

WHAT GOOD IS LEGISLATIVE HISTORY? JUSTICE SCALIA AND THE FEDERAL COURTS OF APPEALS

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INTRODUCTION

This is an outline of the book titled, *What Good Is Legislative History? Justice Scalia and the Federal Courts of Appeals*, by Joseph L. Gerken. The book addresses Justice Antonin Scalia's criticism of legislative history as a source for statutory interpretation. It focuses on how Federal courts of appeals have responded to Justice Scalia's criticism.

The book will have seven chapters. One chapter lays out Justice Scalia's critique in some detail. It breaks down this critique into two categories: (1) "broad-sides" in which he condemns legislative history *per se*; and (2) contextual criticism of particular uses of legislative history. Two chapters look at the ways that courts of appeals have responded to Justice Scalia's analysis. Two chapters give readers background information essential to an evaluation of Justice Scalia's influence. One traces the history of legislative history. The other discusses the Supreme Court's approach to legislative history pre-Scalia. There are also introductory and concluding chapters. Thus, the chapter breakdown of the book is as follows.

- Chapter 1 - Introduction
- Chapter 2 - A History of Legislative History
- Chapter 3 - The Supreme Court's Treatment of Legislative History Prior to Justice Scalia
- Chapter 4 - Justice Scalia's Opinions
- Chapter 5 - General Criticism of Legislative History in the Courts of Appeals
- Chapter 6 - Court of Appeals Opinions on Specific Uses of Legislative History
- Chapter 7 - Some Concluding Observations

In addition there will be the following addenda.

- A Note on Research Methodology
- A Selective Reading List: Important Cases and Secondary Sources with Annotations
- Bibliography of Books and Articles on Justice Scalia and Textualism
- Index to Cases
- Name Index
- Topical Index

Here is the detailed outline of each chapter.

I. Chapter 1: Introduction

- A. Why this study
 1. Scalia is unequivocal re: legislative history (LH) - he hates it
 2. Striking contrast
 - a. Many articles written about Scalia and LH - suggests his opinion is very influential
 - b. But his decisions are usually dissents or concurrences - suggests they are not influential
 3. This raises the question: how much influence does Scalia's take on LH have on Federal courts of appeals?
- B. My study
 1. I read 200 + CA decisions
 2. Focused on both what the court said and what it did
 - a. Did the court use LH?
 - b. Any impact on outcome of case?
 3. Also researched the history of the Supreme Court's treatment of LH
 - a. To better ascertain Scalia's influence on the issue
- C. Summary of conclusions
 1. Courts cite Scalia for 2 reasons
 - a. General criticism of LH - it is "no good"
 - b. Specific applications - LH should not be used in a particular context
 2. Many decisions adopt Scalia's general criticism of LH
 3. But no majority opinion rejects LH based on general criticism. Instead, cases with general criticism of LH fall into four categories:

- a. Criticism of LH is in a dissenting or concurring opinion
 - b. The decision criticizes LH but there is none to consider
 - c. The decision criticizes then uses LH
 - d. There is a general criticism of LH, but the court rejects LH based on a specific rule
- 4. Some opinions have rejected Scalia's general criticism of LH
 - 5. Scalia influence is most evident in specific, contextual rejection of LH
 - a. Especially the "plain meaning" rule
 - b. Also criticism of type of LH used
 - c. And criticism based on how LH is used
 - 6. "Bottom line" - Scalia has influenced courts' attitude to LH
 - a. More likely to scrutinize how LH is used
 - b. More skeptical re: LH as basis for discerning legislative intent
 - 7. However, he hasn't convinced courts to reject LH *per se*
- D. Organization of this book
- 1. History of LH materials
 - 2. History of Supreme Court's treatment of LH
 - 3. Scalia's opinions on LH
 - 4. Court of appeals (CA) opinions that cite Scalia on LH

II. Chapter 2: A History of Legislative History

- A. What is LH?
- 1. Broadly - story of how law was passed
 - a. E.g. 1960s civil rights legislation - sit-ins, March on Washington, etc.
 - 2. More specifically - documents generated during passage of a statute that shed light on intent of legislators
- B. Steps in legislation and documents generated
- 1. Bill introduced - one house
 - 2. Committee
 - a. Hearings
 - b. Mark-up > amended bill
 - c. Report
 - 3. Floor
 - a. Debates
 - b. Amendments
 - c. Vote
 - 4. Same for other house
 - 5. Conference Committee
 - a. Act presented to both houses
 - b. Conference Committee Report
 - 6. President - Signing statement or Veto statement

7. (If veto) > further proceeding on floor of both houses
- C. Richard Danner - historically, the most important factor in courts' use of LH was not judges' philosophy but availability of materials.
- D. The history of legislative history documentation - some highlights
1. Floor debates and votes
 - a. 1789 - U.S. Constitution - Art. I, § 5, cl. 3
 - (1) Each house shall keep a journal of its proceedings
 - (2) And record the vote where 1/5 of members so request
 - b. Earliest record of proceedings - newspapers
 - c. Register of Debates - 1824 - summary of selected debates
 - d. Congressional Globe
 - (1) 1833 - Summary of selected debates
 - (2) 1851 - text of debates - houses authorized verbatim records
 - (a) House - 1848
 - (b) Senate - 1850
 - (3) Congressional Record - 1873
 - (a) Government publication
 - (b) "Verbatim" - Congressmen can amend comments
 2. Committee documents
 - a. Early 19C - select committees - create one piece of legislation, then disbanded
 - b. Number of standing committees peaked in 1913
 - c. Then decreased - 1946 pretty much same as today:
 - (1) 19 House committees
 - (2) 15 Senate committees
 - d. Committee reports
 - (1) 1880 - HR requires report for each bill voted out of committee
 - (2) 1900 - Senate - same for most bills
- E. A longstanding problem - access to LH material
1. Early guides to LH:
 - a. Congressional Record - History of Bills and Resolutions
 - b. Congressional Reference Service Digest of Bills
 2. 1947 - Congressional Index
 3. 1948 - USCCAN - full text of selected reports
 4. 1970 Congressional Information Service
 - a. index-abstract
 - b. fiche - text of virtually all committee documents
 - c. compiled LH
 5. 1990 - Congressional Universe
 - a. CIS index/abstracts online
 - b. Full text of items on-line since c/2000
 - c. CIS historical online - full text back to 1789

6. Lexis and Westlaw
 - a. All committee reports from 1990
 - b. Congressional Record from 1985
- F. The “bottom line” - legislative history has never been so readily accessible

III. Chapter 3: Legislative History in the Supreme Court Prior to Justice Scalia

- A. Early years - no LH to consider
- B. The issue arose because of two factors:
 1. Growth of Federal statutory law
 2. Development of LH sources - see above
- C. Some Benchmark Supreme Court decisions
 1. 1845 - *Albridge* - Court rejects LH
 2. 1860 - *Dubuque & Pacific* - Court uses LH - no comment on its legitimacy
 3. 1892 - *Trinity Church* - turning point - explicit approval of LH
- D. The “plain meaning” (PM) rule
 1. The rule - if language of statute is unambiguous, do not resort to LH
 - a. Exception - if PM would lead to an absurd result
 2. Rule actually predates *Trinity Church* - Revised Statutes issue
 3. Late 19C, early 20C - PM rule prevails in S. Ct. statutory interpretation
 4. 1940 - *American Trucking* - no rule forbids using LH even if statute “superficially” clear
 5. 2 rules coexist - neither explicitly rejected by Court
 6. By 1980, according to Patricia Wald, “plain meaning” is a “dead letter”
 - a. Court will use LH whenever useful to interpretation of statute
 7. Since Scalia (1986) - resurgence of PM rule
 8. 2004 - *Lamie* - refers to PM rule as “well established”
- E. A predecessor - Justice Jackson
 1. LH “dubious help” in statutory interpretation
 2. Courts’ use of LH is “overdone”
 3. Congressional debates not candid or accurate
 4. LH materials inaccessible to many (Jackson’s “lament”)
 5. Jackson never condemned LH *per se* - said it is overused, misused
 6. He thought some LH - esp committee reports - was valid
- F. Other justices have expressed concern over use of LH
 1. Thurgood Marshall
 2. Chief Justice William Rehnquist
 3. Clarence Thomas

- G. A footnote - Chief Justice John Roberts on LH - his record on D.C. Court of Appeals
 - 1. No diatribes
 - 2. Does not cite Scalia on LH
 - 3. Has used LH
 - 4. All over the place on Plain Meaning
 - a. *Sierra Club* - can use LH even if statute clear
 - b. *Consumer Electronics* - same, but “bar is high”
 - c. *England* PM rule, but still uses LH
 - d. *Totten* - strict PM rule

IV. Chapter 4: Justice Scalia’s Opinions

- A. Biographical background
- B. He is not the only one attacking LH
 - 1. Easterbrook, Kozinski, Starr - also appointed to court of appeals mid-1980s
 - 2. Scalia became most prominent voice
 - a. He is on Supreme Court
 - b. Scalia Style - see below
- C. An early foray - *Hirshey*
 - 1. The Dole footnote
- D. Scalia’s general criticism of LH
 - 1. No such thing as legislative intent - *Edwards*
 - 2. LH not accurate evidence of legislative intent
 - a. *Hirshey* - legislators don’t read committee reports
 - b. *Blanchard* - legislators don’t write committee reports
 - (1) inserted by staffers at behest of lobbyists
 - (2) intended to sway judges, not to enlighten legislators
 - c. *Crosby* - debates take place in “virtually empty” chambers
 - (1) *Conroy* - statements not even made on floor
 - 3. Structural argument - US Constitution - *Mortier*
 - a. Statute product of votes in both houses
 - b. No vote on committee reports - should not be taken as “law”
- E. Scalia on Plain Meaning
 - 1. He resurrects the doctrine
 - 2. Absolutist position - don’t even mention LH if statute has PM
- F. Scalia on type of LH material used
 - 1. “Snippets” from Congressional Record
 - a. Exception - floor manager of bill - *Babbitt*

2. Committee reports that cite cases - *Blanchard*
3. Absence of LH as significant - “the dog that did not bark” - *Chisom*
4. Post-enactment LH - *Sullivan, Romani*

G. Scalia on particular uses of LH

1. Rule of Lenity- if criminal statute ambiguous - resolve doubt for defendant
 - a. Majority - lenity only applies if doubts persist after resort to LH
 - b. Scalia - don’t construe ambiguous statute vs defendant based on LH
 - c. I.e. Scalia as pro criminal defendant
2. Waiver of sovereign immunity - *Nordic Village*
 - a. Scalia - waiver must be clearly expressed in statute’s text, not in LH
3. State court concurrent jurisdiction - *Tafflin*
 - a. Rule - states have jurisdiction to decide Federal claims unless statute unambiguously deprives court of such jurisdiction
 - b. Scalia - can’t use LH to show Congress’ unambiguous intent
4. Agency interpretation of Federal statute - the *Chevron* issue
 - a. General rule
 - (1) agency rule contrary to unambiguous statute is invalid
 - (2) if statute ambiguous, agency rule is valid if consistent with a valid interpretation of the statute
 - b. *Cardoza- Fonseca*
 - (1) majority - court can look to LH to determine unambiguous meaning of statute
 - (2) Scalia - LH has no bearing on whether statute is ambiguous

H. The Scalia style

1. Unequivocally opposed to LH
2. “Take no prisoners” style - sarcasm as basis for judicial reasoning - unique
3. Quips - “Cocktail party”, “Rosetta Stone of legislative archeology”, “argument should be laughed out of court”, quotes Livy, *History of Rome* vs “dog that did not bark”

I. Although other Justices on have criticized use of LH

1. Scalia unique in rejecting LH *per se*
2. And in rejecting committee reports
3. Most consistent ally on this - Clarence Thomas

J. Breyer - reasoned response - the majority strikes back

K. Scholarly debate on Textualism

V. **Chapter 5: General Criticism of Legislative History in the Courts of Appeals**

A. Scalia’s general criticism of LH is often cited

1. Tone of CA opinion sometimes reflects Scalia - caustic, sarcastic
- B. Sometime cases have extended analysis of LH issue
 1. Some quote Scalia at length
- C. Surrogate opinion - a CA decision expressing Scalia's views that is subsequently cited as anti-LH authority
- D. A few CA decisions have explicitly rejected Scalia's critique
 1. Because his is a minority opinion
 2. Rejecting the underlying rationale
- E. What CAs do with the LH - general observations
 1. No majority opinion rejects relevant LH solely because of general critique
 2. General criticism of LH is almost always gratuitous
- F. Ways in which general criticism of LH is gratuitous
 1. Expressed in dissent or concurrence
 2. LH is criticized, but there is none to consider
 3. LH is criticized then used
 - a. Two prominent critics did this - Starr and Kozinski
 4. LH is rejected because of a narrow rule
 - a. "Plain meaning" cases
 - b. Other narrow rules invoked
- G. Conclusion - how influential has Justice Scalia been?
 1. Often cited - critique adopted by CA
 2. Yet his general critique usually not dispositive of decision whether to use LH
 3. Does this mean he is not influential? No
 4. His influence on CAs most evident in cases where a narrow rule is applied
 - a. CA's general skepticism re: LH translates to less use of LH
 - b. Courts generally more critical re: how and when LH is properly used

VI. Chapter Six: Court of Appeals Opinions on Specific Uses of Legislative History

- A. CA cases with general criticism of LH are only half the story
- B. Scalia influence also felt in cases where a particular rule applies
 1. Especially "plain meaning" cases
 2. Also - cases on LH source used
 3. Also - cases on how LH is used
- C. Since Scalia has been on the Supreme Court - CAs more likely to invoke PM rule

- D. PM rule has been problematical in its application
 - 1. Split among circuits over the PM of a statute
 - 2. Dispute between majority and dissent in a case over PM
 - 3. CA overrules district court over PM of statute
 - 4. Supreme Court overrules CA over PM of statute

- E. This suggests that judges have a hard time discerning what the PM of a statute is
 - 1. Also have a hard time deciding whether a statute has a PM

- F. When does a statute have a PM? Some approaches to defining “ambiguity”
 - 1. Dictionary: ambiguous = having more than one meaning
 - 2. Courts reject this approach - every statutory case would meet this definition
 - 3. Plain meaning as “ordinary meaning”
 - a. Statutory term can have more than one meaning and still have a PM
 - b. “Ordinary meaning” is the one most often associated with the term
 - 4. Using a dictionary to establish PM
 - 5. Contextual analysis of statutory text
 - a. Otherwise ambiguous term has a PM in context of statute
 - 6. “Common sense” - “obvious” meaning of term - a “gut reaction” approach

- G. Other narrow rules relating to the types of LH
 - 1. Cases on floor statements
 - a. Statements of the bill’s sponsor or floor manager
 - 2. Cases on committee reports
 - a. Committee reports that incorporate case citations
 - 3. Post Enactment LH
 - a. Universally disregarded
 - b. Some cases contest whether LH is post-enactment
 - (1) LH almost-contemporaneous with passage of Act
 - (2) Statute requires that Congress review regulations
 - (3) “Sunset clause” legislation
 - 4. Absence of LH - “The dog that did not bark”

- H. Interpretive rules relating to the way LH is used
 - 1. *Chevron* - use LH to show that agency rule is contrary to PM of statute?
 - a. Lot of CA cases on this issue
 - b. Courts split on whether to use LH here
 - 2. Rule of lenity
 - a. The issue - use LH to clarify otherwise ambiguous criminal statute?
 - b. Few CAs take Scalia position on this
 - 3. Presumption against waiver of sovereign immunity - if statute is ambiguous
 - a. Issue - use LH to clarify ambiguous statute?
 - b. CAs usually adopt Scalia position here
 - 4. Federal statutory preemption of state law - must be unambiguously expressed
 - a. Again - can LH be used to unambiguously express intent to preempt?

- b. CAs split on this issue
- 5. Common issue in these cases - Scalia rejects LH as a way of making an ambiguous statute unambiguous

VII. Chapter 7: Some Concluding Observations

- A. Is textualism just a means of reaching a conservative outcome in a case?
 - 1. The theory
 - a. Most Federal statutes are liberal
 - b. LH generally used to expand scope of statute
 - c. Therefore, restrict the use of LH to restrict scope of liberal statute
 - 2. Theory probably held up in 1940s through 1980s
 - a. Most legislation was liberal - Social Security, labor laws, civil rights
 - b. Most judges taking textualist position were conservative - Scalia, Starr, Kozinski, Easterbrook, Buckley
 - 3. Which takes precedence - textualism as methodology, or outcome?
 - a. A test case - Scalia on the Rule of Lenity
 - b. He sticks to textualist approach even though it favors the rights of criminal defendants
 - 4. Once textualist theory is defined and utilized, it takes on a life of its own
 - 5. Today the textualist/conservative corollary may be breaking down
 - a. Much Federal legislation is conservative - Bankruptcy “reform”, tax “reform”, USA Patriot Act
 - b. Textualism may constrict scope of this conservative legislation
 - 6. Examples of CA cases going both ways
 - a. Textualism used to reach conservative outcome - most cases
 - b. Textualism used to reach liberal outcome - some cases
- B. Return to initial question - why the focus on Scalia, given that his opinions on LH are usually dissents or concurrences?
- C. What the future holds
 - 1. Justice Breyer’s middle position - skeptical but not dismissive of LH
 - 2. Will two new Supreme Court justices tip the balance?
 - a. Probably not vis-s-vis the absolutist position - LH will get used
 - b. But - may be significant reduction in how often LH is used
 - 3. LH in the CAs - what the future holds
 - a. CA judges are their own boss - unlikely to be influenced much by shift in Supreme Court approach to LH
 - b. LH can be a useful tool in interpreting statute
 - c. Courts unlikely to completely forsake its use for ideological reasons
 - 4. Danner revisited - it may be that the determinative factor is the availability of LH sources, not judicial philosophy
 - a. If so, LH will get used

- b. LH has never been so accessible - Congressional Universe, Westlaw
- D. Scalia's failure
 - 1. CAs simply do not buy his contention that LH is invalid *per se*
 - 2. Even courts that espouse his rhetoric end up using Lh when it is pertinent
- E. Scalia's lasting heritage
 - 1. He makes an issue of litigants' courts' use of LH
 - a. At least, courts are compelled to address *whether* they should use LH
 - b. Not a given that it is an appropriate source for statutory interpretation
 - 2. Courts are much more astute regarding when and how to use LH
 - a. Much more likely to reject LH based on its use in a specific context

VIII. **Addenda**

- A. A Note on Research Methodology
- B. Selective Reading List - Important Cases and Secondary Sources with Annotations
- C. Bibliography of Books and Articles on Justice Scalia and Textualism
- D. Index to Cases
- E. Name Index
- F. Topical Index

WHAT GOOD IS LEGISLATIVE HISTORY? JUSTICE SCALIA AND THE FEDERAL COURTS OF APPEALS

Why This Study?

Justice Antonin Scalia's approach to legislative history is simply stated - he hates it. This is only a slight exaggeration. Justice Scalia's critique is uniquely unequivocal. He does not merely say, as predecessors have, that legislative history is often misused. He flat out rejects legislative history as a valid basis on which to construe statutory text.

I teach a law school course in Advanced Legal Research. One course assignment requires each student to lead a class discussion regarding an article related to "real life" use of legal research. The use and abuse of legislative history is one of the topics that students discuss. In preparing a list of suggested readings for this topic, I noticed an interesting discrepancy. Dozens of recent articles, and a number of books, discuss Justice Scalia's criticism of legislative history. However, that criticism has been expressed almost entirely in dissents and concurrences to Supreme Court opinions. It is very rare for the Court to apply Justice Scalia's critique in a majority opinion.

This raises an interesting question. What do the Federal courts of appeals do with Justice Scalia's opinions on legislative history? Since they are minority opinions, the lower courts are not bound to apply them. However, it is hard to ignore all of the attention that the Scalia critique, and Textualism generally, has received in the secondary literature. Are judges influenced by this debate? And, if so, do their views on the validity of legislative history affect the outcome of the appeals which they decide?

Research Methodology

I took a straightforward approach to researching this issue. I first tried to find every case in which courts of appeals discussed Justice Scalia in relation to legislative history. The fact that most

of Justice Scalia's opinions on legislative history were dissents and concurrences simplified my efforts, since proper citation format calls for the citing opinion to give the name of the judge who wrote a dissent or concurrence. Thus, my basic query to find Scalia cases was as follows.

scalia /p legislat! /s history intent!

I employed this query in order to retrieve cases that used terms such as "intention of the legislators" or "legislative intent" instead of "legislative history." For the handful of Scalia majority opinions, I used the name of the case as my search term, for example:

pierce +s underwood /p legislat! /s history intent!

It was also necessary to find cases that cited to what I call "surrogate" Scalia decisions. Occasionally, a circuit court decision quotes Justice Scalia chapter-and-verse on legislative history. Subsequent cases then cite to the circuit court opinion rather than the Scalia opinion in support of its critique. I used case names to get these decisions. Thus,

Sinclair /p legislat! /s history intent!

I retrieved about 250 relevant cases. In reading the cases, I wanted to focus on the impact of the Textualist critique on the court's analysis of the substantive statutory issue, and on the outcome. Thus, I asked the following questions:

- Which party introduced legislative history in its argument?
- Why? How did the legislative history support its interpretation of the statute?
- What type of legislative history document was used? E.g. committee report, floor debate.
- What did the majority opinion say about legislative history?
- Did the majority use or reject the legislative history? If it was used, how was it used?
- Was the decision to use or reject legislative history critical to the outcome of the case?
- Did a concurring or dissenting opinion disagree with the majority regarding whether to use

legislative history?

- What Scalia opinions were cited? How was Scalia's critique applied to the issue?

Some Significant findings

Early on in the research, I noticed some interesting discrepancies. Often, an opinion would criticize legislative history and then go on to use it. Or an opinion would denounce legislative history as a universally invalid tool of statutory construction, but then apply a more limited, contextual rule as its basis for rejecting the particular committee report offered by the litigant.

For example, courts for over a century have applied the "plain meaning" rule. Under this rule, extrinsic sources should not be used if a statute has a plain meaning; however, if the statute is ambiguous, the court may look to legislative history.¹ You do not need to be an opponent of legislative history to apply the "plain meaning" rule. Indeed, the rule defines the times when it is proper to use legislative history. Yet time and again, an appellate opinion would first apply the "plain meaning" rule and then go on to denounce legislative history generally. Also, it was apparent that the meaning of statutes tends to be more "plain" to Textualists. Out-and-out opponents are much less likely to discern ambiguity in a statute, and hence are less likely to see a need for legislative history. Also, in a surprising number of instances, two decisions, or two opinions in the same decision, would both declare that the statute had a plain meaning, but they would reach the opposite conclusion as to what that plain meaning was.

In writing out my findings, I discerned that it would be necessary to include a discussion of the Supreme Court's treatment of legislative history over the years, in order to clarify just how Justice Scalia's approach differed from the mainstream. This was particularly so with respect to the

¹ There is a corollary, which states that the court can resort to legislative history if application of the statute's plain meaning will lead to an absurd result. Even Justice Scalia accepts this corollary.

“plain meaning” rule, which has gone through periods of general acceptance and rejection on the Court. I learned that prior justices, notably Robert Jackson, have criticized the misuse and overuse of legislative history. However, no one prior to Justice Scalia had unequivocally rejected legislative history. Thus, there was a consensus, pre-Scalia, that committee reports were, of all the sources, most representative of Congress’ intent.

This is still a work in progress, and I suspect that I will fuss with my conclusions before I am finished. However, a few “bright line” conclusions seem well founded. There are virtually no cases in which a majority court of appeals opinion rejects relevant legislative history solely on the Scalia critique. In many cases, the court criticizes then uses legislative history. Occasionally, the court will criticize legislative history when there is none to even consider. Often the criticism is contained in a concurring or dissenting opinion. And, as discussed above, the court often includes a global criticism of legislative history where there is a narrower, contextual reason why the source should not be credited.

Does this mean that Justice Scalia’s critique has fallen on deaf ears? Certainly not. It is clear that courts are much more critical in their analysis of when and how legislative history bears on the meaning of statutory text. That Justice Scalia is partly responsible for this more critical attitude is suggested by the frequency with which his opinions are cited in this context. Also, Justice Scalia has identified a number of specific contexts in which the use of legislative history is problematic. For example, the “rule of lenity” posits that an ambiguous penal statute should be construed in favor of a criminal statute. Justice Scalia has repeatedly asserted that it is improper to look to legislative history to show that a penal statute is unambiguous. Some courts have adopted this approach.

Probably the most important impact of Justice Scalia’s critique is simply that it gets raised so often in court of appeals opinions. Even though Textualism is not adopted chapter-and-verse, the

fact that it is discussed time and again in these opinions means that litigants will need to justify why the legislative history sources that they cite are credible indicators of what Congress intended when it passed the statute at issue.

The Focus of My Presentation

My talk will focus on Chapter Five of my work, “General Criticism of Legislative History in the Courts of Appeals.” This chapter includes many of the essential findings, with regard to Justice Scalia’s impact. The following chapter of the book will address how courts use Justice Scalia’s contextual critiques, for example, his take on the “plain meaning” rule and the “rule of lenity.” An outline of the entire work is included, to give readers a sense of how Chapter Five fits into the big picture.

Joseph L. Gerken

CHAPTER FIVE: GENERAL CRITICISM OF LEGISLATIVE HISTORY IN THE COURTS OF APPEALS

The frequency with which his opinions have been cited in support of a general criticism of legislative history suggests that Justice Scalia has indeed had a significant impact on courts' consideration of this issue.

Courts have expressed their general reservations regarding legislative history in a variety of ways, including the following. “[W]hen legislative history is examined in an attempt to discern legislative intent it must be used with great caution.”² “As a general matter, legislative history ... should be approached with skepticism.”³ The court “ordinarily essays legislative history with a skeptical eye.”⁴ “A healthy dose of cynicism is salutary when divining legislative intent.”⁵ “[L]egislative history often may lead one astray.”⁶ “[R]ecourse to legislative history to clarify the meaning of statutory language is, at best, a shaky endeavor.”⁷ “Repair to debates and reports and other precursors to law is ever fraught with difficulty.”⁸ “Discerning congressional intent from

² *Mills v. Director, Office of Workers' Compensation*, 877 F.2d 356, 363 (5th Cir. 1989) (Duhe J., dissenting), citing, *inter alia*, *Blanchard v. Bergeron*, 489 U.S. 87 (1989) (Scalia J., concurring).

³ *United States v. Investment Enterprises, Inc.*, 10 F.3d 263, 274 n. 27 (5th Cir. 1993), citing *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 617, *et seq.* (1991) (Scalia, J., concurring)

⁴ *Taylor v. United States*, 181 F.3d 1017, 1027 n. 1 (9th Cir. 1999) (Wardlaw J., dissenting), citing *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) and *Leisnoi, Inc. v. Stratman*, 154 F.3d 1062, 1070 (9th Cir.1998).

⁵ *Medical Society of State of New York v. Cuomo*, 976 F.2d 812, 819 (2nd Cir. 1992), citing *Blahchard*, 489 U.S. at 98-99 (Scalia J., concurring).

⁶ *Rehabilitation Assn. of Virginia, Inc. v. Kozlowski*, 42 F.3d 1444, 1457 (4th Cir., 1994).

⁷ *Environmental Defense Fund, Inc. v. City of Chicago*, 948 F.2d 345, 350 (7th Cir., 1991) *vacated on other grounds*, 506 U.S. 982 (1992), citing *Blanchard*, 489 U.S. at 89 (Scalia J., concurring).

⁸ *Natural Resources Defense Council v. Environmental Protection Agency*, 822 F.2d 104, 113 (D.C. Cir. 1987), citing, *inter alia*, *Hirschey v. FERC*, 777 F.2d 1, 7-8 & n. 1 (D.C.Cir.1985) (Scalia, J., concurring).

legislative history is a speculative enterprise under the best of circumstances ...”⁹ Courts have noted the “pitfalls of traversing such uncertain terrain”¹⁰ and stated, “it is with reluctance that we embark into the ever uncertain precincts of legislative history.”¹¹ Courts have also noted that “[e]stimable jurists have called into question the value of legislative history”¹² and that “[t]he Supreme Court has warned time and again about the manifest dangers of resorting to legislative history.”¹³ Opinions have referred to legislative history as a “morass”¹⁴ and as “legislative jetsam.”¹⁵ Four times, courts of appeals have taken up Justice Scalia’s characterization of the use of legislative history as “psychoanalyzing those who enacted” legislation.¹⁶ Eight decisions quoted or paraphrased Justice Scalia’s “cocktail party” quip.¹⁷

⁹ *Oregon v. Ashcroft*, 368 F.3d 1118, 1136 (9th Cir. 2004), citing *Chisom v. Roemer*, 501 U.S. 380, 406 (1991) (Scalia J., dissenting).

¹⁰ *Aviall Services, Inc. v. Cooper Industries, Inc.*, 263 F.3d 134, 151 (5th Cir., 2001) (Wiener J., dissenting) *reversed on hearing en banc*, 312 F.3d 677 (2002) *reversed* 125 S.Ct. 577 (2004).

¹¹ *Teamsters v. Interstate Commerce Com’n*, 801 F.2d 1423, 1428 n.4 (D.C. Cir., 1986), citing, *inter alia*, *Hirschey*, 777 F.2d at 7-8 and n. 1 (Scalia J., concurring).

¹² *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1300 n. 3 (9th Cir. 1998), citing, *inter alia*, *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 616-23 (1998) (Scalia J., concurring).

¹³ *Florida Power & Light Co. v. United States*, 846 F.2d 765, 779 n. 8 (D.C. Cir. 1988) (Starr, dissenting), citing, *inter alia*, *United Savings A’ssn of Texas v. Timbers of Inwood*, 486 U.S. 365 (1988).

¹⁴ *United States v. Li*, 206 F.3d 56, 73 (1st Cir. 2000) (Torruella J., concurring in part, dissenting in part), citing *Immigration & Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J. concurring).

¹⁵ *United States v. Koyomejian*, 970 F.2d 536, 543 (9th Cir. 1992) (Kozinski J., Concurring).

¹⁶ The law is what the law says, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it.” *Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia J., concurring). This statement is quoted or paraphrased in the following opinions: *Farm Credit Midsouth PA v. Farm Fresh Catfish Co.*, 371 F.3d 450, 452 (8th Cir. 2004); *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190, 1199 (10th Cir. 1999); *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1306 (10th Cir. 1999) and *South Carolina Education A’ssn v. Campbell*, 883 F.2d 1251, 1261 (4th Cir. 1989).

¹⁷ “[T]he use of legislative history is akin to ‘entering a crowded cocktail party and looking over the heads of the guests for one’s friends.’” *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia J., concurring) (quoting Judge Harold Leventhal.) The court of appeals decisions that quoted or paraphrased this quip include: *CBS, Inc. v. Primetime 24 Joint Venture*, 245 F.3d 1217, 1227-28 (11th Cir. 2001); *Taylor v. United States*, 181 F.3d 1017, 1027 n. 1 (9th Cir. 1999); *Hoonah Indian Assn. V. Morrison*, 170 F.3d 1223, 1228 (9th Cir. 1999); *Leisnoi v. Stratman*, 154

One of the more colorful commentaries occurred in *Kansas City Southern Railway Co v.*

*McNamara*¹⁸ In that opinion, Judge Thomas Gibbs Gee wrote:

Judicial faithfulness to legislative will consists not in crude gropings into the consistently dark closets of legislative history but in a fine faithfulness to the mediating power of the legislative word.... If we do not take a legislative body at its word, we run the risk of substituting our own normative (and inherently non-democratic) views, of disrupting the strange political trade-offs that make democracy possible, of - worst of all - polluting a public language of relatively fixed meaning and reference, a language necessary for the public discourse we call self-government.¹⁹

In this single paragraph, the court manages to convey the notion that legislative history is both perverse, in some sense (“crude gropings in the dark closets”), and unhygienic (“polluting” the “public language”).

McNamara is by no means the only court of appeals decision to employ colorful imagery. Judge Alex Kozinski, in a concurring opinion in *United States v. Koyomejian*,²⁰ wrote that “[i]ndiscriminate use of legislative history, like the promiscuous use of antibiotics, only makes the disease of poor legislative draftsmanship worse and the cure more difficult to come by.”²¹ And in *Federal Election Commission v. Rose*,²² Judge Kenneth W. Starr wrote that “our expedition into the jungle of legislative history shows that one of the specimens the parties have captured and closely

F.3d 1062, 1070 (9th Cir. 1998); *United States v. Smith*, 155 F.3d 1051, 1056 n. 9 (9th Cir. 1998); *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1411 (6th Cir. 1996); *Broad v. Sealaska Corp.*, 85 F.3d 422, 435 (9th Cir. 1996) and *Nalle v. Commissioner of Internal Revenue*, 55 F.3d 189, 194 (5th Cir. 1995).

¹⁸ 817 F.2d 369 (5th Cir. 1987)

¹⁹ *Id.*, at 373, citing *Immigration & Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J. concurring).

²⁰ 970 F.2d 536 (9th Cir. 1992).

²¹ *Id.*, at 543 (Kozinski J., concurring).

²² 806 F.2d 1081 (D.C. Cir. 1986),

examined has the markings of a rogue elephant.”²³

Such colorful characterizations - legislative history as “crude gropings”, as pollution, as a “rogue elephant”, or likened to the “promiscuous use of antibiotics” - suggest, if nothing else, that Justice Scalia’s criticism has touched a nerve. They also suggest that Justice Scalia’s tendency to employ colorful metaphors enjoys a certain popularity.

Many of these judicial observations are conclusory in nature, having little, if any, analysis of the reasons why legislative history should be mistrusted. However, a number of opinions include extensive and quite thoughtful analyses.

In *Matter of Sinclair*,²⁴ Judge Frank Easterbrook, writing for a unanimous panel for the Seventh Circuit, offered an extended critique of the deficiencies of legislative history. He began by conceding that legislative history can be of value in interpreting statutes.

Legislation speaks across the decades, during which legal institutions and linguistic conventions change. To decode words one must frequently reconstruct the legal and political culture of the drafters. Legislative history may be invaluable in revealing the setting of the enactment and the assumptions its authors entertained about how their words would be understood. It may show, too, that words with a denotation “clear” to an outsider are terms of art, with an equally “clear” but different meaning to an insider. It may show too that the words leave gaps, for short phrases cannot address all human experience; understood in context, the words may leave to the executive and judicial branches the task of adding flesh to bones.²⁵

Immediately following this concession, however, came the following caustic criticism.

Quite different is the claim that legislative intent is *the* basis of interpretation, that the text of the law is simply evidence of the real rule. In such a regimen legislative history is not a way to understand the text but is a more authentic, because more proximate, expression of legislators’ will. One may say in reply that legislative history is a poor guide to legislators’ intent because it is written by the staff rather

²³ *Id.*, at 1089.

²⁴ 870 F.2d 1340 (7th Cir. 1989).

²⁵ *Id.*, at 1342.

than by members of Congress, because it is often losers' history ("If you can't get your proposal into the bill, at least write the legislative history to make it look as if you'd prevailed"), because it becomes a crutch ("There's no need for us to vote on the amendment if we can write a little legislative history"), because it complicates the task of execution and obedience (neither judges nor those whose conduct is supposed to be influenced by the law can know what to do without delving into legislative recesses, a costly and uncertain process). Often there is so much legislative history that a court can manipulate the meaning of a law by choosing which snippets to emphasize.... These and related concerns have led to skepticism about using legislative history to find legislative intent.²⁶

Clearly, Judge Easterbrook is drawing from Justice Scalia's criticism of legislative history here. He makes virtually the same observations - that committee reports are not written by members of Congress, that statements are inserted into the record in *lieu* of getting Congressional approval for statutory text, that judges misinterpret the law when they rely on "snippets" of legislative history. However, he does leave room for limited use of legislative history sources, provided that they do not become "*the* basis of interpretation."

Judge Alex Kozinski offered a similar critique in a concurring opinion in *Wallace v. Christensen*.²⁷

The fact of the matter is that legislative history can be cited to support almost any proposition, and frequently is. The propensity of judges to look past the statutory language is well known to legislators. It creates strong incentives for manipulating legislative history to achieve through the courts results not achievable during the enactment process. The potential for abuse is great.²⁸

In an extended footnote, Judge Kozinski quoted the exchange between Senators Armstrong and Dole, which then-Judge Scalia had highlighted in *Hirschey*.²⁹ According to Judge Kozinski, this

²⁶ *Id.*, at 1342-43.

²⁷ 802 F.2d 1539 (9th Cir. 1986).

²⁸ *Wallace*, at 1559 (Kozinski J., concurring).

²⁹ *Wallace*, at 1559 (Kozinski J., concurring), quoting *Hirschey v. FERC*, 777 F.2d 1, 7-8 n. 3 (D.C. Cir. 1985) (Scalia J. concurring) (quoting 128 Cong. Rec. S8659 (daily ed. July 19, 1982)). See the discussion of the *Hirschey* footnote in Chapter 4, pages xx - xxx.

exchange demonstrated the inutility of relying on committee reports as an indication of Congress' "understanding" of the purpose of a statute.

Reports are usually written by staff or lobbyists, not legislators; few if any legislators read the reports; they are not voted on by the committee whose views they supposedly represent, much less by the full Senate or House of Representatives; they cannot be amended or modified on the floor by legislators who may disagree with the views expressed therein. Committee reports that contradict statutory language or purport to explicate the meaning or applicability of particular statutory provisions can short-circuit the legislative process, leading to results never approved by Congress or the President.³⁰

Again, we see the same criticisms that Justice Scalia has leveled against legislative history - that it can "be cited to support almost any proposition", that courts's use of it "creates incentives" for unscrupulous legislators to manipulate the record, that its use can "short circuit the legislative process."

Occasionally, a court of appeals decision relies on extended quotation of a Justice Scalia opinion. An example is Judge Kozinski's long footnote in *Wallace* in which he quotes, *verbatim*, then-Judge Scalia's famous excerpt in *Hirshey* highlighting Senator Dole's ignorance of the contents of a committee report.³¹ In *Nalle v. Commissioner of Internal Revenue*,³² the court focused on the "public notice" implications of relying on legislative history. The plaintiffs in *Nalle* had relied on the text of a tax statute in taking a deduction for certain expenses. Internal Revenue acknowledged the validity of the plaintiffs' interpretation of the text, but contended that they should have consulted the statute's legislative history to determine its true meaning. The court rejected this argument, reasoning as follows.

³⁰ *Wallace*, 802 F.2d at 1560 (Kozinski J., concurring).

³¹ See *Wallace*, at 1559 n. 3 (Kozinski J., dissenting) (quoting *Hirshey*, 777 F.2d at 7-8 n. 3).

³² 997 F.2d 1134 (5th Cir. 1993).

to require similarly-situated taxpayers in the future to examine the legislative history before relying upon the plain-spoken word of Congress would be to teach what we believe to be

a false and disruptive lesson in the law. It says to the bar that even an "unambiguous [and] unequivocal" statute can never be dispositive; that, presumably under penalty of malpractice liability, the oracles of legislative history, far into the dimmy past, must always be consulted. This undermines the clarity of law, and condemns litigants (who, unlike us, must pay for it out of their own pockets) to subsidizing historical research by lawyers.³³

Here, the court let Justice Scalia's own words explicate its concerns with the use of legislative history. This practice of relying on extended quotes of Justice Scalia serves to embed his doctrine *verbatim* in the text of court of appeals opinions. In this instance, it also serves to insert language which had been in a concurring opinion (Justice Scalia's concurrence in *Conroy v. Askinoff*) into a majority opinion (the opinion in *Nalle*). A dissident voice thus finds expression as the voice of "the court."

There is an interesting phenomenon that has occurred in the wake of decisions such as *Sinclair* and *Wallace*. Once these circuit court opinions lay out the Scalia position in chapter-and-verse, they tend to become independent sources of authority for the textualist critique. Subsequent decisions will offer the same criticism; but, instead of citing a Justice Scalia opinion as the source for the argument, the later decision will cite to *Sinclair* or *Wallace*. Thus, *Sinclair's* critique of legislative history has been cited at least 25 times;³⁴ and the critique in *Wallace* has been cited at

³³ *Nalle*, at 1140, quoting *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia J., concurring).

³⁴ See *United States v. Sioux*, 362 F.3d 1241, 1246 (9th Cir. 2004); *United States v. Tomasino* 206 F.3d 739, 746 (7th Cir. 2000); *Public Citizen v. Carlin* 184 F.3d 900, 904 (D.C. Cir. 1999); *In re Prudential Insurance Co.*, 148 F.3d 283, 305 (3rd Cir. 1998); *United States v. Thomas*, 77 F.3d 989, 992 (7th Cir. 1996); *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 931 (7th Cir. 1996); *Mewson v. Friedman*, 76 F.3d 813, 816 (7th Cir. 1996); *United States v. National Steel Corp.*, 75 F.3d 1146, 1149 (7th Cir. 1996); *Kofa v. I.N.S.* 60 F.3d 1084, 1088 (7th Cir. 1995); *Strickland v. Commissioner*, 48 F.3d 12, 17 n. 3 (1st Cir. 1995); *Weddel v. Secretary HHS*, 23 F.3d 388, 391 (Fed. Cir. 1994); *Matter of Witkowski* 16 F.3d 739, 744 (7th Cir. 1994); *Hanson v. Espy* 8 F.3d 469, 478 n. 10 (7th Cir. 1993); *Friends of Boundary Waters Wilderness v. Robertson* 978 F.2d 1484, 1491 (8th Cir. 1992);

least six times.³⁵ One can call these opinions surrogates, since they serve as authority for the Scalia critique, without actually citing to his opinions.

Surrogate opinions sometimes cite each other. For example, *Sinclair* cites *Wallace* as an example of courts' justified "skepticism about using legislative history to find legislative intent."³⁶ *Leisnoi, Inc. v. Stratman*³⁷ cites *Puerta v. United States*³⁸ for the proposition that "the use of legislative history as a tool for statutory interpretation suffers from a host of infirmities."³⁹ Certainly, that notion did not originate with *Puerta*. However, *Puerta* did include the following analysis.

The legislative history suffers the usual infirmity, that it was not passed by both houses of Congress and signed into law by the President. For that reason, it is not the law. The staff person who wrote the House committee's legislative history might have represented accurately what all the House committee members meant to say in the bill but did not, which would give strength to *Puerta's* argument. Alternatively, the staff person might have been assigned to write what some committee members wanted in the bill but did not get, or to throw a bone to some pro-privacy lobbyist whose preferred language was rejected by the House committee. The staff person could have written the "history" before the bill was drafted, anticipating language that did not get into the bill. Legislative history need not be written with the same

Herrmann v. Cencom Cable Associates, Inc., 978 F.2d 978, 982 (7th Cir. 1992); *N.A.A.C.P. v. American Family Mutual Ins. Co.*, 978 F.2d 287, 294 (7th Cir. 1992); *Broadcast Music, Inc. v. Claire's Boutiques, Inc.*, 949 F.2d 1482, 1491 (7th Cir. 1991); *Environmental Defense Fund, Inc. v. City of Chicago* 948 F.2d 345, 350-51 (7th Cir. 1991) *vacated sub nom City of Chicago v. Environmental Defense Fund, Inc.*, 506 U.S. 982 (1992); *Continental Can Co., Inc. v. Chicago Truck Drivers*, 916 F.2d 1154, 1157-58 (7th Cir. 1990); *United States v. South Half of Lot 7, City of Omaha*, 910 F.2d 488, 489-90 (8th Cir. 1990); *Davel v. Sullivan*, 902 F.2d 559, 562 (7th Cir. 1990); *American Hospital Assn. v. N.L.R.B.*, 899 F.2d 651, 657 (7th Cir. 1990); *In re Burns*, 887 F.2d 1541, 1545 (11th Cir. 1989); *Overseas Educ. Assn., Inc. v. Federal Labor Relations Authority*, 876 F.2d 960, 974 (D.C. Cir. 1989) (Buckley J., concurring) and *United States v. Pinto*, 875 F.2d 143, 144 (7th Cir. 1989).

³⁵ See *United States v. Sioux*, 362 F.3d 1241, 1247 n. 6 (9th Cir. 2004); *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1300 n. 3 (9th Cir. 1998); *Schalk v. Reilly*, 900 F.2d 1091, 1096 n. 4 (7th Cir. 1990); *United States v. Anderson*, 895 F.2d 641, 647 (9th Cir. 1990) (Kozinski J., dissenting); *Trustees of Iron Workers Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 213 n. 9 (7th Cir. 1989); *Matter of Sinclair*, 870 F.2d at 1342-43.

³⁶ *Matter of Sinclair*, 870 F.2d at 1343, citing *Wallace* 802 F.2d at 1559-60 (Kozinski J., concurring).

³⁷ 154 F.3d 1062 (9th Cir. 1998).

³⁸ 121 F.3d 1338, 1334 (9th Cir. 1997).

³⁹ *Leisnoi*, 154 F.3d at 1070, citing *Puerta*, 121 F.3d at 1344.

care, or scrutinized by those skeptical of the statute with the same care, as statutory language. There is no way for a House or Senate member outside the relevant committee to vote against legislative history, so there is not much reason for them or us to parse every sentence.⁴⁰

Puerta did not cite to any Scalia opinion. However, the analysis in *Puerta* is vintage Scalia analysis; and the court in *Leisnoi* relied on that analysis in *lieu* of citing a Scalia opinion. Both *Leisnoi* and *Puerta* have since become surrogate Scalia opinions in their own right. *Leisnoi*'s criticism of legislative history has been cited at least three times.⁴¹ *Puerta* has been cited at least three times, in addition to its citation in *Leisnoi*.⁴²

It is clear from this discussion that Justice Scalia's influence on courts of appeals vis-a-vis legislative history cannot be measured simply by examining decisions which cite directly to opinions that he has authored. There is another sub-group of "post-Scalia" opinions which are decidedly influenced by his critique, and courts of appeals sometimes cite or quote those "post-Scalia" opinions rather than citing an actual Scalia opinion.

DECISIONS THAT HAVE EXPLICITLY REJECTED JUSTICE SCALIA'S RATIONALE

Courts have not been unanimous in adopting Justice Scalia's criticism of legislative history. Two court of appeals decisions explicitly rejected a Scalia opinion because it was expressed in a minority opinion. In rejecting a House committee report, the district court in *Medical Society of*

⁴⁰ *Puerta*, 121 F.3d at 1344.

⁴¹ See *Rucker v. Davis*, 203 F.3d 627, 646 (9th Cir.) *rev'd sub nom. D.H.U.D. v. Rucker*, 535 U.S. 125 (2000); *American Rivers v. Federal Energy Regulatory Com'n*, 201 F.3d 1186, 1208 (9th Cir. 2000); *Taylor v. United States*, 181 F.3d 1017, 1027 n. 1 (9th Cir. 1999).

⁴² See *Unionbancal Corp. v. Commissioner of Internal Revenue*, 305 F.3d 976, 984 n. 44 (9th Cir. 2002); *Burns v. Stone Forest Industries, Inc.*, 147 F.3d 1182, 1184 (9th Cir. 1998); *Thompson v. Calderon*, 151 F.3d 918, 928 (9th Cir. 1998).

*New York v. Cuomo*⁴³ quoted Justice Scalia's concurrence in *Blanchard v. Bergeron*.⁴⁴

As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references ... were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant ... but rather to influence judicial construction⁴⁵

On appeal, the Second Circuit “recognize[d] that a healthy dose of cynicism is salutary when divining legislative intent.”⁴⁶ However, the court went on to note

that in *Blanchard* itself, the eight-member majority expressly relied on a Senate Report.... The Court has also said on another occasion that Committee Reports represent “the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation” and are therefore the “authoritative source for finding the Legislature’s intent.”⁴⁷

Thus, the circuit court rejected Justice Scalia’s opinion, since he had been outvoted 8-to-1 in *Blanchard*. And the court went on to explicitly approve of committee reports as a valid basis for statutory interpretation, based on two contrary Supreme Court opinions.

In *Duffield v. Robertson Stephens & Co.*,⁴⁸ the Ninth Circuit considered whether plaintiffs could be compelled to submit claims under the Civil Rights Act of 1991⁴⁹ to arbitration. The Ninth Circuit rejected a Fourth Circuit opinion on the issue,⁵⁰ in part because

⁴³ 777 F.Supp. 1157 (S.D.N.Y. 1991).

⁴⁴ 389 U.S. 87 (1989)

⁴⁵ *Id.*, at 1163, quoting *Blanchard v.* 389 U.S. at 98-99 (1989) (Scalia J., concurring).

⁴⁶ *Medical Society of State of N.Y. v. Cuomo*, 976 F.2d 812, 819 (2nd Cir. 1992).

⁴⁷ *Id.*, quoting *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)).

⁴⁸ 144 F.3d 1182 (9th Cir. 1998).

⁴⁹ 42 U.S.C. § 2000e, *et seq.*

⁵⁰ *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 880-82 (4th Cir. 1996).

[t]he Fourth Circuit ... ignored the reasoning of eight Justices on the subject of statutory analysis, relied on a separate opinion by Justice Scalia, and partially on the basis of that reasoning decided to disregard the legislative history of the 1991 Civil Rights Act.⁵¹

The Scalia opinion upon which the Fourth Circuit had relied was a concurrence in *Thompson v. Thompson*.⁵² The Ninth Circuit rejected Justice Scalia's reasoning as set forth in that concurrence since an eight-judge Supreme Court majority had also rejected that reasoning, and had expressly relied on legislative history in interpreting the 1991 Civil Rights Act.⁵³

Thus, the courts of appeals in both *Medical Society* and in *Duffield* explicitly rejected a Scalia opinion on the illegitimacy of legislative history and went on to rely on proffered legislative history in interpreting the statute at issue. In both *Medical Society* and *Duffield*, the court rejected Justice Scalia's take on legislative history for the simple reason that it was a minority opinion.

A few decisions have explicitly contested the merits of Justice Scalia's critique. In *Sundstrand Corp. v. Commissioner of Internal Revenue*,⁵⁴ Chief Judge Richard A. Posner of the Seventh Circuit offered a thoughtful defense of legislative history as an aid in interpreting statutes. Judge Posner did not deny the potential pitfalls in relying on legislative history.

The history of a statute can, it is true, be misused. The term "legislative history" picks up some peculiarly unreliable "historical" guides to meaning - the statement of a single legislator, on a day when the chamber may have been empty; a statement not made on the floor at all, but inserted in the record of the proceedings later; a passage

⁵¹ *Duffield*, 144 F.3d at 1192, citing *Austin*, 78 F.3d at 883 (citing *Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (Scalia J., concurring)).

⁵² 484 U.S. 174, 188 (Scalia J., concurring).

⁵³ The Ninth Circuit subsequently overruled *Duffield*. In *E.E.O.C. v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742 (9th Cir. 2003), the court held that the Civil Rights Act of 1991 does not preclude the enforcement of compulsory arbitration clauses. The court in *Luce* rejected the legislative history relied on in *Duffield*, reasoning that the statute was unambiguous. *Luce*, at 753-54. The *Luce* court did not mention Justice Scalia's concurrence in *Thompson*. *Id.*

⁵⁴ 17 F.3d 965 (7th Cir. 1994).

in a committee report that may have been inserted by a lobbyist or a committee staff member and not scrutinized carefully by other members of the committee; a passage inserted by an opponent of the bill, designed to impart a particular “spin” to it-or by a proponent, designed as an invitation to a sympathetic court to “restore” a provision that had been deleted in a compromise with opponents.⁵⁵

However, he suggested that the textualist critique has “possibly [been] overstated”, citing Justice Breyer’s defense of a reasoned use of legislative history.⁵⁶ And he contended that an unthinking adherence to a textualist approach can also lead to misinterpretation of a statute.

[T]here is no principle of interpretation that if the meaning of a word, phrase, or sentence plucked out of the heart of a statute seems clear if you do not read or think beyond it you must accept this as the meaning of the statute. On the contrary, taking a word, a phrase, or a sentence out of context is as great a sin in statutory interpretation as it is in ordinary argument. Slicing a statute into phrases while ignoring their contexts - the surrounding words, the setting of the enactment, the function a phrase serves in the statutory structure - is a formula for disaster. But there is context and there is context. Surrounding sentences are context for interpreting a sentence, but so is the history behind the sentence-where the sentence came from, what problem it was written to solve, who drafted it, who opposed its inclusion in the statute.⁵⁷

According to Judge Posner, legislative history can be particularly useful

to illuminate a statute that may be ambiguous not because any individual sentence or clause in it is ambiguous but because some of its sentences or clauses don't fit together clearly or don't mesh with rather obvious realities of the subject matter of the statute.⁵⁸

In other words, judges need to use common sense. There is no need to opt for either a strict textualist approach or for an approach that condones the use of legislative history in every context. Judges are practiced at applying statutes to the particular facts of a given case. This is what they do.

⁵⁵ *Id.*, at 967.

⁵⁶ *Ibid.*, citing Stephen Breyer, “On the Uses of Legislative History in Interpreting Statutes”, 65 *So. Cal. L.Rev.* 845 (1992).

⁵⁷ *Sundstrand*, 17 F.3d at 967 (internal citations and quotation marks omitted).

⁵⁸ *Id.*, at 967-68.

To reject legislative history *per se* as a source for statutory interpretation is neither necessary nor desirable.

Whether and How Legislative History Gets Used

It is useful to distinguish between what courts *say* about legislative history and what courts *do* with legislative history in their opinions. A close examination of the decisions containing a general criticism of legislative history reveals a surprising conclusion - there are very few majority opinions that reject otherwise relevant legislative history on the ground that legislative history generally should not be trusted. Rather, the opinions break down into a number of categories:

- Decisions in which the general criticism is expressed in a dissenting or concurring opinion, and is not the view of the panel's majority.
- Decisions that criticize legislative history where there is no relevant legislative history to consider.
- Decisions that criticize legislative history, but then go on to consider the relevant legislative history.
- Decisions that criticize legislative history generally, but in fact reject proffered legislative history based on a much narrower rationale.

These categories share one salient characteristic. In each instance, there is an opinion which criticizes legislative history generally, *but* that general rationale is irrelevant to the court's decision as to whether to make use of proffered legislative history.

Criticism in Dissents and Concurrences

The general criticism of legislative history was expressed in a dissenting opinion in thirteen

cases,⁵⁹ and in a concurring opinion in five cases.⁶⁰

In *Princeton University Press v. Michigan Document Services, Inc.*,⁶¹ Judge James L. Ryan delivered an impassioned appeal against the use of legislative history in which he quoted Justice Scalia four times. “The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.”⁶² And, again, “Committee Reports are unreliable ‘as a genuine indicator of congressional intent’ and ‘as a safe predictor of judicial construction.’”⁶³ And again, “Committee Reports do not accurately indicate congressional intent because they do not ‘necessarily say anything about what Congress as a whole thought,’ even if all the members of the Committee ‘actually adverted to the interpretive point at issue ... [and] were in unanimous agreement on the point.’”⁶⁴ And again, “the use of legislative history [is] the equivalent of entering a crowded

⁵⁹ *United States v. Li*, 206 F.3d 56, 73 (1st Cir. 2000) (Torruella J., concurring in part, dissenting in part); *Aviall Services v. Cooper Industries*, 263 F.3d 134, 151 (5th Cir. 2001) (Weiner J., dissenting); *Mills v. Director, Office of Workers’ Compensation*, 877 F.2d 356, 362-63 (5th Cir. 1989) *en banc* (Duhe J., dissenting); *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1411-12 (6th Cir. 1996) *en banc* (Ryan J., dissenting); *Johnson City Medical Center v. United States*, 999 F.2d 973, 984 and n. 8 (6th Cir. 1993) (Batchelder J., dissenting); *Oregon v. Ashcroft* 368 F.3d 1118, 1136 (9th Cir. 2004) (Wallace J., dissenting); *Taylor v. United States*, 181 F.3d 1017, 1027 n. 1 (9th Cir. 1999) *en banc* (Wardlaw J., dissenting); *Broad v. Sealaska Corp.*, 85 F.3d 422, 435 (9th Cir. 1996) (Kleinfeld J., dissenting); *In re Boeh*, 25 F.3d 761, 770-72 (9th Cir. 1994) (Norris J., dissenting); *Garcia v. Spun Steak Co.*, 13 F.3d 296, 300 (9th Cir. 1996) (Reinhart J., dissenting from denial of rehearing *ne banc*); *United States v. Anderson*, 895 F.2d 641, 647 (9th Cir. 1990) (Kozinski J., dissenting); *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1526-27 (D.C.Cir. 1988) (Starr J., dissenting); *Florida Power & Light Co., Inc. v. United States*, 846 F.2d 765, 779 n. 8 (D.C. Cir. 1988) (Starr J., dissenting).

⁶⁰ *Rumsay Indian Rancheria v. Wilson*, 64 F.3d 1250, 1260 (9th Cir. 1994) (Wallace J., concurring); *United States v. Koyomejian*, 970 F.2d 536, 543 (9th Cir. 1992) *en banc* (Kozinski J., concurring); *United States v. O’Mara*, 963 F.2d 1288, 1294 n. 3 (9th Cir. 1992) (Kozinski J., concurring); *Wallace v. Christensen*, 802 F.2d 1539, 1557-1560 and n. 3 (9th Cir. 1986) *en banc* (Kozinski J., concurring in judgment); *Overseas Education A’ssn v. Federal Labor Relations Auth.*, 876 F.2d 960, 974 (D.C. Cir. 1989) (Buckley J., concurring).

⁶¹ 99 F.3d 1381 (6th Cir. 1996).

⁶² *Ibid.*, quoting *Conroy v. Aniskoff, Jr.*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

⁶³ *Princeton University Press*, at 1411, quoting *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 617 (1991) (Scalia J., concurring).

⁶⁴ *Princeton University Press*, at 1411, quoting *Wisconsin Public Intervenor*, 501 U.S. at 620.

cocktail party and looking over the heads of the guests for one's friends.’”⁶⁵ While quite unequivocal in its criticism of legislative history, this opinion had no impact on the outcome of the case, since it was rendered as a dissent. *Princeton University Press* was an *en banc* decision; of the thirteen Circuit Judges deciding the case, only one other judge, Martha Craig Daugherty, joined in Judge Ryan’s dissent.⁶⁶ The majority opinion in fact made extensive use of legislative history, basing its holding in large part on a set of guidelines that “the House and Senate Conferees explicitly accepted ... ‘as part of their understanding’” of the statute.⁶⁷

As discussed above,⁶⁸ Judge Kozinski’s opinion in *Wallace v. Christensen*⁶⁹ is a scathing attack on courts’ use of legislative history. Judge Kozinski contends “that legislative history can be cited to support almost any proposition, and frequently is” and that litigants often manipulate legislative history “to achieve through the courts results not achievable during the enactment process.”⁷⁰ The opinion is also notable as one of the few opinions to quote *in toto* then-Judge Scalia’s notorious footnote in *Hirschey v. FERC*,⁷¹ including the extended exchange between Senators Armstrong and Dole,⁷² which, according to Judge Kozinski, demonstrated that “few if any

⁶⁵ *Princeton University Press*, at 1411, quoting *Conroy*, 507 U.S. at 519 (Scalia J., Concurring).

⁶⁶ See *Princeton University Press*, at 1383.

⁶⁷ *Princeton University Press*, at 1390, quoting H.R. Conf. Rep. No. 1733, 94th Cong. 2d Sess., at 70 (1976).

⁶⁸ See *supra*, pages 4-5.

⁶⁹ 802 F.2d 1539 (9th Cir. 1986).

⁷⁰ *Id.*, at 1559 (Kozinski J., concurring in the judgment.)

⁷¹ 777 F.2d 1 (D.C. Cir. 1985).

⁷² *Wallace*, at 1559 n. 3 (Kozinski J., concurring in the judgment), quoting *Hirschey*, at 7-8 n. 1 (quoting 128 Conc. Rec. S8659 (daily ed. July 19, 1982)).

legislators read [committee] reports.⁷³

This opinion has been cited numerous times in court of appeals decisions.⁷⁴ Yet it is a minority opinion. *Wallace* is an *en banc* decision. Of the eleven circuit judges deciding the case, only one, Judge J. Blaine Anderson, joined Judge Kozinski's opinion, which concurred in the judgment. As in *Princeton University Press*, the majority in *Wallace* made extensive use of legislative history, devoting almost three full pages to a discussion of a Senate Report, a Joint House-Senate Conference Report and a congressman's floor remarks.⁷⁵

The minority opinions in *Wallace* and *Princeton University Press* are notable in that the criticism of legislative history was set forth at some length, and in rather caustic terms. However, there are numerous other dissents or concurrences that include critiques of legislative history, citing to a Justice Scalia opinion. Judge Alice M. Batchelder, dissenting in *Johnson City Medical Center v. United States*⁷⁶ contended, "[w]hen excavating the legislative history one is *bound* to find conflicting opinions and evidence that at least arguably create 'ambiguity' or imprecision in the statute."⁷⁷ In *Aviall Services, Inc. v. Cooper Industries, Inc.*,⁷⁸ Judge Jaques L. Weiner Jr., dissenting,

⁷³ *Id.*, at 1559-60.

⁷⁴ The following decisions cite or quote Judge Wallace's criticism of legislative history in *Wallace*: *United States v. Sioux*, 362 F.3d 1241, 1246 (9th Cir. 2004); *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1300 n. 3 (9th Cir. 1998); *Schalk v. Reilly*, 900 F.2d 1091, 1096 n. 4 (7th Cir. 1990); *United States v. Anderson*, 895 F.2d 641, 647 (9th Cir. 1989); *Iron Workers' Local 473 Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 213 n. 9 (7th Cir. 1989) and *Matter of Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989).

⁷⁵ *Id.*, at 1543-46, citing S.Rep. No. 94-369, 94th Cong., 2d Sess., reprinted in 1976 U.S.C.C.A.N. 335; Joint House-Senate Conference Report No. 94-838, 94th Cong., 2d Sess., reprinted in 1976 U.S.C.C.A.N. 351 and 121 Cong. Rec. 15705 (1975) (Statement of Rep. Drinan).

⁷⁶ 999 F.2d 973 (6th Cir. 1993).

⁷⁷ *Id.*, at 984 (Batchelder J., dissenting), citing *Edwards v. Aguillard*, 482 U.S. 578, 638 (1987) (Scalia J., dissenting.) (Emphasis in original).

⁷⁸ 263 F.3d 134 (5th Cir. 2001), reversed in part, 312 F.3d 677 (2002) (*en banc*), reversed *sub nom.* *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S.Ct. 577 (2004).

asserted that “[t]he majority’s resort to legislative history to shore up its problematic reading of the statute aptly demonstrates the pitfalls of traversing such uncertain terrain....”⁷⁹ In *Mills v. Director*,⁸⁰

Judge John M. Duhe, Jr., dissenting, quoted Justice Scalia.

When legislative history is examined in an attempt to discern legislative intent it must be used with great caution. Mr. Justice Scalia concurring in *Blanchard v. Bergeron* warned against ... “give[ing] legislative force to each snippet of analysis, and even every case citation, in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind.”⁸¹

In *Oregon v. Ashcroft*⁸², Senior Judge J. Clifford Wallace, dissenting, wrote:

Lacking a textual hook for its position, the majority attempts to patch the holes in its argument with inconclusive fragments of legislative history. Discerning congressional intent from legislative history is a speculative enterprise under the best of circumstances, and the risk of error is compounded in a case such as this when legislators' published statements do not squarely address the question presented.⁸³

Judge Wallace cited Justice Scalia’s dissent in *Chisom v. Roemer* in support of his criticism.⁸⁴

Each of these judicial statements emphatically dismiss legislative history as a credible source for discerning the meaning of a statute. None of the statements has the force of law since they are all expressed in dissents or concurrences. Since each of these minority opinions criticize the majority for using legislative history, one might expect that the majority opinion would offer a defense of its use of legislative history. Yet, most often what one finds is that the majority “turns the other cheek.” In other words, it simply uses legislative history without giving any rationale for

⁷⁹ *Id.*, at 151 (Weiner J., dissenting.)

⁸⁰ *Mills v. Director, Office of Workers' Compensation Programs*, 877 F.2d 356 (5th Cir. 1989).

⁸¹ *Id.*, at 363 (Duhe J., dissenting), quoting *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Other internal citation omitted).

⁸² 368 F.3d 1118 (9th Cir. 2004).

⁸³ *Id.*, at 1136 (Wallace J., dissenting).

⁸⁴ *Ibid.*, citing *Chisom v. Roemer*, 501 U.S. 380, 406 (1991) (Scalia J., dissenting).

why such use is appropriate. The unspoken inference is that there is no need to justify using this tool of statutory construction - that criticism of its use is so beyond the pale of reasoned discourse that no response is required. Thus, one ignores the carping of the dissent or concurrence much as one might ignore a rambunctious child at the dinner table.

For example, the majority in *Wallace* chose not to respond directly to Judge Kozinski's impassioned attack on legislative history opting to simply discuss - in some detail - relevant committee reports and floor statements.⁸⁵ Likewise, the majority opinion in *Mills* did not directly respond to Judge Duhe's criticism. It simply analyzed the relevant legislative history - in some detail - and then based its statutory interpretation on that analysis.⁸⁶

When Judge Andrew J. Kleinfeld, dissenting in *Broad v. Sealaska Corp.*,⁸⁷ quoted Justice Scalia, comparing the use of legislative history to looking for one's friends at a cocktail party,⁸⁸ the majority did not take the bait. Instead it simply offered its extended analysis of the relevant House Explanatory Statement.⁸⁹ When Judge Starr, dissenting in *Save Our Cumberland Mountains, Inc. v. Hodel*⁹⁰ reiterated his "frequently voiced concerns as to the relevance and helpfulness of legislative

⁸⁵ *Wallace*, 802 F.2d at 1545-46, citing *Joint House-Senate Conference Report No. 94-838*, 94th Cong. 2d Sess. 19, 20, reprinted in 1976 U.S.C.C.A.N. 351, 353; 122 Cong.Rec. 5164 (1976) (Statement of Rep. Drinan); 121 Cong.Rec. 15704 (1975) (Statement of Rep. Hutchinson) and 121 Cong. Rec. 15709 (1975) (statement of Rep. Kindness).

⁸⁶ *Mills*, 877 F.2d at 359-60.

⁸⁷ 85 F.3d 422 (9th Cir. 1996).

⁸⁸ *Id.*, at 435 (Kleinfeld J., dissenting), quoting *Conroy v. Askloff*, 507 U.S. 511, 519 (1993) (Scalia J., dissenting).

⁸⁹ *Broad*, 85 F.3d at 427-28, citing House Explanatory Statement to Alaska Native Claims Settlement Act, 133 Cong. Rec. H11,933 (Daily ed. Dec. 21, 1987), reprinted in 1987 U.S.C.C.A.N. 3299, 3307-08.

⁹⁰ 857 F.2d 1516 (D.C. Cir. 1988).

history”;⁹¹ the majority did not respond; instead it simply discussed the relevant Senate Report.⁹²

Occasionally, the court acknowledges potential flaws in the use of legislative history for statutory analysis, but justifies its use in the particular case. For example, in *Aviall*, the majority admitted that “legislative history sometimes is of limited value due to its potential ambiguity.” The court asserted, however, that “it can nevertheless be useful when it overwhelmingly supports one side, as it does in this case.”⁹³ And the majority opinion in *Princeton Press* responded to Judge Ryan’s diatribe, asserting that

[t]here are strong reasons to consider this legislative history. The statutory factors are not models of clarity; and ... courts have often turned to the legislative history when considering fair use questions.⁹⁴

The “bottom line” is that, in all of these cases, the Scalia-based criticism of legislative history did not carry the day. The majority opinion relied on legislative history sources, and those sources were often decisive to the court’s statutory analysis.

Decisions That Criticize Legislative History Where there Is No Legislative History to Consider

Four decisions criticized the use of legislative history generally even though there was no significant legislative history to consider.⁹⁵ Thus, *Gordon v. United Van Lines, Inc.*⁹⁶ observed, “[t]here is virtually no legislative history for the statute, a circumstance of no great concern for those

⁹¹ *Id.*, at 1526, citing, *inter alia*, *United States v. Taylor*, 487 U.S. 326, 344-46 (Scalia J., concurring).

⁹² *Save Our Cumberland*, 857 F.2d at 1518-19, discussing S. Rep. No. 1011, 94th Cong., 2nd Sess. (1976) reprinted in 1976 U.S.C.C.A.N. 5909.

⁹³ *Aviall Services, Inc.*, 263 F.3d at 140.

⁹⁴ *Princeton Press*, 99 F.3d at 1381.

⁹⁵ *Gordon v. United Van Lines, Inc.*, 130 F.3d 282, 286 (7th Cir. 1997); *National Resources Defense Council, Inc. v. Environmental Protection Agency*, 822 F.2d 104, 113-14 (D.C. Cir. 1987); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1189 (10th Cir. 1999) and *United States v. O’Mara*, 963 F.2d 1288, 1292-94 (9th Cir. 1992) (Kozinski J., concurring).

⁹⁶ 130 F.3d 282 (7th Cir. 1997).

who distrust this source of interpretation.”⁹⁷ Likewise, in *National Resources Defense Council, Inc. v. Environmental Protection Agency*,⁹⁸ the court asserted that “[r]epair to debates and reports and other precursors to law is ever fraught with difficulty”⁹⁹ before noting that there was “little in the [legislative] history of this enactment that is instructive....”¹⁰⁰

The central issue in *Forest Guardians v. Babbitt*¹⁰¹ was whether the Secretary of Interior had “unlawfully withheld” a critical habitat designation, based on his excessive delay in issuing such a designation. The court observed:

notwithstanding the debate concerning the propriety of finding statutory meaning by reference to legislative history, the floor debates and committee reports provide little guidance regarding any possible distinction between “unlawfully withheld” and “unreasonably delayed.”¹⁰²

In his concurring opinion in *United States v. O’Mara*,¹⁰³ Judge Kozinski reasoned that a *mens rea* requirement should be read into a criminal statute that is silent on the issue, “unless the structure or language of the text (or perhaps the legislative history) reveals a contrary congressional intent.”¹⁰⁴ A footnote to this assertion stated, “given the disfavor into which legislative history has justly fallen, it is questionable whether reliance on legislative history in this context is still appropriate.”¹⁰⁵ The

⁹⁷ *Id.*, at 286.

⁹⁸ 822 F.2d 104 (D.C. Cir. 1987).

⁹⁹ *Id.*, at 113.

¹⁰⁰ *National Resources Defense Council, Inc.*, at 113-14.

¹⁰¹ 174 F.3d 1178 (10th Cir. 1999).

¹⁰² *Id.*, at 1189.

¹⁰³ 963 F.2d 1288.

¹⁰⁴ *Id.*, at 1294-95.

¹⁰⁵ *Id.*, at 1295 n. 4.

footnote went on to note that, in the case before the court, the statute’s “legislative history tells us nothing about whether Congress intended a *mens rea* requirement.”¹⁰⁶ Thus, “the disfavor to which legislative history has justly fallen” was of no consequence to Judge Kozinski’s opinion, given that there was no relevant legislative history to consider.

Each of these decisions cited or quoted at least one Scalia opinion in support of the general contention that legislative history is an unreliable source in statutory construction; in each case, that contention was superfluous, since there was no relevant legislative history for the court to consider.

Decisions That Criticize and Then Use Legislative History

Another type of gratuitous criticism occurs when the court expounds on the general inadequacy of legislative history as a source for statutory interpretation, then proceeds to discuss, often at some length, the relevant legislative history. This occurred in twenty-four opinions.¹⁰⁷

*Servicios-Expoarma, C.A. v. Industrial Maritime Carriers, Inc.*¹⁰⁸ addressed the question of

¹⁰⁶ *Id.*

¹⁰⁷ *United States v. Li*, 206 F.3d 56, 73 (1st Cir. 2000) (Torruella J., dissenting); *Strickland v. Commissioner, Maine Dept. of Human Services*, 48 F.3d 12, 17 (1st Cir. 1995); *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350, 1365 (2nd Cir. 1992) *vacated as moot sub nom. Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993); *Austin v. Owens-Brockway*, 78 F.3d 875, 881-82 (4th Cir. 1996); *Rehabilitation A’ssn of Virginia, Inc. v. Kozlowski*, 42 F.3d 1444, 1455, 1457 and n. 11 (4th Cir. 1994); *Chesapeake & Potomac Telephone Co. v. United States*, 42 F.3d 191, 201 n. 32 (4th Cir. 1994); *Servicios-Expoarma v. Industrial Maritime Carriers, Inc.*, 135 F.3d 984, 990-93 and n. 7 (5th Cir. 1998); *United States v. Investment Enterprises*, 10 F.3d 263, 274 n. 27 (5th Cir. 1993); *United States v. Hudspeth*, 42 F.3d 1015, 1022-24 and n. 13 (7th Cir. 1994); *American Rivers v. Federal Energy Regulatory Com’n*, 201 F.3d 1186, 1208-09 and n. 26 (9th Cir. 1993); *Taylor v. United States*, 181 F.3d 1017, 1027 n. 1 (9th Cir. 1999) (Wardlaw J., dissenting); *Hoonah Indian A’ssn*, 170 F.3d 1223, 1228-29 (9th Cir. 1999); *Leisnoi*, 154 F.3d 1062, 1070-71 (9th Cir. 1998); *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1299-1302 and n. 3 (9th Cir. 1998); *Broad v. Sealaska Corp.*, 85 F.3d 422, 435 (9th Cir. 1996); *In re Boeh*, 25 F.3d 761, 771-72 (9th Cir. 1994); *United States v. Anderson*, 895 F.2d 641, 647 (9th Cir. 1990) (Kozinski J., dissenting); *Saratoga Savings and Loan A’ssn v. Federal Home Loan Bank Board*, 879 F.2d 689, 693 (9th Cir. 1989); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1189 (10th Cir. 1999); *Love v. Delta Airlines*, 310 F.3d 1347, 1395 n. 15 (11th Cir. 2001); *Florida Power & Light Co. v. United States*, 846 F.2d 765, 779 and n. 8 (D.C. Cir. 1988) (Starr J., dissenting); *American Mining Congress v. Environmental Protection Agency*, 824 F.2d 1177, 1179, 1191 and n. 22 (D.C. Cir. 1987); *American Civil Liberties Union*, 823 F.2d 1554, 1583 (D.C. Cir. 1987) (Starr J., dissenting) and *Teamsters v. Interstate Commerce Com’n*, 801 F.2d 1423, 1428 and n. 4 (D.C. Cir. 1986).

¹⁰⁸ 135 F.3d 984 (5th Cir. 1998).

when “delivery” of goods occurs, for statute of limitations purposes, under the Carriage of Goods by Sea Act (COGSA). The court acknowledged a “general objection to the use of legislative history in judicial interpretation of statutes”¹⁰⁹, and, in a footnote, quoted Justice Scalia’s monograph, *A Matter of Interpretation: Federal Courts and the Law*¹¹⁰

“My view that the objective indication of the words, rather than the intent of the legislature, is what constitutes the law leads me, of course, to the conclusion that legislative history should not be used as an authoritative indication of the statute’s meaning.”

Further, the use of legislative history "does not even make sense for those who accept legislative intent as the criterion. It is much more likely to produce a false or contrived result than a genuine one." ¹¹¹

However, the court then engaged in an extended discussion of the legislative history of COGSA. It noted that the House Committee on Merchant Marine and Fisheries “seemed to agree that under COGSA, ‘delivery’ was accomplished by relinquishing the goods to the land carrier, who is not necessarily the ultimate consignee.”¹¹² Thus, the court, despite its professed reservations, relied on the legislative history of COGSA in reaching its ultimate holding.

In *United States v. Hudspeth*,¹¹³ the Seventh Circuit considered whether the defendant’s commission of three burglaries within thirty minutes qualified him for sentencing as a “career criminal.” The court observed that “resort to legislative history is usually selective and thus of little

¹⁰⁹ *Ibid.*

¹¹⁰ (Princeton, 1997).

¹¹¹ *Servicios-Expoarma, C.A.*, at 990 n. 7, quoting *A Matter of Interpretation*, at 29-32 (internal page citations omitted from quotation).

¹¹² *Id.*, at 992.

¹¹³ 42 F.3d 1015 (7th Cir. 1994).

value if any when interpreting a statute.”¹¹⁴ In support of this assertion, the court quoted Justice Scalia’s concurring opinion in *Conroy v. Aniskoff*:

"The greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislators.... If one were to search for an interpretive technique that, on the whole, was more likely to confuse than to clarify, one could hardly find a more promising candidate than legislative history."¹¹⁵

However, immediately following this disclaimer, the court provided an extended discussion of the legislative history of the statutory provision at issue. It noted that Congress considered amending the sentencing provision after a defendant had been sentenced as a career criminal based on a single robbery involving six different victims. Congress intended such an incident to count as only one crime. However,

Senator Biden explained that the amendment would serve to punish career offenders, even for multiple offenses committed on the same night, so long as the crimes are not simultaneous in nature.¹¹⁶

Based in part on this legislative history, the court held that the defendant was properly sentenced as a career criminal.¹¹⁷ Thus, despite its disclaimer, the Seventh Circuit relied on a careful analysis of legislative history in construing the career criminal sentencing statute.

*Leisnoi, Inc. v. Stratman*¹¹⁸ involved a provision in the Alaska Native Claims Settlement Act related to mining of land in the vicinity of a native village. The plaintiff contended that the Secretary of Interior’s interpretation of the provision was inconsistent with its legislative history. In response,

¹¹⁴ *Id.*, at 1023 n. 13.

¹¹⁵ *Id.*, at 1023 n. 13, quoting *Conroy*, 507 U.S. 511, 519 (1993).

¹¹⁶ *U.S. v. Hudspeth*, 42 F.3d at 1023, citing 134 Cong. Rec. S17,370 (daily ed. Nov. 10, 1988).

¹¹⁷ *U.S. v. Hudspeth*, at 1023-24.

¹¹⁸ 154 F.3d 1062 (9th Cir. 1998).

the court noted that “the use of legislative history as a tool for statutory interpretation suffers from a host of infirmities.”¹¹⁹ The court also cited Justice Scalia’s “cocktail party” comment in *Conroy*.¹²⁰ Having expressed its general reservations, the court examined the legislative history, concluding that “the language” in the report cited by the plaintiffs “is ambiguous and arguably consistent with the Secretary’s interpretation of the statute.”¹²¹

One of the most consistent critics of legislative history, Judge Kenneth W. Starr, formerly of the District of Columbia Court of Appeals, authored three opinions in which he criticized, generally, the use of legislative history, and then proceeded to rely on it in his analysis. In each opinion, Judge Starr offered a somewhat different justification for his use of legislative history in light of its perceived deficiencies.

Dissenting in *Florida Power and Light Co. v. Nuclear Regulatory Commission*,¹²² Judge Starr cited a post-enactment statement by one of the sponsors of the statute under consideration. In a footnote, he offered the following explanation for referring to this legislative history.

The Supreme Court has warned time and again about the manifest dangers of resorting to legislative history. (Perhaps most noteworthy of late are recent Court opinions authored by Justices Marshall and Scalia suggesting the *irrelevance* of legislative history.) And those dangers are, of course, at their height when repair is had to post-enactment statements by legislators.

Without abandoning those well-established concerns, I note by way of modest defense of my invocation of Senator Simpson’s statements that Congress has of late

¹¹⁹ *Id.*, at 1070, quoting *Puerta v. United States*, 121 F.3d 1338, 1334 (9th Cir. 1997) (internal quotation marks and citation omitted.)

¹²⁰ *Id.*, quoting *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia concurring in judgment).

¹²¹ *Lesnoi, Inc.*, at 1070-71, citing H. Rep. Rept. No. 94-729, at 26 (1975), reprinted in 1975 U.S.C.C.A.N. 2376, 2393.

¹²² 846 F.2d 765 (D.C. Cir 1988).

been passing smorgasbord measures of distinctly substantive bite in omnibus pieces of appropriations legislation. After the dust settles, questions then have to be sorted out, sometimes in court.... It may well be, then, that ... the courts should not close their eyes to what may well be, in practical terms, the *only* legislative history available if Congress proceeds to conduct its business in accord with more recent procedural innovations.¹²³

Thus, Judge Starr committed the double textualist “sin” of citing not only legislative history, but post-enactment legislative history. By way of explanation, he pointed to Congress’ recent penchant for passing “smorgasbord” measures, which require courts to “sort out” interpretive issues without the benefit of structural or textural clues that might be available in more carefully drafted legislation. Given these circumstances, he contended, courts have no choice but to seek guidance where it is available.

In his dissent to *American Civil Liberties Union v. Federal Communications Commission*,¹²⁴

Judge Starr offered the following *apologia* for relying on a House Committee Report.

Under more typical circumstances, where a mere Committee Report, lacking the authoritativeness of the House Report at issue here, was being pressed into service in an effort to override statutory language, I would be quick to agree with my colleagues’ understandable refusal to permit that which is not law to triumph over that which was duly passed by Congress and signed into law by the President. We in the judiciary have become shamelessly profligate and unthinking in our use of legislative history, a regrettable fact of contemporary judicial life in the face of powerful voices of warning from the not-so-distant past.

But in this instance, I would defer to Congress’ expression of intent in the relevant Committee Report under the unusual circumstances here, where the statute, as the majority candidly acknowledges, admits of some ambiguity; where the Report speaks clearly on the precise question at issue; and where the Report was expressly considered and adopted by both Houses.¹²⁵

¹²³ *Id.*, at 779 n. 8 (Starr dissenting) (internal citations omitted.)

¹²⁴ 823 F.2d 1554 (D.C. Cir. 1987).

¹²⁵ *Id.*, at 1583 (Starr, dissenting in part) (Internal citations omitted.)

Judge Starr took note¹²⁶ of a footnote in the majority opinion that stated that “[t]he report at issue here was drafted by the House Committee on Energy and Commerce but was specifically adopted by both the House and Senate as their explanations of the Act.”¹²⁷ In other words, according to Judge Starr, the Committee Report at issue here did not suffer from the infirmities of typical legislative history materials, in part because both houses of Congress had adopted it. He did not elaborate on how adoption by both houses bolstered the legitimacy of a source that, under other circumstances, he might have disparaged.

Judge Starr wrote the majority opinion for a unanimous panel in *International Brotherhood of Teamsters v. Interstate Commerce Commission*.¹²⁸ At issue was the Teamsters’ challenge to ICC’s approval of the proposed acquisition of North American Van Lines by Norfolk Southern Corporation. The court held that ICC exceeded its statutory authority in approving the acquisition.¹²⁹ The conclusion was premised on an analysis of the statutory language.¹³⁰ Had the opinion ended there, it would, of course be perfectly consistent with a textualist interpretation of the statute. However, he went on to note that “[t]he legislative history of the provision’s original enactment strongly supports our reading of the statute’s plain language.”¹³¹ Judge Starr then included a lengthy footnote justifying this approach.

¹²⁶ *Ibid.*

¹²⁷ *Id.*, at 1569 n. 33, citing 130 Cong. Rec. S14,285 (daily ed. Oct. 11, 1984) and 130 Cong. Rec. H12,245 (daily ed. Oct. 11, 1984).

¹²⁸ 801 F.2d 1423 (D.C. Cir. 1986).

¹²⁹ *Id.*, at 1428.

¹³⁰ *Id.*, at 1426-28, interpreting 49 U.S.C. § 11344(c).

¹³¹ *Id.*, at 1428.

As a unanimous Supreme Court has instructed us, when [statutory] language is clear and plain, language controls. But we are also mindful that what may seem clear, or at least the most natural reading of a statute, may nonetheless be viewed as unclear or ambiguous. Thus it is with reluctance that we embark into the ever uncertain precincts of legislative history. Our doing so is arguably justified in these specific circumstances by the clear weight of authoritative precedent, in that the Supreme Court itself, as we indicate in the text, has examined in detail the legislative history of this provision.¹³²

Judge Starr does not explain why the apparently clear meaning of the statute might “nonetheless be viewed as ... ambiguous.” Indeed, given that the legislative history yields the same interpretation as the text of the statute, one might conclude that the statute is indeed unambiguous. That the Supreme Court had previously examined the same legislative history would not, in itself, be of much solace to textualists, given that they consistently criticize the Court for its over-reliance on legislative history.

Thus, Judge Starr, in these three opinions, saw fit to rely on legislative history despite disparaging that source of authority in those same opinions. Interestingly, he offered a different justification for doing so in each opinion.

Judge Alex Kozinski, of the Ninth Circuit has also frequently criticized legislative history, often citing Justice Scalia’s opinions on the issue. Twice, however, after voicing such criticism, Judge Kozinski went on to rely on material that, at the least, bears a strong resemblance to legislative history. On both occasions, he sought to distinguish his use of the materials from the use of legislative history to which he objects.

In *United States v. Spokane Tribe of Indians*,¹³³ the district court had granted an injunction,

¹³² *Teamsters*, at 1428 n. 4 (internal citations omitted).

¹³³ 139 F.3d 1297 (9th Cir. 1998).

under the Indian Gaming Regulatory Act (IGRA),¹³⁴ against gambling operations run by the Spokane Tribe. IGRA defines a process under which states and tribes are to negotiate compacts governing Indian-run gambling. The Spokane tribe had previously sued the State of Washington for failure to negotiate in good faith under IGRA. That suit was dismissed, based on *Seminole Tribe of Florida v. Florida*,¹³⁵ a Supreme Court decision that declared certain provisions of IGRA unconstitutional. The issue before the Ninth Circuit was whether remaining provisions of IGRA should be enforced. Put another way, the court considered whether “Congress [would] have enacted IGRA had it known that it could not give tribes the right to sue states that refuse to negotiate?”¹³⁶

Writing for a unanimous panel, Judge Kozinski held that “it ... seems highly unlikely that Congress would have passed one part [of IGRA] without the other, leaving the tribe essentially powerless.”¹³⁷ He noted that “IGRA’s legislative history strongly supports this inference” and discussed, at length, a Senate Indian Affairs Committee Report.¹³⁸ In a footnote, Judge Kozinski acknowledged that “estimable jurists have called into question the value of legislative history”¹³⁹ citing, *inter alia*, Justice Scalia’s concurrence in *Wisconsin Public Intervenor v. Mortier*¹⁴⁰ and

¹³⁴ 25 U.S.C. § 2701.

¹³⁵ 517 U.S. 44 (1996).

¹³⁶ *U.S. v. Spokane Tribe*, 139 F.3d at 1299.

¹³⁷ *Id.*, at 1300.

¹³⁸ *Id.*, at 1300, citing S. Rep. No. 100-446, at 1-14, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3071-84.

¹³⁹ *Id.*, at 1300 n. 3.

¹⁴⁰ 501 U.S. 597, 616-23 (Scalia J., concurring).

Wallace v. Christensen,¹⁴¹ a “surrogate” Scalia decision.¹⁴² The footnote went on to assert:

[w]e bypass this controversy because we do not use legislative history to interpret IGRA; rather, we are evaluating a counter-factual: What would have happened if Congress had known that the provision for suing states was invalid? To answer this question we must understand the political process underlying IGRA's passage, and legislative history is a legitimate source of enlightenment on that issue.¹⁴³

This is an interesting, albeit cryptic assertion. One might ask why legislative history is a “legitimate source of enlightenment” in considering what Congress *would have* intended, in light of an unanticipated Supreme Court decision, if legislative history is *not* a legitimate source for discerning what Congress *did* intend vis-a-vis legislation that it passed. In either instance, the purported function of the legislative history is to cast light on Congress’ intentions.

In *United States v. Anderson*,¹⁴⁴ the defendant challenged the enhancement of his sentence under the Sentencing Guidelines based on a finding that he was an “organizer, leader, manager or supervisor.”¹⁴⁵ Citing a Commentary to the Sentencing Guidelines, Anderson claimed that the enhancement should apply only if the court found that he was a participant in the underlying crime. The majority opinion rejected this argument, reasoning that “guideline commentary is not a substitute for the provisions themselves.”¹⁴⁶ The majority suggested a parallel to the use of legislative history

¹⁴¹ 802 F.2d 1539, 1559-60 (9th Cir. 1986) (en banc) (Kozinski J., Concurring). Note, Judge Kozinski, in *Spokane Tribe* purports to cite to “A Smithee J. concurring” in *Wallace*. See *Spokane Tribe*, at 1300 n.3. However, the *Wallace* concurrence which he cites is his own opinion. See *Wallace*, at 1557.

¹⁴² See the discussion of surrogate cases *infra* at pages 7-8.

¹⁴³ *U.S. v. Spokane Tribe*, 139 F. 3d at 1300 n. 3.

¹⁴⁴ 895 F.2d 641 (9th Cir. 1990).

¹⁴⁵ United States Sentencing guidelines, § 3B1.1(c).

¹⁴⁶ *U.S. v. Anderson*, 895 F.2d at 646.

to contravene the plain language of a statute.¹⁴⁷ Judge Kozinski, dissenting, asserted:

[t]he majority makes a fundamental analytical error by treating the Commentary to the Sentencing Guidelines as a secondary aid to interpretation, akin to legislative history, rather than as an integral part of the Guidelines themselves.¹⁴⁸

He noted:

[t]here are few among the federal judiciary more skeptical than I about the uses and abuses of legislative history. Such history is rarely written by the same people who wrote the legislation; it is seldom, if ever, even seen by most of the legislators at the time they cast their votes. Much legislative history--committee reports and floor debate--is intended to serve political rather than legislative purposes. It frequently reflects the views of only a minority of the legislature; it is often planted, to assuage a certain constituency, or worse, to influence court decisions. In short, courts are wise to be very sparing in their reliance on legislative history, particularly when statutory language is clear.¹⁴⁹

This is one of Judge Kozinski's most compelling statements regarding the inauthenticity of legislative history. In support of his argument, he cites two of Justice Scalia's most notable concurrences, in *Hirschey v. F.E.R.C.*¹⁵⁰ and *United States v. Taylor*.¹⁵¹ He also cites his own concurrence in *Wallace v. Christensen*.¹⁵² However, he then goes on to assert that:

the Sentencing Commission's Commentary to the Sentencing Guidelines is not cut from the same cloth as ordinary legislative history. In the first place, the Commentary is written by the same Commission by means of the same processes as the Guidelines themselves. The Commentary was part of the original Guidelines package when it was

¹⁴⁷ *Ibid.*

¹⁴⁸ *Id.*, at 646 (Kozinski, dissenting).

¹⁴⁹ *Ibid.* (Internal citations omitted.)

¹⁵⁰ 777 F.2d 1, 7-8 and n.1 (D.C. Cir. 1985) (Scalia, J. concurring).

¹⁵¹ 487 U.S. 326, 344-47 (1988) (Scalia, J. concurring).

¹⁵² 802 F.2d 1539, 1559-60 (9th Cir. 1986) (Kozinski, J concurring in judgment). As discussed *infra*, at 7-8 *Wallace* is a notable "surrogate" Scalia decision.

presented to Congress; it forms part of the amendments that the Commission presents to Congress on a continuing basis.¹⁵³

Consequently, he contends, the Commentary should be considered, even though it would lead to a conclusion contrary to the (apparently) clear language of the Guideline.¹⁵⁴

There are some interesting differences between Judge Starr's and Judge Kozinski's approaches in the above decisions. On the one hand, Judge Starr acknowledges that he is, in fact, relying on legislative history; however, he offers a rationale for doing so; indeed, he offers three quite different rationales in the three decisions. On the other hand, Judge Kozinski denies that he is, in fact, using legislative history, at least in the ways that he so often disparages. He asserts that he is "evaluating a counter-factual" which is different than construing statutory meaning intent; and he asserts that the Commentaries to the Sentencing Guidelines are not really like legislative history, so that there is no problem with using them. What both judges share is a perceived need to explain themselves - to justify their respective analyses in light of their criticism of the use of legislative history.

General Criticism of Legislative History Where a Narrow Rule Suffices

In some cases, the general criticism of legislative history is gratuitous for a different reason. In these decisions, there is a specific, narrowly tailored rule that precludes consideration of the proffered legislative history. Such a rule would be applied regardless of whether one were a proponent or opponent, generally, of the use of legislative history to construe statutes. Yet the court, upon applying the narrow rule goes on to include a general criticism of legislative history. In this

¹⁵³ *U.S. v. Anderson*, at 647 (Kozinski J, dissenting.)

¹⁵⁴ *Ibid.*

context, the general criticism is superfluous, since the legislative history is rejected for other, narrower reasons.

For example, in numerous cases, the court applies the “plain meaning” rule, which holds that legislative history should not be utilized when the meaning of the statute is plain. The Supreme Court has invoked the “plain language” rule for more than a century.¹⁵⁵ Clearly, the invocation of that rule does not suggest that legislative history generally is unreliable. In fact, the converse of the rule - that legislative history sources can be used when a statute is ambiguous - suggests that there is a proper place for such sources in the interpretation of statutes. However, there are numerous cases in which a court of appeals has invoked the “plain meaning” rule, and then launched into a general diatribe against legislative history. In this context, the diatribe is superfluous, since the court need only invoke the “plain language” rule to exclude the legislative history sources.

*Kansas City Southern Railway v. McNamara*¹⁵⁶ is the decision in which the court warns against “polluting” the meaning of statutes by “crude gropings into the consistently dark closets of legislative history.”¹⁵⁷ These disparaging remarks are entirely superfluous, since the court held that “the meaning of this statute is clear enough”, so that resort to legislative history is not called for.¹⁵⁸

CBS, Inc. v. Primetime 24 Joint Venture,¹⁵⁹ an Eleventh Circuit decision, quotes Justice Scalia’s observation that “the use of legislative history is akin to ‘entering a crowded cocktail party

¹⁵⁵ See the discussion in Chapter 3, pages xx - xxx.

¹⁵⁶ 817 F.2d 368 (5th Cir. 1987).

¹⁵⁷ *Id.*, at 373.

¹⁵⁸ *Ibid.*

¹⁵⁹ 245 F.3d 1217 (11th Cir. 2001).

and looking over the heads of the guests for one's friends”¹⁶⁰ and then offers the following unqualified observation.

[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. When a statute is passed by Congress, it is the text of the statute, and not statements put in some committee report or made on the floor ... that has been voted on and approved by the people's elected representatives for inclusion in our country's laws. The language of our laws is the law.¹⁶¹

These statements might be taken as a global denunciation of legislative history as a tool of statutory construction. However, the court's reason for rejecting legislative history in the case is simply that “there is no ambiguity in the term ‘termination’ of cable television services.”¹⁶² In other words, the “plain meaning” rule applies.

United States v. Thomas,¹⁶³ a Fifth Circuit decision, cites Justice Scalia for the notion that “just about any interpretation of an act can be supported with a quote from the legislative history.”¹⁶⁴ That global statement is, however, gratuitous, since the court rejects legislative history for the simple reason that the statute in question is unambiguous.¹⁶⁵

The Tenth Circuit has twice quoted Justice Scalia, “the law *is* what the law *says*, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it.”¹⁶⁶ This

¹⁶⁰ *Id.*, at 1227, quoting *Conroy v. Askino*, 507 U.S. 511, 519 (1993) (Scalia J., concurring).

¹⁶¹ *CBS, Inc.*, 245 F.3d at 1227.

¹⁶² *Id.*, at 1223.

¹⁶³ 991 F.2d 206 (5th cir. 1993).

¹⁶⁴ *Id.*, at 215 n. 48, citing *Conroy v. Askino*, 507 U.S. 511 (1993) (Scalia J., concurring).

¹⁶⁵ *U.S. v. Thomas*, 991 F.2d at 214-15.

¹⁶⁶ *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1306 (10th Cir. 1999); *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190, 1199 n. 10 (10th Cir. 1999), both quoting *Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264 (1996) (Scalia, J., concurring).

quip is generally taken to mean that courts generally should not trust legislative history. Yet, in both opinions, the court's ruling was more narrow, namely that the statute in question has a plain meaning and therefore resort to legislative history is not required.¹⁶⁷

There is, of course, no reason why a court must refrain from offering its generalized critique of legislative history sources when it premises its exclusion of such sources the "plain meaning" rule. The point is simply that the generalized critique has no bearing on the court's decision - it would have rejected legislative history in any event.

The "plain meaning rule" is not the only narrow rule invoked in this context. Another example is the rule against the use of legislative history which is generated after passage of the statute at issue. This is a common sense rule, based on the premise that "words written after the vote and the President's signature were uninfluential in the process leading to the vote."¹⁶⁸ Clearly, this logic applies whether or not one believes that legislative history, generally, is a useful tool in statutory construction.

Yet in *Rehabilitation Association of Virginia, Inc. v. Shalala*,¹⁶⁹ the court, after rejecting proffered legislative history as post-enactment,¹⁷⁰ went on to offer the following generalized insight. "While once a helpful source of guidance to Congressional intent, legislative history often may lead

¹⁶⁷ See *Public Lands Council*, 167 F.3d at 1306; *Federal Lands Consortium*, 195 F.3d at 1198 n.9.

¹⁶⁸ *Covalt v. Carey Canada, Inc.*, 860 F.2d 1434, 1438 (7th Cir. 1988). The post-enactment rule is discussed at greater length *infra*, in the text accompanying footnotes xxx through xxx.

¹⁶⁹ 42 F.3d 1444 (4th Cir. 1994).

¹⁷⁰ *Id.*, at 1457.

one astray.”¹⁷¹ Likewise, *Chesapeake and Potomac Telephone Co. v. United States*,¹⁷² a Fourth Circuit decision ruled, “we cannot accept as authoritative with regard to a provision enacted by a previous Congress statements by single legislators made during debate of a bill, which was never enacted into law....”¹⁷³ This is certainly a sufficient reason for rejecting the legislative history. Yet the court felt compelled to quote Justice Scalia, “[n]either due process nor the First Amendment requires legislation to be supported by committee reports, floor debates or even consideration, but only a vote.”¹⁷⁴

In *Environmental Defense Fund, Inc. v. City of Chicago*,¹⁷⁵ the Seventh Circuit ruled that “post-enactment statements, such as we have here, bear no necessary relationship to the forces at work at the time of enactment....”¹⁷⁶ Despite the sufficiency of this ground for rejecting the proffered legislative history, the court felt compelled to assert that, “recourse to legislative history to clarify the meaning of statutory language is, at best, a shaky endeavor.”¹⁷⁷ The court went on to quote extensively from two prominent opponents of legislative history.

Justice Scalia has written that use of legislative history

is neither compatible with our judicial responsibility of assuring reasoned, consistent and effective application of [statutes], nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis ... in committee reports that are increasingly unreliable evidence of what the voting

¹⁷¹ *Ibid.*

¹⁷² 42 F.3d 181 (4th Cir. 1994).

¹⁷³ *Id.*, at 201 n. 32.

¹⁷⁴ *Id.*, at 201, quoting *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 133 (1989) (Scalia J., concurring.)

¹⁷⁵ 946 F.2d 345 (7th Cir. 1991).

¹⁷⁶ *Id.*, at 351.

¹⁷⁷ *Id.*, at 350.

Members of Congress had in mind.

And as our Brother Easterbrook has noted regarding preenactment legislative history,

[it] is a poor guide to legislators' intent because it is written by the staff rather than by members of Congress, because it is often losers' history ..., because it becomes a crutch ..., because it complicates the task of execution and obedience (neither judges nor those whose conduct is supposed to be influenced by the law can know what to do without delving into legislative recesses, a costly and uncertain process).¹⁷⁸

Regardless of one's agreement or disagreement with the Scalia-Easterbrook statements, it is clear that the quotations are gratuitous to the court's rejection of post-enactment legislative history.

Other contextual rules have also been implicated in this context. *Rhode Island v. Narragansett Indian Tribe*¹⁷⁹ ruled that "statements by individual legislators should not be given controlling effect" when construing a statute.¹⁸⁰ It also held that "a court cannot override the unambiguous words of an enacted statute and substitute for them the court's views of what individual legislators likely intended."¹⁸¹ Thus the court excluded legislative history based on two complementary rules - the "plain meaning" rule, and the rule against crediting individual legislators' statements. The court then went on to add, gratuitously, that it was bound to interpret the text of the statute "notwithstanding the nods and winks that may have been exchanged in floor debates and committee hearings."¹⁸² There simply was no reason for the court to refer to "nods and winks", suggesting that legislative history is generally a matter of subterfuge; this statement had no bearing

¹⁷⁸ *Id.*, at 350-51, quoting *Blanchard v. Bergeron*, 489 U.S. 87, 99, (1989) (Scalia, J. concurring in part and concurring in the judgment) and *Matter of Sinclair*, 870 F.2d 1340, 1343 (7th Cir.1989). (Easterbrook J.).

¹⁷⁹ 19 F.3d 685 (1st Cir. 1994).

¹⁸⁰ *Id.*, at 699 (Internal quotation omitted.)

¹⁸¹ *Id.*, at 700.

¹⁸² *Ibid.*

on the court's determination.

Sometimes it is the dissenting or concurring judge who adds a gratuitous slap at legislative history. *Garcia v. Spun Steak Co.*¹⁸³ held that a company's English-only policy did not violate Title VII of the Civil Rights Act of 1964.¹⁸⁴ This decision was based in part on the absence of any discussion of English-only policies in the Act's legislative history.¹⁸⁵ The court subsequently denied plaintiff's request for *en banc* review of the panel decision;¹⁸⁶ however, Judge Stephen Reinhardt, dissented from the denial, disputing that the "absence [of legislative history] can be so crucial a basis for invalidating an agency rule."¹⁸⁷ Judge Reinhardt went on to quote Justice Scalia's disparagement of legislative history as "that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction, legislative history."¹⁸⁸ Clearly, this was gratuitous. The question of whether the *absence* of legislative history is a proper basis for inferring Congressional intent is an important one; indeed, in *Garcia*, it was dispositive.¹⁸⁹ However, one need not think of legislative history as the "last hope of lost interpretive causes" to question the validity of inferring intent from Congressional silence.

Other cases in which the court jumped from a narrow question regarding the use of legislative

¹⁸³ 998 F.2d 1480 (9th Cir. 1993).

¹⁸⁴ *Id.*, at 1490, interpreting 42 U.S.C. § 2000e-2.

¹⁸⁵ *Ibid.*

¹⁸⁶ 13 F.3d 296, 296 (9th Cir. 1993).

¹⁸⁷ *Id.*, at 300.

¹⁸⁸ *Id.*, at 300, quoting *United States v. Thompson/Center Arms Co.* 505 U.S. 505 (1992) (Scalia J., concurring in the judgment.)

¹⁸⁹ See the discussion of this issue in Chapter Four, pages xx - xxx herein.

history to a criticism of legislative history are cited in the accompanying footnote.¹⁹⁰

How Influential Has Justice Scalia Been?

Assessing Justice Scalia's influence on the courts of appeals depends on the criteria one applies. Judged by the sheer number of times that he has been cited, Justice Scalia's views on legislative history have been quite influential. He has been cited and quoted often, sometimes at great length. One measure of the extent of his influence is the frequency with which post-Scalia opinions in the courts of appeals take on a life of their own, serving as "surrogates" for Justice Scalia's own opinions. Another measure is the detailed analysis which many court of appeals decisions apply with regard to legislative history as a tool of statutory construction. This analysis is typically drawn directly from Justice Scalia's opinions. Another telling characteristic is the caustic tone of many opinions, which sound like Justice Scalia's "voice." Taken together, these factors suggest that textualism, and specifically the contention that use of legislative history *per se* is a suspect mode of statutory analysis, has gained a foothold in Federal appellate jurisprudence.

On the other hand, if one examines the uses that courts make of legislative history in these cases, a different picture emerges. It is extremely rare for a majority opinion to reject relevant legislative history based on a judgment that such a source is inherently suspect. Even in cases where judges vehemently denounce legislative history sources, that denunciation typically has no bearing on the court's decision whether to use such sources. As the above discussion demonstrates, criticism of legislative history almost always occurs in one of four contexts. It may be expressed in a dissent

¹⁹⁰ *Fort Bragg Assn of Educators v. Federal Labor Relations Authority*, 870 F.2d 698, 703 (D.C. Cir. 1989) (narrow issue: weight to be accorded a letter inserted as an exhibit in a senate report); *Johnson City Medical Center v. United States*, 999 F.2d 973, 948 and n. 8 (6th Cir. 1993) (Batchelder J., dissenting) (narrow issue: use of legislative history in first step of *Chevron* analysis. For a fuller discussion of this issue, see Chapter Six, pages xx - xxx.

or concurrence. The court may criticize legislative history where there is no legislative history to consider. The court may criticize legislative history and then go on to consider it. Or, the court may reject legislative history for a narrow reason, then go on to issue a gratuitous swipe at legislative history generally. In other words, what the court says and what it does vis-a-vis legislative history are two very different things.

Does this mean that Justice Scalia's influence on the courts of appeals is illusory? Probably not. Another way to assess his real influence is to look closely at the cases where a narrower, contextual rule applies. As discussed above, in virtually every one of these cases, the general criticism of legislative history is gratuitous, in that the court would reach the decision that it did regardless of whether it was generally in favor of legislative history. For example, any judge - pro or anti-legislative history - can apply the "plain meaning" rule. Rejecting legislative history based on a determination that a statute is unambiguous need not implicate any position with regard to the general probity of legislative history. However, as the following chapter will show, there seems to be a very consistent correlation between a judge's views on textualism and the way that he or she applies the "plain meaning" rule. Put simply, a textualist judge is much more likely to come to the conclusion that legislative history should be rejected because the statute has a plain meaning. The same correlation holds with regard to other contextual rules.

What is going on here? Are judges simply manipulating the rules to accord with their ideological predispositions? The answer is probably not that simple. One explanation is that textualism embodies a state of mind with which judges approach legislative history. Textualist judges will be more skeptical of the utility of legislative history as a basis for statutory interpretation. They will also look more critically at how legislative history is being used in context, and at the type of

sources which litigants adduce in support of their arguments. In this respect, Justice Scalia's views have, indeed, been quite influential.

The following chapter will explore some of the ways in which Justice Scalia's analysis impacts on courts' contextual decisions with regard to the use of legislative history.