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Censoring Legislative History: Justice Scalia on the Use of Legislative History in Statutory Interpretation

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Comment

Elizabeth A. Liess

Censoring Legislative History: Justice Scalia on the Use of Legislative History in Statutory Interpretation

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I. INTRODUCTION

The approach of the Supreme Court in interpreting statutory language was a stagnant issue until the appointment of Justice Antonin Scalia by Ronald Reagan in 1986. Since then, the Supreme Court's

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accepted approach to statutory interpretation has been placed under a microscope. Once Justice Scalia's nomination was approved, he initiated a campaign to purge the Supreme Court of its reliance on non-textual sources to aid in the interpretation of statutory language.

One of the primary thrusts of this battle has centered on the use of legislative history.[1] The Supreme Court has used legislative history as a tool of interpretation for nearly a century.[2] Ideally, after the purpose of the statute is ascertained, the Court applies its understanding to reach a compatible result with what Congress intended when the statute was enacted. Courts have used legislative history and other extrinsic material to ascertain the purpose of the statute and the Congressional intent. Courts seldom follow this ideal approach. Justice Scalia objects to the use of legislative history because he believes that extrinsic material actually replaces the statutory language. Justice Scalia advocates the use of extrinsic material to determine only the context in which the statute was enacted.

A one sentence statement of this position is that the text which Congress passed into law is the text which the Court must restrict itself to using.[3] The decisionmaker's task is to ascertain the meaning of the words in the text to interpret Congressional purpose. When the extrinsic material replaces the decisionmaker role in ascertaining intent, the judge's role is undermined. Therefore, if the meaning that is derived from the text is ambiguous or would result in an absurd construction, then the decisionmaker may look to non-textual sources to interpret the statute.[4]

The purpose of this comment is to present and evaluate Justice Scalia's main objections to the use of legislative history. The foundations for the textualist school of thought will be briefly discussed, followed by an overview of Justice Scalia's arguments for rejecting legislative history. The second section of the article will focus on the common criticisms of Justice Scalia's approach and why the use of legislative history should continue, albeit with certain limitations in place. Finally, the article considers why Justice Scalia is motivated to abandon legislative history in his theory of statutory construction.

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1. The types of legislative history with which Scalia is most concerned and which are included under this umbrella term include Congressional floor debates, committee reports, hearing testimony, and presidential messages.
2. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 196-97 (1983).
3. Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 281-82 (1990).
4. This is basically a statement of the "plain meaning rule." In Caminetti v. United States, 242 U.S. 470, 490 (1917), the court stated that when the language does not lead to an absurd result, there is no need for judicial construction.

II. A TEXTUALIST ON THE USE OF LEGISLATIVE HISTORY

A. The Textualist Approach

According to the textualist theory, the only authoritative source for interpreting statutes is the text of the statute.[5] The interpretive role of the Court is to ascertain and effectuate the intentions of Congress as they are expressed when legislation is passed. The textualists believe that legislative history is a rival text created by a group other than the voting legislature. The legislative history has no authority and is not intended to determine statutory meaning.[6]

The backbone of the textualist approach to statutory construction is the "plain meaning rule." The modern standard for the rule is that when the statute is plain on its face, there is no need to consult extrinsic material to ascertain legislative intent.[7] Justice Scalia promotes himself as a strict advocate of this principle. Most recently, however, the Court has placed minimal significance on the plain meaning rule in statutory construction. Instead, the Court uses legislative history as an integral part of its approach to statutory construction.

It may be helpful to draw a comparison to a pyramid. At the apex of the pyramid, we find that there is no reliance on legislative history. At the next lower level, where minimum reliance is used, legislative history confirms an interpretation of the "plain meaning" of the statutory language. Intermediate reliance, approximately at the middle of the pyramid, is the use of legislative history without clarifying whether the text of the statute is ambiguous. The base of the pyramid represents replacement of the text of the statute with the legislative history.[8]

One of Scalia's converts in his campaign to limit the use of legislative history is Justice Anthony Kennedy.[9] Justice Kennedy recently noted one of the concerns textualists have when non-textual resources are consulted. Kennedy stated, "[r]eluctance to working with the basic meaning of words in a normal manner undermines the legal process . . . [and] leads instead to woolly judicial construction that mars the plain face of legislative enactments."[10]

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5. *See* Wald, *supra* note 3, at 282.
6. William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699 (1991).
7. *In re* Sinclair, 870 F.2d 1340 (7th Cir. 1989).
8. *See* Wald, *supra* note 3, at 282, 285. (This represents using the legislative history to replace the statute's language as authoritative. In other words, it compels a finding that the information in the legislative history is definitive on the question of the statute's construction.)
9. Justice Kennedy was appointed to the Court in 1988 by Ronald Reagan.
10. *See* Public Citizen v. Department of Justice, 491 U.S. 440, 469-70 (1989)(Kennedy, J., concurring). (Kennedy uses the term "woolly" rather facetiously because the majority opinion referred to the verb "utilized" as a woolly verb. This is why the

Justice Scalia has taken the Court to task on a number of occasions for its half-hearted attempts to adhere to the plain meaning rule. These attempts were so half-hearted in the early 1980s that one commentator identified the 1981 term as tolling the death knell of the plain meaning rule.[11] During this term, Court watchers observed a definite trend of Justices using legislative history as a backstop to confirm their interpretation of the text of statutes.[12] This approach, labelled the "hybrid" approach, is evident when judicial opinions enunciate their interpretation of the statute, stating the statute is plain on its face, but then refer to the relevant legislative history to further support their interpretation.[13]

B. Justice Scalia's Objections to the Use of Legislative History

Scalia defines specific guidelines to follow when interpreting statutes. These guidelines allow for the consideration of three sources. Primarily, of course, Justice Scalia accepts the plain meaning of the statutory text at issue. Second, a judge can view the structure of the statute or the "four corners" of the document as a whole to gain an insight into the meaning of the language.[14] Finally, other related provisions of enacted statutes may be considered by comparing wording and the meaning attached to those words.[15]

By defining the methods which Justice Scalia accepts in his theory, we can easily identify what sources are not acceptable to him. The primary objections Justice Scalia relies on in his campaign against the use of legislative history can be categorized into two themes. These themes are constitutional objections and practical objections.

1. Constitutional Objections to Legislative History

Article I of the U.S. Constitution requires that: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United

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court was inspired to begin its exploration of the legislative history of the Federal Advisory Committee Act. *Id.* at 452).

11. *See* Wald, *supra* note 2, at 197-198.
12. *Id.* (This "hybrid" approach is also the equivalent of the minimum level of reliance which I placed near the top of the pyramid.)
13. *See* Wald, *supra* note 3, at 289. (The author noted cases from the 1988-89 term where the Court referred to legislative history to confirm its reading of statutory language. In Patterson v. McLean Credit Union, 491 U.S. 164, 175-182 (1989), the Court considered whether section 1981 was limited to the protection of the right to make contracts and the right to enforce contracts. The Court held that the provision only protected situations within these two distinct categories and briefly surveyed proposals by various Congressmen.)
14. Karahalios v. National Fed'n of Fed. Employees Local 1263, 489 U.S. 527, 530-37 (1989). Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 815-17 (1989).
15. Green v. Bock Laundry Mach., 490 U.S. 504 (1989)(Scalia, J., concurring).

States; If he approves he shall sign it . . . ."[16] Justice Scalia argues that the constitutional requirements of Article I are not complied with when legislative history is used as a tool of statutory construction.

The two elements Justice Scalia extracts from Article I to support his argument are the concepts of bicameralism and presentment to the President. Since the word "bicameral" indicates a two-house form of government, bicameralism in this context is the concurrence by both houses of Congress to activities where there must be two-house assent. The lack of concurrence by both houses to legislative history created without two-house approval is a violation of bicameralism. Justice Scalia argues that the formal legislative process must be followed before the material can become authoritative.[17]

The presentment element of Article I is met by presidential signature on a piece of legislation which has been approved by both houses of Congress. Justice Scalia theorizes that the President is signing a bill the language of which is limited to what is contained in the bill. The Court, then, is bound by Article I to interpret only text which complies with the bicameralism and presentment doctrines.

Justice Scalia argues that assent among the branches of Congress and between Congress and the President is the only reasonable way to comply with the Article I requirements. The bicameralism and presentment doctrines together make up the formal legislative process adopted by the Constitution. These parties have only given their assent to the text of the statute, not the extrinsic material floating around Capitol Hill.

There is a definite consistency in Justice Scalia's adherence to the constitutional objectives of bicameralism and presentment. Prior to his appointment to the Supreme Court, Justice Scalia declared the importance of these two concepts. In 1983, he joined with the American Bar Association to urge the Court to affirm a Ninth Circuit Court of Appeals decision. In *INS v. Chadha*,[18] the Ninth Circuit struck down a Congressional veto provision in immigration deportation cases. Specifically, the issue dealt with the ability of the Attorney General and Congress to mandate deportation of individuals. Under agency rules, the Attorney General was able to suspend deportation recommendations made by the Immigration and Naturalization Service (INS). However, section 244(c)(2) of the Immigration and Nationality Act[19] reserved the right for the Senate or the House of Representatives to unilaterally veto the Attorney General's suspension and mandate that deportation be carried out. The Court expressly stated that Congress

16. U.S. CONST. art. I, § 7, cl. 2.
17. *See* Blanchard v. Bergeron, 489 U.S. 87 (1989)(Scalia reiterating these constitutional objections in concurring opinion).
18. 462 U.S. 919 (1983).
19. Formerly located at U.S.C. § 1254(c)(2).

may make law only by bicameral action and presentment to the President.[20] In this case, section 244(c)(2) was declared unconstitutional as a violation of the separation of powers doctrine.[21]

Justice Scalia's position on the use of legislative history predicts his rejection of the legislative veto. The only authoritative voice of Congress is the voice of the legislation it enacts. Although the legislative veto is "a useful 'political invention' "[22], it is clear that Congress may not interfere with Executive branch decisions.

In an administrative law context, the decision of the majority in *Chadha* is an early 1980s indication of the new emphasis on the separation of powers doctrine. Like the majority who joined in that decision, Justice Scalia is a staunch supporter of a clear-cut application of the separation of powers doctrine. *Chadha* also warns that administrative separation of powers issues will be reviewed on a more narrow basis. Because of Justice Scalia's participation under the umbrella of the ABA, this is an early indicator of Scalia's emphasis on strict adherence to constitutional divisions of power.

2. *Practical Objections to the Use of Legislative History*

The first practical objection is the ease with which staff or members of Congress can manipulate the content of legislative history. In theory, manipulation of content facilitates a favorable interpretation by courts and enforcement agencies. The second practical objection is the inconsistency which arises or the "margin of error" which results when legislative history is used to interpret statutes.[23] The result is that a judge may engage in judicial activism and ignore the principle of judicial restraint.

a. *Staff Involvement and Poisoning the Process*

The staff of committees and members of Congress play a role which places them in a sensitive position with considerable discretion. Justice Scalia's objections emphasize the difficulty of staff oversight. Although an elected official presumably is the approved spokesperson for his or her constituents, the same cannot be said for the staff of a Congressional committee or a member's staff assistant. The responsibility of drafting the reports which make up part of legislative history is overwhelming. So overwhelming that the staffers cannot be trusted to accurately report the purpose and scope of specific legislation.[24]

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20. INS v. Chadha, 462 U.S. 919, 957-959 (1983).
21. *Id.* at 959.
22. *Id.* at 945.
23. Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827 (1991).
24. David A. Farber and Philip P. Frickey, *Legislative Intent & Public Choice*, 74 VA. L. REV. 423, 438-46 (1988).

One of the textualist's primary fears is the susceptibility of committee reports to a "stacking of the deck" in order to promote a favorable interpretation from a judge.[25] The staff of the members of Congress are the links to the Political Action Committees (PACs), the constituents, and the administrative agency personnel. With these ties, it is easy for a staffer to encourage their favorite member of Congress to purposely include favorable statements in public addresses or to ensure these statements are written into the committee report. Justice Scalia believes that these inputs poison the legislative process.

b. Erroneous Interpretations Allow for Activism

The second practical barrier which textualists identify as grounds for ignoring legislative history is the threat of inconsistency. This inconsistency is an invitation for judicial activism. Unrestricted use of legislative history allows a judge to sift through various material and reach result-oriented decisions.[26]

A commonly cited analogy first announced by Judge Leventhal and commonly used by Scalia is that: "[T]he intelligent use of legislative history is like walking into a crowded cocktail party and looking over the heads of the guests to pick out your friends . . . ."[27] It is not difficult to comprehend the meaning of this remark by Judge Leventhal. With selective use of committee testimony, statements, and reports, any stray remark or "snippet" may be used as authoritative evidence of Congressional intent.

The textualists fear that "snippets" of legislative history will be used without regard to the context in which the remarks were made.[28] In *In re Sinclair*, Judge Easterbrook[29] observed that the improper use of legislative history is difficult to avoid. Therefore, judges should restrict their references to legislative history as much as possible.[30] By minimizing the use of legislative history, it is concluded that judicial

25. *In re* Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989). Judge Easterbrook wrote that he objected to the use of committee reports because it was "loser's history" ("If you can't get your proposal into the bill, at least write the legislative history to make it look as if you'd prevailed"). *Id.*

26. Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1309-10 (1990).

27. *Id.* at 1310 n.58.

28. *In re* Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989). This case analyzed whether a statute or legislative history should prevail when there is conflict between the enacted statutory text and the extrinsic evidence. Easterbrook determined that the enacted statutory text prevails over the legislative history in all cases.

29. Easterbrook also embraces the textualist approach to statutory interpretation. *See* Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983). *See also* Zeppos, *supra* note 26.

30. *Id.*

choice will be eliminated.[31]

Minimizing the types of sources available to decisionmakers is not an attractive option for the intentionalists. The majority in *Public Citizen v. Department of Justice* wrote that all material available to ascertain intent should be utilized.[32] In *Public Citizen,* the Court faced the issue of whether the American Bar Association was an "advisory committee" as defined in the Federal Advisory Committee Act (FACA).[33] The plaintiffs argued that the ABA was an advisory committee and was therefore required to disclose information regarding the nominations for positions on the federal bench.[34]

The majority opinion, authored by Justice Brennan, held that the word "utilized" in the FACA language was ambiguous and thus, the Court was forced to look to legislative history to ascertain Congressional intent.[35] In its exploration, the Court delved into all related material to determine whether the FACA applied to the ABA.[36] The majority expansively used extrinsic material in this case to overshadow the question of whether the disclosure requirement was a vio-

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31. *See* Zeppos, *supra* note 26, at 1337.

32. 491 U.S. 440, 454-55 (1989).

33. 5 U.S.C. App. § 1-12. Section 3(2) of the FACA defines advisory committee as:

> "(2) The term 'advisory committee' means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . .
>
> which is—
>
> (A) established by statute or reorganization plan, or
>
> (B) established or utilized by the President, or
>
> (C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies of officers of the Federal Government . . . ."

Public Citizen v. Department of Justice, 491 U.S. 440, 452 (quoting FACA).

34. *Id.* at 447-48.

35. *Id.* at 452-55.

36. *Id.* at 455-467. Justice Kennedy noted that the obvious place for the majority to look to find the purpose of the FACA was under the section of the Conference Committee Report entitled: "Findings and Purposes." *Id.* at 475-76. The section lists six findings and purposes of the FACA:

> "(1) the need for many existing advisory committees has not been adequately reviewed; (2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary; (3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established; (4) standards and uniform procedures should govern the establishment operation, administration, and duration of advisory committees; (5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and (6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved."

H.R. CONF. REP. NO. 92-1403, 92d Cong., 2d Sess. 1-2 (1972).

lation of the Appointments Clause.[37] The majority intended to construct the statute to avoid raising a question of constitutionality.[38]

Justice Scalia, who did not participate in the case, would argue that the majority needlessly relied on legislative history to avoid the constitutional question. Justice Kennedy concurred in the judgment but for different reasons. He refused to look at the legislative history, but instead analyzed the case on constitutional grounds. Justice Kennedy concluded that since the purpose of the committee was to aid the President in the nominating process and appointment process, the FACA infringed on the President's appointment power.[39]

Mindful of Justice Kennedy's opinion on the Court's use of legislative history, the Court will avoid a constitutional analysis of a provision as long as the result is not *plainly* contrary to the intent of Congress.[40] While it is highly debatable whether or not placing the ABA committee under the provisions of the FACA is plainly contrary to Congressional intent, the majority made a questionable statement when it said, "we are loath to conclude that Congress intended to press ahead . . . in the absence of firm evidence that it courted those perils."[41] It is absurd to say that Congress intentionally enacts legislation it believes to be unconstitutional. Certain provisions of an enactment, though unconstitutional, do not subvert the legislation in its entirety.

3. *The Revised Standard for Interpretation*

Justice Scalia has recently attempted to define his own standard and theory of statutory interpretation. In *Blanchard v.Bergeron*,[42] Justice Scalia ventured into new territory by declaring that he favored developing "an interpretation of the statute that is reasonable, consistent, and faithful to its apparent purpose . . . ."[43] Unfortunately, Justice Scalia did not elucidate as to what he meant by "reasonable" and "apparent."[44] Obviously, the interpretation must not be apparent from a reading of the legislative history. Instead, Justice Scalia envisions that judges should exercise a high degree of discretion to fix the

37. U.S. CONST. art. II, § 2, cl. 2.
38. Public Citizen v. Department of Justice, 491 U.S. 440, 466 (1989). ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.")(quoting Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988)). The FACA is one of the only oversight tools for advisory committees.
39. *Id.* at 469.
40. Crowell v. Benson, 285 U.S. 22, 62 (1943).
41. Public Citizen v. Department of Justice, 491 U.S. 440, 466 (1989).
42. 489 U.S. 87 (1989).
43. *Id.* at 100.
44. *See* Wald, *supra* note 3, at 305.

application of legislation. As Justice Cardozo put it, "Statutes do not cease to be law because the power to fix their meaning in case of doubt or ambiguity has been confided to the courts."[45]

III. THE OTHER SIDE: AN APPRAISAL OF THE VALUE OF LEGISLATIVE HISTORY

This section discusses the popular responses to the objections made by Justice Scalia. These responses are illustrated in judicial opinions, by legal commentators, and by members of Congress. Because this debate *is* a productive one, the proposals set out below are intended to guide the judiciary in future clashes on the need to refer to extrinsic material to aid in interpretation. If realistic parameters are established, the use of extrinsic materials will enhance the working relationship between Congress and the judicial system.

A. Critique of Arguments

The failure to comply with the legislative process is one of the justifications for Justice Scalia's rejection of legislative history. However, this argument should be a concern only if the legislative history actually replaces the statute.[46] Definitely, legislative history should not be the real starting point in statutory construction. However, when legislative history is used only as evidence of purpose, the constitutional protections of bicameralism and presentment are less important. Thus, judges should ensure that the particular constitutional requirements are complied with when legislative history is consulted.

Justice Scalia believes that the most unreliable type of legislative history is a committee report.[47] Contrary to that view, arguably the most unreliable types of legislative history are individual statements of Congressmen. The statements of the sponsor of legislation are the least reliable if we accept the idea that the Article I requirements must be complied with. Statements by sponsors should be used with caution because, as of the time these statements are made, there will have been no compliance with the legislative process. This is particularly true when a legislator is first introducing the legislation. At that point, there is no clear indication the legislation has any support.

Justice Scalia also opposes individual statements of Congressmen because of the chance of manipulation by members. This problem, however, is not as serious as the failure to comply with the legislative process. Common sense tells us that bill sponsors and supporters will always take action to garner support for their ideas. Responsible opponents must oppose or reject amendments while these proposals are

45. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 127 (1921).
46. *In re* Sinclair, 870 F.2d 1340, 1342 (7th Cir. 1989).
47. Blanchard v. Bergeron, 489 U.S. 87, 98-99 (1989)(Scalia, J., concurring).

being debated. Similarly, misleading and inappropriate remarks in legislative history need to be clarified. Judges who use legislative history have a responsibility to determine if contradictory legislative history exists. Likewise, judges who oppose the use of legislative history have opportunities to "impeach" legislative history by finding contradictions in various extrinsic material. This method may be very effective if Justice Scalia wishes to prove his point that legislative history often is contradictory. At this point, he has yet to do so.

The second Article I objection Justice Scalia makes is when legislative history is consulted without input by the President through the presentment doctrine. This objection lacks the observation that the executive branch does play a role in the legislative process at the committee level. That is the role of the Executive or administrative agency in drafting legislation and lobbying Congress. The executive branch has an on-going role in drafting and reviewing materials generated in the enacting process.[48] For instance, in *Bankamerica Corp. v. United States*,[49] the Court cited testimony from committee hearings given by Louis D. Brandeis, who was an advisor to President Wilson at the time the Clayton Act was enacted.[50] This is one example of the Court lending credibility to an executive branch statement which did not comply with the bicameral requirement.

1. *Courts Already Approach Certain Legislative History with Caution.*

Scalia argues that the temptation to use legislative history should be avoided because of the tendency to manufacture statements for favorable interpretations. As previously discussed, this is a valid fear in the early part of the legislative process because there has been no debate or agreement.

Indeed, courts have recognized that statements from individual legislators are unreliable. In *Hadden v. Bowen*,[51] the court determined that a House committee report was more reliable than statements made by individuals. The individual statements were contradicted by the final committee report attached to the legislation. Therefore, the court in *Hadden* created a hierarchy of authority for the extrinsic material that was consulted.[52] By keeping in mind this

48. *See* Zeppos, *supra* note 25, at 1312.
49. 462 U.S. 122 (1983).
50. *Id.* at 134-35.
51. 657 F. Supp. 679 (D. Utah 1986), *rev'd on other grounds*, 851 F.2d 1266 (10th Cir. 1988).
52. The House Committee Report is a better indication of the legislative intent than are statements made by individual Congressmen, senators, or the President. Where the views expressed in the committee report conflict with such statements, the report controls. *Id.* at 684-85.

hierarchy, a type of judicial oversight evolves. This oversight will avoid misapplication of Congressional intent.

The courts construing statutes have now been forewarned that a bill introduced into committee for the first time or remarks made during testimony have been untouched by the legislative process. As the bill passes through the legislative process of committee comment, however, sufficient exposure to the safeguards of notice and comment have been initiated and a broad compliance with the legislative process occurs.

Justice Scalia, unfortunately, does not view the committee process as a practical equivalent to the formal procedures of Article I.[53] The committee report has come under attack from Scalia because of the role of committee staff in sifting through evidence to prepare the reports. Notice that Scalia's objections to statements by individual legislators and to committee reports are substantially similar.

This argument ignores two important aspects of the committee system: increased professionalism of committee personnel and the role of executive departments in lobbying members of Congress. Agencies have substantial opportunity to submit information to Congressional committees and, in fact, are required to do so in certain circumstances.[54] As legislation is exposed to the legislative process, opponents will have the opportunity to create their own record in the legislative history. Language will be inserted and deleted in the bill itself and committee staff will know what the intended scope of the legislation is through oral testimony and written reports. After the staff sifts through this information, the substantive aspects of the legislative process have been complied with.

2. *The Textualist Approach Increases the Margin of Error in Interpretation*

The textualist approach to statutory interpretation tolerates a certain degree of inconsistency and error by maintaining loyalty to the plain statutory language.[55] This practice places more importance on following canons of construction and denies the need to identify with Congressional intent. An example of such a case was *United States v. Locke*.[56] In this case, the Court interpreted the Federal Land Policy and Management Act of 1976.[57] At issue was the timeframe in which holders of mining claims on federal lands were obliged to register their claims with the Bureau of Land Management (BLM). The statutory language provided that the claimants must file claims "prior to

53. Blanchard v. Bergeron, 489 U.S. 87, 98-99 (1989)(Scalia, J., concurring).
54. ARTHUR MAAS, CONGRESS AND THE COMMON GOOD (1983).
55. *See* Zeppos, *supra* note 26, at 1314.
56. 471 U.S. 84 (1985).
57. 43 U.S.C. §§ 1701-1784 (1982).

December 31."[58]

The plaintiffs in *Locke* filed their claim on December 31. The Court, noting that the deadline language was unambiguous, held that the plaintiffs forfeited their million-dollar claim. The dissenters argued that the plaintiffs should not be required to relinquish the claim for two reasons. First, the BLM had deviated from the statute and approved a regulation which required filing on or before December 31. Second, the BLM accepted registrations which were received in the office prior to January 19 of the following year.

An intentionalist view of this case would have looked to the BLM's own administration of the 1976 Act. Noting the inequities which would result if the claimants were obliged to forfeit, the intentionalist view espoused in the dissent placed authoritative control on the BLM's procedures. These procedures used a flexible approach to the December 30 deadline. However, the majority, led by Justice Marshall and Chief Justice Burger, denied the plaintiffs the benefit of the agency approach. The opinion was sadly deficient in the analysis of why a strict application of the deadline was necessary. It is also noteworthy that the Court did not rebuke the BLM for promulgating a regulation inconsistent with the statutory authority.

The majority of courts do accept the idea that legislative history may be used to show that statutory language may be modified because of clear Congressional intent.[59] The *Locke* case exemplifies the problems encountered by a textualist who ignores clear, unequivocal evidence of contrary Congressional intent. The *Locke* case was a prime candidate for a deciding court to avoid literal application of the statute's text. It is hardly credible that Congress chose the second to last day of the year rather than the last day of the year for a filing deadline.[60]

B. Justice Scalia's Failure to Propose Workable Solutions.

The assault on the use of legislative history in interpretation has made inroads in persuading decisionmakers to guard against unlimited use of extrinsic material. However, Scalia's analysis of the role of legislative history in statutory interpretation lacks one fundamental element: proposing a reasonable alternative. Apart from the statement found in *Blanchard v. Bergeron* relating to "reasonable and apparent,"[61] Justice Scalia has failed to propose a method to deal with the issue. Is it necessary to propose a new test? It is necessary because Justice Scalia cannot expect to persuade the judiciary to convert to a

58. 43 U.S.C. § 1744(a)(1982).
59. Hadden v. Bowen, 851 F.2d 1266, 1267 (10th Cir. 1988).
60. *Id. See also* Wald, *supra* note 3.
61. *See* Wald, *supra* note 3.

strict textualist approach, one which has never been followed. Instead, Justice Scalia needs to acknowledge that extrinsic material will be utilized and enunciate a test which allows for its use.

Currently, Justice Scalia will only refer to extrinsic material when the language is ambiguous and would lead to an absurd result. It appears that before one may look to legislative history, the decisionmaker must scrutinize similar language contained in other federal statutory provisions. One need not have a very active imagination to determine the effects of this type of activity if its use became common. Resorting to statutory language in other code provisions raises a concern because there are no limitations on its use. These considerations do not stop Scalia from using other code provisions to resolve ambiguity or doubt, however.

In *Lukhard v. Reed*,[62] the Court was faced with the issue of whether the income qualifications of Aid For Dependent Children (AFDC) should include personal injury awards as part of the countable income of a recipient. Scalia, who wrote for the majority, reviewed one statute dealing with a public welfare program and the tax code to see if those enactments had directly faced the issue. In the Internal Revenue Code and in the provisions governing the Food Stamps program, the text specifically provided that personal injury awards were not considered "income." The Court stated that since these two examples expressly indicated that awards were not income, by virtue of AFDC's silence, the personal injury award should be counted as income.

Why do committee reports written contemporaneously with the legislation present problems for textualists but the use of other code provisions to interpret statutory language do not? The same objections to the use of legislative history can be used to reject reference to other code provisions. Is it any more likely to resolve meaning with any more certainty by looking at other statutory language, especially when the language is not even within the same code provision?

Common sense tells us that code provisions should not be authoritative either. They were not created contemporaneously with the statute at issue and there is no unequivocal intent to modify statutory language. The personnel involved in enacting the legislation will be different and will emphasize different aspects of the legislation.

These are precisely some of the justifications a federal court decision proffered in refusing to accept retroactive legislative history.[63] In 1984, Congress attempted to create legislative history which would apply to the 1976 Copyright Act provision governing the right to a jury

62. 481 U.S. 368 (1987).

63. Educational Testing Servs. v. Katzman, 670 F. Supp. 1237 (D.N.J. 1987).

trial when statutory damages are sought.[64] The majority of courts had denied the right because there was only reference to the word "court" and "in its discretion" in the language codified at 17 U.S.C. section 504(c).[65] In 1984, Congress enacted legislation titled, "The Semi-Conducter Chip Act" (SCPA).[66] This was an entirely new act which dealt with copyright law. Since Congress was working with a new technology, they chose to deal with the problems in new legislation rather than through amendment to the 1976 Act. The SCPA did not depart from the language of the 1976 provision. While the legislative history of the 1976 Act was silent, this time the House Judiciary Committee purposely inserted language in the SCPA committee report which stated that it was Congress' understanding that the legislation protected the jury trial right, just as the right was protected in 1976.[67] Congress did this because circuit courts were split on the issue of whether a jury trial was available when statutory damages were sought.

One court expressly rejected this attempt to force retroactive intent on the judiciary. In *Educational Testing Servs. v. Katzman*,[68] a Seventh Circuit district court rejected the legislative history of the House of Representatives relating to the SCPA. This attempt to deal with the jury trial issue through the back door indicates that Congress failed to fully consider the ramifications of their actions. This is especially true when we consider that Congress amended the 1976 Act in 1988, even though courts continued to deny the jury trial right. Congress knew that this was a problem but refused to affirmatively deal with it.

The *Lukhard* case raises some of the same problems as those raised by the analysis of the SCPA. For example, the legislative body enacting the provisions was not the same. Therefore, the language was not drafted contemporaneously with the legislative history. In the SCPA example, there was an unequivocal statement that the 1984 provision should apply retroactively to the 1976 Copyright Act. This raises the question of whose or what intent do we look at?

One can refer to presidential statements,[69] individual legislators' statements, committee reports, or post-enactment legislative history.

64. *See* 3 MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 18.01 (1992).
65. It is curious and interesting to note that the circuit split on the jury issue may be due to the fact that "court" and "discretion" are words which have accepted meanings in judicial practice. This fact may be beyond the thinking of the average member of Congress. *See* West Virginia Univ. Hosps., Inc. v. Casey, 111 S.Ct. 1138, 1146 (1991) for a discussion on issues which arise when words have clearly accepted meaning in both legislative and judicial practice.
66. 17 U.S.C. § 900 (1984).
67. *See* NIMMER, *supra* note 64, at § 14.01.
68. 670 F. Supp. 1237 (D.N.J. 1987).
69. *See* Popkin, *supra* note 6.

The intentionalists conceivably would accept it all. This may raise problems of information overload, and certainly, the more sources referred to, the more chance of finding contradictory intent.

Justice Scalia has dealt with these problems by looking for a "unanimous" intent. Since there will never be unanimity, the closest we can get is narrowing the sources to a statutory enactment which formally complies with Article I. However, in our legal system, we have determined that "collective" intent is one important fiction which will be perpetuated.[70] Textualists believe that there is no legislative intent, there is simply statutory purpose.

If the textualists mean that there is no intent because Congress failed to consider the "un-provided" for case—they are correct. "The reason why difficult cases of statutory interpretation arise is because Congress has not provided a clear answer."[71] The intent that the decisionmaker is looking for is what Congress would have done had they considered the question.

There are cases when the decisionmaker does not want to make that judgment. If the statute is vague or if the question is charged with politics, the Court may avoid a decision by doing one of two things. The Court may "remand" or the Court may simply take an activist view and create judicial law.

The strategy of remanding is used predominantly by the Supreme Court to force Congress to clearly express their intent in legislative enactments.[72] In some situations, the Court may have a very good idea of what Congress intended by looking at the legislative history. However, since Congress did not clearly express that intent in words, the Court will refuse to use the legislative history. When Justice Scalia can garner enough votes to ignore the implied intent, the Court will force Congress to draft more explicit statements of their intent.

This remanding occurred frequently after Congress enacted the Civil Rights Act of 1964. One specific example was *General Electric Co. v. Gilbert*[73] where the Court denied women the right to claim disparate treatment because of pregnancy. The Court took this approach despite the presence of legislative history which directly addressed that issue. Later, in 1978, the 95th Congress enacted the Pregnancy Discrimination Act to protect pregnant women from discriminatory treatment.[74]

The other side of the coin occurs when the statutory language is vague and the Court decides the issue by exploring legislative history to justify the holding. In any of these types of cases, one would think

70. *See* Zeppos, *supra* note 26, at 1341-42, 1344.
71. *See* Zeppos, *supra* note 26, at 1321.
72. *See* Mashaw, *supra* note 23.
73. 429 U.S. 125 (1976).
74. 42 U.S.C. § 2000e-2(a)(1).

that we may see more blocked-out provisions because of "void for vagueness." This occurred in *Blanchard v. Bergeron*, and, in fact, may be an alternative for textualists who promote clearer, more expressive language. This may kill two birds with one stone because, as at least one commentator has noted, vague statutory language does lead to more litigation.[75]

IV. SCALIA'S MOTIVATION FOR IGNITING THE DEBATE

Justice Scalia is rejecting a century of the Supreme Court's use of legislative history. The Court, while paying lip-service to the plain meaning rule, routinely analyzes legislative history to construe a statute in accordance with Congressional intent. Is this really all that is behind Scalia's vigorous dissents and concurrences? Is his purpose merely to get the Court "back on track"? There are two points of view pertaining to these questions. Justice Scalia is either simply promoting the textualist view or he sees this as a way to support his own political agenda.

Throughout Justice Scalia's jurisprudence, one finds the theme of a strict interpretation of separation of powers. Any breach of the lines between the three branches of government is a violation of the doctrine. Indeed, "the interpreter . . . must above all things put aside his estimate of political and legislative values, and must endeavor to ascertain in a purely objective spirit what ordering of the social life of the community comports best with the aim of the law in question in the circumstances before him."[76]

This passage communicates the idea that one branch of government may not force upon another its own standards of propriety. One of Scalia's objections is the effect on the separation of powers doctrine when legislative history is used. By references to legislative history, is the Court's role as the interpreter of legislation undermined? When legislative history is used as the "real rule" rather than as merely evidence, it is not frivolous to argue that the Court's role is undermined at the expense of bolstering Congress.

The light should go on in everyone's head when we review the nature of the President's involvement in nominations to the Court. An increasingly conservative court can be just as great a barrier to the will of Congress as a President who has veto power.[77] For Scalia, promoting a strict textualist view may result in the enhancement of the executive branch rather than making the branches co-equal. The United States has seen an increasingly liberal Congress at odds with a conservative Executive. With a new administration, however, the

75. *See* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 404 (1985).
76. CARDOZO, *supra* note 45, at 90.
77. *See* Mashaw, *supra* note 23, at 832.

Supreme Court appears to be ready to move into more liberal jurisprudence.

The textualist view is a clever way for a conservative Court to decrease the impact of "liberal statutes."[78] Why is this true if the textualist view is the most accurate interpretive approach? Principally because the textualist approach is just another pliable tool for decisionmakers who wish to make their own value judgments and avoid strict adherence to Congressional purpose.

Although most commentators do not want to label Justice Scalia as a judge with such an obvious political agenda, there is no reason not to. The use of legislative history can be subdued to the extent that statutory language is the "real rule" and the first resort. Further, as illustrated by the *Hadden* decision, a hierarchy of reliable legislative history is already evolving. Finally, when intentionalists are "impeached" by contradictory legislative history, the most accurate statutory purpose will unfailingly emerge.

78. *Id.* at 834.