TAMING A DRAGON: LEGISLATIVE HISTORY IN LEGAL ANALYSIS

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

-- J.R.R. Tolkien, from *Beowulf: The Monster and the Critics* (1936). ²

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I. Introduction: The Dragon of Legislative History

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

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

The use of legislative history in statutory interpretation and analysis remains a critical part of the broader picture of legal analysis. With the theoretical world remaining in a state of diverse conversation regarding the use of legislative history in statutory interpretation, the legal writer is faced with another: the increasing availability of legislative history online. As legislatures and legal research websites have placed increasing amounts of legislative history data online, the monetary and temporal costs of

3 See Victoria F. Nourse, A Decision Theory of Statutory Interpretation: Legislative History by the Rules, 122 Yale L. J. 70, 72 (2012); Kenneth R. Bortzbach, Legislative History: The Philosophies of Justice Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts, 80 Marq. L. Rev. 161 (1996).
undertaking legislative history have plummeted. While the legal research world is far from being a place where all legislative history data is available online, that world is becoming more of a reality over time. As a result the issue of the use of legislative history in statutory analysis and interpretation is unlikely to go away. From the perspective of a legal writer this is due not so much to ideological or theoretical consensus but to the continuing effects of technology resulting in the reduction of barriers to access. The Internet is driving availability and availability drives usage. As the information becomes increasingly accessible to citizens and to lawyers, legislative history will continue to be part of legal and public policy arguments. The dragon of legislative history becomes ever more resistant to being caged.

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

In order to establish its argument, this article will first explore the current state of the debate regarding the use of legislative history, providing a general overview of the main positions in that debate. Next, the article will examine the increasing availability of legislative history thanks to the massive increase of information available online through free legal research sources available right from a computer’s Internet browser or an application on a smartphone. The article will then discuss the value and practical use of legislative history in legal writing dealing with statutes, providing a view of the current practice on the Supreme Court to use legislative history as an aid to statutory interpretation rather than as a substitute for the statutory text. It will also discuss the value of legislative history to provide background and context to statutory analysis and interpretation. Finally, the article will address prudential considerations revolving around the issue of restraint in the use of legislative materials in legal writing and analysis. Hopefully, this discussion will help legal writers to tame the dragon of legislative history without being consumed by the beast.

II. Legislative History and Statutory Interpretation

A. The State of the Debate

Statutory interpretation and application in both the state and federal legal systems is a critical driver in legal analysis given the long-established role of statutes in American
law. At both the state and federal levels, enacted law largely drives the legal system.\textsuperscript{5} While common law cases still occur in great number, the vast bulk of the work of the courts, and particularly the federal courts, involves statutory interpretation.\textsuperscript{6} As one author as put it, America is “a statutory society.”\textsuperscript{7} In such a world, statutory interpretation by the courts and the effect that such interpretation has on parties, lawyers and legal analysts in cognate fields is a subject of considerable importance. Not just the theory but also the practice of statutory interpretation can affect the outcome of cases, and in turn affect the kind of advice and strategy that lawyers and other professional advisors provide to clients: “few topics,” as William N. Eskridge, Jr. and Philip P. Frickey write, “are more relevant to legal craft and education than the interpretation of statutes, now our primary source of law.”\textsuperscript{8}

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

\textsuperscript{7} Edward Heath, How Federal Judges Use Legislative History, 25 J. Legis. 95 (1999).
\textsuperscript{8} Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321 (1990).
\textsuperscript{9} Owen M. Fiss, 34 Stan. L. Rev. 739 (1982).
\textsuperscript{10} Id.
\textsuperscript{11} See Fritz Snyder, Legislative History and Statutory Interpretation: The Supreme Court and the Tenth Circuit, 49 Okla. L. Rev. 573 (1996) (“[w]ell over a hundred law review articles have appeared on this topic in the last ten years.”) Given that Snyder wrote that line 17 years ago, one hazards to guess how many articles have added to that number since.
\textsuperscript{12} Kenneth R. Dortzbach, Legislative History: the Philosophies of Justice Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts, 80 Marq. L. Rev. 161 (1996).
Further complicating the argument over legislative history’s place in statutory interpretation and application is the idea that statutory interpretation seeks to effectuate the intent of the legislature,13 while being governed by the plain meaning of statutory language.14 Even if the concept of legislative intent is viewed skeptically,15 even as a legal fiction,16 it continues to loom large in the practical work of legal analysis and argument.17 The principle of looking for legislative intent is generally considered to be the starting point in the endeavor of statutory interpretation.18 As a consequence, the use of legislative history is of practical concern to a legal analysis, advocate or jurist.19 Skepticism regarding the validity of the idea of legislative intent does not undermine the validity of discerning the goal or, to use Felix Frankfurter’s term, “aim”20 of a statute. As Justice Frankfurter noted, even if the terminology of “legislative intent” is avoided because of its imprecision, the concept of legislation having a purpose or goal cannot be shunned.21 Karl Llewellyn expressed similar thoughts.22 Legislative history, even when sparse, can serve as evidence in evaluating statutory arguments.23

17 See M.B.W. Sinclair, Statutory Reasoning, 46 Drake L. Rev. 299, 300-04 (1997); Cf. U.S. v. N.E. Rosenblum Truck Lines, 315 U.S. 50, 53 (1942) (”[t]he question here, as in any problem of statutory construction, is the intention of the enacting body[]”); Blum v. Stenson, 456 U.S. 888, 896 (1984) (“[w]here, as here, resolution of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear[]”).
18 Id.
20 Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 538 (1947).
21 Id. at 538-39; see also William N. Eskridge, The Circumstances of Politics and the Application of Statutes, 100 Colum. L. Rev. 558, 564-565 (2000) (discussing “three levels of generality” in legislative intent).
While there is a lack of theoretical consensus regarding a proper approach to the use of legislative history to determine legislative intent or aim, there are some common patterns regarding its use when interpreting statutes and determining the goal that the legislature was attempting to reach in promulgating a particular statutory text. Looking here at the approach commonly used within the federal courts, the text is the starting point of any examination of a statute. If a statute’s language proves vague or ambiguous, courts may use a variety of approaches to resolve the difficulty with the statutory language. Specific tools include looking at similar statutory provisions to try to determine meaning, precedent to see how courts have interpreted the statute in prior cases, custom and usage, tradition, dictionary definitions and legislative history. There is a diversity of views regarding the use of legislative history, and not all judges and scholars are convinced that it is necessary to find an ambiguity in statutory language before resorting to the inspection of the legislative record. Adding to the complexity in


26 As Hillel Y. Levin explains, there are a number of different approaches to statutory interpretation. Contemporary Meaning and Expectations in Statutory Interpretation, 2012 U. Ill. L. Rev. 1103, 1107-14 (2012). For an overview of the different approaches to statutory interpretation, see William N. Eskridge, Jr., Philip P. Frickey, and Elizabeth Garrett, Legislation and Statutory Interpretation 211-247 (2000).


28 See Bart M. Davis, Kate Kelly and Kristin Ford, Use of Legislative History: Willow Witching for Legislative Intent, 43 Idaho L. Rev. 585, 586-592 (2007). Jos. R. Torres and Steve Windsor list the following materials as sources of legislative history:

Materials that may constitute legislative history include floor debates, planned colloquies, prepared statements on submission of a bill, statements in committees by relevant executive branch administrators, committee
using legislative history in legal analysis, materials may vary considerably from jurisdiction to jurisdiction, both in terms of the level of detail in the legislative record and in terms of the relevance of the material found in the record. As one commentator has admonished, “little legislative history is helpfully relevant. Much of it is unreliable or unreliably revealed.” When looking through the records of legislative history, helpful material can be rare to find, and when found may require sifting large amounts of information to separate the helpful information from the unhelpful. As a result, the type of legislative materials readily available and useful in one state or at the federal level may not be available in a different jurisdiction.

**B. The Argument for the Use of Legislative History**

The use of legislative history has a respectable pedigree in the federal courts. At the Supreme Court, Chief Justice John Marshall, who set the stage for the judiciary’s role as the branch of government that says what the law is, advocated an approach to statutory interpretation that is open to the use of virtually any tool or source that can assist a court reports, transcripts of discussions at committee hearings, statements and submissions by interested persons, committee debates on “mark-up” of bills, conference committee reports, analyses of bills by legislative counsel and administrative departments, amendments accepted and rejected, executive branch messages and proposals, prior and subsequent legislative dealing with the same subject matter, recorded votes and other relevant actions taken by the legislature prior to a bill’s enactment.


in discerning the meaning of the text.\textsuperscript{32} As he famously observed, “[w]here the mind labours to discover the design of the legislature, it seizes every thing [sic] from which aid can be derived.”\textsuperscript{33} This aphorism by Marshall was relied upon by the Court to defend the practice of looking at legislative history in Wisconsin Public Intervenor v. Mortier.\textsuperscript{34} As Justice Byron White noted in writing for the Court, legislative history should not be placed off-limits to judges engaged in “a good-faith effort to discern legislative intent.”\textsuperscript{35} Rather, the examination of legislative history as an aid in statutory interpretation had an established history in the Court’s practice, reaching back to the case of Wallace v. Parker in 1832.\textsuperscript{36} White rather dryly observed at the end of his discussion that the use of legislative history was unlikely to fade away.\textsuperscript{37}

Taking up Justice White’s observation, what provides for the endurance of the use of legislative history? The answer to that question rests in the twin curses of drafting legislative texts: ambiguity and vagueness.\textsuperscript{38} Judges, lawyers and legal analysts often reach for legislative history in order to resolve questions of ambiguity or vagueness that arise during the statutory application process.\textsuperscript{39} And this problem of ambiguity and vagueness is itself the consequence of human nature: human knowledge is finite.\textsuperscript{40} Possessing neither infinite information nor infinite clarity, the people responsible for writing statutes occasionally make mistakes or use clumsy wording to convey an idea or principle. Imprecise or muddled drafting may also be the price for getting a particular statute through the legislative process, as different legislators compromise and haggle over specific language in order to ensure both passage through the legislature and the signature of the executive, leaving it to the courts to make sense of the resulting

\textsuperscript{32} United States v. Fisher, 2 Chranch 358, 386 (1805).
\textsuperscript{33} Id. For an overview of statutory interpretation on the early Supreme Court, see John Choon Yoo, Marshall’s Plan: the Early Supreme Court and Statutory Interpretation, 101 Yale L.J. 1607 (1992).
\textsuperscript{35} Id. at 612 n. 4.
\textsuperscript{36} Id., citing Wallace v. Parker, 6 Pet. 680, 687-690 (1832).
\textsuperscript{37} Id.
\textsuperscript{38} See Barbara Luck Graham, Supreme Court Policymaking in Civil Rights Cases: a Study of Judicial Discretion in Statutory Interpretation, 7 St. Louis Univ. Public L. Rev. 401 (1988) (“[t]he problem of statutory interpretation lies within the ability of judges to ascertain the objective, purpose, motivation or intent from statutes that are ambiguous[]”); William N. Eskridge, The Circumstances of Politics and the Application of Statutes, 100 Colum. L. Rev. 558, 556 (2000).
\textsuperscript{40} William N. Eskridge, The Circumstances of Politics and the Application of Statutes, 100 Colum. L. Rev. 558, 556 (2000).
Beyond awkward or inaccurate drafting, even diligent and precise drafting can run afoul of the march of time. Pity the statutory drafter who tries to look down the road to take into account the myriad ways in which the statute could be applied in legal cases arising years, perhaps even decades, after the initial statute is enacted. New facts arise, new circumstances arise, new conditions arise, all of which may have been unforeseen or imperfectly foreseen by those crafting the actual text of the statute in question. Unable to anticipate the use to which the statute would be put, the language contained therein may be left with phrasing that is later viewed, given the change in circumstances, as insufficiently clear. In light of such considerations, it is no surprise that legislative history has often been part of statutory analysis.

An example of a Supreme Court case employing legislative history to provide context for statutory interpretation is Thompson v. Thompson. That case dealt with the application of the Parental Kidnapping Prevention Act (PKPA) in a conflict between child custody decrees. The Court looked to legislative history in order to understand congressional intent behind the statute, and provided a lengthy overview of that history in order to explain the background of the statute. The Court noted that the legislative history was “unusually clear,” and then proceeded to recount it in detail, including a colloquy between two members of Congress discussing related legislation, and a letter discussing possible solutions to the problem of child-kidnapping sent from an assistant attorney general of the United States to the chair of the House Judiciary Committee.

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43 Id.
44 Cf. id. (“[i]t may be irresponsible for the interpreter to pretend that a statute retains a plain meaning if it seems to apply to a new situation, when application to the new situation is way beyond or even against the legislator’s original goal[”].)
45 Even so, there has been some dispute over the appropriate ends to which legislative history can be applied. For an overview of some of the differences between different theorists as of 1992 who support the use of legislative history, along with a discussion of the approaches of some critics of the use of legislative history, see W. David Slawon, Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law, 44 Stan. L. Rev. 383, 386-389 (1992); see also David S. Law and David Zaring, Law Versus Ideology: the Supreme Court and the Use of Legislative History, 51 Wm. & Mary L. Rev. 1653, 1658, 1659-1665. (2010).
47 Id. at --, 108 S.Ct. at 515-16.
48 Id. at --, 108 S.Ct. at 518-19.
49 Id. at --, 108 S.Ct. at 519.
The Court, despite a strong dissent from Justice Scalia, relied not only on the language of the statute in its reasoning, but on the “context and history of the PKPA.”

Congressional intent has had a place in the interpretation of statutory language, even if, as Justice Powell once noted, the statutory language in question is unambiguous. Such language will be considered definitive in the absence of a “clearly expressed legislative intent to the contrary.” The approach of looking at legislative history to evaluate language that on its face is unambiguous can be seen in the Court’s opinion in Train v. Colorado Public Interest Research Group, Inc. That decision, written by Justice Thurgood Marshall, urged that legislative history be regularly consulted in statutory interpretation. That case dealt with the scope of the Environmental Protection Agency’s authority to regulate nuclear waste discharge into national waterways as “pollutants” under the Federal Water Pollution Control Act. When the case came before the lower court of appeals, that court addressed the issue solely by looking at the language of the Act. Marshall, writing for the Court, took exception to this method of statutory application, finding fault with the appellate court’s refusal to examine the legislative history of the statute, even if the language of the statute appeared dispositive:

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

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50 Id. at --, 108 S.Ct. at 520-23 (Scalia, J., dissenting).
51 Id. at --, 108 S.Ct. at 520.
53 Id.
54 426 U.S. 1(1976).
55 Id. at 11 (quoting United States v. American Trucking Ass’n, 310 U.S. 534, 543-44 (1940) referencing Cass v. United States, 417 U.S. 72, 77-79 (1974); Murphy, Old Maxims Never Die: The “Plain-Meaning Rule” and Statutory Interpretation in the “Modern” Federal Courts, 75 Col. R. Rev. 1299 (1975)); but see Brusewitz v. Wyeth LIC, -- U.S. --, 131 S.Ct. 1068, 1081 (2011) (where the Court found no need to examine legislative history where the Court’s interpretation of a statute’s was “the only interpretation supported by the text and structure” of the statute); West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 98 (1991):

The best evidence of [a statute’s] purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous – that has a clearly accepted meaning in both legislative and judicial practice – we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.
Under this approach, a court is wise to examine legislative history in order to better determine the meaning of the terms contained in the statute. Marshall took a similar approach in writing the decision in *United States v. Dion*, dealing with the abrogation by Congress of Native American hunting rights under the Eagle Protection Act. The language in the statute, as the Supreme Court recognized, is “sweepingly framed” with detailed information regarding prohibited acts to thwart any harvesting or selling of eagles, alive or dead, whole or in part. The court noted that the statute does contain provisions allowing the Secretary of the Interior to provide permits for Native Americans to engage in prohibited actions under the Act, so long as they were for religious or otherwise narrowly allowed purposes. Despite the broad prohibitory language in the statute, and the express exceptions for narrow usage permits for Native Americans, the Supreme Court undertook an examination of the legislative history of the original Act and its amendments to determine if Native American tribes were included under the ambit of the prohibitory language. The Court found that it was “plain” that the statute, after an examination of the legislative history behind it, supported the view that Congress sought to end the general right of Native Americans to hunt eagles.

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

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

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57 Id. at 739 (quoting Andrus v. Allard, 444 U.S. 51, 56 (1979)).
58 Id. at 741.
59 Id. at 744.
61 Id.
62 Id. at 846-49.
63 Id. at 848.
64 Id. at 850-51.
65 Id. at 851-53.
• Understanding the “reasonable purpose” underlying “a particular statutory word or phrase serves within the broader context of a statutory scheme.”

• “Choosing among reasonable interpretations of a politically controversial statute.”

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

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

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

C. The Textualist Corrective

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

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66 Id. at 853-856.
67 Id. at 856, 856-861.
68 543 U.S. 50 (2004); see also Bart M. Davis, Kate Kelly and Kristin Ford, Use of Legislative History: Willow Witching for Legislative Intent, 43 Idaho L. Rev. 585, 590-91 (2007) (discussing the differing approaches to statutory interpretation taken by the different justices deciding that case).
69 543 U.S. at 66 (Stevens, J., concurring).
70 Id.
71 See John David Ohlendorf, Textualism and Obstacle Preemption, 47 Ga. L. Rev. 369, 376 (2013) (describing textualism as arising “in the mid-1980s as a reaction against the more robust purposivists”).
strong distinction should be drawn between the text and its background, avoiding the dragon’s teeth of conflating legislative history with legislation. As one former federal judge commenting on the use of legislative history puts it, “[u]nder democratic theory, the statute rather than extrastatutory materials governs the nation.”\footnote{Kenneth W. Starr, Observations About the Use of Legislative History, 1987 Duke L. J. 371, 374 (1987).} In order to honor the democratic process of compromise that leads to specific statutory language, the task of the legal analyst faced with a statute is to “strictly adhere to clearly worded statutory texts rather than purpose the legislature’s supposed background aims.”\footnote{John David Ohlendorf, Textualism and Obstacle Preemption, 47 Ga. L. Rev. 369, 379-80 (2013).}

The emergence of textualism in the modern period is usually identified with the work of Justice Antonin Scalia,\footnote{For an overview of Scalia’s approach to statutory interpretation, see generally Antonin Scalia, A Matter of Interpretation (1997); for a concise statement of his views regarding legislative history, see id. at 29-37.} but the move towards imposing restraint on the impulse to reach for legislative history appears before his tenure on the Supreme Court.\footnote{See Reed Dickerson, Statutory Interpretation: Dipping Into Legislative History, 11 Hofstra L. Rev. 1125, 1138-40 (1983) (describing some of the efforts to limit the use of legislative history prior to Justice Scalia’s appoint to the Supreme Court by President Reagan).} As Kenneth Dortzbach recounts, the move to constrain the use of legislative history in statutory analysis by the Supreme Court stretches back at least to 1979 with the dissents by Chief Justice Burger and then-Associate Justice Rehnquist’s dissent in \textit{United Steelworkers of America v. Weber}.\footnote{Kenneth R. Dortzbach, Legislative History: thePhilosophies of Justices Scalia and Breyer and the Use of Legislative History by the Wisconsin State Courts, 80 Marq. L. Rev. 161, 165-68 (1996).} While there is little question that Justice Scalia’s work, both as a scholar before he went on the bench and as a judge and justice afterward, constitutes a powerful exposition of textualist doctrine in an effort to constrain judges in the use of legislative history in statutory interpretation, Scalia’s has not been a lone voice speaking against the regular use of legislative records in statutory interpretation.\footnote{David S. Law and David Zaring, Law Versus Ideology: the Supreme Court and the Use of Legislative History, 51 Wm. & Mary L. Rev. 1653, 1661 (2010); Jane S. Schacter, The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond, 51 Stan. L. Rev. 1, 3 (1998).}

The textualist critique of the use of legislative history is grounded in a multiplicity of concerns regarding the proper role of judges in relationship to the legislature. One caution about the use of legislative history arises from a concern about the ability of lawyers, judges and other legal analysts to competently navigate the warren of information contained within the legislative record. Lacking for the most part in the sorts of training that professional lawyers and social scientists receive, legal writers are often ill equipped to undertake the sort of nuanced and complex historical evaluations necessary to produce an accurate and comprehensive understanding of historical events and their effects on public action. One notable textualist, Judge Frank Easterbrook, arrived at part of his own critique about the use of legislative history from this underlying concern, asking whether judges are truly qualified to be able to understand the web of compromise and public policy to be able to decide statutory cases in such a way as “to nudge the outcome a little in the direction of goodness.”

Even if actors within the legal system have the kind of training to properly navigate and comprehend the legislative record, that does not end the inquiry into whether that is their proper role in the American constitutional system where the statutory law is what the legislature enacts, not what individual legislators may have intended:

Doubts about the value of legislative history arise not because the context of a law is unimportant, but because snippets from the debates so often have been used in lieu of the text, or as an excuse to nudge the law closer to the view of the losers in the legislative battle (a class that may include the judge). The text of the statute – and not the intent of those who voted for or signed it – is the law.

One aspect of the textualist critique is what Jane Schacter refers to as the “institutional role” of the Court. The use of legislative history, as she explains the textualist view, “enables and perhaps encourages judicial activism.” Judges are empowered to import their own policy preferences into the interpretive process, aided by the use of legislative history that often contains information that could be used to justify a

79 For a summary of the arguments against the use of legislative history, see Alex Kozinski, Should Reading Legislative History Be An Impeachable Offense, 31 Suffolk L. Rev. 807, 813-14 (1998); see also Michael H. Koby, The Supreme Court’s Declining Reliance on Legislative History: the Impact of Justice Scalia’s Critique, 36 Harv. J. Legis. 369, 377-381 (1999).
81 Id.
82 Id. at 444.
84 Id.
This arbitrary temptation in the use of legislative history is typified by a quote that Schacter relates from a former appellate judge, that employing the legislative record is akin to “looking over a crowd and picking out your friends.” Using legislative history to discern legislative intent not readily apparent from a statute’s language, in this view, conflates a judge’s common law judging role with the role appropriate for the judiciary in dealing with a statutory source of law provided by a co-equal branch of government. The seemingly non-political branch of government, the judiciary, begins to shape the political process that results in legislation, creating, as Schacter summarizes, “incentives and leverage for both staffers and lobbyists to write into law items that do not appear in the statutory text because they fail to command support of a legislative majority.” A related problem is identified by Kenneth W. Starr, who writes that “[i]n using legislative materials, the courts create winners and losers in the legislative process: elevating the view of some and denigrating or rejecting the views of others.” Legislative history, far from serving to foster greater deference to the legislature may perversely end up empowering an imperial judiciary.

There is good reason for the courts to be hesitant to look beyond the text of a statute in an effort to discern legislative intent. As Judge Easterbrook points out, statutes are complex things, with multiple objectives and considerations. Justice Scalia has also written about the profound difficulty in discerning legislative purpose given the motivations of individual legislators as a consequence of the nature of political work. Even if one concedes that legislative intent should be discerned as part of statutory interpretation, in such a system, legislative history may often be of limited utility in discerning that intent. When faced with the less-than-helpful legislative record in one case, Justice Robert Jackson quipped that the “[l]egislative history here as usual is more vague than the statute we are called upon to interpret.” More recently, Justice Kennedy has written about problems with poor clarity in legislative history, rendering it “murky, _______________

85 Id. at 8.
86 Id. at 7.
87 Id. at 8.
88 Id. at 9.
90 Cf. Barbara Luck Graham, Supreme Court Policymaking in Civil Rights Cases: a Study of Judicial Discretion in Statutory Interpretation, 7 St. Louis Univ. Public L. Rev. 401, 405-06 (1988). In Graham’s perspective, “[t]he problem of statutory interpretation lies not so much with the unreliable nature of legislative history as evidence of congressional intent as it does with the discretionary use of legislative history in achieving specific policy results.” Id. at 405.
91 Edwards v. Aguillard, 482 U.S. 578, 637 (Scalia, J., dissenting).
ambiguous and contradictory.”\(^{94}\) The ambiguity and vagueness that can be found within the legislative record can lead to its own version of the infinite regress problem: legislative history that is supposed to aid in the interpretation of a statute itself has to be interpreted and purified in order to produce clarity.\(^ {95} \) – and at that point much of the clarity asserted looks more like artifice than a proper divination of legislative intent. Making matters worse, the legislative materials themselves may be subject to distortion through efforts to color the interpretation of the statute. Far from being a reliable, objective indicator of statutory meaning, the legislative record is, to quote Justice Scalia, “eminently manipulable.”\(^ {96} \) Rather than entering into the political tangle of legislative history, textualism seeks to maintain a neutral stance and follows the words in the text.\(^ {97} \)

The textualist argument also grounds itself in a series of prudential considerations regarding the institutional integrity of Congress.\(^ {98} \) Textualists raise particular concerns regarding the possibility that the legislative history could be distorted or manipulated, undermining its reliability as evidence of actual legislative intent.\(^ {99} \) Another prudential concern involves the erosion of discipline on the part of the legislators, that instead of clear, tight drafting of the text, they will instead rely on legislative history to remedy imprecise drafting.\(^ {100} \) In either case, the use of legislative history to determine the meaning of a statute could result in, as one commentator calls it, “cheap legislation”\(^ {101} \) –

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\(^{96}\) Edwards v. Aguillard, 492 U.S. 578, 638 (Scalia, J., dissenting).


\(^{100}\) Jane S. Schacter, The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond, 51 Stan. L. Rev. 1, 9 (1998); Bernard W. Bell, R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory, 78 N.C. L. Rev. 1253, 1265 (2000).

\(^{101}\) Paul Killebrew, Where Are All the Left-Wing Textualists, 82 N.Y.U. L. Rev. 1895, 1907 (2007); see also John F. Manning, Textualism as a Nondelegation Doctrine, 97 Colum. L. Rev. 673, 687-88 (1997).
a statement of intent carrying legislative effect without going through the rigorous and politically accountable process of becoming a formal part of the statute itself.102

Another argument raised against use the use of legislative history involves the nature of legislative intent – namely whether the intent reflected in the legislative record is an accurate reflection of the intent of the legislature. While an enacted statute is a statement of the intent of the entire legislature “as a whole,” legislative materials prepared by committees, individual members may or may be reflective of the intent of the entire body. Richard I. Nunez has criticized the reliability of legislative history to provide specific information regarding statutory meaning. Nunez, who has had the advantage of having worked in both the drafting and interpretive process for state legislation, casts doubt on the reliability of legislative history to serve as a vehicle for understanding legislative intent to understand the specific language in a statute. Nunez identifies three aspects of legislative intent that can affect a statute:

- “Legislative intent concerning solution of a general social problem.”
- “Legislative intent concerning the general purposes of a specific statute.”
- “Legislative intent concerning the meaning of a specific statutory word or phrase.”

Nunez argues that while legislative intent is a valid concept to employ when discussing the first two categories of information, it is not a useful concept to use when discussing the specific meaning of a term within a statute. Nunez’s skepticism about the usefulness of legislative history to provide meaning for specific words and phrases arises from a concern about the reliability of the legislative record to provide accurate information regarding such specific meaning. Using the concept of “hardness” to classify legislative evidence, he finds that the best evidence to use to determine specific statutory meaning is the statute in question itself, “such as the definition section, the preamble, or the explicit recitals of policy.” The least reliable form of evidence in

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102 Id.
104 Id.
106 Id. at 128.
107 Id.
108 Id. at 129.
109 Id.
110 Id.
111 Id. at 130.
112 Id.
113 Id.
114 Id.
115 Id.
Nunez’s view is what he terms “non-legislative evidence,” material “not produced by the legislative process,” including such sources as scholarly articles, administrative agency interpretations and restatements of law.  

In the middle falls legislative materials, but as Nunez contends, there are a number of reasons to be highly restrained in their use. Anticipating one aspect of Scalia’s critique of the use of legislative history to determine legislative motivation, Nunez notes that multiple legislators with multiple agendas work on legislative enactments, with the result that “[o]nly at the broadest level of generalizations […] can we honestly assume that there exist[s] a consensus among the legislators as to the intent of the statute.” Consequently, it is a mistake to look at the words of any single legislator or legislative record given the diversity of members of a legislature and the “diverse motives and understandings that produce a final statute.” Adding to this problem is the phenomenon of legislators hostile to a proposed law putting material into the legislative record in an attempt to poison the legislative history against the text if enacted. Still other objections arise upon inspection of the legislative process. Human fallibility raises its head, “it is not the sections of the statute that were fully discussed, but the sections that were not, which usually create problems as to legislative intent.” Timing too plays a role with “[t]he reliability of a particular legislative document […] related to the time sequence of the legislative process involved.” The horse-trading aspect of legislation needs to be considered, with imprecise language being used “in order to obtain agreement among the widest number of legislators, or to avoid thorny issues that would be exposed were exactness demanded.” The legislative record may be extensive, but the information it provides is evidence not of the collective mind of the legislature but rather its “thinking process,” including the “persuasive arguments” relevant to the proposed legislation but “not clear statements of legislative intent.” Given these realities, Nunez concludes, while the idea of legislative intent may have merit, use of legislative materials has “no inherent value as evidence of” such intent.

**III. Legislative History in the Information Age**

**A. Availability and Use of Legislative History**

One of the practical objections that have been raised to the use of legislative history in statutory interpretation and analysis revolves around the ability of advocates...
and jurists to get hold of the documents from the legislative record. Back in the 1980’s, one scholar noted that even if legislative history “could be and were adequately available,” there was no way for all the documents to be tracked, recorded and stored in a way that would be easily and economically accessible to researchers.\textsuperscript{126} Stephen Breyer in his 1992 article on legislative history attempted to thwart that possible objection by noting that for lawyers researching a specific statute, the full legislative record could be found in federally-supported depository libraries, and that “most libraries” provide summary reports of the legislative history.\textsuperscript{127}

Leaving aside for a moment the utility for many lawyers of such a system where they might be required to travel a not inconsiderable distance to obtain legislative history materials, the use of legislative history under such conditions would doubtless increase research, litigation and adjudication costs, as time and effort had to be allocated into tracking down the legislative record and going through it meticulously.\textsuperscript{128} Breyer tried to counter such an objection by noting the value provided by legislative history research, “that the costs of using history are meaningful only when compared against the benefits of whatever clarity it may bring and with the costs of alternative ways of achieving the same objective.”\textsuperscript{129} Justice Scalia, unsurprisingly, took a different approach in his 1997 book on legal interpretation, drawing on his pre-judicial work with the Justice Department to contend that an inordinate amount of time can be spent on legislative history research and reading.\textsuperscript{130} As he wrote, “[t]he most immediate and tangible change that the abandonment of legislative history would effect is this: Judges, lawyers, and clients will be saved an enormous amount of time and expense.”

In the past, whichever side in the accessibility debate had the better argument involved a prudential judgment. It is possible that, in an overwhelmingly print-oriented research environment that the benefits of using legislative history might outweigh the costs in a specific case, while the overall expense, in both time and money, of engaging in legislative history could result in a burdensome increase in cost for the legal system with not enough in the way of substantive improvement in legal analysis to justify the additional expense.\textsuperscript{131} Nowadays this particular aspect of the debate over the use of legislative history is being rendered increasingly less relevant by changes in the

\textsuperscript{126} Reed Dickerson, Statutory Interpretation: Dipping Into Legislative History, 11 Hofstra L. Rev. 1125, 1141-42 (1983).
\textsuperscript{131} Id. at 36.
legislative process and technology. As long ago as the early 1970’s, one commentator observed that legislative history was becoming more accessible due to improvements in legislative record keeping.\textsuperscript{132} With the advent of the Internet and rise in online availability of legislative materials, availability is becoming less an issue. Writing at the end of the 1990’s, Michael H. Koby wrote of the “promise” held by the Internet to make legislative history documents “almost universally available.”\textsuperscript{133} While a considerable amount of legislative history is not yet (and the word “yet” should be emphasized) available online, the practical objection stemming from a lack of access to legislative history is becoming ever less compelling. It is akin to a dark ages pilgrim looking at a recently uncovered fossil and mistaking it for the remains of the dragon that he fears lurks in the mountains.

One of the consequences of increased access to legislative materials is increased use.\textsuperscript{134} As legislative history becomes easily accessible, advocates are going to reach for it to argue cases. Invariably, in cases where statutes predominate and the legislative history is available, that legislative history will favor one side in a dispute, and prudent advocates and analysts will incorporate legislative history into legal research and writing. As Eskridge and Frickey have explained, most lawyers follow an “eclectic” approach when examining statutes, using the tools at hand to discern the likely approach that a court may take to applying the law.\textsuperscript{135} If the only tool a lawyer has is a hammer, as the saying goes, every problem is a nail. But if the toolkit expands, then different approaches to problem solving and analysis become possible, then helpful, then eventually necessary. As legislative history becomes more and more accessible, attorneys will turn to it to look at the legislative record to see what dwells within it, to either help or hinder their clients. The dragon’s horde becomes all the more alluring. As legislative history enters into the mix, and becomes more and more available, that process is likely to accelerate, with the standard of practice shifting as a result.

Researching legislative history in print sources is still with us, and is unlikely to disappear anytime soon. Utopia (or dystopia, depending on one’s perspective) has not yet arrived. But technology is making legislative history more and more accessible and as a result more likely to be employed in legal writing and analysis. For the foreseeable future, legal analysts delving into legislative history will likely function in both print and online research sources. However, the books are being inexorably supplanted by the


\textsuperscript{133} Michael H. Koby, The Supreme Court’s Declining Reliance on Legislative History: the Impact of Justice Scalia’s Critique, 36 Harv. J. Legis. 369, 372 (1999).

\textsuperscript{134} Cf. Michael H. Koby, The Supreme Court’s Declining Reliance on Legislative History: the Impact of Justice Scalia’s Critique, 36 Harv. J. Legis. 369, 372 (1999) (“[t]he increased availability and accessibility of congressional documents also contributed to growth in citation to legislative history”).

\textsuperscript{135} William N. Eskridge, Jr. and Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 Stan. L. Rev. 321 (1990).
spread of computer-assisted legal research. Internet-based legal research is changing the conditions under which legislative history research is undertaken by increasing the ease and comprehensiveness of the research that can be done from the comfort of a researcher’s office or the local coffee shop. Far from being locked away in distant archives or regional libraries, legislative history is becoming more and more accessible by the day. Whether chained or not, the dragon of legislative history is slowly moving onto the field.

B. This is What the Future Looks Like: the Explosion of Internet Sources for Legislative History Research

1. Internet Research Sources

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

- Proprietary sources like WestlawNext\(^\text{136}\) and LexisAdvance\(^\text{137}\) that provide detailed legislative history materials through their web-portals as part of a research subscription.
- Free legal research sources online for federal legislative history, such as the Library of Congress’ own Thomas website,\(^\text{138}\) Congress.gov: United States Legislative Information,\(^\text{139}\) and the U.S. Government Printing Office Federal Digital System.\(^\text{140}\)
- Webpages for individual houses of Congress\(^\text{141}\) and the state legislatures.\(^\text{142}\)

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\(^{142}\) For a sample of official state legislature websites, see, e.g.,  
Search engines such as Google, Bing, and Yahoo.

In addition to these established avenues of legislative history research, with the rise of mobile technology (tablet computers and smartphones), a whole new aspect of researching legislative history online has emerged. No longer constrained to a desktop or laptop computer, legislative history materials are available not only though the Internet browsers on mobile devices, but through specialized applications (commonly called “apps”) used on both phones and tablets. Looking through some of the apps available on the two dominant mobile computing platforms at the time of this writing, Apple’s iOS operating system and Google’s Android operating system, there are several legal research apps available that could be used to research legislative history. On iOS, both WestlawNext and LexisAdvanced are available for the iPad, with LexisNexis also available for the iPhone. The Congressional Record itself is available as a free app from the Library of Congress, for use with either the iPad or the iPhone, providing access to volumes available from 1995 forward. On the Android platform, WestlawNext is available as a proprietary application. In both platforms, smartphones and tablets come with Internet browsers that allow navigation of the World Wide Web from the device.


148 Id.
Not every piece of the legislative record is yet available online, and there are significant variations in what is available online from jurisdiction to jurisdiction through governmental websites. At the time of this writing, federal legislative history materials available online through the Library of Congress’ research website Thomas vary depending on the document sought. Congressional Record materials go back to the 101st Congress (1989-1990), and committee reports go back to the 104th (1995-96). State by state variation in the online availability of legislative records is present as well.


Researching federal legislative history can be a complicated process. Looking at researching a specific federal statute’s legislative history online outside of Westlaw and LexisNexis can currently be a challenge if part of the statute’s relevant legislative history falls outside of the range of materials that can be found through the government’s

open-access websites. However, for statutes that fall within the range of years for which legislative history is available, compiling a detailed legislative history is relatively painless – especially when compared with print-based research for the same material. Take as an example the legislative history for the North Korean Human Rights Act of 2004. Without a compiled legislative history for the Act at one’s fingertips, discovering a reasonably comprehensive legislative history from print sources requires a journey through a significant number of print resources. That research process can only be undertaken if the researcher is fortunate enough to be at a law library that has copies of all the necessary print sources for the legislative record.

What is the process like to compile legislative history materials for the statute using only free Internet sources to conduct the precise same search for documents, this time using the federal government’s own websites, Thomas and the Congressional Publishing Office? Looking at the Thomas website from the Library of Congress under the website’s search page for Bill Summary and Statute from the 108th Congress in 2003-2004, a simple search for the statute – using nothing more than the formal title of the Act – reveals a host of information. Thomas provides the researcher with links to relevant legislative material, including the text of the Public Law text of the statute, links to information regarding congressional actions and amendments, committee actions, cosponsors, and Congressional Budget Office cost estimates, and the official report for the Act, House Report 109-478-Part 1. Searching through the Thomas website’s Congressional Record materials for the 108th Congress, again using nothing more than the formal name of the statute, provides links to floor speeches and discussions from both the House and the Senate, as well as links to materials from the congressional Daily Digest, a link to the text of proposed amendments, as well as voluminous related congressional materials. If one looks at the U.S. Government Printing Office Federal Digital System website, and runs a search again with just the name of the statute, just the first page of results include links to: the official House Report for the statute, 109-478-Part 1, a PDF text of the official Statutes at Large version of the Act, and the formal signing statement by then-President George W. Bush.

This online legislative history research in the Thomas and the Government Printing Office websites took less than an hour to compile, cost nothing except the price of internet access, and was carried out with a laptop far from a courthouse or law school library. The only information that was necessary to carry out the search for the legislative history was: 1) the name of the Act and 2) how to find the websites for

157 Id.
Thomas and the U.S. Government Printing Office Federal Digital System. Is this brief overview of the online search results an exhaustive compilation of the legislative history of the North Korean Human Rights Act of 2004? Perhaps not, but the materials found on these websites in less than an hour does provide the key committee and floor materials for the legislative record, and it does so in a way that is uniform to anyone with access to an Internet browser, providing more consistency in the types of materials that can be obtained quickly and cost-effectively obtained. A detailed legislative record can be obtained online for the Act. While Internet research for legislative history is not yet as chronologically comprehensive as what is available in print resources, at the federal level the bedeviling accessibility problem is slowly but surely becoming less an issue. Moving forward, as legislative materials are added to the databases, accessibility issues will likely continue to fade.

C. It is Easier Than It Looks: Legislative History, Legislative Intent and Disability Protection Under the Washington Law Against Discrimination

While federal legislative history research online is an increasingly viable option, what about online legislative history research regarding state statutes? It is outside the limits of this particular article to provide a 50-state survey of the state of online legislative history research. However, this article will demonstrate how efficient and effective online legislative history research can be at the state level by walking through an example from the Washington Law Against Discrimination.\(^\text{162}\) The statute, commonly referred to as WLAD, provides protection to individuals against discrimination based on a variety of characteristics or traits.\(^\text{163}\) The current statutory provisions include protection against discrimination based on “the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability[.]]\(^\text{164}\) Originally, the statute did not include a definition of the term “disability,” but the legislature provided a fairly broad definition in 2007. The 2007 revision further defines “impairment” under the law, with a similarly sweeping understanding of that term.\(^\text{165}\)

The background regarding the level of detail and the broad scope of the 2007 statute’s disability and impairment definitions provides an interesting overview of the relationship between the courts and the legislature when it comes to statutory interpretation. A 2006 case before the Washington State Supreme Court, \textit{McClarty v. Totem Electric},\(^\text{166}\) involved protections against discrimination on the basis of disability under the previous version of the statute lacking the extensive definitional material.\(^\text{167}\) In that case, the plaintiff filed a complaint against his former employer arguing disparate

\(^{162}\) Wash. Rev. Code sec. 49.60.
\(^{163}\) Id. at sec. 49.60.010.
\(^{164}\) Id.
\(^{165}\) Id. at (c)(i)-(ii).
\(^{166}\) 137 P.3d 844 (Wash. 2006).
\(^{167}\) Id. at 845-46.
treatment on the basis of disability.\textsuperscript{168} The Washington high court’s decision focused on the definition of “disability” under the WLAD.\textsuperscript{169} Looking at the statute, the court noted that the WLAD acted to create an exception to the generally recognized right of an employer to terminate an employee at-will, carving out a variety of exceptions to that rule resulting in an inability of employers to rely on “race, sex disability, and other enumerated characteristics from providing a basis for hiring or discharge.”\textsuperscript{170} The court recognized that the WLAD forbids an employer from taking an adverse employment action against an employee based on disability, but it then looked at the general history of the WLAD, applicable federal law, and the interplay of the WLAD’s requirements with both court precedent and state regulations providing protection for individuals with disabilities.\textsuperscript{171}

The court then sought to provide a definitive definition for the term “disability” as used in the WLAD, beginning its effort by noting that “[t]he WLAD speaks in terms of ‘disability,’ not of ‘medical condition.’”\textsuperscript{172} The court adopted the definition from the federal Americans with Disabilities Act to use when interpreting the WLAD, holding that a plaintiff could establish the presence of a disability under the state statute if the following conditions were met:

\begin{itemize}
  \item [1] a physical or mental impairment that substantially limits one or more of his [or her] major life activities,
  \item [2] a record of such an impairment, or
  \item [3] is regarded as having such an impairment.\textsuperscript{173}
\end{itemize}

The court continued to specify that “[a] physical or mental impairment that is substantially limiting impairs a person’s ability to perform tasks that are central to a person’s everyday activities, thus are ‘major life activities.’”\textsuperscript{174} In support of its decision, the court stated that such an approach comported with the “plain meaning of the term ‘disability’ as utilized by the legislation and the history underlying the WLAD.”\textsuperscript{175} It also had the added virtue of following the federal definition under the ADA.\textsuperscript{176} Finally, the court’s definition would limit the kind of cases that could be brought under the disability protections of the WLAD, keeping frivolous claims at bay.\textsuperscript{177} As the court’s opinion put it, such a definition would conserve “scarce judicial resources” to focus on “those most in need of the WLAD’s protections, rather than persons with receding hairlines.”\textsuperscript{178}

\begin{thebibliography}{99}
\bibitem{168} Id. at 846.
\bibitem{169} Id. at 847.
\bibitem{170} Id. at 847-48.
\bibitem{171} Id. at 848-852.
\bibitem{172} Id. at 850.
\bibitem{173} Id. at 851.
\bibitem{174} Id. at 852.
\bibitem{175} Id.
\bibitem{176} Id.
\bibitem{177} Id.
\bibitem{178} Id.
\end{thebibliography}
Soon after the *McClarty* decision was handed down, the legislature moved to amend the WLAD’s protections regarding disability, leading to the current statutory language.179 The question of the effect of that new language on the state Supreme Court’s previously announced definition of disability was resolved in *Hale v. Wellpinit School District No. 49* in early 2009.180 In that case, a challenge was brought to the applicability of the new statutory language to a disability case that was dismissed after *McClarty* was decided but prior to the enactment of the new language by the legislature.181 In making its decision, the court noted that the legislature’s amendment of the WLAD after *McClarty* was designed to reject that case’s definition of the “disability,” and that the new definition would be “applied retroactively.”182 The court examined the formal findings included with the statute by the legislature, textual differences between the previous version of the WLAD, operative at the time of the *McClarty* decision, and the revision of the statute’s disability definition provisions post-*McClarty*.183 The court rested its analysis on the new text of the WLAD, rather than the legislative history relevant to the revision of the statute, finding that under the new text of the statute, the definition of “impairment” was significantly broadened and that the new definition “eliminate[s] the requirement that the plaintiff demonstrate that the allegedly disability condition limits ‘one of his major life activities.’”184 The court found that the statute expressed the legislative intent to provide a different definition than the one adopted by the court in *McClarty*, and that it was permissible for the legislature to craft the new definition to apply retroactively.185

The plain language along with the legislative findings of the revised statute answered the question for the court in *Hale*. Assume, for sake of discussion, that a lawyer wanted to see if there was anything in the legislative record that might confirm the Washington Supreme Court’s reading of the revised version of the WLAD, or provide contextual information to assist in understanding the purpose or aim of the statute’s definition of “disability.” Perhaps the lawyer needs additional information to persuade a recalcitrant client or an obstinate senior partner regarding the substantive correctness of the *Hale* court’s determination of the revised statute’s purpose and effect. So, off that lawyer goes to inspect the legislative history behind the revised text of the WLAD.186 She

180 Id. at 1021.
181 Id. at 1023.
182 Id. at 1023-24.
183 Id. at 1024-25.
184 Id. at 1025.
185 Id. at 1028.
186 For an overview of the process of researching legislative history for Washington State, see Washington State Legislative History, Gallagher Law Library, University of Washington School of Law, available online at [https://lib.law.washington.edu/content/guides/washleghis](https://lib.law.washington.edu/content/guides/washleghis) (downloaded May 30, 2013); for an overview of Washington State legislative history research using both books and internet sources, see Julie Heintz-Cho, Tom Cobb and Mary A. Hotchkiss, Washington Legal Research 151-68 (2d ed. 2009).
could carry out the legislative history research using print resources, or the lawyer could head to a local coffee shop, fire up her laptop and research the legislative history online.

The Washington State legislature homepage has legislative materials of varying comprehensiveness available from 1991 to present.187 Using the Senate Bill information for the disability provisions in the revised WLAD provided in the *Hale* case188 it is easy enough to find the formal bill summary on the state legislature website using the website’s Detailed Legislative Reports search function189 After navigating to the materials for the 2007 legislative session (the year the WLAD was revised), one merely has to add the official bill number for the then-proposed statute.190 In addition to online versions of the House and Senate Journals, a search of the official state legislature homepage reveals a significant amount of legislative history information for the revision of the WLAD’s provisions regarding disability protection.191 Textually, earlier versions of the bill that would eventually be enacted are available, as is a procedural history relevant to the bill that formally was passed and enacted by the legislature, Senate Bill 5340.192 Documentary sources include a broad selection of materials dealing with both the text and the purpose and intent of the legislature in enacting the revision.193 Bill documents, bill digests, and bill reports, including a detailed formal analysis of the bill by the state House of Representatives is easily found through links provided on the webpage.194 Amendments to the bill, with clear indication whether the amendment was passed or rejected, are included, with links to the texts of the amendments.195 Included as well are links to video recordings of relevant House and Senate committee meetings.196 An examination of the Substitute House and Senate Bill Reports available through the website demonstrate that the legislature very clearly drafted the WLAD to alter the law to more strongly protect the rights of people with disabilities.197 The legislative history also evidences the intent for the WLAD revision to apply retroactively.198

187 Id. at 2.
192 Id.
193 Id.
194 Id.
195 Id.
196 Id.
198 Id.
State legislative history materials are becoming increasingly available online with the march of time and technology. While there is less uniformity regarding availability of state legislative materials than federal ones (a consequence of living in a federal system with multiple jurisdictions), access is becoming less and less of an issue, just as it is at the federal level. The rise of online availability of legislative history information, combined with the decreasing intensity of the broader theoretical dispute regarding the use of legislative history at the federal level, leads to a need for a clearer view of the role of legislative history in legal writing and analysis. It is to this topic that the section of this article will now turn, with some thoughts on how to tame the dragon of legislative history.

IV. Use It But Don’t Abuse It: Legislative History’s Utility in Legal Analysis

A. Towards a Middle Path for the Use of Legislative History

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

That textualism has been unable to win the field has been conceded for some time by some of the leading judicial figures within the textualist camp. In a 2008 interview with the ABA Journal, Justice Scalia pointedly admitted this when he gave advice to appellate advocates within the course of the interview. While holding fast to textualism, Scalia noted that his approach was “distinctive,” and that the bulk of the current Supreme Court members were interested in using legislative history. As a

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199 John F. Manning, Second-Generation Textualism, 98 Cal. L. Rev. 1287, 1307-08 (2010) (proposing that the Supreme Court has not decided to exclude legislative history entirely from its decisions, it has reached “an equilibrium that greatly tempers judicial reliance on legislative history as a source of evidence while enhancing judicial attention to the text[”]).


201 Id. at 2.

202 Id.
result, a prudent advocate should tailor his or her arguments accordingly.⁹²³ “It does make a difference,” Scalia told the interviewer, “to my colleagues.”⁹²⁴

As far back as 1990 Judge Easterbrook noted the continued durability of inquiring into legislative history, observing that “[n]o degree of skepticism concerning the value of legislative history allows us to escape its use.”⁹²⁵ He also proposed that judges look to legislative history not expansively but to provide a sense of the area that the statute is meant to govern, the “domain of the statute.”⁹²⁶ In a 1998 law review article Alex Kosinski of the Ninth Circuit Court of Appeals, another leading textualist judge, looked out on the impasse regarding the different approaches to statutory interpretation and, after providing a robust defense of the textualist position, proposed that Congress might decide to end the debate itself via the passage of “[l]egisl[ion] instructing the courts and administrative tribunals how it expects them to apply the statutes it passes.”⁹²⁷ He also suggested other options to resolve difficulties in statutory interpretation, including the creation of “an official legislative record, generated jointly by both houses,” to provide formal guidance to the courts regarding statutory application.⁹²⁸

As John F. Manning has proposed, textualism appears to be entering in a second phase, acknowledging the value that legislative history brings to statutory interpretation while continuing to insist on following “closely the terms of a clear text[.]”⁹²⁹ In Manning’s view, textualism has developed into a basic approach to statutory construction holding “that judges must respect the level of generality at which the legislature expresses its policies.”⁹³⁰ This “newer textualism,” as Manning calls it places priority on the statutory text but does not posit an ideological hostility to the use of legislative history.⁹³¹ Instead, “it requires only the conclusion that legislative history should not trump statutory text when both speak clearly but send conflicting signals.”⁹³²

One particular use of such an approach is when the Supreme Court examines legislative history not to supplant or supplement a statute’s plain meaning, but as evidence to support its reading of the plain language of a statute to ensure that such a reading comports with legislative intent. Such a use of what is referred to as

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⁹²³ Id.
⁹²⁴ Id.
⁹²⁶ Id. at 448.
⁹²⁸ Id.
⁹³⁰ Id. at 1316.
⁹³¹ Id. at 1315.
⁹³² Id.
“confirmatory legislative history”\textsuperscript{213} has found support from justices normally considered to be in different ideological wings of the Court: Samuel Alito writing for the Court in \textit{Zedner v. United States}\textsuperscript{214} and Stephen Breyer writing for the Court in \textit{Rowe v. New Hampshire Motor Transport Association.}\textsuperscript{215} \textit{Rowe} is of particular interest. In that case the Court found that federal law preempts state governments from effectuating policies regarding “a price, route, or service of any motor carrier,” including airlines. The Court grounded its opinion in the plain language of the statute, and then supported its reading of the statute with material from the legislative record, consulting the legislative history for three critical pieces of information confirming its approach to the statutory text:

- That Congress acted with knowledge of an earlier decision by the Supreme Court when it enacted the statutory text operative in \textit{Rowe}.\textsuperscript{216}
- That permitting a “state regulatory patchwork is inconsistent with Congress’ major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace.”\textsuperscript{217}
- Explaining Congress’ approach in excluding a specific term from the operative language of the statute before the Court, “despite having at one time considered” including such language.\textsuperscript{218}

These points were not used by the Court in \textit{Rowe} to supplement the statute’s language or to discern the specific meaning of a statute in the absence of text or the presence of ambiguity or vagueness. Instead, the legislative history was used to support the Court’s reading of the plain meaning of the statute. That the Court’s decision was justified by the plain meaning of the statute without recourse to the legislative history is demonstrated by Justice Scalia’s concurrence, where he made the point that the recourse to legislative history was unnecessary in the case.\textsuperscript{219} Scalia’s observation is quite correct, the use of legislative history did nothing to provide unique substance to the Court’s ruling, however, it did provide confirmatory support for the court’s reading of the plain language of the statute. And the decision written by Breyer did so with support from a wide constellation of justices\textsuperscript{220} from both the so-called “liberal” and “conservative” wings of the Court:

\textsuperscript{213} James J. Brudney, 76 Brook. L. Rev. 901 (2011); Reed Dickerson, Statutory Interpretation: Dipping Into Legislative History, 11 Hofstra L. Rev. 1125, 1134-37 (1983)
\textsuperscript{216} Id. at --, 128 S.Ct. at 994.
\textsuperscript{217} Id. at --, 128 S.Ct. at 996.
\textsuperscript{218} Id. at --, 128 S.Ct. at 997.
\textsuperscript{219} Id. at --, 128 S.Ct. at 999 (Scalia, J., concurring in part).
\textsuperscript{220} Id. at --, 129 S.Ct. at 992.
While two of those justices (Stevens and Souter) are no longer serving, the remaining justices make up a six-justice majority on the current Court.\textsuperscript{221} \textit{Rowe} shows that the confirmatory use of legislative history is an approach to the use of legislative materials in statutory interpretation that can receive majority support on the Court.

This moderation towards the limited use of legislative history should not be read to mean that textualism has failed to influence the way non-textualist judges on the Supreme Court approach statutory interpretation. Commentators have noted that Justice Scalia has an effect on his colleagues, likely moving the Court towards a more textually respectful orientation when evaluating and interpreting statutes.\textsuperscript{222} As John Ohlendorft has observed,

Justices whom one does not associate with textualism have donned their “grammarians’ spectacles” and given pride of place to the text in their more recent efforts at statutory interpretation, turning only to background purposes and legislative history only after exhausting available textual arguments, and, even then, almost with an air of diffidence.\textsuperscript{223}

Textualism has served and continues to serve an important function, guiding the Court away from an over-reliance on legislative history towards a more grounded and limited use of legislative records. Indeed, in many ways, textualism, albeit in what Ohlendorft describes as “a weak form,” may now be considered to be the “dominant interpretive methodology” at the Supreme Court.\textsuperscript{224}

Nevertheless, the success of textualism at the Supreme Court has not resulted in non-textualists abandoning the use of legislative history altogether. The textualist critique has resulted in a welcome refocusing on the statutory language, this approach has

\textsuperscript{221} Supreme Court of the United States, Members of the Supreme Court, \url{http://www.supremecourt.gov/about/members_text.aspx}, downloaded Aug. 3, 2013.
\textsuperscript{224} Id. at 372; see also Jeffrey A. Pojanowski, Statutes in Common Law Courts, 91 Tex. L. Rev. 479, 480 (2013).
been incorporated into, rather than supplanting another approach to the use of legislative history, purposivism. As initially identified by Hart and Sacks\(^{225}\) and explained by John F. Manning, purposivism is grounded on a three-fold idea: that legislation has a purpose, that in the American system the legislature acting within constitutional boundaries is the primary policy-maker when it comes to law, and that statutory interpretation should show deference to the policies chosen and enacted by the legislature.\(^{226}\) Not eschewing recourse to legislative history, purposivism sees the legislative record as one (but not the only) tool available to discern the purpose behind a statutory enactment.

While allowing for the use of legislative history, such an approach can avoid difficulties with the overuse or abuse of legislative history to interpret specific statutory terms. Robert John Araujo has argued that legislative history “cannot be relied on to define what the authors [of a statute] intended in every factual context.”\(^{227}\) While legislative history is not a reliable guide to the meaning of the precise terminology used in a statute,\(^{228}\) it can be a useful source of information to determine a statute’s purpose, understood as the “results of the text and what it may achieve.”\(^{229}\) While legislative history may, in Araujo’s view, be seen “in part” as a legal fiction, it is a useful one for discerning the “teleological dimension” of a statute.\(^{230}\) One hallmark of Araujo’s discussion of legislative history is to focus less on the specific intent of the legislature in enacting a certain provision and to pay more attention to the broader goals the text was designed to address.\(^{231}\) Because of the indeterminacy of much of the information within legislative history, looking at most legislative records in an attempt to provide a clear and compelling direction in an interpretation of a statute is likely to be unhelpful.\(^{232}\) Even looking at statutes with extremely detailed legislative histories often results in finding little information with which “to conclude objectively what was in the specific will of the legislature.”\(^{233}\) While affirming that legislative history does serve an important function in statutory construction, Araujo argues strongly that “[i]t is not a principal one that clarifies with specific determinacy the meaning of a statute.”\(^{234}\) Given the nature of legislative history, it can be of assistance but it cannot be dispositive when it comes “to defin[ing] what the authors intended in every factual context.”\(^{235}\)

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

\(^{228}\) Id.
\(^{229}\) Id.
\(^{230}\) Id. at 279-80.
\(^{231}\) Id. at 296.
\(^{232}\) Id.
\(^{233}\) Id.
\(^{234}\) Id.
\(^{235}\) Id.
Chief Justice John Roberts, but this recent embrace of purposivism has been more attentive to enacted statutory text than the traditional purposivist approach exemplified by the Supreme Court decision in *Holy Trinity Church v. United States.*  

If a statute frames the relevant command in a crisp and precise way, the Court now takes Congress to have defined the relevant statutory purpose with specificity." The justices, as Manning writes, by and large “accept the constraints of the statutory text,” giving priority to the language used in the statute “even when doing so produces results that fit poorly with the apparent purposes that inspired the enactment.” While legislative history is not discarded in this new approach to purposivism, Manning sees the Supreme Court using legislative history for confirmatory purposes, and “only rarely” used in “a dispositive role in the Court’s opinions, even for purposes of resolving ambiguity.” The approach described by Manning has both overlap with and some divergence from the traditional approach to the use of legislative history. It does continue on with openness to looking at the legislative history “resolve indeterminacy” in statutory interpretation, but the Court “will not do so to vary the meaning of clear text.”

This overview of the debate about the use of legislative history demonstrates both the theoretical camps regarding the propriety of its use, and of efforts to craft a more restrained and textually responsible approach, at the federal Supreme Court level, to its use in interpreting statutes. Practice is leading, if not to consensus, then perhaps to “an equilibrium” resulting not in the banishment of legislative history from the Court’s statutory analysis but its restraint in favor of the text as enacted by the legislature. As Manning puts it, “[w]hen the statute is clear and precise, ulterior purposes counts for little. When a statute is vague and open-ended, ulterior purpose can be dispositive.”

**B. Context, Background and Purpose**

The textualist critique, particularly when informed with the insights provided by Richard I. Nunez is highly persuasive regarding using legislative history as a source of meaning for individual terms in a statute, outside of considerations of ambiguity and absurdity. But as an objection to the use of legislative materials as evidence of

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237 Id. at 132.
240 Id. at 165-66.
241 Id. at 165-66.
242 Id. at 166.
243 Id. at 165-66; Jeffrey A. Pojanowski, Statutes in Common Law Courts, 91 Tex. L. Rev. 479, 485 (2013)
244 See also, e.g, Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 568 (2005); West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 98 (1991);
purpose, background and as a verification of the meaning of statutory text, it is far less persuasive in light of historic Supreme Court practice. 245 As Nunez states, legislative history can provide a record of the legislature’s “thinking process.” 246 Such information is, as the textualist critique powerfully contents, not law, but it may be highly relevant to understanding the context, background and purpose of a statutory enactment.

One of the challenges writing about a legal rule derived from a statute rather than a court rule regards the lack of contextual information that permits for a fully developed discussion of a legal rule. One possible approach to compensating for this lack of information is to look at the formal legislative history to try to fill in the contextual information that is critical in a fully developed discussion of a rule. By looking at the statutory text along with information found in the legislative history, the purpose of the statute, the events that may have brought the subject of the statute to the legislature’s attention, considerations involving the proper legislative response to an identified problem, and the like can be discerned if the legislature has compiled an extensive record of its deliberations in regard to the statute discussed. As a well-known quote from Felix Frankfurter puts it: “[l]egislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose.” 247

Statutes, like all written documents, are a form of literature, and literature embodies principles of language that reference meaning beyond the simple words that are put on a page. As James Boyd White observes, while it is “absurd to say that there is no meaning in the text itself, or that ‘meaning’ is simply a word for what we in our wisdom happen to agree about at the moment,” it is also “absurd to speak as if the meaning of a text were always simply there to be observed and demonstrated in some quasi-scientific way.” 248

### Notes

245 See, e.g., Humphrey’s Ex’r v. United States, -- U.S. --, 55 S.Ct. 869, 873 (1935): While the general rule precludes the use of [congressional] debates to explain the meaning of the words of a statute, they may be considered as reflecting light upon the general purposes and the evils which it sought to remedy […] Thus, the language of the act, the legislative reports, and the general purposes of the legislative as reflected in the debates, all combine to demonstrate the congressional intent.


248 Law as Language: Reading Law and Reading Literature, 60 Tex. L. Rev. 415, 417 (1982).
To read a text is to engage, as White explains, in a “shared process” that is bounded by the norms of a specific interpretive culture, handed on from reader to reader. Reading literature, including legal literature, is “inherently communal,” and is ‘an activity of the mind and imagination, a process that requires constant judgment and creation,” carried out with awareness of the way others within the interpretive community are reading the texts. Law shares in these characteristics of language, as White explains:

Law is in a full sense a language, for it is way of reading and writing and speaking and, in doing these things, it is a way of maintaining a culture, largely a culture of argument, which has a character of its own.

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

Adding to this already bedeviling complexity is the increasing number and complexity of federal statutes enacted since the New Deal, an increase which one commentator notes “made it increasingly necessary for the [Supreme] Court to interpret statutory language and to rely on legislative history.” Advocates, judges, and legal analysts have to make sense of all that. And while strict construction of enacted legal

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249 Id. at 415-16.
250 Id. at 415.
251 Id.
252 Id.
254 Barbara Child, What Does “Plain Meaning” Mean These Days?, 3 Scribes J. Legal Writing 1, 16 (1992).
texts can be a valuable interpretive approach in order to constrain mischief by judges, advocates and analysts, such strict construction of enacted law may not comport with the intention of the law’s drafters. Russell Kirk put it well commenting on the related topic of constitutional interpretation: “‘strict interpretation’ and ‘original intent’ may not always coincide.”257

Limitations on the plain meaning approach are well understood and applied by the courts. Justice Scalia has written in support of the use of legislative history to help avoid an absurd result in interpreting statutory language. In Green v. Bock Laundry Machine Company, he wrote that when faced with statutory language that, “if interpreted literally, produces an absurd, and perhaps unconstitutional result,” resort to examination of the “public materials” behind the statute, including its legislative history and background, is “entirely appropriate” in order to “verify” the meaning the legislature intended to convey through its chosen terminology in the statute.258 The limits of a strict approach to plain language do not undermine the significant insights that textualism can offer to legal writers and analysts who engage with the legislative record for information to aid in statutory analysis. It serves as a standing reminder of the normative status of statutory text. When seeking to effectuate legislative intent the best expression of that intent is to be found in the words of the statute itself.259

Statutory interpretation is not a mechanistic process, though, and there are times when the legislative record may be of assistance in discerning legislative intent, background and purpose. Context counts in interpreting statutes, and underestimating the importance of context is a critical error.260 Interpretation is, as one scholar notes, “essentially a messy business,”261 and this is nowhere more true than when dealing with statutes. As another author has put it, statutes reflect a deep reality within the legislative process, a reality that calls not for rote thinking but for creative engagement:

Statutes reflect underlying principles, purpose and policies that explain or justify the rules they provide. They are the product of process of legislative study, negotiation, and compromise and often culminate a series of enactments. The express terms of a statute often reflect its underlying policies imperfectly; developing arguments based on those policies calls for creativity on the part of counsel.262

261 Gerald Graff, “Keep off the Grass,” “Drop Dead,” and Other Indeterminacies: A Response to Sanford Levinson, 60 Tex. L. Rev 405, 410 (1982).
At the same time, the creativity of legal writers, jurists, and analysts is limited by the boundaries of the legal text itself. And it is here that textualism’s most powerful critique of the abuse of legislative history in statutory interpretation comes to the fore – the law is not the legislative history, no matter how accurate and well-developed and clearly expressed it may be; the law is the statute before the courts and the people, and the statute consists of the words chosen by the legislature and either consented to by the executive or enacted by the legislature over an executive veto. Legislative history may carry persuasive weight, particularly when the meaning of a particular statute or regulation isclouded over with ambiguity, but the legislative and regulatory record itself is not a formal part of the law unless that record is adopted by a court in a decision or incorporated by a legislative body into the text of an enacted law. Consequently, a careful legal analyst must be vigilant against confusing the legislative record with the law itself, or writing in such a way that the read falls into confusion regarding the proper relationship of the legislative or regulatory history and the law.

Textualism’s critique illuminates and emphasizes legislative history’s nature as a secondary source, at best good evidence of a statute’s background and goals, and at worst an inaccurate guide to that meaning. Consequently it is a secondary source that should be treated carefully. The need for caution in the use of legislative history in statutory interpretation is not contrary to the nature of legislation as literature but flows from the unique type of literature that statutes represent. Legal language and the texts that carry it are, at least in the best examples, crafted with a precision to meaning that attempts to memorialize as much information as possible. The reason for this is plain: in a way that is unique among written texts, statutes (and analogous drafted texts like contracts) carry very real and painful consequences for their violation, they “have to carry authority in a way that a literary critic’s interpretation of a poem or a bystander’s interpretation of a remark in the street do not.”

Violate the statute against murder, and one’s life may be forfeit; violate a statute regarding the duty of care, and litigation may result. Such consequences do not attend to the reading of most other documents -- my treasured copy of The Hobbit, for example. Context is replaced with detail as much as possible given the limits of the drafter’s skill. Such an approach is a wise one, given the real-world consequences of non-compliance with the law, consequences that make an over-reliance on legislative history a particular concern.

Dragons are dangerous after all.

At the end of the day, at least in some cases, the need for context, particularly in regard to hard cases (which are the kind most likely to end up being the subject of legal

263 See State v. Gaines, 206 P.3d 1042, 1048 (Or. 2009).
analysis and judicial action) is evident.\textsuperscript{267} Textualism is not ignorant of this need, and textualists such as Justice Scalia and Justice Thomas have recognized the importance of context in understanding statutory language.\textsuperscript{268} As Justice Scalia has written, “the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.”\textsuperscript{269} The need for context does not in and of itself mandate the conclusion that the only way to discern context is by the use of legislative history.\textsuperscript{270} Textualists will generally look at the implications of language and context provided by the statutory text itself.\textsuperscript{271} Given the need for context in statutory analysis, it is difficult to see why legislative history should be excluded for evaluation as evidence of a statute’s broader context and purpose. Treated with caution, yes, but cabined off in all but a few circumstances? Prudence would seem to auger in favor of a legal analyst looking at the legislative record in order to discern its context, of the “deals reached” within the legislature that resulted in the statute.\textsuperscript{272} When faced with new and changing circumstances, legislative history can serve as a tool for lawyers and judges to use when the legislative record proves reliable and helpful in discerning context for the statute,\textsuperscript{273} not as a substitute for the statute’s text, but as an aid to understanding its purpose and to confirm the meaning of its normative language.\textsuperscript{274} From the information provided by the legislative history, the legal writer and analyst can strengthen his or her assurance regarding the import of the text’s language.\textsuperscript{275} It is in this way that legislative history can serve to provide texture to analysis of the law — not a substitute for its content but as a way of understanding the situations from which the law arose.

C. Using Legislative History as Contextual Evidence

Committee reports have long been used by courts when examining legislative

\textsuperscript{267} See, e.g., Dolan v. U.S. Postal Service, 546 U.S. 481, 486 (2006); United States v. International Union, 352 U.S. 529, 530 (1957) (“[a]ppreciation of the circumstances that begot this statute is necessary for its understanding and understanding of it is necessary for adjudication of the legal problems before us[”]).
\textsuperscript{269} Id. at 432 (quoting Smith v. United States, 508 U.S. 223, 241 (1993) (Scalia, J., dissenting).
\textsuperscript{271} Id. at 429-33.
\textsuperscript{273} See John David Ohlendorf, Textualism and Obstacle Preemption, 47 Ga. L. Rev. at 328.
\textsuperscript{274} See, e.g., U.S. v. Allery, 526 F.2d 1362, 1365-66) (8th Cir. 1975) (using legislative history as part of an effort to determine the legislative intent behind and the scope of the application of statutory language).
\textsuperscript{275} See Barbara Child, What Does “Plain Meaning” Mean These Days? 3 Scribes J. Legal Writing 1, 14 (1992).
history, and as one commenter has noted, committee reports been considered to be “the most reliable source of legislative history.” However, there are good reasons to be cautious in the use of committee reports, as with all forms of legislative history they are subject to evaluation as evidence of legislative purpose and meaning. In Pierce v. Underwood, the Supreme Court looked critically at one of the respondents’ arguments about the meaning of terminology in the Equal Access to Justice Act. The argument was based on a congressional committee report from the 1985 reenactment of the 1980 version statute. While the relevant text of the statute remained the same, the 1985 committee report’s view of the meaning of that language, as the Court characterized it, “contradicted, without explanation” the meaning of the language evidenced by the 1980 House Report regarding the statute.

The 1985 committee report varied as well from the usage of twelve out of the thirteen circuit courts of appeal. Writing for the majority, Justice Scalia noted for the language in the report to be “controlling” on the Supreme Court, it had to “be either (1) an authoritative expression of what the 1980 statute meant, or (2) an authoritative expression of what the 1985 Congress intended.” The Court noted that since it was the role of the Court to determine what the laws means, the first condition was not met. In regard to the second condition, in a longer analysis, the Court found that the 1985 committee report was not related to the actual text of the statute. There is no indication whatever in the text or even the legislative history of the 1985 reenactment that Congress through it was doing anything insofar as the present issue is concerned except reenacting and making permanent the 1980 legislation. These circumstances lead the Court to skepticism about the value of the committee report, although the Court also noted that insofar as the 1985 committee report was simply commenting on language that it did not draft, “[e]ven in the ordinary situation,” the 1985 committee report present did “not suffice to fix the meaning of language” in the statute. As Justice Scalia wrote, “only the clearest indication of congressional command would persuade [the Court] to adopt [the] test” indicated by the 1985 committee report.

As the Court’s decision in Pierce v. Underwood demonstrates, committee reports should not be viewed uncritically in relation to the statutory language they purport to

278 Id. at 566-568.
279 Id. at 566.
280 Id. at 567.
281 Id.
282 Id. at 566.
283 Id.
284 Id. at 567-68.
285 Id. at 567.
286 Id. at 567.
287 Id. at 567-68.
explain. At the very least, a real, tangible nexus has to be present between the committee report and the language used in the text of the statute. Once such a link is present, however, there are solid reasons to support the use of committee reports as useful evidence of congressional intent. As Michael Culotta explains, there are numerous reasons to support the use of committee reports in discerning legislative intent. Consequently, committee reports are critical parts of the legislative record and in many instances may be the most complete reflection of how a bill has gone through the committee process within the Congress. As Culotta explains, committee reports reflect not only the “bipartisan negotiation” that takes place within a committee; they also reflect the work of experts from which the committee may have heard during the legislative process. “As such, committee reports are likely to best articulate the technical meaning of statutory text and, as a result, the overall meaning of the statute.” Conference reports are especially reliable, in Culotta’s view, “because they are the products of a bicameral negotiation among experts in a particular legislative area.” As a result, such reports “may be extremely useful in illuminating the meaning of ambiguous statutory language.”

Culotta’s language in the last sentence is worth emphasizing. Legislative history may be “extremely useful”, but its use is not mandatory. No matter how helpful legislative history is as evidence of legislative intent and statutory context, it remains a secondary source. As Culotta notes, the law remains the statutory text. This distinction does not erode the value of legislative history but protects it and places in its proper role. The use of legislative history legal writing and analysis should not be a substitute for accurately and completely discussing the statutory text. Good statutory analysis begins and ends with the actual statutory language, making sense of it both as part of an individual statute and within a broader statutory scheme of which it is a part. The statutory law is what Congress has enacted pursuant to the Constitution’s required protections and process.

Keeping the text of the statute first and foremost in mind, committee reports can provide significant information regarding statutory background, particularly the need for a particular piece of legislation. A good example of this value in legislative history for legal writing and analysis can be found in examining a relatively recent revision of the court

288 Id. at 697-98.
289 Id.
290 Id.
291 Id.; see also Auburn Housing Authority v. Martinez, 277 F.3d 138, 147-48 (2d Cir. 2002); Resolution Trust Corp. v. Gallagher, 10 F.3d 416, 421 (7th Cir. 1993).
293 Id.; see also Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 568 (2005).
system in the U.S. territory of Guam. Guam is an unincorporated territory of the United States, and as such, its governmental structure is created by and operates under a federal statute that serves as the fundamental law of the territory. 296 This statute is the Guam Organic Act, originally passed in 1950 and amended since. A recent statute governing Guam’s court system is the 2004 Judicial Structure of Guam Act. 298 The act revised the Organic Act’s provisions regarding the court system in the territory, specifying the different levels of court in the territory (federal district, territorial supreme court, superior court and other lower courts as established by local law), the court rules for the Guam supreme court, superior court and other lower courts that may be established, specifying the courts of record in the territory, detailing the jurisdiction and powers of the local courts, and providing that the qualifications of the judges of the courts outside the federal district court are to be under local control. A recent statute governing Guam’s court system is the 2004 Judicial Structure of Guam Act. 298 The act revised the Organic Act’s provisions regarding the court system in the territory, specifying the different levels of court in the territory (federal district, territorial supreme court, superior court and other lower courts as established by local law), the court rules for the Guam supreme court, superior court and other lower courts that may be established, specifying the courts of record in the territory, detailing the jurisdiction and powers of the local courts, and providing that the qualifications of the judges of the courts outside the federal district court are to be under local control. The statute is fairly short but contains considerable detail. What it does not contain is any set of findings, a purpose or intent section, or any information providing the background and context that led Congress to enact the statute.

Fortunately, the legislative history for the 2004 revision contains information regarding the purpose of the statute and the underlying considerations that moved Congress to enact the amendment. The House Report from the Committee on Resources provides an overview of both the bill and its background. Making clear that the aim of the statute is to “amend the Organic Act of Guam for the purposes of clarifying the judicial structure of Guam,” the House Report discusses the legislative and judicial considerations that lead to the need to revise the Guam judicial structure in order to provide for local appellate review of trial court decisions in the territory by a supreme court that is “a co-equal branch” of the territorial government, protected from “changes based upon shifts in control of Guam’s executive and legislative branches.” The House Report also details local reactions to the prospect of the reform of the judicial

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299 Id.
300 Id.
301 Id.
303 Id. at 1-2.
304 Id.
structure on Guam.\textsuperscript{305} The procedural history of the amendment is provided, as is a statement of constitutional authority for the congressional action, a statement on costs and funding, a Congressional Budget Office analysis of the bill, a negative statement on whether the amendment contains any unfunded mandates and a negative statement on whether the amendment preempts any “State, local or tribal law.”\textsuperscript{306}

While the text of the Guam Judicial Structure Act provides the “how” of Congress’s legislative scheme, it cannot provide the “why.” It is the legislative history found in the committee report that provides insight as to the “why.” Congress was not acting just for the sake of doing something. It was acting to correct a long-running structural problem with the court system on Guam, seeking to provide both greater local controls over the courts while insulating the local judiciary from manipulation by the political branches of the territorial government.\textsuperscript{307} The statute unfortunately does not provide a legal reader with that overall context. The legislative history does. It is in this situation that legislative history functions most helpfully, not to set forth something to be taken as authoritative law, but to provide background information about the reason for the law’s creation by the legislature. It is this contextualizing background function that renders legislative history so valuable to a jurist, advocate or analyst, and makes legislative history helpful to the legal writer preparing a statement of the law as it applies to a particular case. As such, the legislative history can be helpful to a writer seeking to provide a sense not only of what a rule says but where the rule comes from and what the rule is seeking to accomplish. Not in a way that would be binding – like if the information was to come directly from an actual source of law – but in a way that is informative and explanatory. It is in this way that legislative and regulatory history can be employed by legal writers to provide a texture to the law – not a substitute for its content but as a way of adding depth to communicating the law’s goals.

\textbf{D. Legislative History Role as Evidence Rather Than Law}

The core of the argument over the use of legislative history is a debate about the nature of law.\textsuperscript{308} When statutes are in play, what is the binding authority – the intent of the legislators or the words of the statute?\textsuperscript{309} Changes in Supreme Court practice and the increasing availability of legislative history make this question more important than ever. The textualist argument convincingly demonstrates that between the text of the statute and the legislative history, the text is the authoritative statement of the law, and that legislative history has little to offer in terms of the ordinary practice of understanding the precise meaning of individual terms used in a given statute, outside of situations with statutory ambiguity or absurd result. While the textualist argument is convincing in regard to the use of legislative history to determine the meaning of specific terms in a statute, it is less convincing in terms of determining the context and purpose of a statutory

\textsuperscript{305} Id.
\textsuperscript{306} Id. at 2-4.
\textsuperscript{307} See generally, id.
\textsuperscript{308} Wilson Huhn, The Five Types of Legal Argument 164 (2d ed. 2008).
\textsuperscript{309} Id.
Legislative history is not law, but it can be evidence.\textsuperscript{310} Openness to the use of legislative history does not necessarily mean losing sight of the need for placing priority on the text enacted by the legislature, so long as the distinction between the law and evidence of its context and purpose are kept clear.

Restraint is called for when using legislative and history to maintain this analytical clarity in legal writing by reinforcing the primary nature of the enacted text in statutory interpretation, and reinforcing the boundary between legislative and legislative history. Materials purporting to be legislative history may or may not carry persuasive weight.\textsuperscript{311} Emphasizing that legislative history is evidence rather than law opens the possibility for prudent evaluation of the legislative record, an evaluation in which the careful legal writer must be vigilant against conflating legislative history with legislation, the record with the law itself. Confusion here can lead not only to confusion on the part of the writer, but also on the part of the reader who is seeking guidance and illumination from the writer’s work. As with all legal writing, a commitment to stating the law accurately and comprehensively is a paramount value. The use of legislative history should be undertaken to further that value rather than undermine it. There is an old witticism from Canada: “in the United States whenever the legislative history is ambiguous it is permissible to refer to the statute.”\textsuperscript{312} An exaggeration, no doubt, but one that betrays some truth from an outsider’s perspective: American courts (and hence American judges) may appear too quick to resort to legislative history in the face of statutory language that was sufficient on its own to resolve a case. A similar concern might be voiced about attorneys eager to use legislative history to undermine a reading of an unambiguous statute that might have a negative impact on a client’s case.

In either event, the basic point undergirding the need for restraint is the same: to avoid the substitution of ideas from outside the legislative process into the interpretation and application of a statute. Legal writing and analysis discerning the meaning of a statutory text needs to begin and end with the language of the enacted text. For the federal Supreme Court, the starting point of statutory interpretation and application is the text itself in its proper context: “in all statutory construction cases, we begin with the


‘language itself [and] the specific context in which that language is used.‘\textsuperscript{313} Between the statute and the legislative history, only the statute is the law.\textsuperscript{314} Even a statute that is poorly drafted, or one where the conditions of application have changed dramatically since the time of its enactment, remains the law until repealed by the legislature or overturned by a court as unconstitutional. No matter how clear, no matter how precise, no matter how reliable, the legislative record is not the law. Its utility and its usefulness remain linked to and restrained by the text of the statute itself.

As Justice Thomas has observed, “Congress’ intent is found in the words it has chosen to use,” and the judicial role is to “identify and give effect to the best reading of the words in the provision at issue.”\textsuperscript{315} While legislative history may sometimes be a valuable aid to a legal writer working to discern the background and purpose of a statute, or to resolve ambiguous or statutory language, or to avoid an absurd result, in order to reach that “best meaning,” it should not stand as a substitute of the language chosen by the legislature and enacted into law. “The best evidence” of statutory purpose is, as the Supreme Court has explained, “is the statutory text adopted by both House of Congress and submitted to the President.”\textsuperscript{316} Under normal circumstances, legislative history may clarify. It may contextualize. It may illuminate. But it cannot replace.\textsuperscript{317} The democratic legitimacy of a statute only attaches to texts that have gone through the requisite constitutional process of bicameral passage and either presidential assent or reenactment over a presidential veto. As the Supreme Court has stated, “legislative intention, without more, is not legislation.”\textsuperscript{318}

The concern about the normative role of legislative text was strongly emphasized by Chief Justice Burger in his dissent in \textit{United Steelworkers of America, AFL-CIO-CLC v. Weber}.\textsuperscript{319} In that case, the Court upheld the legality of an employer-union affirmative action plan creating a quota system for African-American employees seeking admission into a training program.\textsuperscript{320} In reaching its decision, the Court examined the legislative history of Title VII to determine whether that statute should be read to preclude private parties from entering into the kind of affirmative action plan to which the union and the

\textsuperscript{314} Exxon Mobil Corp. v. Allapattah Services, Inc., 545 U.S. 546, 568-71(2005) (discussing the legal nature of legislative history and concerns regarding the reliability of legislative history in resolving statutory ambiguity).
\textsuperscript{315} Harbison v. Bell, 556 U.S. 180, 198 (2009) (Thomas, J., concurring) (citing West Virginia Univ. Hospita
\textsuperscript{317} CBS Inc. v. PrimeTime 24 Joint Venture, 245 F.3d 1217, 1222 (11th Cir. 2001); Northwest Forest Recourse Council v. Glickman, 82 F.3d 825, 834-35 (9th Cir. 1996); Malloy v. Eichler, 860 F.2d 1179, 1183 (3d Cir. 1988).
\textsuperscript{318} Train v. city of New York, 420 U.S. 35, 45 (1975).
\textsuperscript{319} 443 U.S. 193 (1979).
\textsuperscript{320} Id. at 197.
employer had voluntarily agreed.\textsuperscript{321} In its discussion finding that the legislative history supported the legality of the affirmative action agreement at issue in the case, the Court emphasized that the statute’s “prohibition against racial discrimination” had “to read against the background” of both the legislative history of the statute and the general contextual history “from which the Act arose.”\textsuperscript{322} By the majority’s reading, in light of that examination, the statute’s prohibition on racial discrimination did “not condemn all private, voluntary, race-conscious affirmative action plans.”\textsuperscript{323} Burger strongly criticized the majority’s opinion for what he saw as disregard for the plain language of Title VII.\textsuperscript{324}

No dogmatic enemy of the use of legislative history,\textsuperscript{325} Burger expressly noted that legislative history had a role to play in discerning a statute’s purpose, asking in his dissent “how are judges supposed to ascertain the purpose of a statute except through the words Congress used and the legislative history of the statute’s evolution?”\textsuperscript{326} At the same time, Burger emphasized that the language in the statute was so clear that “[o]ne need not even resort to the legislative history to recognize what is apparent from the face of Title VII,” namely that the act prohibits employers from discriminating on the basis of race.\textsuperscript{327} Burger also joined a dissent by then Associate Justice Rehnquist examining the legislative history of the act in detail, noting in his own dissent that Rehnquist’s exploration of the legislative history, “conclusively demonstrates” that the language in the statute reflects the “intended effect” of the legislative action undergirding Title VII.\textsuperscript{328} In Burger’s view, the majority’s decision had the effect of “totally rewriting a crucial part of Title VII to research a ‘desirable’ result,”\textsuperscript{329} something which, he argued, went beyond the Court’s judicial authority.\textsuperscript{330}

Justice Scalia and Chief Justice Burger’s views regarding the abuse of legislative history are reminders of the need to keep the focus on the statutory text when engaging in interpretation and application, whether dealing with the confirmatory use of legislative history or the use of legislative history to determine the background and purpose of a statute. As with any interpretive tool, legislative history has to be kept in the proper perspective – as evidence of context and legislative intent, but evidence that is secondary to statutory text.\textsuperscript{331} The use of legislative history as evidence should be subject to the same determinations of weight to which any other type of evidence is subject, an

\textsuperscript{321} Id. at 200-01.
\textsuperscript{322} Id. at 201.
\textsuperscript{323} Id. at 208.
\textsuperscript{324} Id. at 216-17.
\textsuperscript{325} See generally, e.g., Tennessee Valley Authority v. Hill, -- U.S. --, 98 S.Ct. 2279 (1979) (Burger, C.J., writing for the Court).
\textsuperscript{326} Weber, 443 U.S. at 217 (Burger, C.J., dissenting).
\textsuperscript{327} Id.
\textsuperscript{328} Id.
\textsuperscript{329} Id. at 216.
\textsuperscript{330} Id. at 218.
assessment that calls for lawyers and jurists to inspect the legislative record, to “assess[] how well those sources reflect the legislative context from which the statute emerged.” rather than declaring it off limits as a general rule.332

Legal writers and analysts live in a research universe in which legislative history is a part. At the same time, not every piece of legislative history is of equal value,333 and in some instances the legislative history of a statute may prove to be of little assistance in resolving an issue of statutory interpretation.334 There may also be policy or constitutional considerations that favor taking a restrained approach to the examination of legislative history regarding a particular matter. As I have argued elsewhere, for example, courts should avoid the examination of extrinsic evidence in evaluating the purpose of legislation under the Lemon Test’s secular purpose prong in Establishment Clause cases.335 The risk of infringing on the free speech and religious liberty rights of religious believers in the public square may outweigh any marginal benefits that would accrue to the understanding of a particular statute or statutory scheme. Likewise, in other circumstances the use of legislative history might provide more heat and smoke, so to speak, than light. A prudential and restrained approach to the use of legislative history by a legal analyst may be the better part of valor.

Two last points. First, in one study, the use of legislative history by liberal Supreme Court justices in employment law cases showed that the use of legislative history had a restraining effect on the justices in the cases studied, that “legislative history reliance is associated more often with outcomes to which they would likely be ideologically opposed.”336 That use of legislative history need not release a ravaging dragon upon the land is borne out by the experience in Oregon, where the judiciary has

332 Id.

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

embraced the use of legislative history in statutory analysis. One Oregon lawyer noted as recently as 2010 that despite using legislative history as part of its regular practice, the Oregon Supreme Court had refrained from using legislative history to “override[] the clear language of the statutory text, in context.” This appears to bear out, at this point in time at least, that the use of legislative history in statutory analysis does not necessarily result in the eclipse of the enacted text itself.

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

V. Conclusion

This article has argued that despite the theoretical disputes over the use of legislative history in statutory interpretation, there appears to be an emerging practice at the federal Supreme Court level in favor of using legislative history not only for traditional uses such as resolving ambiguous language and absurd results but also to provide confirmation of the Court’s reading of a statute and to discern the statute’s purpose subject to the express language of the enacted text. While the textualist push serves as a valuable corrective to refocus legal writing and analysis on the authoritative language of statutory text, the value of legislative history as a possible aid to discerning the context and aims of a statute makes the practice of consulting legislative history resilient. Adding to this resilience is the growing availability of legislative history thanks

337 For a discussion of Oregon’s approach to the use of legislative history, see generally Jack. L. Landau, 47 Willamette L. Rev. 563 (2011); Jeffrey C. Dobbins, 47 Willamette L. Rev. 575 (2011);
to the Internet, both through proprietary websites like Westlaw and LexisNexis and through government-run websites that provide legislative history data at no cost to researchers. While the legislative history information available online varies by jurisdiction, going forward an ever-increasing amount of legislative history material is going to be available online and accessible to anyone with a laptop or a smartphone. Specialized libraries are becoming less essential as materials available online expand.

In light of the emerging practice regarding the use of legislative history at the Supreme Court and the technological advances that have made legislative history increasingly accessible, legislative history becomes increasingly useful to legal writers, whether in the judiciary, in legal practice, or in other analytical capacities. And with that increasing access comes increasing use by advocates and those who evaluate their arguments. Legislative history can provide valuable information to the legal writer that provides a fuller and more detailed perspective on why particular statutes have been enacted and what those statutes were meant to accomplish. While legislative history has value as evidence of purpose, background, and context, there are solid reasons to be cautious about its use. First and foremost, between the statute and the legislative history, only the statute is law in a proper sense. As a result, legal writers using legislative history should exercise restraint in the use of legislative history, ensuring that the legislative record is consulted in a reliable fashion and without compromising rigorous fidelity to the words chosen by the legislature to include in the statute.

Given the less contextually rich nature of statutory texts, it can be helpful to expand the scope of information used to understand and explain those enacted legal sources, always keeping in mind that the normal role of relevant legislative materials is to serve as evidence to explain the context, background, and purpose of the law, not to serve as a substitute for it. Even so, the basic structure and kinds of information used by legal writers to explain legal rules can be improved by a judicious use of legislative history guided by the principle of good faith in identifying, explaining and communicating the requirements of the law. The dragon of legislative history cannot be caged, but with a proper understanding of its value and role, the dragon can be tamed.