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STATUTORY INTERPRETATION: DIPPING INTO LEGISLATIVE HISTORY

Reed Dickerson*

INTRODUCTION

It is currently fashionable among jurisprudges to approve or condone the selective use of legislative history in determining the meaning of statutes. "Legislative history" in this context normally refers to utterances (and some events) that engage the attention of the legislature during the process, from conception to birth, of enacting the statute being interpreted. What, specifically, legislative history consists of will appear later in this article. Its attractions are considerable, largely because it is easier to read legislative history than to pick away at statutory text.

The conscientious judge searches for the "true" meaning of a statute, because the constitutional separation of powers assigns to the legislative branch the central responsibility for the statutory management of social policy in the substantive areas allocated to it under the applicable constitution, subject to such constitutional requirements as "due process," "equal protection," definiteness, and similar guarantees of minimum fairness.

Enthusiasm for legislative history usually assumes that fidelity to legislative supremacy is best served by an unrelenting search for legislative intent, an alleged phantom that Professor Max Radin and his many judicial and academic converts have been unsuccessful in exorcising. The concept of legislative intent is a hardy one and, however fictional, it is basic to maintaining an appropriately defer-

* Professor Emeritus of Law, Indiana University (Bloomington); author: THE INTERPRETATION AND APPLICATION OF STATUTES (1975); co-editor, with C. Nutting, CASES AND MATERIALS ON LEGISLATION (1978). Thanks go to Professors Michael D. Carrico, Maurice Holland, Michael Sinclair, and Laurel A. Wendt for their comments and suggestions.

1. See infra notes 27-39 and accompanying text.

2. Radin, Statutory Interpretation, 43 HARV. L. REV. 863 (1930). Professor Radin argues that a legislature is incapable of having a realistic intent. Id. at 870-71.

3. I doubt that the concept of legislative intent is fictional, rather than "real." See R. Dickerson, The Interpretation and Application of Statutes 73-74 (1975). This does

1125
ential judicial attitude. Without it, the legislative process makes no sense.  

Many judicial pronouncements seem to imply that the fidelity owed to legislative intent stands higher than any fidelity the court may owe to the statute itself.  

It is well known that, because of the frailty of language and hectic and compromising nature of the legislative process, what gets said in a statute sometimes differs from what the moving parties intended it immediately to accomplish. To hew to the statute in such a case, it is often said, would be to commit the unpardonable sin of literalness, because everyone knows that words are conditioned by the context in which they are uttered. And who can deny that the legislative history of a statute is part of its context, especially when one finds little in the literature to challenge that assumption? Even so, there are gnawing doubts.

Fidelity to legislative intent is, of course, laudable, but one may ask whether this alone is sufficient fidelity to the applicable constitution. It seems not. Every American constitution provides, in effect, that the only instrument by which the legislature may create law in the usual sense is a statute enacted in the manner prescribed by that constitution.  

The concomitant is that fidelity to legislative supremacy can be achieved constitutionally only if legislative meaning is pursued through a decent rendering of the statute according to the standards of the system of communication used by the legislative audience.  

There is some feeling today that, in view of the legislature's conceded inadequacies, the courts should be able to compensate by treating statute law as if it were case law. Professor Jack Davies recently proposed legislation to that effect, but to apply only after a statute has reached the venerable age of twenty years. Although this interesting proposal is clouded with substantive, practical, and political difficulties, it at least seeks a legislative accommodation,

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4. Id. at 78-79.
7. For the four main constitutional restrictions, see id. at 7-12. These are (1) legislative supremacy, (2) exclusiveness of statutory vehicle, (3) reliance on accepted means of communication, and (4) reasonable availability.
however doubtful, with existing constitutions because it calls for appropriate legislation. More typical have been rationalizations for the judicial amendment of defective statutes that simply ignore or gloss over the constitutional difficulties. For persons of this persuasion, the matters to which this article is directed are academic trivia. But until such persons show a better grasp of the constitutional issues, a more realistic understanding of the legislative process, and at least a rudimentary understanding of the principles of communication, they need not be taken seriously.

Persons more sensitive to the ramifications of the separation of powers, including legislative supremacy, should take greater pains to delineate the legitimate uses, if any, of legislative history in determining legislative intent. But if we are to take due account of the constitutional exclusiveness of the statutory vehicle, how can we justify the use of legislative history, when it lies beyond the sweep of the one thing that a legislature has constitutional power to enact? To handle this adequately, we need a coherent theory of statutory interpretation.

After eighteen years of study, I offered in *The Interpretation and Application of Statutes* a comprehensive approach to statutory interpretation that, while satisfying some cravings, has created much academic disdain, because it fitted no existing orthodoxy and used nontraditional terminology to describe a distinction that has been strongly implied but never before systematically exploited. In the meantime, the profession remains caught in a semantic trap from which it is apparently unable to extricate itself.

Although it is widely recognized that in taking account of statutes courts have not only a law-finding function ("interpretation" in its conventional non-legal sense) but, in cases where the law so found

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9. Davies asserts that, if a legislature can constitutionally include an automatic termination date, it can take the less drastic action of automatically diluting the force of the statute upon the expiration of a prescribed period. *Id.* at 225 n.67. Is not this only a euphemism for a deferred power to amend? Delegated legislation provides no precedent, because (1) it authorizes supplementing the enabling statute, not amending it, and (2) it provides at least rudimentary guidelines for that purpose.


is inadequate to dispose of the case before it, a law-making\textsuperscript{18} function that engrails on the statute meaning appropriate to resolving the controversy, the implications of this are not generally appreciated. The distinction is fundamental, because the two elements differ widely and are governed by two disparate sets of principles.\textsuperscript{14}

The former element, for which I borrowed Professor Alf Ross's term "cognitive,"\textsuperscript{15} is controlled for the most part by general, extra-legal principles of communication. The latter, for which I have used the term "creative," is essentially controlled by constitutional principles. The current confusion of doctrine respecting "statutory interpretation" results from legal theoreticians' use of the single term indiscriminately to cover two functions that not only differ radically but should, for constitutional reasons relating to the separation of powers and unfair surprise, be performed, not simultaneously, but serially.\textsuperscript{16}

This long recognized distinction and the constitutional exclusiveness of the statutory vehicle must be conscientiously respected if we are to make practical and constitutional sense out of the grab bag of materials that goes under the name "legislative history," irreverently referred to by Charles P. Curtis as "the ashcans of the legislative process."\textsuperscript{17} Resistance to the distinction between a court's cognitive and its creative functions is often voiced in terms of the alleged impossibility of intellectually separating from each other notions that are functionally intertwined, a purported handicap that rings oddly in the ears of those who realize that doing just that has long been a main preoccupation of the courts.

My own views can be summarized quickly.\textsuperscript{18} While performing its cognitive function of finding statutory meaning, courts should defer to legislative history only to the extent, if any, that it can be considered part of the external context\textsuperscript{19} of the statute, it being no part of the statute itself. This is easier said than done, because there

\textsuperscript{13} For a list of articles discussing this "law-making" function, see R. Dickerson, \textit{supra} note 3, at 14 n.5; see also W. Statisky, \textit{Legislative Analysis: How to Use Statutes and Regulations} 23-24 (1975).
\textsuperscript{14} R. Dickerson, \textit{supra} note 3, at 13-33 ("Basic Concepts: The Ascertainment of Meaning (Cognition) and Judicial Lawmaking Through the Assignment of Meaning (Creation)").
\textsuperscript{16} R. Dickerson, \textit{supra} note 3, at 20, 190.
\textsuperscript{17} C. Curtis, \textit{It's Your Law} 52 (1954).
\textsuperscript{18} For a more detailed treatment, see R. Dickerson, \textit{supra} note 3, at 137-97 ("The Uses and Abuses of Legislative History").
\textsuperscript{19} \textit{See infra} text accompanying notes 24-25.
are strong doubts that much, if any, legislative history is properly regarded as context.

Where the statutory meaning so found is inadequate to decide the case, courts are free, and indeed are required, to attribute to the statute judge-made meaning appropriate under the legal standards for making law where the statute fails (its creative function). Unfortunately, the indiscriminate lumping of these two judicial functions under the name "statutory interpretation" has stunted the doctrinal growth of both.20 Indeed, with respect to statutes I perceive no currently accepted body of doctrine for judicial law making.

It is not my purpose here to develop such a body of doctrine, beyond pointing out that there are at least ten possible guides to supplement judicial law making in administering statutes21 and that with respect to them the concept of legislative intent plays a more modest role. For this reason, the need to discover it, with or without resort to legislative history, is likely to be less. Indeed, there should be little or no restriction on what the court may look at for this purpose. The most serious problem here is to determine whether the judicial enhancement of the statute involves the threat of unfairly surprising the legislative audience,22 a risk that can be avoided by deferring the effectiveness of the new legal meaning.23 Conversely, unfair surprise is no problem for the cognitive function so long as nothing is attributed to the statute that is not revealed by the text as it is conditioned by its total context.

Although the cognitive-creative dichotomy (and sequence) has not been adopted by the judiciary in those terms, it has been strongly implied by the many courts that resort to legislative history only when significant uncertainty of the statutory meaning emerges. Unfortunately, the implication is blurred by the willingness of some courts to accept legislative history as the sole source of the uncertainty. Rather, notions of fairness would seem to require that the factors creating uncertainty should not be the basis for upsetting otherwise clear language-in-context, unless those factors are part of context and thus available to the legislative audience.

Because some extrinsic evidence lies within the statutory context and some lies outside, it is important to understand the quali-
cations for external context. I suggest four. To serve as external context extrinsic material must be (1) relevant; (2) reliable and reliably revealed; (3) reasonably available to the audience (that is, shared by author and audience); (4) taken into account (that is, relied on), as constituting part of the communication, by both author and audience.

In general, little legislative history is helpfully relevant. Much of it is unreliable or unreliably revealed. Most if not all of it is of questionable practical availability to typical members of the legislative audience. Besides, little or none of it is relied on by typical members of the legislative audience as conditioning the language of the statute.

The reader should keep in mind that whether something is part of the external context of a statute is relevant to the court's cognitive function, not its creative function. The reader should also consider what the material is being used to show. On the one hand, material that purports to state what the statute means (which is congruent with immediate purpose) should be rejected out of hand, because it competes with the statute and, if used, undermines the courts' role of having the final say on what statutes-in-context mean. On the other hand, material that states what the statute is ulteriorly (more broadly or remotely) attempting to accomplish is not similarly offensive, however objectionable it may be on other grounds. With these general guidelines, let us now see how particular kinds of legislative history measure up.

**KINDS OF LEGISLATIVE HISTORY**

*Recommendations of a Study Group*

Many statutes are the culmination of studies by official bodies charged with finding legislative solutions to social problems. The resulting reports are the most reliable type of evidence of legislative intent so far as the intent can be inferred from the ulterior purposes of the statute disclosed by the study. These purposes are relevant, however, only so far as it is probable that what the legislature en-

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24. For a more detailed discussion of external context, see R. Dickerson, supra note 3, at 105-25, 142-62.
25. All but item (4) have received some recognition in England. See, e.g., Samuels, *The Interpretation of Statutes*, 1980 Statute L. Rev. 86, 95.
26. See R. Dickerson, supra note 3, at 87-88, 156-57.
27. For further discussion of the legislative history generated by study groups, see id. at 161-62, 166-67, 196.
acted in the particular case was directed at the same purposes as those disclosed by the report. In each case, some deviation is highly probable. How to determine it is the problem.

Another problem is practical availability. Unless the statute or its official publication refers to the report, it would be asking too much of typical members of the legislative audience to take into account the purposes stated in the report unless they were independently a part of the background knowledge, however supplied, common to that audience. English courts, which tend to reject all legislative history, cite the reports of Royal Commissions and similar bodies, but only to affirm legislative purposes. If those purposes are independently revealed by knowledge otherwise a part of the legislative context, or if the report is used in making law to resolve an otherwise unresolvable uncertainty, that approach makes sense. Otherwise, such a report should not be relied on for cognitive purposes, unless the statute specifically refers to it.

The same considerations would seem to apply to executive communications recommending legislation.

**Committee Hearings**

It is highly doubtful that committee hearings can qualify as external context. What is said at such hearings is so unreliable, even when it appears to make good sense, that courts should pay little heed to it, except possibly for confirmatory purposes. It tends to be highly adversarial, but without even the elementary safeguards for balance that our judicial system provides. As for witnesses, the cards are likely to be heavily stacked in favor of the proponents of the bill. There are few guarantees of thoroughness. Nor is such material reasonably available to the legislative audience.

**Committee Reports**

Committee reports are the second most reliable kind of legislative history. Their main value is in showing (if they do) the ulterior purposes that the respective bills are intended to advance. Here, they

30. *Id.* at 155-56. Critical developments are often off-stage, out of public view.
31. *Id.* at 147-54.
32. However, even these reports are unreliable so far as they try to state the meaning of what is being recommended for enactment. *See supra* text accompanying note 26.
tend to emphasize the main thrusts of the legislation, which are usually not too hard to infer from general context.

By long-standing practice, most congressional committee reports include sectional analyses. Unfortunately, these usually consist of mere paraphrases of the statute, and the deviations from statutory text are not likely to be helpful. Although the best person to write the paraphrase is normally the one who drafted the statute, the opportunity to get the paraphrase right is likely to be even poorer than the opportunity to get the statute right. Even worse, paraphrases are inevitably competing statements of legislative intent rather than statements of specific ulterior purposes. Nor are there adequate guarantees of objectivity.

Practical availability is also a problem. Even conference reports, each reflecting a consensus following disagreement between two houses, are not free from these defects.33

Floor Debates

Among the least reliable kinds of legislative history are floor debates.44 Not only are they laden with sales talk, but their frequent reference to what a provision means is an unconscious effort to finesse the courts in performing their constitutional function of having the last word on what the statute means. Besides, it would be rare for the authors of a statute to take such references into account.

Even where floor debate is directed to ulterior purposes, the problem of bias persists. Indeed, there are even fewer restraints on insincerity, because the disciplines of the legislative process bear less heavily on the motives for legislative action than they do on the legislative action itself.

Reliability is further undermined by the widespread practice, at least in Congress, of allowing legislators to amend or supplement their remarks in the published version in the Congressional Record. “As it goes into the Record, House debate is thus a curious melange of the opening lines of many speeches never heard on the floor, coupled with revised, sometimes totally new, remarks. . . . [M]embers in both houses rearrange the facts and rewrite bits and chunks of historical record.”35

33. R. DICKERSON, supra note 3, at 145, 147, 196.
34. For a general discussion of floor debates, see id. at 145, 147, 155-57, 185-87, 191, 195, 267.
It is thus doubtful that much, if any, floor debate, other than statements by the manager of the bill, is useful even for confirmatory purposes. Besides, even with publication, practical availability remains a problem.

_Adoption, Non-Adoption, or Rejection of Interim Amendments_

Although often relied on by courts in interpreting or applying statutes, the adoption, non-adoption, or rejection of an amendment proposed during the course of enactment, standing alone, is normally an ambiguous and therefore neutral circumstance.\(^{36}\) The reason is simple. Any of these actions may result from disparate purposes on which it is hard, if not impossible, to ascertain legislative consensus.

Even if the proposed amendment is adopted, it may have been intended to change substance or it may have been intended merely to clarify the language. If it is rejected, the range of possibilities is much wider. It may be rejected by some legislators because they disagree with its substance (but not necessarily the same substance). On the other hand, those who agree with the substance may nevertheless vote against it as a spurious or unnecessary attempt to clarify. Simple non-action, being consistent with many explanations in circumstances not calling for consensus, has no probative value for any purpose.

Where such ambiguities tend to be resolved by other circumstances, they should not be considered for the purposes of cognition, unless they, too, meet the standards of external context.\(^{37}\) Otherwise, the court must cope with the risk of unfair surprise.

_Miscellaneous_

Post-enactment developments should be disregarded for purposes of cognition, simply because at enactment they were taken into account by neither the authors of the statute nor its audience.\(^{38}\) The problems of relevance, reliability, and availability also persist, often in greater degree, even where they relate only to ulterior purpose.

Official executive pronouncements at the time of signing are rare so far as legislative intent and ulterior purpose are concerned. When made, these cannot be brushed aside as post-enactment commentary, however, because the chief executive officer is himself part of the enactment process. Can the President's views on ulterior pur-

\(^{36}\) R. DICKERSON, _supra_ note 3, at 160-61.

\(^{37}\) See _supra_ text accompanying notes 24-25.

\(^{38}\) R. DICKERSON, _supra_ note 3, at 179-83.
pose be attributed to Congress? The question raises no greater theoretical difficulty than arises for statements made by the second house, which could hardly have been within the contemplation of the first house unless the bill went to conference. The problems in both instances are those of reliability and availability: How probable is it, in the circumstances, that the recited purposes also motivated the earlier legislative participants? Assuming reliability, are such statements sufficiently available and relied on to be part of context? Probably not.

Statements on the witness stand by a legislator or draftsman, even when confined to ulterior legislative purpose, cannot, under any theory, be part of legislative context. Indeed, such statements are not even part of legislative history, however much they deal substantively with the enactment of the statute. So far as they purport to declare the meaning of the statute, they compete with the statute. Also, they are highly unreliable.

JUDICIAL USE OF LEGISLATIVE HISTORY

A Partial Concession: Confirmatory Use

While it seems clear that few, if any, aspects of legislative history are part of proper legislative context and that all the rest can, in constitutional principle, be disregarded for purposes of cognition, there is a widespread practice among judges, even in England (where it is usually covert), to consult materials of legislative history during the cognitive phase. Shortly before his retirement from the bench, Chief Judge Charles D. Breitel, of the New York Court of Appeals, wrote me as follows respecting The Interpretation and Application of Statutes:

I found the chapter on the abuses and uses of legislative history the most valuable just because it is the area most misunderstood by judges, lawyers, and students of the subject. I have small disagreements, of course, but they are only small.

At page 139 you emphasize, as is so often done with the parol evidence rule, that one confine oneself to beginning with textual language. That does not happen, and it is not required to happen that way. One always looks to extrinsic material either to discover meaning, to confirm meaning, or to elaborate on meaning. The parol evidence rule and the statutory rule do come into play only

39. R. Dickerson, supra note 3, at 156 n.49.
40. Id. at 163-64, 189-90, 195-96.
when the extrinsic material tends to contradict or vary the meaning determined literally or in context. I think this examination of extrinsic material is a good practice. But even if it were not, the fact is the practice is about as universal in every instance in which a court says that it is excluding the extrinsic material either in the contractual or statutory interpretation case. It has in fact first looked at the material. At the paragraph that begins at the very bottom of page 146 and concludes at the top of page 147, analytically you ought to be right. The fact of the matter is, however, that if there is any leeway, deference of some kind will be paid to comments that are literally described as “official”, albeit not in a constitutional sense. It is not law, as you say, but it surely plays a role as a source if there is any kind of leeway.\footnote{43}

Because this analysis is realistic in recognizing the widespread psychological need for reassurance in hard cases, it makes sense not to deny the court the opportunity to look for confirmation of an interpretation otherwise made probable by text and context, even if confirmation takes it beyond what is also available to the legislative audience. The crucial constitutional safeguard lies in Judge Breitel’s statement that rejection is required “when the extrinsic material tends to contradict or vary the meaning determined literally or in context.”\footnote{42} In other words, it may be used to support, but not to overturn, meaning-in-context. On the other hand, his requirement of “leeway” implies the guarantee that judicial law making will be deferred until cognition establishes an area of otherwise unresolvable uncertainty. Acceptance of Lord Renton’s belief that legislative history should not be cited in court\footnote{43} would help prevent confirmatory use from becoming abuse.

A striking example of the use of legislative history for confirmatory purposes appears in Mr. Justice Frankfurter’s dissent in \textit{Schwegmann Bros. v. Calvert Distillers Corp.}\footnote{44} Here, the majority held that the Miller-Tydings Act, which expressly exempted from the Sherman Act vertical agreements setting minimum prices for re-

\footnotesize{\textsuperscript{41}} Letter from Chief Judge Charles D. Breitel to Reed Dickerson, August 21, 1978 (copy on file with the \textit{Hofstra Law Review}).
\footnotesize{\textsuperscript{42}} Id.
\footnotesize{\textsuperscript{43}} Renton, \textit{Interpretation of Legislation}, 1982 \textit{Statute L. Rev.} 7, 9 (1982); see also R. Dickerson, \textit{supra} note 3, at 196 (court consultation of legislative history should not be mentioned in opinions).
\footnotesize{\textsuperscript{44}} 341 U.S. 384, 398-402 (1951) (Frankfurter, J., dissenting); see also R. Dickerson, \textit{supra} note 3, at 162 n.63 (discussing the use of legislative history and the Frankfurter approach to this case).
sale of specified commodities (where such agreements were lawful under local state law), did not result in validating state non-signer provisions that extended the force of minimum price fixing agreements horizontally to keep competing retailers in line.45

Selected statements from legislative history provided the majority with apparent support for its belief that, by omitting reference to the horizontal aspects of resale price maintenance, Congress intended to preserve to that extent the prohibitions of the Sherman Act.46 What it overlooked was that validation of the vertical aspects would not work without validation of the horizontal. It also missed Frankfurter's perception that Congress did not need to validate affirmatively state non-signer provisions but merely needed to nullify the legal force that had indirectly struck them down in the first place—the Sherman Act's invalidation of the vertical consentual arrangements upon which the non-consentual horizontal restraints on competing retailers depended, under state law, for their validity.47

Frankfurter's appreciation of the indirect force of the statute kept the statutory remedy coextensive with the statutory need, fulfilled the legislative purpose of providing a workable validation of vertical price fixing, and was fully consistent with the wording of the statute, all this being supportable without going beyond the total statutory scheme. As for legislative history, it happened in this instance to confirm Frankfurter's perception at every point48 (even the legislative history cited by the majority fell into line). The majority, on the other hand, misread the extent of the statutory need and drew a false inference from Congress' decision to omit non-signer clauses (even though inclusion would have been superfluous). As for confirmation, the majority had to disregard part of the legislative history. It might better have disregarded all of it.

The case seems to support the recommendation of Professor Henry M. Hart, Jr., that a court should hold off looking at legislative history until an examination of the statute in context has generated a problem of meaning.49 Indeed, the majority's failure in

45. See 341 U.S. at 389.
46. Id. at 390-95.
47. See id. at 397 (Frankfurter, J., dissenting).
48. Id. at 398-401.
49. H. Hart, Jr., Tentative Restatement of the Law (prepared for a 1953 Meeting of the Association of American Law Schools), reprinted in F. Newman & S. Surrey, Legislation—Cases and Materials 669, 670 (1955); see also R. Dickerson, supra note 3, at 141 (discussing the Hart scheme). It is not clear, however, whether this scheme was meant to apply to a court's cognitive function or its creative function.
Schwegmann to grasp fully what needed legislative attention may have resulted from a premature examination of legislative history.

Because legislative history in this instance consistently confirmed Frankfurter’s independently supportable position, it is ironic that Mr. Justice Jackson, long an impassioned enemy of legislative history, selected this as the occasion for one of his strongest diatribes against its use. Despite the cogency of Jackson’s general points, Frankfurter cannot be faulted for a reading that was fully supported by the statute-in-context (and therefore adequately accessible to the legislative audience) and for confirming it by looking at the legislative history. It would have been better if Frankfurter had not referred to that legislative history in his opinion.

Current State of Judicial Doctrine

A sampling of the cases suggests that most courts tend to conform to the approach previously outlined by deferring the use of legislative history until significant uncertainty is otherwise established. This might seem to imply that, after shunning legislative history for purposes of cognition, courts are willing to consult it only for purposes of judicial law making.

Unfortunately, the constitutionally implied dividing line between judicial cognition and judicial creation is not the simple line between certainty of meaning and uncertainty of meaning, but rather the line between them as drawn after the court has exhausted the resources of text and context. Mere uncertainty is not enough, because much initial uncertainty is only apparent, disappearing when the resources of meaning, which exclude matters falling outside total context, have been more fully evaluated. Only then has the court discharged its responsibility to total context and thus to legislative supremacy. Unfortunately, it is hard, if not impossible, after the fact to determine in which instances the courts’ consultation of legislative history was premature. The implications of judicial support are correspondingly weakened.

On the other hand, it must be clear that this article is not based on the specifics of case law. As the Canadian courts have discovered, case law in this area tends to be relevant only for the meaning of the statutes respectively involved, because the specifics of meaning are usually unique. As for legitimate across-the-board legal principles,

50. Schwegmann, 341 U.S. at 395 (Jackson, J., concurring).
few exist. The domain of cognition is for the most part the domain of
general principles of meaning and communication, not principles of
law.

The vast literature of case doctrine in the field of "statutory
interpretation" is fragmentary, chaotic, and unrelatable consistently
to either the basics of meaning theory or accepted principles of con-
stitutional law. These complaints include the uses of legislative history,
which cannot be reconciled on the basis of any rational theory
expressed by existing case law.

Recent Developments

Since 1975, there have been a number of attempts to clarify the
use of legislative history in the judicial handling of statutes. Some
have been frontal attacks, but most have been incidental to efforts
directed toward broader legislative problems such as the interpreta-
tion of statutes generally.

In his second Carpentier lecture at Columbia University, Pro-
fessor James Willard Hurst recently discussed general trends in the
interpretation of statutes. Although in a footnote he later impliedly
acknowledged the dichotomy between the cognitive and the creative
judicial functions, his delivered text dealt only with "interpreta-
tion." This limited the chance that his audience might sense the rele-
vance of asking whether it should make any difference whether legis-
lative history was being used for purposes of judicial law finding or
for purposes of judicial law making. He hints that it does, but only
in his observation that American courts regularly require that per-
sons offering "outside" evidence first show that the text, taken by
itself, is uncertain. This makes good communication sense only if it
can be assumed that the material in question is not part of the
proper context of the statute (thus excluding it from the cognitive
process) and if it can be assumed that the uncertainty is invincible
and not merely apparent. For most legal minds, such a hint is too
fragile to inform and persuade.

Although Hurst urges caution in the use of legislative history,
he is reluctant to rule it out for purposes of cognition or confine it to
confirmation. Like most modern academics, who have been heavily
exposed to the precepts of legal realism, he seems overly vulnerable
to the argument that, since most courts are doing something, that

53. See J. Hurst, supra note 51, at 31-65.
54. See id. at 32 n.3.
55. Id. at 53, 55-56.
something defines compelling legal principle.56

One significant trend is for the courts to use legislative history mostly to define ulterior legislative purpose rather than to define legislative meaning. Certainly, a court should not allow its cognitive judgment to be affected by any extrinsic statement, by whomever uttered, that purports to give the meaning of the statute and thus to erode the documentary exclusivity that every American constitution gives to statutes. This is not a constitutional mandate of literalism, but a constitutional mandate that the effectiveness of a statute be confined to its text as conditioned by its total context. One of the most important causes of the prevailing confusion is the failure to recognize the limits of external context.

Another trend, observed by Hurst, is that “few rules of competence limit resort to evidence... outside of the statute books.”57 But if there are “sound reasons for caution in looking beyond the statute book for evidence of the legislature’s intention”58 (including constitutional reasons not limited to the separation of powers), it might be appropriate to suggest stiffer rules of competence. Hurst’s reasons for caution are sound, but in the hands of the great bulk of American judges, who remain woefully ignorant of the realities of the legislative process, such rules need much stiffening if they are to be effective safeguards.

Professor and long-time State Senator Jack Davies, in his recent “nutshell” book on legislation, after surveying the practical aspects of legislation and acknowledging the usefulness of background context supplied by general knowledge (which absolves him of literalism), concludes that courts should “discourage the use of legislative history.”59

Legislative history can raise more questions than it answers. One legislator cannot speak for the full institution.

... Legislative debates, studies, committee reports, and official records are difficult to find, lengthy, self-contradictory, and of uncertain reliability. ... [Because the use of legislative history is costly, the] more expensive technique favors wealthy interests over [interests] with limited resources.60

Having been persuaded by these considerations, Davies found

56. Id. at 54-55.
57. Id. at 53.
58. Id. at 54.
60. Id. at 255.
no occasion in his brief treatise to rely also on constitutional considerations or the subtleties of communication theory.

On the other hand, Professor John M. Kernochan, in his 1976 Read Memorial Lecture at Dalhousie University, found it hard to “understand why the minister whose department sponsored a bill and who pilots it through the House of Commons is not to be considered a reliable spokesman. . . . The problem of isolating reliable information in Hansard [England’s Congressional Record] . . . is surely not insuperable if one locates the responsible spokesmen.”

I assume that Kernochan, like Davies, is talking about the cognitive function. In any event, his assertion is very “iffy” here; reliability does not depend solely on proximity to the bill and moral integrity. Certainly, competing statements as to what the bill means are almost worthless and for a judge to rely on them is, in effect, to abdicate his own constitutional responsibility to ascertain meaning. In a hectic context, in which bills’ “should be made to pass as razors are made to sell,” the will to succeed too often outruns the will not to mislead.

As for the practical availability of legislative materials to the legislative audience, Kernochan says that:

The problem of availability would surely be solved by public or private initiative if the [English] rules were changed. In the United States, in the federal courts, there is now a long tradition of resort to so-called internal legislative history materials. . . . In sum, the full range of legislative history materials is called upon for interpretive aid at the federal level. In using such materials, the courts . . . have demonstrated, again and again, a capacity to weigh evidence drawn from that process.

But if public or private initiative would solve the availability problem in England, why has the problem not yet been satisfactorily solved for federal legislative history, where the opportunity to solve has presumably been as long-lived as the tradition of resort that created it? (Or is British initiative superior to our own?) Although physical availability has recently improved with the growth in number and holdings of depositary libraries, and the mechanical burdens of research have been greatly lightened, for example, by the pri-

62. R. Dickerson, supra note 3, at 155 (footnote omitted).
63. Kernochan, supra note 61, at 351 (footnotes omitted).
vately published research aids of the Congressional Information Service, practical availability to the great bulk of the legislative audience is still effectively stifled by the burgeoning complexities and the economics of research.\(^{64}\)

But suppose that the existing kinds of legislative history could be and were made adequately available. In view of Murphy’s law that no bulletin board or parking lot is ever large enough, coupled with the fact that today’s extrinsic evidences of legislative attitudes are at best sporadic and fragmentary, would not this new availability result largely in increasing the judicial appetite for legislative materials? What about executive sessions? What about relevant corridor or backroom negotiations? Given the courts’ and lawyers’ already staggering workloads of litigation, could even the courts’ more modest appetite ever be satisfied?

Even if Kernochan’s dreams of availability were realizable, note that both major modern institutional studies of legislative history, California’s\(^{65}\) and England-Scotland’s,\(^{66}\) resulted in suggestions, not for opening the floodgates, but for drafting specially prepared statements of legislative purpose or intent. California’s study group rejected using draftsmen’s statements,\(^{67}\) but recommended testing beefed-up committee reports.\(^{68}\) Britain’s commissioners recommended tentative preparation of explanatory materials on a selective

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64. See R. Dickerson, supra note 3, at 147-54. Since 1970, Congressional Information Service, Inc., has privately published a service that reproduces in microfiche all congressional reports, hearings, committee prints, and other legislative documents except the Congressional Record. See 1981 CIS ANNUAL ABSTRACTS xi. It provides indexes by subject, name of author or witness, official or popular name, bill number, and public law number. See id. at xvi-xx. The service is available in almost all academic law libraries, most universities, and large public libraries, and in many court or law-firm libraries. The index is available also through computerized bibliographic services such as DIALOG and ORBIT.

On the other hand, the service does not reach pre-1970 federal materials or any state materials. See id. at xi. It is expensive to own and time-consuming to use (committee working papers alone aggregate more than 850,000 pages a year, see id.). The aggregate extra expense makes use economically feasible for the practitioner only in controversies involving large sums of money or matters of great importance. Also, what does the conscientious legal advisor rely on between the date of enactment and CIS’s date of publication? And should the government be able to rely on a private system that it neither owns nor controls to disseminate assumedly binding knowledge respecting the laws that it enacts?


68. Id. at 26-30.
basis, to be taken into account if the statute referred to the material in question.\(^6\)

Most surprising is Kernochan's assertion that the Supreme Court has shown its capacity to evaluate legislative history.\(^7\) My own reading of Supreme Court cases tells me that beyond a gradual trend to loosen restrictions the Supreme Court has no coherent philosophy. This should surprise no one who is privy to the long standing deficiencies in legal education regarding legislation and the legislative process. Most courts simply have no realistic grasp of how legislation is put together. Confirmation of their inadequacies appears in recent studies of the United States Supreme Court and of California's Supreme Court.\(^71\)

The clinching argument for Kernochan is that the Supreme Court shows no discernible disposition to retreat from its current faith in legislative history as providing "significant insights into legislative intent," a faith "tested by experience."\(^72\) If there is faith here, it is an amorphous faith unsupported by a comprehensive and coherent philosophy. Moreover, the Supreme Court is not likely to develop such a philosophy so long as it remains deficient in its understanding of the legislative process and continues to scramble general communication theory with its almost standardless judicial law making. How Kernochan can conclude that it has tested and vindicated what adds up to a non-theory is hard to see. Even in "realist" jurisprudence, doctrinal confusion is hardly vindicated simply because it is deeply entrenched.

In addressing my approach, Kernochan impliedly accuses me of rigging the deck by defining "'context' rigorously to exclude [legislative history] sources," and then purports to refute the definition by declaring it to be "contrary ... to the view taken in this lecture."\(^73\) The truth is that the definition was not developed as an exclusionary contrivance but resulted from a careful lexicographical exercise, ex-

\(^6\) See Kernochan, supra note 61, at 351-52 (referring to the capacity of the federal courts in general).

\(^7\) See Wald, Some Observations on the Use of Legislative History in the 1981 Supreme Court Term, 68 IOWA L. REV. 195 (1983); see also Comment, infra note 96; Smith, Infra note 100.

\(^71\) Kernochan, supra note 61, at 352. But cf. Wald, supra note 71, at 214 ("I am left with the sense ... that consistent and uniform rules for statutory construction and use of legislative materials are not being followed today.").

\(^73\) Kernochan, supra note 61, at 352 n.78.
tending over a period of years, that included surveying the existing (and exceedingly sparse) English-language literature on the subject.

Finally, Kernochan brushes aside the practical burdens that the pressure to consult legislative history poses for the counselor not yet confronted with specific litigation. We should not curtail reliance, he implies, until "a more extensive investigation of the practical experience with the use of such material" has been made. But the matter needs no formal sociological study, because counsel for even a substantial enterprise obviously cannot evaluate the sweep of legislative histories of the many new and old statutes that affect that enterprise as those histories might bear on a myriad of plausible problems yet to arise. The problem is formidable enough even if the meaning of the statute is determined only by the enacted text as conditioned by the shared background of general knowledge and tacit assumptions that constitute its external context.

It is refreshing to read the Rhodes-White-Goldman investigation of legislative history, conducted from a Florida point of view, by authors who show a surprisingly detailed understanding of the realities of state statute making. Their general thesis is that the constitutional separation of powers requires a conscientious search for legislative intent, which includes investigating legislative history and other extrinsic materials in instances where the circumstances disclose relevant uncertainty. Finding most of Florida's kinds of legislative history of questionable value, they urge caution in its use by the courts. To this end they offer criteria for sifting. Finally, they offer elaborate suggestions for (1) requiring beefed-up committee reports; (2) recording and retaining the records of committee hearings and floor debates; and (3) requiring sponsors' statements of intent.

Unfortunately, the authors' grasp of legislative procedure out-runs their grasp of constitutional limitations and the basic principles of communication. The result is a loosely argued legal rationale yielding unconvincing conclusions. Their most serious deficiency is their failure to appreciate the importance of knowing whether legislative history is being used to find legislative meaning or to supple-

74. Id.
76. See id. at 383.
77. See id. at 389-402 (the authors also discuss the use of extrinsic materials generally).
78. See id. at 403-04.
79. See id. at 405-07.
ment it. Second, they work with a simplistic concept of the "plain meaning" rule\textsuperscript{80} that fails to observe the important difference between measuring "plainness" by the statute alone and measuring it by the statute-in-context, where context includes extrinsic materials but not necessarily legislative history.\textsuperscript{81}

In their argument favoring recourse to extrinsic aids, Rhodes, White, and Goldman brush off reliance on intrinsic aids as not representing a search for "meaning," because it involves only applying "the proper maxim" and then "behold[ing] the legislative intent."\textsuperscript{82} As a communication theory, this will surprise people accustomed to relying on syntax and internal context. The authors say that "it seems illogical . . . to rely on [the canons] exclusively when direct evidence of legislative intent [presumably legislative history] is within reach."\textsuperscript{83} (Is statutory language "indirect"?) In any event, junking the canons of interpretation does not necessarily lead to relying on legislative history.

The authors seem unnecessarily bothered by Professor Stephen L. Wasby's assertion that it is useless for the court to look for legislative intent in instances where, as in the Sherman Act, the legislature, through the devices of vagueness and generality, has consciously delegated to the courts authority to supplement substantively the statute.\textsuperscript{84} Having by hypothesis left the matter to the courts, the legislature should not be expected to have supplied in the legislative history the very element that it chose to leave to the courts. (The exception is the situation in which legislative history shows that the statute is more vague or less vague than the legislature intended it to be.)

Rhodes, White, and Goldman are not overwhelmed by the argument that practical unavailability to the legislative audience rules out recourse to legislative history. "[W]hen basic rights are at issue, the courts may construe a statute prospectively . . . ."\textsuperscript{85} This is not as easy as it sounds. Because whatever meaning law-finding uncovers

\textsuperscript{80} See id. at 384-85.
\textsuperscript{81} See supra text accompanying notes 24-25.
\textsuperscript{82} Rhodes, White & Goldman, supra note 75, at 385.
\textsuperscript{83} Id.
\textsuperscript{84} See id. at 387 (discussing Wasby, Legislative Materials as an Aid to Statutory Interpretation: A Caveat, 12 J. Pub. L. 262, 267 (1963)). Although Wasby uses the word "ambiguity," id. at 267, he probably means "vagueness." Ambiguity (equivocation) is only rarely intended. Presumably it results from legislative error. See R. Dickerson, supra note 3, at 48-51.
\textsuperscript{85} Rhodes, White & Goldman, supra note 75, at 388 (footnote omitted).
necessarily attached at enactment, the theory that allows deferred
effective dates for "interpretations" presumes instances in which the
court is making new law either by assigning a meaning where no
legislative or court-attributed meaning previously existed or by re-
placing an erroneous judicial interpretation with a presumably cor-
rect one. In the latter situation, a look at legislative history may
not be useless. But to use this device during the cognitive phase risks
eroding the constitutional exclusiveness of the statutory vehicle.

Accepting the realistic notion of vicarious legislative intent,
Rhodes, White, and Goldman, citing G. Folsom, claim that its reach
extends to validating committee reports as authoritative state-
ments. Vicarious intent certainly encompasses legislative intent as
expressed in the statute. But it can rarely encompass legislative in-
tent as expressed in the report in situations where it is not merely
confirmatory, because normal legislative talk is about "bills," not
"reports."

As for ulterior purposes, individual legislators naturally advert
to their own purposes and, since these are presumably adequately
served by the statutory expression of legislative intent, there is no
occasion to be concerned with the fact that the sponsors and others
may have had (and collaterally declared) different ulterior purposes.
Their normal irrelevance thus makes them an unlikely object of
adoption by legislators only loosely acquainted with the proposed
legislation. Rhodes, White, and Goldman's claim carries more plau-
sibility where the statement in question accompanies the recommen-
dations of the initiating organization.

Rhodes, White, and Goldman's general philosophy is summa-
rized in their statement that the "preponderance of case law dis-
misses attempts to limit the evidence which the courts may consider,
although the weight accorded such evidence varies from case to
case." On the basis of this, they weigh the respective values of
broad categories of legislative history, without regard, however, for
whether the constituent statements convey intended meaning or ulte-
rior purpose.

What about criteria of selection? "Certainly, one may assume
that judges will exercise reasoned judgment in relying on these
materials." But, in view of the well documented pitfalls here, one

86. R. Dickerson, supra note 3, at 255-61.
87. See Rhodes, White & Goldman, supra note 75, at 390.
88. See id. at 389.
89. Id. at 396 (referring specifically to committee hearings).
may wonder whether the authors' faith has been vindicated. There is much evidence that it has not.

Where materials are used only for confirmatory purposes, there is little to complain about. As for "debates reflecting a common agreement among legislators of the meaning of ambiguous language,"\(^9\) there is something to complain about if the ambiguity is only apparent and it is resolved differently by total context.

The difficulty posed by loosely disciplined judicial freedom to rely on extrinsic indications of legislative intent is not only that these materials are relatively unavailable to the legislative audience but also that inadequate standards prevail for determining what materials of "legislative history" may be consulted and that inadequate standards prevail for evaluating them. It is not enough to tell the audience that the courts are going to consult legislative history, because the keys for unlocking meaning on the basis of such materials have never been reliably determined and disseminated. This is not another instance of variations in case law. We deal here with extra-legal matters inherent in the going system of communication, which every constitution impliedly adopts. Nor is it only a matter of separation of powers. The non-judicial legislative audience must be taken into account. Realizing the problem, Rhodes, White, and Goldman undertake to formulate usable standards for "evaluating the probative force of extrinsic aids."\(^9^1\)

Their first standard is "contemporaneity." "Materials developed before and during the process of consideration are given greater weight than later efforts to explain the intended meaning."\(^9^2\)

I would think so. First of all, under no theory of communication could post-enactment statements be considered part of context, because there is no way that either legislature or audience could have taken them into account during the process of enactment. (Even for confirmatory purposes, they grow progressively weaker with the passage of time.) The same result is reached under a concept of statutory context that recognizes the element of "taking account of," which means joint reliance by author and audience. Similarly, statements made before enactment normally weaken with the passage of time.

The second standard is "credibility." "The more explanatory and analytical and less contrived the extrinsic aid, the greater the

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90. Id. at 398 (footnote omitted).
91. Id. at 403.
92. Id.
weight it will be accorded.” I buy “credibility” as synonymous with “reliability.” As for the supporting statement, should we read it as a prediction or as a proposed subsidiary standard? I can not evaluate the former and I do not see how the latter is in any way helpful. Is the more detailed and structurally more complicated likely to be more reliable? I would have thought that the authors would have talked, instead, about the probabilities of accuracy and bias under the circumstances and whether a statement made sense internally and harmonized with other, reliable information. And how could a court know whether a statement was “contrived” without delving into inaccessible motives and suppressed understandings? The supporting assertions that “reports of committees are generally regarded with respect by the courts” and that floor “debates . . . have been excluded as too unreliable in many jurisdictions” seem more consistent with wholesale acceptance or rejection than with the case-by-case approach that they seem to advocate.

Rhodes, White, and Goldman's third standard is “proximity.” “The closer the source of the aid to the essence of legislative action, the more persuasive the aid is viewed by the courts.” The spacial metaphor may be aesthetically appealing, but it seems undesirably static for a functional relationship. As for the supporting assertion, is this, again, a prediction or a proposed standard? If the latter, how does a court define and locate “legislative essence”? Is this not an amorphous concept more part of the problem than part of its solution? One also wonders whether the authors meant the essence of legislation in the abstract, as they seem to say, or the essence of the legislation in question.

The fourth standard is “context.” This would seem to be the correct standard. It becomes clear, however, that the authors are not talking about the total context of the statute but rather about the internal context of the legislative history taken as a whole. “The weight given a particular aid will vary depending on other factors in the legislative history of the statute, such as consensus and availability.”

If we are going to rely on relevant, presumably reliable legislative history, it makes sense to read it as a whole. However, this in no way bears on the problem posed by limitations on the scope of the context of the statute. Besides, how can availability to the court be a

93. Id.
94. Id. at 403-04.
95. Id. at 404.
problem for the context of the legislative history in a situation where availability to the court is already presumed?

In later applying these criteria to California legislative history, student writer Walter Kendall Hurst interprets "contemporaneity" as helping determine whether "the extrinsic aid actually plays a part in the thinking process of the legislators during the enactment process."\(^9\) If this is true, this criterion is helpful in applying the broader requirement that, to be part of the context of the statute, material must have been "taken account of" by the legislature and its audience as conveying part of the legislative message. The same may be said of the requirement of "proximity," which does for the spatial aspects what the standard of contemporaneity does for the temporal.

After examining the judicial use of the various kinds of legislative history available in California, Hurst concludes, citing as an example People v. Tanner's\(^9\) reliance on "a plethora of extrinsic aids" (including a press release and letters),\(^8\) that the California courts "need ... a rational and [an] objective means of evaluating the relative values of the multitude of potential extrinsic aids modernly available ... ."\(^9\) He urges case-by-case treatment using the Rhodes, White, and Goldman standards.

On the basis of those two exercises, I am not persuaded that the four proposed criteria just considered provide an adequate set of guidelines for handling legislative history.

Steven E. Smith, who, without attempting to formulate a theory of statutory interpretation, follows the California tendency to identify the search for legislative intent with the investigation of legislative history, seems to conclude that the California courts are becoming too lax in their reliance on extrinsic materials in the interpretation of statutes.\(^10\) He is particularly offended by the courts' recent reliance on oral testimony by legislators or authors, letters of legislators quoted in law journals, and authorized statements of intent prepared and published after enactment, in instances where the material so referred to recounted what went on during

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98. Comment, supra note 96, at 213.
99. Id. at 216.
consideration of the bill. In other words, California courts are accepting this evidence as ad hoc publication of legislative deliberations and giving them the weight federal courts give to officially published congressional committee hearings.

Although California courts refuse to allow a witness to state his own opinion of what a statute means, the California Supreme Court recently allowed the introduction of a legislator-author’s letter that recited his personal opinion as having been “‘argued to that effect in obtaining the bill’s passage,”’ it having been printed, after enactment, in legislative journals not normally referred to for such purposes. Such thinking bodes ill for the future of statutory interpretation in California.

To curtail excesses in this limited area, Smith recommends that a court consider statements by a legislator only if they are made in sworn testimony subject to cross-examination, the opposing party has been informed in advance, and the role of the legislator in writing, introducing, or securing passage of the bill has been ascertained. With these and other precautions, Smith considers statements by legislators, if used “with great caution,” helpful in filling gaps in state legislative history. Availability to the legislative audience is simply ignored.

Judge Richard A. Posner has made an interesting evaluation of the impact of economic forces on the development, constitutionality, and interpretation of legislation, of which only the last concerns us here.

Preliminarily, he observes that “the meaning of a statute is not fixed until the courts have interpreted the statute. Judicial interpretation of statutes is thus an intrinsic part of a complete economic theory of legislation . . . .” This is reminiscent of Professor John Chipman Gray’s notion that a statute is not law until the courts breathe life into it. This notion overlooks the fact that the great bulk of statutory meaning gets enacted and acted on without help from the courts. Gray’s fallacy was a common result of subsisting on a diet of case law. I cannot evaluate Posner’s position, because it

101. Id. at 296-98.
102. Id. at 294-95.
103. Id. at 297-98 (emphasis in original).
104. Id. at 298-99.
is not clear what he means by "fixed."

In any event, I question his later statement that courts "do not speculate on the motives of the legislators in enacting the statute. . . . [They] do not have the research tools . . . ."108 (Presumably, "motives" means ulterior purposes.) This may be partly true with respect to the legislative impact of interest groups, on which Posner was focusing, where the persuasive purposes (the "real" ones) have gone underground. But it can hardly be true of the ulterior legislative purposes often recited in, or inferable from, statutory text or revealed by common knowledge or legislative history. How else could some of the currently accepted "purpose" theories of statutory interpretation have developed?

More persuasive is his statement that "however conscientiously the judge tries to follow the legislature's will, he will be limited to the statutory text and to other public materials."109 Unfortunately, he seems to imply that legislative history qualifies as "public materials" and otherwise meets the requirements of context. "Public" in theory? Arguably. "Public" in practice? Highly doubtful.

For Posner, who confronts only the cognitive function, the more significant question is whether courts should write off legislative history on the ground that "legislators vote on the statutory language rather than on the legislative history."110 He believes that they should not write off legislative history, in view of "a considerable amount of 'log rolling'—that is, vote trading . . . . Log rolling implies that legislators often vote without regard to their personal convictions."111 Because such a legislator assents to a "deal" rather than the statute, and because "the terms of the deal presumably are stated accurately in the committee reports and in the floor comments of the sponsors,"112 he implies that it is proper for the court to look at such materials in determining meaning.

If it is, should it not make a difference whether the log rolling was pervasive or incidental? If it should, how could a court that did not have "the research tools that [it needs] to discover the motives behind legislation"113 get at legislative facts that inevitably lurk below the surface?

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109. Id. at 273.
110. Id. at 274.
111. Id. at 275.
112. Id.
113. Id. at 272.
I am more bothered by an apparent non sequitur. That log rolling has occurred does not mean that the legislators involved were not voting, in a very real sense, their personal convictions. All it means is that each participant has treated the other's bill as a means rather than as an end. He believes that under the circumstances his legislative values will best be served by voting for a bill that he might otherwise oppose or be indifferent to, after he has determined that its enactment will not exact too great a price. His legislative intent may be vicarious, but no more so than in a non-log rolling situation in which a legislator votes for a bill because a trusted colleague has assured him that it is “a good bill.” The main lesson to be drawn from log rolling is that there is an almost unlimited range of potential ulterior reasons for intending that a bill be enacted. Even wide differences in ulterior purpose, however, do not necessarily mean differences in legislative intent. Besides, the likelihood that legislative history will disclose the nature of the “deal” is slim, because this kind of legislative maneuvering normally has low visibility.

In his attack on the plain meaning rule, which he identifies with literalism, 114 Professor Arthur W. Murphy argues that one of the benefits of eliminating the rule would be to “force the courts to rationalize the use of legislative history.” 115 Indeed, “abandonment of the plain meaning ritual might be a first step towards development of a coherent approach to statutory interpretation generally.” 116

But any notion that flight from the rule leads inevitably into legislative history necessarily ignores the existence and role of external context. External context is not limited to legislative history and indeed probably does not even include it. For one thing, a modified version of the plain meaning rule, and one that makes a good deal of sense, centers, not on a literal reading of the statutory text, but on a reading of the statutory text taken in total context. 117 But even under Murphy's more traditional statement of the plain meaning rule, there is plenty among the rich resources of internal statutory context to generate uncertainties not revealed by a literal reading of the text.

115. Id. at 1315.
116. Id. at 1316.
Incidentally, Murphy makes a distinction that corresponds closely, if not identically, to that between the cognitive and the creative functions of courts.

The courts should recognize . . . that frequently there is no reliable evidence of intent, even in the broad sense of purpose, to guide them, and that their role changes as the signal grows weaker . . . . The relationship of legislature and court cannot be solely one of command. In large areas it must be one of delegation . . . .

Substantively, this is solid. My only quibble is that the courts' law making power comes, not only by implied delegation from the legislature, but also from the applicable constitution as one aspect of the separation of powers. My only substantial objection is that Murphy, like Posner, has not fully recognized the nature and force of external context.

Another article worth mentioning is Sean Donahue's plea for "[a] semiotic [i]nterpretation of [s]tatutes," in which he rejects legislative history as an aid to cognition on the basis of the general thesis of The Interpretation and Application of Statutes, outlined above. His main mission is to urge, as an alternative aid to cognition, the adoption of Professor Elmer A. Driedger's principle that the reader of a statute "must try to reconstruct, from the words of the Act, the draftsman's final legislative scheme. In other words, he must reverse the drafting process." This he proposes to do with the help of Noam Chomsky's rules of generative and transformational grammar, tree diagrams, Jerrold Katz's projection rules, and various other aspects of linguistics or semiotics that I am unqualified to comment on. The important point is that there are escape routes from the evils of literalism other than the path of legislative history.

118. Murphy, supra note 114, at 1317.
119. Donahue, supra note 12.
120. R. Dickerson, supra note 3.
121. See supra notes 18-26 and accompanying text.
123. Donahue, supra note 12, at 216-29.
124. Samuels, supra note 25, at 90-102, makes a number of solid points, but their relevance is diluted by England's significantly different constitutional separation of powers.
Other Developments in Relevant Legislative Theory

Because a coherent philosophy of statutory interpretation is hard to come by, it may be useful to examine several recent articles that have tried to meet this need without special reference to the problems of legislative history.

Professor Kenneth S. Abraham recently compared the interpretation of statutes with the interpretation of poetry. While no discernible exchange of benefits resulted (statutes are all dialectic and no rhetoric) the exercise produced some apt comments on the interpretation of statutes. Along the way, Abraham showed a grasp of communication principles unusual for people trained in law.

Starting with a salute to legislative supremacy and the separation of powers, he poses as polar extremes of statutory interpretation the "determinacy of meaning in the . . . text" ("cognition"?) and "the contention that each reader determines his own meaning" ("creation"?) apparently treating them as competitive rather than complementary. After summarizing the "moderate" views stated by Professor H.L.A. Hart and by me, he frames the issue as follows: "[T]o what extent does the text have a determinate meaning, and to what extent is the reader free to interpret it as he chooses?"

To show the possibilities here, he discusses at length the famous Riggs v. Palmer, which disqualified a beneficiary from taking under a will on the ground that he had killed the testator to prevent him from cutting the killer out of the will. To achieve this result, the court applied an exception even though the wills and the intestacy laws of the state recited none.

126. I mean "dialectic" in the classical sense of the art of objectively ascertaining "truth," which Plato differentiated from "rhetoric" (the art of persuasion). Plato, Phaedrus at 260, 265, 266, 277, in THE DIALOGUES OF PLATO (B. Jowett trans. 3d ed. Oxford, as reprinted at p. 233 of vol. 1 of the Random House edition, 1937; the page numbers first referred to are those in the margins). Dialectic apparently includes conceptualization, definition, and "division by classes." For a helpful summary, see R. Weaver, The Ethics of Rhetoric 15-26 (1953).
127. Abraham, supra note 125, at 677.
128. Id. at 678.
129. Id. at 679.
130. Id. at 680.
131. 115 N.Y. 506, 22 N.E. 188 (1889).
132. Abraham, supra note 125, at 681 (discussing Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188 (1889)).
133. See id. at 681-82.
Deans Pound and Wade have attacked the decision as a judicial amendment of statutory law.\footnote{134} Calling them “textualists,”\footnote{135} Abraham speculates on the possibility that even textualists might support the court’s result by developing “a theory that would link the meaning of the text to the legislature’s intention.”\footnote{136} He then challenges this approach by asking, “May the legislature be deemed to have intended anything that was not consciously on the minds of a majority of legislators at the time of enactment?”\footnote{137} (In view of the prevalence of vicarious intent, he might well have phrased the question in terms of “any legislator.”)

Passing over the possibility of enacting a “law of interpretation” unfavorable to unexpressed exceptions, Abraham suggests that “textualists” must ultimately become contextualists. It is here that Abraham makes his most important point, the recognition of what he calls “communities of interpretation.” This term is “a way of speaking about the power of institutional settings, within which assumptions and beliefs count as facts. Membership in a community of interpretation means that one has accepted its beliefs. These beliefs determine readers’ strategies of interpretation.”\footnote{138}

Abraham makes a solid contribution here, but he has unnecessarily complicated it. His “community of interpretation” refers to what Leonard Bloomfield long ago called a “speech-community.”\footnote{139} A speech community is simply a group of people who share a common language (or sublanguage) and thus a common culture (or subculture), which in turn defines the context that conditions the utterances that occur within it.\footnote{140}

The shared culture that defines (and is defined by) a language and that constitutes the stuff of external context consists of not only a vast fund of semantic habits but also a vast fund of shared assumptions. So far as relevant, such assumptions are taken for granted unless the utterer of a statement indicates otherwise.\footnote{141} One of them could well be the exception applied by Riggs v. Palmer.\footnote{142}

Because, being taken for granted, tacit assumptions are not al-

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\footnote{134. See id. at 682.}
\footnote{135. Id. at 683.}
\footnote{136. Id. at 684.}
\footnote{137. Id. (footnote omitted).}
\footnote{138. Id. at 685.}
\footnote{139. L. Bloomfield, Language 42-56 (1933).}
\footnote{140. Id.}
\footnote{141. R. Dickerson, supra note 3, at 60-61, 69, 107, 121, 199-200.}
\footnote{142. 115 N.Y. 506, 22 N.E. 188 (1889); see supra note 133 and accompanying text.}
ways adverted to, Abraham’s question whether we can attribute to
the legislators something “not consciously on [their mind] at the
time of enactment”\textsuperscript{144} does not pose a critical issue for the cognitive
function.\textsuperscript{144} Riggs thus stands or falls on whether or not the excep-
tion constituted, in probable fact, a tacit assumption of the legisla-
ture and its audience. The best practical way to resolve this for pur-
poses of cognition is for the court to speculate, from what it knows
about total context and without relying on legislative history, what
the legislature would have done had it been called on to deal ex-
pressly with the problem. In this instance, the answer seems fairly
clear. But assuming that the exercise ends in evenly balanced uncer-
tainty, the court is faced with an invincible contextual ambiguity. At
this point, it is relegated to creating new law, in which case it is free
to find that imposition of an exception makes the best sense out of
the statutory context. Even here, however, state legislative history
would probably add nothing.

The court’s opinion was probably right in result, but inadequate
in rationale. Instead of finding that the applicable statutes took this
across-the-board limitation for granted, the court gives the impres-
sion that the controlling factors were a maxim “dictated by public
policy” and “universal law administered in all civilized countries.”\textsuperscript{145}
Although in the concluding clause of the same paragraph, the court
impliedly recognizes the power of the legislature to supersede such a
maxim, it does not make clear that the generating force of the ex-
ception is neither the maxim nor the policy behind it but rather the
legislature’s tacit recognition of the exception. Abraham’s explana-
tion seems less plausible.

Of the other authorities discussed by Abraham, Hart and Sacks
come closest to the tacit recognition rationale, but they do not treat
the problem as one of evaluating statutory context. Instead, they
contend that the maxim and the policy behind it are so strong that
they constitute a rule of law, binding on the legislature, and that to
override them the legislature must make itself “unmistakably
plain.”\textsuperscript{146}

Because the legislature cannot constitutionally be denied access
to the methods of communication established in the relevant speech

\begin{footnotesize}
\begin{itemize}
  \item 143. Abraham, \textit{supra} note 125, at 684.
  \item 144. See R. Dickerson, \textit{supra} note 3, at 69, 121-22.
  \item 145. Riggs v. Palmer, 115 N.Y. 506, 511, 22 N.E. 188, 190 (1889), \textit{quoted in Abra-
    ham, supra note 125, at 682.}
  \item 146. See Abraham, \textit{supra} note 125, at 686.
\end{itemize}
\end{footnotesize}
community, I would prefer to say that the maxim and the policy behind it are so basic that they create a factual presumption of tacit legislative acceptance so strong that it normally takes either an expressed or a strongly implied legislative rejection to overcome it. If this is so, the principle expressed by the maxim is part of the statutory context.

Professor Ronald Dworkin’s position as described by Abraham147 is not sufficiently different from Hart and Sack’s to warrant additional comment. My main complaint here is that all three consider at least some important matters of cognition to be ultimately matters of law. I consider them to be, instead, matters of fact involving, after identification of the speech community shared by the legislature and the legislative audience, a careful balancing of the textual materials in the light of the semantic habits, values, and tacit factual assumptions that have been adopted by that audience.

Riggs v. Palmer has always intrigued me, because the court thinks solely in terms of the meaning of the statute (which only impliedly requires distribution in accordance with the will). It thus ignores the problem of determining the meaning of the will itself. If the same cognitive technique of weighing tacit assumptions had been applied to the will, the problem of statutory interpretation (with its constitutional complications) might not have arisen. Was the court right in assuming that the will meant that even the testator’s killer was to take under it? Was what was implausible for the legislative mind plausible for the testamentary mind?

Professor Guido Calabresi’s fascinating book, A Common Law for the Age of Statutes,148 is of only marginal concern here, because it is addressed almost exclusively to the problem of the obsolescent or decrepit statute, for which he proposes a revised separation of powers that recognizes the selective amendment of such statutes through new common law.149 In his preoccupation with legitimating this kind of judicial law making, he surprisingly brushes aside the constitutional considerations that are integral to this article. He makes only passing reference to the problems of cognition, which may have been his reason for mentioning in his sources no treatise on statutory interpretation and no non-legal source on the theory of language or communication. One might infer that such matters can be handled simply by reading cases.

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147. Id. at 687.
149. E.g., id. at 101-04, 116-19, 163-66.
Lastly, there is a recent anonymous tangle of non sequiturs in a pretentious exercise that would invite obscurity but for its appearance in America's most prestigious law review. The mission of this student note was to provide the United States Supreme Court with a more realistic philosophy for interpreting statutes and constitutions. Unfortunately, its approach was described in a number of amorphous and largely undefined terms and rested on unverified assumptions of doubtful validity. Although it is concerned only with cases in which useful legislative history is unavailable, its assumptions portend the serious mishandling of such materials.

One such assumption was that "statutory interpretation . . . is the . . . power to 'say what the law is'," suggesting that statutory interpretation, which is described as the attribution, rather than the discovery, of meaning, is ultimately an exercise in judicial law making.

This led to the assumption that it made sense to limit the investigation to the work of one court, and later to the general assumption that the courts of each jurisdiction are free to select their own principles of communication as if they were matters of common law, rather than controlled by extra-legal considerations mandated by constitutional implication. The author apparently believes that courts should determine what words ought to mean. By what standards and with what credentials? Would this include changing the meaning of statutory words that were clear-in-context?

Having sided with the skeptics against reliance on legislative intent, the author claims that "the Court now invokes a literalist reading of statutory terms as a surrogate for actual legislative intent." His main concern is that the literalism that he believes inheres in the Supreme Court's current "clear statement" approach, as broadly supplemented by the maxim expressio unius est exclusio alterius (negative implication), is preventing the courts from using "instrumental," "equitable," or "generative interpretation" to com-

151. Id. at 892 (footnote omitted).
152. See id. at 904, 912, 913.
153. See R. DICKERSON, supra note 3, at 7-12.
154. See Note, supra note 150, at 893, 896, 898.
155. Id. at 894.
156. Id. at 895. The term is undefined.
157. Id. at 896.
158. Id. at 898. The term, though undefined, refers to some kinds of judicial law
pensate in part for the "deficiencies in congressional ability to achieve valid legislative ends," Congress's unintended inequities and its failure to "respond effectively to new problems as they arise." He also seems to assume that the only escape from literalism is through "equitable interpretation," which, too, is undefined, or through a common law version of judicial law making in which a statute has the same status as common law. The role of context in conditioning text is simply unrecognized.

Although the Supreme Court may be overly reticent about initiating substantive policy in the context of statutes, it is not so clear that it has so neatly boxed itself in by literalism. One is liberated from literalism by learning to read in context. One is liberated from expressio unius, first, by realizing that negative implications occur only where context so indicates and, second, that, even where they are so indicated, their limited reach leaves much room for judicial supplementation or analogy without necessarily interfering with the statutory scheme.

Finding, in the Court's recognition of "an individual right to be free from . . . overly intrusive regulatory law" and its "vague judicial hostility to regulatory legislation, a sense that Congress has illegitimately extended the pervasive intrusion of federal law into private life," the author concludes that "the legitimacy of congressional legislation" has thus been undermined. Accordingly, he suggests that "the Court might abandon the language of intent, with its pretense of deference, and move toward more explicit articulation of the substantive values that inform current statutory interpretation" (a concept not further explained) or, alternatively, that it "openly . . . commit itself to a common law model of statutory interpretation [in which] courts would view statutes as statements of consensually agreed-upon principles."

The author is uncertain whether courts should be allowed to override statutory principles, even though he says that "[e]nvisioning statutes as common law would not free the courts from their obligation to implement legislative will . . . the common law model would

159. Id. at 904 (footnote omitted).
160. Id. at 905.
161. R. Dickerson, supra note 3, at 234-35.
162. See id. at 250-51. For an excellent discussion of judicial law making by analogy to statute, see Williams, supra note 12.
163. Note, supra note 150, at 911, 912.
164. Id. at 913.
free the courts to implement that will.’’165 How legislative will differs, if at all, from legislative intent he does not say. (How can we rely on the former, if we cannot rely on the latter?)

Much of this analysis would make sense if we could assume that such a theory of judicial creativity applied only after completion of the cognitive phase in accordance with constitutionally supported principles of communication.

Ultimately, the author wants to induce Congress to stick to general principles by getting it out of the business of legislating detail, the existence of which poses constitutional problems for courts trying to keep legislation abreast of social needs, a responsibility that today’s legislatures tend strongly to neglect.166 How would the courts accomplish this? “By interpreting statutes as if they expressed discernible principles, . . . thereby demanding that statutes in fact do so . . . .”167 Because no constitutional amendment is suggested, may we presume that all that courts would need to do is ignore the statutory specifics and substitute their own as the need required?

What would all this accomplish? If he had analyzed the cases, he would have found that the number of cases in which the words of a statute are invoked is vastly larger than the number of cases involving significant problems of meaning. Indeed, only a few of the questions raised by legislative language ever get litigated at all.168

In any event, I am not persuaded, under any supposed constitutional circumstances, that the courts are equipped, whether by opportunity, by access to facts, or by capacity, to handle any substantial proportion of the need for statutory reform to which the legislative branch inadequately responds. Although state courts, egged on by section 402A of the Restatement of Torts, have adopted the common law approach to divert the privity cases from the supposed clutches of the Uniform Commercial Code, this modest intrusion on legislative supremacy has produced more doctrinal confusion than it has alleviated.169 And why have the courts produced so little

165. Id. at 914.
167. Note, supra note 150, at 915.
168. See J. Hurst, supra note 51, at 31; see also supra text accompanying note 107.
169. See Dickerson, Was Prosser’s Folly Also Traynor’s? or Should the Judge’s Monument Be Moved to a Firmer Site?, 2 Hofstra L. Rev. 469, 481 (1974); Dickerson, The ABC’s of Products Liability—With a Close Look at Section 402A and the Code, 36 Tenn. L. Rev. 439, 453 (1969).
badly needed reform in the archaic areas of property law, where statutory inhibitions are relatively few? Is it reasonable to expect more from the courts than statutory tinkering? I suggest that it will be far more profitable to follow the precedent of California's and New York's law revision commissions than to transfer any major responsibility for updating statutes to a court system that is irretrievably bogged down with its main job of dispensing individual justice.

Unfortunately, the article dissolves into a confusion of vague aspirations attributable to the author's insensitivity to the consequences of distinguishing between finding meaning and creating it, the general principles of communication (especially the nature and role of context), the constitutional principles that limit the options of courts when dealing with statutes, and the circumstances that make it fatuous in today's world to expect that a legislature that trusts neither the executive branch nor the judicial branch will confine itself to general principles. Only a constitutional amendment could meet the need, and even that probably would not work; the author merely posits that to accomplish his objective for statutory interpretation "would require a conception of separation of powers radically different from the one traditionally espoused."\(^{170}\)

Despite all this, the article reflects much innovative thinking and hard work. Much the same could have been said of Ader's steam-powered airplane.

**Extending and Improving Legislative History**

Earlier, I predicted that making legislative history more available would result largely in increasing the judicial appetite for it.\(^ {171}\) This is portended by frequent requests for recording more of the legislative process, including stating in state committee reports the reasons for the actions taken, the recording of state committee proceedings and floor debates, and Rhodes, White, and Goldman's recommendations for statements of legislative explanation and intent,\(^ {172}\) the annotation of floor debates,\(^ {173}\) and filing all "reports, memoranda, fact sheets, and other such material which seeks to analyze, explain, 'sell,' or defend legislation."\(^ {174}\)

So much for quantity. As for quality, we have as an example

\(^{170}\) Note, supra note 150, at 913 (footnote omitted).
\(^{171}\) See supra text accompanying notes 64-65.
\(^{172}\) Rhodes, White & Goldman, supra note 75, at 405-07.
\(^{173}\) Id. at 406.
\(^{174}\) Id.
Smith's recommendations for legitimating courtroom testimony by individuals participating in the legislative process.175

Ironically, such "improvements," by their very bulk and complexity, tend to undercut rather than advance efforts to bring legislative history into the context of the statute. Even the computerization of legislative history is an inadequate answer to nonavailability, because it tends to widen the already wide gap between the well-heeled litigant and the financially ill-favored one.176 Have we not already priced much of justice out of the market?

On the other hand, most advocates of using legislative history who seriously investigate the practicalities of its development and use (after rejecting the approach of improving statutory text) conclude that most of it is unreliable and the rest of it is of so little use that it becomes desirable to improve or replace it. This feeling usually culminates in a recommendation to create accompanying statements of legislative intent or statements of ulterior purpose.177

The former, of course, must be rejected as competing with the statute. As for legislative history generally, Abraham makes a telling point: "Reliance on legislative records . . . present[s] the same problem as reliance on the statutory text itself. Legislative records are also texts and do not come to the reader already interpreted."178

Suppose that we somehow surmount the difficulties of composition and produce a comprehensible purpose clause. In such a case, it is common, on further reflection, to conclude that it makes better sense to include the usefully expressible in the statute itself,179 bringing us full circle to the better-drafting approach whose rejection we assumed at the outset.

The final irony is that studies of general purpose clauses have shown that most of them wind up as pious incantations of little practical value because what little value they have is usually inferable from the working text. Indeed, the codifiers of title 49 (part only) of the United States Code, in their bill restating federal transportation laws,180 dropped most existing purpose clauses as superfluous, and, I

175. See Smith, supra note 100, at 298-99; see also supra text accompanying note 104.
176. See J. Davies, supra note 59, at 255.
177. See, e.g., Rhodes, White & Goldman, supra note 75, at 405-07.
178. Abraham, supra note 125, at 684-85.
179. "A statement of intent has a paradoxical quality: the more it attains the status of an objective footprint on the trail of legislative enactment, the more it becomes a mere restatement of the statute properly included within the statute itself." Final Report, supra note 65, at 32.
am informed, no one complained.

Although a general purpose clause is occasionally useful, the most useful clauses are those introducing particular sentences, which offer the advantage of focused specificity.

**CONCLUSION**

The cruel fact is that there is no interpretative cure that will relieve the courts and the legislative audience of the burden of sweating out the communicative burdens imposed by inadequate draftsmanship. Would not our academic efforts be better addressed, therefore, to the dialectic of legal drafting? In the meantime, let us confine our scavenging among the flimsy materials of legislative history to its occasional weak confirmatory use and its possible suggestiveness during the courts' creative efforts.

Finally, let me mention an intensely practical consideration: Ultimately, we must face up to the fact that all but a minute percentage of new law is promulgated, not by legislatures or courts, but by administrative agencies exercising rule-making power (which the British more aptly call "delegated legislation"). If legislative history is part of external context and thus vital to understanding statutes, must not "regulatory history" be a vital part of understanding the quasi-statutes that confront us as administrative regulations? Think about it.

181. See R. Dickerson, Legislative Drafting 107-08 (1954).

182. See The Preparation of Legislation, CMND 6053, at 63, 150 (1975); Renton, supra note 43, at 10-11.

183. "No interpretive device can relieve the courts of their ultimate responsibility for considering the different contexts in which the words of a provision might be read, and in making a choice between the different meanings which emerge from that consideration." Commission, supra note 66, at 42.

184. See supra note 126.