a Congressional Budget Office analysis of the bill, a negative statement on whether the amendment contains any unfunded mandates, and a negative statement on whether the amendment preempts any “[s]tate, local or tribal law.”<sup>227</sup>

While the text of the Judicial Structure Act provides the “how” of the Congressional legislative scheme, it cannot provide the “why.” It is the legislative history found in the committee report that provides insight as to the “why.” Congress was not acting just for the sake of doing something. It was acting to correct a long-running structural problem with the court system of Guam, seeking to provide both greater local controls over the courts while insulating the local judiciary from manipulation by the political branches of the territorial government.<sup>228</sup> The Judicial Structure Act, unfortunately, does not provide a legal reader with that context. The legislative history does.

It is in this situation that legislative history functions most helpfully, not to set forth something to be taken as authoritative law, but to provide background information about the reason for the creation of the law by the legislature. It is this contextualizing background function that renders legislative history so valuable to a jurist, advocate, and analyst, and makes legislative history helpful to the legal writer preparing a statement of the law as it applies to a particular case. As such, the legislative history can be helpful to a writer seeking to provide a sense, not only of what a rule says, but where the rule comes from and what the rule seeks to accomplish. Not in a way that would be binding—such as if the information was to come directly from an actual source of law—but in a way that is informative and explanatory. It is in this way that legislative and regulatory history can be employed by legal writers to provide a texture to the law, not a substitute for its content, but as a way of adding depth to the communication of the law’s goals.

### *C. Considerations in the Use of Legislative History*

#### 1. Textualism’s Key Insight

The core of the argument over the use of legislative history is a debate about the nature of law.<sup>229</sup> When statutes are in play, what is the binding authority—the intent of the legislators or the words of the statute?<sup>230</sup> Changes in Supreme Court practice, and the increasing availability of legislative history, make this question more important than ever. The

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<sup>227</sup> *Id.* at 4.

<sup>228</sup> *See generally* H.R. REP. NO. 108–638.

<sup>229</sup> HUHNS, *supra* note 13, at 160.

<sup>230</sup> *See id.* at 159.

textualist argument convincingly demonstrates that between the text of the statute and the legislative history, the text is the authoritative statement of the law; legislative history has little to offer in terms of the ordinary practice of understanding the precise meaning of individual terms used in a given statute, outside of situations with statutory ambiguity or an absurd result. While the textualist argument is convincing, in regard to the use of legislative history to determine the meaning of specific terms in a statute, it is less convincing in terms of determining the context and purpose of a statutory enactment. Legislative history is not law, but it can be evidence.<sup>231</sup> Openness to the use of legislative history does not necessarily mean losing sight of the need for placing priority on the text enacted by the legislature. That being said, the distinction between law and evidence of its context and purpose must be kept clear.

## 2. Priority of the Statutory Text

The creativity of legal writers, jurists, and analysts is limited by the boundaries of the legal text itself. And it is here that textualism's most powerful critique of the abuse of legislative history in statutory interpretation comes to the fore; the law is not the legislative history, no matter how accurate and well-developed and clearly expressed it may be; the law is the statute before the courts and the people, and the statute consists of the words chosen by the legislature and either consented to by the executive or enacted by the legislature over an executive veto. Legislative history may carry persuasive weight,<sup>232</sup> particularly when the meaning of a specific statute or regulation is clouded over with ambiguity, but the legislative record itself is not a formal part of the law unless that record is adopted by a court in a decision or incorporated by a legislative body into the text of an enacted law. Consequently, a careful legal analyst must be vigilant against confusing the legislative record with the law itself, or writing in such a way that the reader falls into confusion regarding the proper relationship of the legislative or history and the law.

Textualism's critique illuminates and emphasizes legislative history's nature as a secondary source; at best, good evidence of a statute's background and goals, and at worst, an inaccurate guide to that meaning. While legislative history can be helpful, its utility is limited. Those limitations have been explored by legal scholar Robert John Araujo, S.J. Araujo has argued that legislative history "cannot be relied on to define what the authors [of a statute] intended in every factual context."<sup>233</sup> While legislative history is not a reliable guide to the meaning of the precise

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<sup>231</sup> See, e.g., *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 802 (1984).

<sup>232</sup> See *State v. Gaines*, 206 P.3d 1042, 1048 (Or. 2009).

<sup>233</sup> Araujo, S.J., *supra* note 59, at 296.

terminology used in a statute,<sup>234</sup> it can be a useful source of information to determine a statute's purpose, understood as the "results of the text and what it may achieve."<sup>235</sup> While legislative history may, in Araujo's view, be seen "in part" as a legal fiction, it is a useful one for discerning the "teleological dimension" of a statute.<sup>236</sup>

One hallmark of Araujo's discussion of legislative history is to focus less on the specific intent of the legislature in enacting a certain provision, and to pay more attention to the broader goals the text was designed to address.<sup>237</sup> Because of the indeterminacy of much of the information within legislative history, looking at most legislative records in an attempt to provide a clear and compelling direction in an interpretation of a statute is likely to be unhelpful.<sup>238</sup> Even looking at statutes with extremely detailed legislative histories often results in finding little information with which "to conclude objectively what was the specific will of the legislature."<sup>239</sup> While affirming that legislative history does serve an important function in statutory construction, Araujo strongly argues that "[i]t is not a principal one that clarifies with specific determinacy the meaning of a statute."<sup>240</sup> Given the nature of legislative history, it can be of assistance but it cannot be dispositive when it comes "to [defining] what the authors intended in every factual context."<sup>241</sup>

Legislative history is a secondary source that should be treated carefully. The need for caution in the use of legislative history in statutory interpretation is not contrary to the nature of legislation as literature, as discussed previously, but flows from the unique type of literature that statutes represent. Legal language and the texts that carry it are, at least in the best examples, crafted with a precision to meaning that attempts to memorialize as much information as possible. The reason for this is plain; in a way that is unique among written texts, statutes (and analogous drafted texts like contracts) carry very real and painful consequences for their violation, they "have to carry authority in a way that a literary critic's interpretation of a poem or a bystander's interpretation of a remark in the street do not."<sup>242</sup>

If one violates a statute against murder, one's life may be forfeited. If one violates a statute regarding the duty of care, litigation may result. Such consequences do not attend to the reading of other kinds of documents.

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<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 297.

<sup>236</sup> *Id.* at 279–80.

<sup>237</sup> *Id.* at 296.

<sup>238</sup> *Id.* at 295–96.

<sup>239</sup> *Id.* at 296.

<sup>240</sup> *Id.* at 295–96.

<sup>241</sup> *Id.* at 296.

<sup>242</sup> Graff, *supra* note 205, at 411.

Context is replaced with detail as much as possible given the limits of the drafter's skill.<sup>243</sup> Such an approach is a wise one, given the real-world consequences of non-compliance with the law, consequences that make an over-reliance on legislative history a particular concern.<sup>244</sup> Dragons are dangerous, after all.

### 3. Weight

Legal writers and analysts live in a research universe in which legislative history is a part. At the same time, not every piece of legislative history is of equal value,<sup>245</sup> and in some instances, the legislative history of a statute may prove to be of little assistance in resolving an issue of statutory interpretation.<sup>246</sup> There may also be policy or constitutional considerations that favor providing little weight to the examination of legislative history. For example, as I have previously argued elsewhere, courts should avoid the examination of extrinsic evidence in evaluating the purpose of legislation under the Lemon Test's secular purpose prong in Establishment Clause cases.<sup>247</sup> The risk of infringing free speech and religious liberty of those in the public square may outweigh any marginal benefits that would accrue to the understanding of a particular statute or statutory scheme. Likewise, in other circumstances the use of legislative history might provide more heat and smoke, so to speak, than light. As one commentator has admonished, "little legislative history is helpfully relevant. Much of it is unreliable or unreliably revealed."<sup>248</sup>

Materials purporting to be legislative history may or may not carry persuasive weight.<sup>249</sup> "The best evidence of [statutory] purpose is the statutory text adopted by both Houses of Congress and submitted to the

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<sup>243</sup> See Paul E. McGreal, *Slighting Context: On the Illogic of Ordinary Speech in Statutory Interpretation*, 52 U. KAN. L. REV. 325, 326 (2004).

<sup>244</sup> See, e.g., *United States v. Hayes*, 555 U.S. 415, 436–37 (2009) (Roberts, C.J., dissenting).

<sup>245</sup> McGreal, *supra* note 243, at 374–75.

<sup>246</sup> See, e.g., *United States v. Pub. Utils. Comm'n*, 345 U.S. 295, 321 (1953) (Frankfurter, J., dissenting).

It is one thing to construe a section of a comprehensive statute in the context of its general scheme, as that scheme is indicated by its terms and by the gloss of those authorized to speak for Congress, either through reports or statements on the floor. It is a very different thing to extrapolate meaning from surmises and speculation and free-wheeling utterances, especially to do so in disregard of the terms in which Congress has chosen to express its purpose.

*Id.*; see also *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 765 (D.C. Cir. 1988).

<sup>247</sup> Mark DeForrest, *The Use and Scope of Extrinsic Evidence in Evaluating Establishment Clause Cases in Light of the Lemon Test's Secular Purpose Requirement*, 20 REGENT U. L. REV. 201, 211–12 (2007–08).

<sup>248</sup> Dickerson, *supra* note 28, at 1130.

<sup>249</sup> See, e.g., *Barber v. Thomas*, 130 S. Ct. 2499, 2507 (2010); *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 297 (2010); *Shell Oil Co. v. Iowa Dept. of Revenue*, 488 U.S. 19, 29 (1988); *Weinberger v. Rossi*, 456 U.S. 25, 34 (1982); *Consumer Prods. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117–18 (1980); *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *In re Cont'l Airlines, Inc.*, 932 F.2d 282, 288 (3d Cir. 1991).

President.”<sup>250</sup> Under normal circumstances, legislative history may clarify. It may contextualize. It may illuminate. However, it cannot replace.<sup>251</sup> Weighing the value of legislative history, based on factors such as relevance and indicators of reliability, is an essential part of avoiding the abuse of legislative history. Such an evaluation draws a clear distinction between the statutory text and the extrinsic contextual materials provided through legislative history. This evaluation reinforces the essential point that democratic legitimacy of a statute only attaches to texts that have gone through the requisite constitutional process of bicameral passage and either presidential assent or reenactment over a presidential veto. As the Supreme Court has stated, “legislative intention, without more, is not legislation.”<sup>252</sup>

One type of legislative history that carries a good deal of weight is Committee Reports. These reports have long been used by courts when examining legislative history, and as one commenter notes, are considered to be “the most reliable source of legislative history.”<sup>253</sup> However, even with Committee Reports, there are good reasons to be cautious in their use, and as with all forms of legislative history, they are subject to evaluation as reliable and relevant evidence of legislative purpose and meaning. In *Pierce v. Underwood*,<sup>254</sup> the Supreme Court looks critically the use of legislative history in one of the party’s arguments regarding the meaning of terminology in the Equal Access to Justice Act.<sup>255</sup> The argument was based on a Committee Report from the 1985 reenactment of the 1980 version of the statute.<sup>256</sup> While the relevant text of the statute remains the same after reenactment, the 1985 Committee Report’s view of the meaning of that language, as the Court characterized it, “contradicted, without explanation” the meaning of the language evidenced by the 1980 House Report regarding the statute.<sup>257</sup>

The 1985 Committee Report usage varies in twelve out of the thirteen circuit courts of appeal.<sup>258</sup> Writing for the majority, Justice Scalia notes for the language in the report “to be controlling” on the Supreme Court, it has to “be either (1) an authoritative interpretation of what the 1980 statute meant, or (2) an authoritative expression of what the 1985 Congress

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<sup>250</sup> *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991).

<sup>251</sup> *CBS, Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir. 2001); *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 834–35 (9th Cir. 1996); *Malloy v. Eichler*, 860 F.2d 1179, 1183 (3d Cir. 1988).

<sup>252</sup> *Train v. City of New York*, 420 U.S. 35, 44–45 (1975).

<sup>253</sup> Michael L. Culotta, *The Use of Committee Reports in Statutory Interpretation: A Suggested Framework for the Federal Judiciary*, 60 *ARK. L. REV.* 687, 697 (2007).

<sup>254</sup> *Pierce v. Underwood*, 487 U.S. 552 (1988).

<sup>255</sup> *Id.* at 566–68.

<sup>256</sup> *Id.* at 566–67.

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

<sup>258</sup> *Id.* at 567.

intended.”<sup>259</sup>

The Court notes that since it was the role of the Court to determine what the law means, the first condition was not met.<sup>260</sup> In regard to the second condition, in a longer analysis, the Court found that the 1985 Committee Report was not related to the actual text of the statute.<sup>261</sup> “[T]here is no indication whatever in the text or even the legislative history of the 1985 reenactment that Congress thought it was doing anything insofar as the present issue is concerned except reenacting and making permanent the 1980 legislation.”<sup>262</sup> These circumstances lead the Court to skepticism about the value of the Committee Report, although the Court also notes that insofar as the 1985 committee report was simply commenting on language that it did not draft, “[e]ven in the ordinary situation, the 1985 House [Committee] Report [did] not suffice to fix the meaning of language” in the statute.<sup>263</sup> As Justice Scalia wrote, “only the clearest indication of congressional command would persuade [the Court] to adopt [the] test” indicated by the 1985 Committee Report.<sup>264</sup>

As the Court’s decision in *Pierce v. Underwood* demonstrates, Committee Reports should not be viewed uncritically in relation to the statutory language they purport to explain. At the very least, a real, tangible nexus has to be present between the Committee Report and the language used in the text of the statute. Once such a link is present, however, there are solid reasons to support the use of Committee Reports as useful evidence of congressional intent. As Michael Culotta explains, there are numerous reasons to support the use of committee reports in discerning legislative intent.<sup>265</sup> For reasons that he explains in detail, “committee reports are likely to best articulate the technical meaning of statutory text and, as a result, the overall meaning of the statute.”<sup>266</sup> Conference Reports are especially reliable, in Culotta’s view, “because they are the products of a bicameral negotiation among experts in a particular legislative area.”<sup>267</sup> As a result, such reports “may be extremely useful in illuminating the meaning of ambiguous statutory language.”<sup>268</sup>

#### 4. Analytical Restraint

Alongside a concern for the proper definition of law, much of the

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<sup>259</sup> *Id.* at 566.

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

<sup>261</sup> *Id.* at 566–68.

<sup>262</sup> *Id.* at 567.

<sup>263</sup> *Id.* at 567–68.

<sup>264</sup> *Id.*

<sup>265</sup> Culotta, *supra* note 253, at 697–98.

<sup>266</sup> *Id.* at 704.

<sup>267</sup> *Id.*; *see also* *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 147–48 (2d Cir. 2002); *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416, 421 (7th Cir. 1993).

<sup>268</sup> Culotta, *supra* note 253, at 704.

textualist argument about the use of legislative history is grounded on a concern about undermining the legitimate authority of the legislature in statutory interpretation. To address this concern—to keep the use of legislative history in its proper sphere—the concept of analytical restraint, analogous to the idea of judicial restraint, is helpful to maintain clarity in legal writing in two ways: first, by reinforcing the primary nature of the enacted text in statutory interpretation; and second, by reinforcing the boundary between legislation and legislative history. While allowing for the use of legislative history, such an approach can avoid difficulties with the overuse or abuse of legislative history to interpret specific statutory terms.

Emphasizing that legislative history is evidence rather than law opens the possibility for prudent evaluation of the appropriate weight to give the legislative record. In this evaluation, the careful legal writer must be vigilant against conflating legislative history with legislation, the record with the law itself. Confusion here can lead not only to confusion on the part of the writer, but also on the part of the reader who is seeking guidance and illumination from the writer's work. As with all legal writing, a commitment to stating the law accurately and comprehensively is of paramount value. The use of legislative history should be undertaken to further that value rather than undermine it. There is an old witticism from Canada that says, "in the United States whenever the legislative history is ambiguous it is permissible to refer to the statute."<sup>269</sup> This is an exaggeration, no doubt, but one that betrays some truth from an outsider's perspective; American courts, therefore American judges, may appear too quick to resort to legislative history in the face of statutory language that was sufficient on its own to resolve a case. A similar concern might be voiced about attorneys eager to use legislative history to undermine a reading of an unambiguous statute that might have a negative impact on a client's case.

In either event, the basic point undergirding the need for restraint is the same; to avoid the substitution of ideas from outside the legislative process into the interpretation and application of a statute. Legal writing and analysis discerning the meaning of a statutory text needs to begin and end with the language of the enacted text. For the Supreme Court, the starting point of statutory interpretation and application is the text itself in its proper context: "in all statutory construction cases, we begin with 'the language itself [and] the specific context in which that language is used.'"<sup>270</sup>

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<sup>269</sup> DICKERSON, *supra* note 92, at 164 (citing J. Corry, *The Use of Legislative History in the Interpretation of Statutes*, 32 CAN. B. REV. 624, 636 (1954)); *see also* Starr, *supra* note 6, at 374.

<sup>270</sup> *McNeill v. United States*, 131 S. Ct. 2218, 2221 (2011) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340–41 (1997)).

Between the statute and the legislative history, only the statute is the law.<sup>271</sup> Even a statute that is poorly drafted, or one where the conditions of application have dramatically changed since the time of its enactment, remains the law until repealed by the legislature or overturned by a court as unconstitutional. No matter how clear, no matter how precise, no matter how reliable, the legislative record is not the law. Its utility and its usefulness remain linked to and restrained by the text of the statute itself. This approach does not erode the value of legislative history, but protects it and places it in its proper role. Good statutory analysis begins and ends with the actual statutory language, making sense of it, both as part of an individual statute and within a broader statutory scheme of which it is a part. The statutory law is what Congress has enacted pursuant to the Constitution's required protections and process.<sup>272</sup>

As Justice Thomas has observed, "Congress' intent is found in the words it has chosen to use," and the judicial role is to "identify and give effect to the best reading of the words in the provision at issue."<sup>273</sup> While legislative history may sometimes be a valuable aid to a legal writer working to discern the background and purpose of a statute, or to resolve ambiguous statutory language, or to avoid an absurd result, in order to reach that "best meaning," it should not stand as a substitute of the language chosen by the legislature and enacted into law. The concern about the normative role of legislative text is strongly emphasized by Chief Justice Burger in his dissent in *United Steelworkers of America v. Weber*.<sup>274</sup> In *Weber*, the Court upheld the legality of an employer-union affirmative action plan creating a quota system for African-American employees who sought admission into a training program.<sup>275</sup> In reaching its decision, the Court examined the legislative history of Title VII to determine whether that statute should be read to preclude private parties from entering into the kind of affirmative action plan to which the union and the employer had voluntarily agreed.<sup>276</sup> In its discussion finding that the legislative history supported the legality of the affirmative action agreement at issue in the case, the Court emphasizes that the statute's "prohibition against racial discrimination . . . must therefore be read against the background of [both] the legislative history of [the statute] and the [general] historical context from which the Act arose."<sup>277</sup> By the majority's reading, in light of that

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<sup>271</sup> *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568–71 (2005) (discussing the legal nature of legislative history and concerns regarding the reliability of legislative history in resolving statutory ambiguity).

<sup>272</sup> *Bowsher v. Synar*, 478 U.S. 714, 737 (1986) (Stevens, J., concurring) (citation omitted).

<sup>273</sup> *Harbison v. Bell*, 556 U.S. 180, 198 (2009) (Thomas, J., concurring) (citing *West Virginia Univ. Hosps., Inc., v. Casey*, 499 U.S. 83, 98 (1991)).

<sup>274</sup> *United Steelworkers of America v. Weber*, 443 U.S. 193, 216–17 (Burger, C.J., dissenting) (1979).

<sup>275</sup> *Id.* at 197.

<sup>276</sup> *Id.* at 201–02.

<sup>277</sup> *Id.* at 201 (citations omitted).

examination, the statute's prohibition on racial discrimination did "not condemn all private, voluntary, race-conscious affirmative action plans."<sup>278</sup> Burger strongly criticizes the majority's opinion for what he saw as disregard for the plain language of Title VII.<sup>279</sup>

No dogmatic enemy of the use of legislative history,<sup>280</sup> Burger expressly notes that legislative history had a role to play in discerning a statute's purpose, asking in his dissent "how are judges supposed to ascertain the *purpose* of a statute except through the words Congress used and the legislative history of the statute's evolution?"<sup>281</sup> At the same time, Burger emphasizes that the language in the statute was so clear that "[o]ne need not even resort to the legislative history to recognize what is apparent from the face of Title VII," namely that the act prohibits employers from discriminating on the basis of race.<sup>282</sup> Burger also joined a dissent by then Associate Justice Rehnquist, examining the legislative history of the act in detail, noting in his own dissent that Rehnquist's exploration of the legislative history, "conclusively demonstrates" that the language in the statute reflects the "intended effect" of the legislative action undergirding Title VII.<sup>283</sup> In Burger's view, the majority's decision had the effect of "totally rewriting a crucial part of Title VII to reach a 'desirable' result,"<sup>284</sup> something which, he argues, went beyond the Court's judicial authority.<sup>285</sup>

The views of Chief Justice Burger and Justice Scalia regarding the abuse of legislative history are reminders of the need to keep the focus on the statutory text when engaging in interpretation and application, whether dealing with the confirmatory use of legislative history or the use of legislative history to determine the background and purpose of a statute. As with any interpretive tool, legislative history has to be kept in the proper perspective, as evidence of context and legislative intent, but evidence that is secondary to statutory text.<sup>286</sup> The use of legislative history as evidence should be subject to the same determinations of weight to which any other type of evidence is subject, an assessment that calls for lawyers and jurists to inspect the legislative record, to assess how well those sources reflect the legislative context from which the statute emerged, rather than declaring it off limits as a general rule.<sup>287</sup>

First, in one study, the use of legislative history by liberal Supreme

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<sup>278</sup> *Id.* at 208.

<sup>279</sup> *Id.* at 216–17 (Burger, C.J., dissenting).

<sup>280</sup> See generally *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978).

<sup>281</sup> *Weber*, 443 U.S. at 217 (Burger, C.J., dissenting) (emphasis in original).

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 218.

<sup>285</sup> *Id.* at 218–19.

<sup>286</sup> Davis, *supra* note 167, at 1003–04.

<sup>287</sup> *Id.*

Court justices in employment law cases shows that the use of legislative history has a restraining effect on the justices in the cases studied, that “legislative history reliance is associated more often with outcomes to which they would likely be ideologically opposed.”<sup>288</sup> That use of legislative history need not release a ravaging dragon upon the land is borne out by the experience in Oregon, where the judiciary has embraced the use of legislative history in statutory analysis.<sup>289</sup> One Oregon lawyer noted as recently as 2010, that despite using legislative history as part of its regular practice, the Supreme Court of Oregon has refrained from using legislative history to “override[] the clear language of the statutory text, in context.”<sup>290</sup> This appears to bear out, at this point in time at least, that the use of legislative history in statutory analysis does not necessarily result in the eclipse of the enacted text itself.<sup>291</sup>

Second, analytical restraint while consulting legislative history can also work to thwart a possible problem with the use of legislative history as a species of “dead hand” control, where an excessive reliance on legislative records could result in the ossification of a statute’s application to new circumstances that may fall within the ambit of the statute’s language.<sup>292</sup> If the legislative history is conflated with the legislation, then the use of legislative materials could become a vehicle for members of the legislature to seek to constrain future action by lawyers and courts by exercising authority through the creation of legislative history that they declined to exercise directly through the text of the legislation. Such a manipulation of the legislative record would seek not to empower the judiciary to rework statutory law from the bench, but would instead seek to artificially constrain courts and legal advocates from looking at statutory terms in their ordinary meanings to apply the terms to cases involving facts not anticipated during the legislative process. In effect, the use of legislative history in this case would seek to render the statute so contextualized that it becomes like an ancient insect trapped in amber. Keeping the focus on the legislative text as the law, and properly regarding the legislative history as an aid to providing background and purpose—rather than a dispositive statement of same—can go a long way towards alleviating this worry. The statute’s language remains the law and legislative history must be kept in its proper place as a secondary source that provides insight but not binding effect.

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<sup>288</sup> James J. Brudney & Corey Ditslear, *Liberal Justices’ Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 120–21 (2008).

<sup>289</sup> See generally Jack L. Landau, *Oregon as a Laboratory of Statutory Interpretation*, 47 WILLAMETTE L. REV. 563 (2011) (discussing Oregon’s approach to the use of legislative history); see generally Jeffrey C. Dobbins, *Methodology as Model: Model as Methodology*, 47 WILLAMETTE L. REV. 575 (2011).

<sup>290</sup> Robert M. Wilsey, *Methodology Matters*, 71 OR. ST. B. BULL. 29, 30 (2010).

<sup>291</sup> Landau, *supra* note 289, at 572.

<sup>292</sup> See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 527 n.7 (2009).

## V. CONCLUSION

This article has argued that despite the theoretical disputes over the use of legislative history in statutory interpretation, there appears to be an emerging practice at the Supreme Court level in favor of using legislative history not only for traditional uses, such as resolving ambiguous language and absurd results, but also to provide confirmation of the Court's reading of a statute and to discern the statute's purpose subject to the express language of the enacted text. While the textualist push serves as a valuable corrective to refocus legal writing and analysis on the authoritative language of statutory text, the value of legislative history as a possible aid to discerning the context and aims of a statute makes the practice of consulting legislative history resilient. Adding to this resilience is the growing availability of legislative history, thanks to the internet, both through proprietary websites like Westlaw and LexisNexis and through government-run websites that provide legislative history data at no cost to researchers. Specialized libraries are becoming less essential as the availability of online materials expands.

Legislative history can provide valuable information to the legal analyst, information that provides a fuller and more detailed perspective on why particular statutes have been enacted and what those statutes were meant to accomplish. While legislative history has value as evidence of purpose, background, and context, there are solid reasons to be cautious about its use. First and foremost, between the statute and the legislative history, only the statute is law in a proper sense. As a result, legal writers using legislative history should exercise restraint in the use of legislative history, ensuring that the legislative record is consulted in a reliable fashion and without compromising rigorous fidelity to the words chosen by the legislature to include in the statute. Given the less contextually rich nature of statutory texts, it can be helpful to expand the scope of information used to understand and explain those enacted legal sources, always keeping in mind that the normal role of relevant legislative materials is to serve as evidence to explain the context, background, and purpose of the law, not to serve as a substitute for it. Even so, the basic structure and kinds of information used by legal writers to explain legal rules can be improved by a judicious use of legislative history guided by the principle of good faith in identifying, explaining, and communicating the requirements of the law. The dragon of legislative history cannot be caged, but with a proper understanding of its value and role, the dragon can be tamed.