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NOTE

LEGISLATIVE HISTORY, THE NEUTRAL, DISPASSIONATE JUDGE, AND LEGISLATIVE SUPREMACY: PRESERVING THE LATTER IDEALS THROUGH THE FORMER TOOL

"You must appoint judges . . . to mete out proper justice to the people. You must not pervert the law; you must be impartial." ¹ Justice Frankfurter, while not as authoritative a source, echoed this sentiment: "When the judge, selected by society to give meaning to what the legislature has done, examines the statute, . . .[ w]e must assume in him not only personal impartiality but intellectual disinterestedness." ² Although one would hesitate to elevate legislation of the United States Congress to the level of divine promulgation, the notion that an adjudicator should treat pronouncements of the legislature with a removed neutrality is firmly embedded in the structure of the American constitutional system and judicial tradition.

This presumed dispassionateness merges with the principle of legislative supremacy which dictates that, apart from constitutional issues, judges are subordinate to legislatures in creating public policy. ³ If this role "means anything at all, it must somehow constrain judges who interpret statutes from implementing their own notions of public policy." ⁴ A judge who is not dispassionate can neither faithfully adhere to the decisions made by Congress, nor set aside personal policy preferences, when deciding a case.

This fundamental principle indicates the necessity of another, equally important aspect of neutrality. A neutral judge must respect the means which the legislative body chooses to formulate and imple-

¹ Deuteronomy 16: 18–19 (emphasis added).
⁴ Id. at 282.
ment its notions of public policy. The judiciary should not only enforce the superior role of Congress by faithfully interpreting its legislative choices, but it must also defer to the rules by which the legislature chooses to construct its laws. To use an analogy, a referee in a basketball game may signal a foul on a shot, but he may not second-guess the wisdom of the player in deciding to take that particular shot.

The question of the appropriate judicial role has arisen with great force in the debate centered on the invocation of legislative history in statutory interpretation. The use of such history to determine legislative intent in cases of statutory ambiguity enjoys a long and rooted tradition in American legal practice. Indeed, for a century, the Supreme Court has "routinely treated the declarations of intent found in committee reports and sponsor's statements as especially 'authoritative' evidence of the intent of Congress as a whole." This process, however, has been challenged in the last two decades, and the Court has gradually diminished its employ.

The questions concerning legislative history have produced a diversity of judicial approaches, a cacophony of impassioned voices, and a wealth of secondary literature. Can a legislative body have a collective will? Public choice theorists and textualist judges have argued that it is error to attribute a single congruent intent to such a large group of persons with diverse interests. Does judicial examination of legislative history violate the constitutional structure? Scholars have argued that the use of background legislative materials contravenes the bicameralism, presentment, and veto provisions of Article I of the Constitution, while a recent article challenges its employ as an unconstitutional form of legislative self-delegation. Is legislative history an accurate expression of congressional deliberation? A student note

5 John F. Manning, Textualism as a Nondelegation Doctrine, 97 COLUM. L. REV. 673, 674 (1997).
9 See Manning, supra note 5.
has argued that such materials are corrupt and that legislators often invent "legislative history" solely to influence judicial determinations.10

The focus of this current inquiry, however, is narrow in scope: what treatment of legislative history is most consistent with, and best preserves, the ideal of a "neutral, dispassionate judge"11 and the corresponding principle of legislative supremacy? Given that "the irresponsible judge will twist any approach to yield the outcomes that he desires and the stupid judge will do the same thing unconsciously,"12 what is the best approach to ensure an appropriate role for the rest of the bench? Not only is the use of legislative history to clarify statutory ambiguity and discern legislative intent consistent with a restrained and neutral judiciary, but it also upholds the principle of legislative supremacy. By forswearing any resort to the legislative history of a law, the judiciary would (1) create significant opportunities to substitute its policy views for those of the democratically-elected legislative branch, and (2) accrue the authority to evaluate the efficacy and wisdom of the means which Congress chooses to formulate legislation.

This having been said, however, the present congressional method of articulating legislative history, and the prevalent judicial examination thereof, is not without its flaws. All sources of legislative history are not equally revelatory, and if a judge either fails to understand the legislative process or neglects to cautiously weigh the statements of "intent" revealed in the history of a statute, the judge can fail to implement the policy directives of Congress. For this reason, reform, education, and intra-branch communication are necessary to ensure that judicial examination of legislative history preserves the appropriate congressional role as the "first branch" of government.

To establish this thesis, this Note will first provide a background to the issue of statutory interpretation. Part II delineates the two primary approaches to statutory history: textualism and "legi-textualism."13 After arguing that the latter approach best safeguards judicial

11 Starr, supra note 8, at 374.
13 I borrow this term from Muriel Morisey Spence, The Sleeping Giant: Textualism as Power Struggle, 67 S. Cal. L. Rev. 585 (1994). Professor Spence notes that "there may be no ideal and succinct labels to counterpose 'textualist' and 'textualism,'" but chooses "'legi-textualist' for two reasons: first, the term suggests the countering of the textualists' perspective on both statutory interpretation, and on the legislative process itself; and second, because it emphasizes that relevant 'text' often includes nonstatutory texts, such as legislative history, that the legislature generates." Id. at 587 n.7.
neutrality and legislative supremacy, Part III briefly examines the practical formation of legislative history. The Note concludes by advancing and explicating several suggestions for reform.

I. INTRODUCTION TO STATUTORY INTERPRETATION AND LEGISLATIVE HISTORY

Statutory interpretation is a crucial issue in what Judge Calabresi has coined “the age of statutes.” Even fifty years ago, Justice Frankfurter noted that “courts have ceased to be the primary makers of law in the sense in which they ‘legislated’ the common law. It is certainly true of the Supreme Court that almost every case has a statute at its heart or close to it.” The dawn of this era has also intensified the frequency of statutory complexity and ambiguity. Congress continues to pass laws that “require interpretation, deal with more and more complicated subjects and involve more and more technical expertise.”

This modern legislative phenomenon combines with the inherent uncertainty of language to complicate the judicial function. Language is, of necessity, indeterminate: “Words do not have natural meanings; language is a social enterprise.” The context of a phrase provides its accurate interpretation. For example, in his well-known passage, Wittgenstein asserts: “Someone says to me: ‘Shew the children a game.’ I teach them gaming with dice, and the other says, ‘I didn’t mean that sort of game.’ Must the exclusion of the game with dice have come before his mind when he gave me the order?” The context of the statement provides meaning to its plain language.

Statutory interpretation, then, involves two basic steps: “[D]etermining whether a statutory provision has a plain and unambiguous meaning and, if it does not, deciding which of the possible meanings will prevail.” The resolution of such an ambiguity, analogous to the Wittgenstein example, involves a search for context in which to place the unclear language.

15 Frankfurter, supra note 2, at 527.
19 Spence, supra note 13, at 591.
Consistent with the constitutional structure, the judge must place the language in the context which best effectuates the intentions of Congress as expressed when it passed the legislation.\textsuperscript{20} The debate at hand focuses on the materials that can be consulted in that task. Options include dictionary definitions, the role of the phrase in the text, other related statutes, canons of construction, and legislative history. With regard to the latter, courts have developed a general hierarchy of sources:

Traditionally—and as a general matter—committee report explanations are considered more persuasive and reliable than statements made during floor debates or during hearings on a bill. Within the category of floor debates, statements of sponsors and explanations by floor managers usually are accorded the most weight, and statements by other committee members are next in importance. Statements by Members not associated with sponsorship or committee consideration of a bill are accorded little weight and statements by bill opponents generally are discounted or considered unreliable. Committee hearings are generally treated the same way as floor debates: statements by sponsors or drafters are most persuasive, views of other witnesses seldom carry much weight, and fears of opponents usually are dismissed as unreliable.\textsuperscript{21}

This hierarchy, while neither official nor universal, is representative of a generally-accepted framework of legislative history.

\section{II. Approaches to the Use of Legislative History}

\subsection{A. Textualism}

Textualists begin from the premise that “the text of the statute—and not the intent of those who voted for or signed it—is the law.”\textsuperscript{22} They argue that utilizing legislative history to interpret ambiguous statutes can subvert the “plain meaning” of the statutory language and elevate to the level of law material which has neither been voted upon in Congress nor presented to the President for approval, in violation of Article I of the Constitution.\textsuperscript{23} Legislative history also lacks the “legitimacy of statutory provisions generated through this process, be-

\begin{itemize}
  \item \textsuperscript{20} See Blanchard v. Bergeron, 489 U.S. 87, 98 (1989) (Scalia, J., concurring).
  \item \textsuperscript{21} George A. Costello, Average Voting Members and Other “Benign Fictions”: The Relative Reliability of Committee Reports, Floor Debates, and Other Sources of Legislative History, 1990 Duke L.J. 39, 41–42.
  \item \textsuperscript{22} Easterbrook, supra note 17, at 444.
  \item \textsuperscript{23} U.S. Const. art. I, § 7, cl. 2.
\end{itemize}
cause it has not been adopted, written or even, perhaps read by any elected officials."\(^{24}\)

Textualists, influenced in part by public choice theory, further assert that it is fictive to speak of legislative intent: "The ultimate issue raised by these judges is the extent to which legislation reflects a coherent congressional view of the public interest."\(^{25}\) No collective body as large as Congress can possess a single will, and the legislature is composed of a multitude of individual groups pursuing particular interests, which are often directly opposed to the desires of other factions.

Two criticisms of legislative history are particularly relevant to this analysis. First, textualists argue that "legislative history can permit judges to impose their own values and policy preferences on unclear statutory provisions,"\(^{26}\) compromising the ideal of dispassionate neutrality. The textualists would seek to prevent judges from making public policy by denying the opportunity to selectively highlight, for example, an unrepresentative floor statement. Because there is such a volume of legislative history, and because it is often inconclusive, a judge could consciously or unconsciously bend it to his own motives, compromising dispassionateness and derogating legislative supremacy.

Second, even if a "collective congressional intent" exists, legislative history fails to reveal it. Many Members often fail to read committee reports, the documents taken by users of legislative history as the most authoritative sources of legislative intent.\(^{27}\) Legislative history is easily manipulated, moreover, by lobbyists and special interest groups, so that statements in the record do not necessarily reflect the position of any legislators. Further, because Members of Congress know that judges will analyze legislative history, there are "great incentives to introduce comments in the record solely to influence future interpretations."\(^{28}\) As a result, no guarantee exists that legislative history provides the context intended by the legislature.

How, then, would a textualist judge discern "fair and reasonable meaning" from a statutory text? Justice Scalia, one of the most prominent textualists, summarized an approach:

\(^{24}\) Spence, supra note 13, at 592.
\(^{25}\) Daniel A. Farber & Philip P. Frickey, Legislative Intent and Public Choice, 74 VA. L. Rev. 423, 424 (1988). Viewing political science through the lens of economics, public choice theorists argue that legislation represents compromises generated by interest groups driven by their individual economic interests.
\(^{26}\) Spence, supra note 13, at 593.
\(^{27}\) See Costello, supra note 21, at 41–43.
\(^{28}\) Note, supra note 10, at 1017.
The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.29

First, the adjudicator should interpret a statute according to its plain meaning. In the case of an ambiguity in the text, the judge would determine whether one use of the term comports better with the rest of the statute as a whole. If confusion persists, the judge should provide an interpretation which makes the best sense of the statute in light of other related statutes.

B. Legi-Textualism

The legi-textualists broadly assert that, in cases of statutory ambiguity, the judiciary may consult legislative history. Two primary approaches therein are the imaginative reconstruction position, in which a judge attempts to assume the position of the legislature, and a moderated approach, in which legislative history is one of many available interpretive tools to be utilized, depending upon the circumstances. Both refer to legislative history, but in different measure and for different ends.

According to the imaginative reconstruction approach, also termed the congressional agent mode of interpretation, the judge attempts to discover:

[What the law-maker meant by assuming his position, in the surroundings in which he acted, and endeavoring to gather from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy.]30

Judges Learned Hand and Richard Posner are two of the most-noted proponents of this theory. The latter, for example, would apparently

utilize it in every instance of statutory interpretation, not just in cases of ambiguity.\(^3\)

A judge applies such an approach by examining the "language and apparent purpose of the statute, its background and structure, its legislative history (especially the committee reports and the floor statements of the sponsors), and the bearing of related statutes."\(^2\)

The judge also takes into account "the values and attitudes, so far as they are known today, of the period in which the legislation was enacted,"\(^3\) as well as "any sign of legislative intent regarding the freedom with which he should exercise his interpretive function."\(^4\) In short, judges adopting this technique should focus on the precise position of the legislature to place themselves as nearly as possible in its shoes.

Others, meanwhile, have advanced a more cautious use of legislative history. Justice Breyer argues, for example, that although legislative history should not be the sole or supreme judicial refuge, it is one of many tools, including "context, tradition, custom, precedent, dictionary meanings, [and] administrability,"\(^5\) which judges should selectively use to interpret ambiguous statutory language. The judge need not adopt the position of the legislature, but a cogent understanding of the considerations which informed its decisions is helpful. He concludes that "the 'problem' of legislative history is its 'abuse,' not its 'use.' Care, not drastic change, is all that is warranted."\(^6\)

Former-judge Abner Mikva advances a pragmatic argument for utilizing legislative history, based upon the realities of the legislative process. Statutes are inherently ambiguous, even more so than language in other contexts, because compromise is the essence of the law-making function. A legislator must accommodate various and hostile views in order to marshal the votes for his bill, and lacks unlimited time and resources to perfect its language.\(^7\) As a result of this process, "there are very few statutes which on their face clearly express what Congress intended."\(^8\) In order to understand the resulting language, one must review the arguments which compose the legislative history.

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\(^3\) See Posner, supra note 12, at 817-18.
\(^2\) Id. at 818.
\(^3\) Id.
\(^4\) Id.
\(^5\) Breyer, supra note 6, at 861.
\(^6\) Id. at 874.
\(^7\) See, e.g., Mikva, supra note 16, at 381.
\(^8\) Id. at 583.
Mikva recognizes that the courts should not construct new statutes for the legislature: “[I]f Congress has not done its job, the courts should not do it for them. . . . Many times the ambiguity in a statute is in a genuine zone of unresolved policy; the courts ought to recognize these situations and leave them alone.”[^39] Often, however, Congress has expressed a definite public policy, but the statutory language is insufficient to eliminate all ambiguities. The courts, in order to limit themselves and preserve the primacy of the legislative branch, cannot afford to ignore those obvious tools which members of Congress use to explain what they are doing and to describe the meaning of the words used in the statute. . . . The alternative is to give a judge the relatively unrestrained power to look just at the statute’s words and at Webster’s Dictionary, and to decide with Webster’s what the law of the land will be.[^40]

This approach is different from imaginative reconstruction insofar as it utilizes legislative history to understand the legislative process, not the particular values, mentalities, and positions of the legislators themselves.

III. Which Approach Best Safeguards Judicial Neutrality and Legislative Supremacy?

A. Textualism

The textualist approach is attractive in its simplicity, appealing in its rigidity, and comforting in its clarity. Statutes are “the law,” and in their text resides the legislative will. Any ambiguities can be resolved primarily, if not exclusively, by resort to other statutory texts. This is desirable because it offers the possibility of isolating an objective approach, disallowing any excess of subjective discernment or overstepping of judicial bounds.

Unfortunately, however, textualism’s simplicity belies several significant flaws which enable substitution of the judicial will for the legislative, or at least misinterpretation thereof. Textualists seek to find context by resort to other statutes, but in so doing they resort to other words which “do not have natural meanings.”[^41] This approach could be appropriate in the presence of a fixed and absolute context, but other variable statutory texts do not provide this determinacy. For example, the First Circuit faced a case which involved interpretation of the term “core proceeding” in a bankruptcy statute, a phrase which

[^39]: Id. at 382.
[^40]: Id. at 386.
[^41]: Easterbrook, supra note 17, at 443.
federal law had not previously utilized. Resort to other statutory language, therefore, was unavailing. In such cases, tools do not exist to guide judicial interpretation of congressional will, so little alternative exists but judicial innovation. Fortunately, the court consulted legislative history, and floor statements of the bill’s sponsors clarified the intended usage of the word.

The primary, apparent strength of textualism is simultaneously its greatest weakness. Because derivation of context from dictionary meanings and canons of construction necessitates resort to sources outside the legislative process, it cracks the door for judicial policy-making, whether or not intended. Language needs a context, but there is no guarantee that a dictionary will provide the legislative meaning, and no certainty that the reasonable person would appropriately construe a technical phrase. It may not be possible to know whether the dictionary interpretation, or a canon of construction never agreed upon by Congress, provides the meaning which it intended. With this lack of direction, judges must exercise excessive judgment and are forced to implement their individual interpretations as default principles.

Because the resort to context outside the legislative process is removed from the moorings provided by Congress, it provides room for significant judicial discretion. Although textualists criticize use of legislative history because it could allow a judge to isolate a misrepresentative portion of the congressional history to implement his or her own policy, the decision is at least based upon a statement or text actually formulated by a congressperson, or an agent thereof. Indeed, an empirical study of decisions made by Reagan-appointed judges concluded that “reliance on the plain-meaning approach tends to result in conclusions consistent with a judge’s own political preferences and inconsistent with, or at least indifferent to, congressional policy choices.”

The textualist position compromises judicial neutrality in another crucial manner. Not only does it entail the risk of a statutory interpretation not intended by Congress, but it explicitly derogates the method which Congress has chosen to formulate its laws. The neutral judge must not only follow the congressional intent expressed in a statute, but the judge must respect the means by which Congress desires to manifest this intent. And, to the extent that “Congress per-

42 See In re Arnold Print Works, Inc., 815 F.2d 165 (1st Cir. 1987).
43 See Breyer, supra note 6, at 854–55.
44 Spence, supra note 15, at 601, referring to Stephen F. Ross, Reaganist Realism Comes to Detroit, 1989 U. Ill. L. Rev. 399.
forms its responsibilities through committees and delegates to staff the writing of its reports, it is Congress' evident intention that an explanation of what it has done be obtained from these extrinsic materials."

45 As such, legislative history reflects a "deliberate decision by Congress to have an official record that complements and supplements the statutory provisions."46 To reject it is to "second guess Congress' chosen form of organization and delegation of authority, and to doubt its ability to oversee its own constitutional functions effectively."47 Under this approach, the "neutral" judge is not only deciding a case; the judge is also evaluating and implicitly deciding the best process by which to make law. At its most extreme, by ignoring procedures which a judge considers "illegitimate," the rejection of legislative history could reflect a judicial attempt to cause Congress to change its legislative process.

Finally, the notion that a judge could uncover the intent of Congress by specifically eliminating the tools which it provides for this purpose seems to indicate a subtle attitude of judicial superiority. By finding an interpretive context outside that specified by Congress, the textualist approach articulates, at best, that the judiciary has the ability to determine what Congress meant without resort to materials which it created to clarify its meaning. And, at worst, it indicates a belief that the judiciary can and should create a better meaning. The bench, by eliminating the legislature's formation of interpretive tools, would elevate its discretionary powers to include congressional procedure, rather than merely statutory interpretation.

The textualist approach, therefore, is properly criticized for increasing the possibility of judicial excess and reducing judicial neutrality through disrespect for congressional machinations. If "plain-meaning" has these faults, is there a better method?

B. Legi-Textualism

Imaginative reconstruction constitutes the approach to legislative history which most clearly, on its surface, seeks the "will" of the legislature. However, the difficulties of placing oneself expressly in the shoes of another person, potentially from a different time period and background, produce a significant margin for error. This is only

46 Spence, supra note 13, at 597.
47 Wald, supra note 45, at 307.
heightened by the fact that the judge must place himself, not in the position of one legislator, but of an entire Congress. The unconscious substitution of a judge's preconceived notion of what a "reasonable Congress" would have done in an ambiguous situation enables the replacement of a cloudy congressional intent with a clearly-formulated judicial policy decision, or at least a misinterpretation of its will.

Another problem with this process is that it may elevate the judicial interpreter "well above the supposed role of the honest agent faithfully implementing the intended commands of the supreme legislature."\textsuperscript{48} Even if the judge is able to remain dispassionate and reserved, he or she risks assuming the role of the omnipotent interpreter of what the legislature "really meant" to say, although it didn't actually say it. This could raise the judge to a position of making law, rather than interpreting statutes. In the creative interaction of "text, context, and interpreter,"\textsuperscript{49} the latter could assume a position superior to the constraints of the others.

In spite of these criticisms, imaginative reconstruction may be the lesser of two evils when compared to textualism. The volume of legislative materials at the judicial disposal provides the potential for a more accurate understanding of the congressional mind than do items which Congress may never have consulted and probably never referenced (\textit{i.e.}, dictionaries and canons of construction). Even if a judge deviates from the intent of the enacting Congress, a greater likelihood exists that the interpretation will be closer to the legislative will than a decision made without any reference to legislative materials. The legislative record provides signposts which can prevent the judiciary from straying too far from the congressional mind.

The "middle ground" approach, represented by Justice Breyer and former-judge Mikva, appears to offer the greatest possibility of constraining judicial innovation and preserving legislative supremacy. Selective utilization of legislative history provides a mean between two extremes, a combination of the best features of the other two approaches. On one hand, it employs the legislative roadmarks left by Congress as a tool to uncover the meaning of a statute, and on the other, avoids the subjectivity of reconstructing the will of legislators at a specific but bygone place and time. Legislative history occupies a position, neither greatest nor least, among the interpretive means at the judicial disposal, and may be reviewed and quoted when lending clarity to ambiguous statutory language.

\textsuperscript{48} Eskridge, \textit{supra} note 30, at 386.
\textsuperscript{49} \textit{Id.} at 390.
Intuitively, this approach appears most reasonable. If Congress has left us a trail, should we not follow it to understand the relevant statutory result? It may be that legislative history will not always clarify statutory language. However, the judge protects his or her neutrality by utilizing it, and its constraints provide some assurance of his or her dispassionateness. By following the reasoning utilized by Congress in creating the statute, the will of the legislature is more likely expressed in the judicial opinion. While such resort is not mandated, it is permitted and encouraged when necessary.

This having been said, all interpretive tools are subject to misuse. The cautious use of legislative history, however, creates moorings which aid the judiciary in holding to its subordinate role as detached interpreter. To ignore materials created by the persons who created the statute at issue, in the process of its creation, is a greater act of judicial overstepping than most potential missteps which could result from the misuse of legislative history.

IV. SUGGESTIONS FOR FORMULATING AND UTILIZING LEGISLATIVE HISTORY

A. Introduction

So, as it stands, legislative history is a useful aid for judges in statutory construction. Are there any ways in which this tool can be improved? Legislative history has been characterized as an inaccurate and corrupt mirror to reflect congressional intent. One criticism is that, once legislators learn that courts will use legislative history to interpret a statute, they will manipulate the history in order to produce the judicial outcomes that they could not achieve in the legislative process of voting on statutory language. In one revelatory situation, the Court ignored the views of a legislator who had added his comments to an act ten days after it had been passed.\(^{50}\)

Others argue that interest groups which are unable to convince Congress to implement their policy views in a statute will resort to the legislative history. Indeed, it is "well known that technocrats, lobbyists, and attorneys have created a virtual cottage industry in fashioning legislative history so that the Congress will appear to embrace their particular view in a given statute."\(^{51}\) As a result, legislative history is created "under circumstances in which it is no longer reasonable to

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51 Starr, supra note 8, at 377.
rely on the floor speakers and committees that generate the legislative record as proxies for congressional intent.”

Finally, because the legislative record reflects numerous views, it is possible to glean support for a variety of interpretive positions. Judge Leventhal has compared the process of consulting legislative history to a person who walks into a party and looks over the room until he finds his friends: a judge can find support for many positions. Such selective consultation of legislative history, it is argued, illustrates its inefficacy in unveiling the collective congressional will.

Given these genuine and pragmatic abuses and concerns, the use of legislative history loses a bit of its luster. However, if a reliable legislative history would facilitate the existence of the neutral, dispassionate judge and protect the underlying principle of legislative supremacy, then much effort should be exerted to protect the sanctity of the legislative record. What, if anything, can be done (1) to obviate the need for its use, (2) to guarantee its sanctity as an index of congressional intent, and (3) to increase judicial accuracy in its employ?

B. It Is a Statute We Are Expounding: Precision in Drafting

In *McCulloch v. Maryland,* Chief Justice Marshall stated that “[w]e must never forget, that it is a constitution we are expounding.” In establishing that Congress had the power to charter a national bank, even though such was not enumerated in the Constitution, he asserted:

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind.

Implicit in this statement is the recognition that a statutory directive must be explicit, detailed, and complex, in order to make clear the dictates of the law. It is such exact legislative rendering which best safeguards a limited judiciary and legislative supremacy, for the more detailed a statute, the less room for judicial intervention.

With this background, the debate over legislative history could evolve into the question of how judges can encourage precise and complete statutory drafting, and so avoid any need for legislative his-

52 Note, supra note 10, at 1016.
53 See Wald, supra note 6, at 214 (quoting a conversation with Judge Harold Leventhal).
54 17 U.S. (4 Wheat.) 316 (1819).
55 Id. at 407.
56 Id.
Although there may be no cure for "the ordinary details of meaning that all statutes occasionally leave indeterminate," and analysts of statutory construction "accept that the details of statutory meaning may derive from sources outside the text of the enacted legislation," the judiciary could at least seek to lessen this phenomenon.

One way to ask the question of "how can judges encourage precise statutory drafting" is to make the converse query of "which method of statutory interpretation allows the judiciary to deviate farthest from legislative intent?" If the legislature were to watch the courts give an unintended construction to its legislation, it would be more likely to be precise in its intentions so as to attain its political objectives. From such a perspective, it appears that the textualist approach is the most attractive, because, as argued, it provides the potential of a judicial interpretation which is farthest afield from the original legislative intent.

Legislative history, on the other hand, constricts the range of available alternatives for statutory construction, increasing the likelihood of an interpretation in closer proximity to the intent of the legislators. However, this produces a quandary. Should the courts implement a method of statutory construction which is farthest from legislative intent in order to force the legislature to reassert its supremacy? Such an approach, while perhaps theoretically compelling, is unattractive for the pragmatic reason that it may not work. If a legislature does not correct its drafting ambiguity, and the court's decision stands as binding precedent, subsequent decisions involving the statute could spiral far beyond the original purpose of this approach.

One could argue in another way that the textualist approach encourages clear statutory drafting. If the legislature knows that a court will look solely at the textual language, and not at the congressional history, it may have more incentive to express its collective will clearly. However, there are two flaws with this rationale, and the first involves a question of degree. No matter how precisely a legislature may compose a statute, it will never account for every single possible application. Moreover, it may not be advantageous to explicitly delineate every potential scenario in a statute, and to do so could make the statute cumbersome and unwieldy—to the point where the intended effect of the statute is obscured. Second, this is a form of judicial policymaking. A textualist judge decides that justice would best be served by clear statutory language, so he or she refuses to utilize Congress' cho-

57 Manning, supra note 5, at 681.
58 Id. at 695.
sen means of clarification in order to accomplish this goal. While the end would be desirable, the means used to obtain it again derogates the principle of legislative supremacy and the ideal of neutrality.

In the end, Justice Frankfurter may be correct that "[p]erfection of draftsmanship is as unattainable as demonstrable correctness of judicial reading of legislation."\(^{59}\) While increased statutory clarity is a desirable goal, it is questionable whether judicial policies regarding legislative history would make it possible to achieve this.

C. Reform Legislative History

Could a program of safeguards be implemented which would purify the process of formulating legislative history? Recognizing the imperfections of any approach, there are certainly steps which can be taken. In 1978, Congress addressed the practice of inserting comments into the legislative history after a statute had been passed by enacting the so-called "bullet" reform, which "required the clear marking of insertions into the Congressional Record."\(^{60}\) This enables a reviewing judge to determine if a comment was entered into the legislative history after the bill was passed or inserted by an absent member of Congress. Stringent enforcement of the law would ease concern over this particular abuse.

Some other proposals for reform have been suggested. For example, Congress could seek to create a framework to separate reliable and unreliable legislative history:

"Good" legislative history would include those comments made when the opportunity to subvert majority decisionmaking that is created by consulting the legislative record likely would not be exploited. "Bad" legislative history, in contrast, would include everything else.\(^{61}\)

Or, it could pass a concurrent resolution to affirm the legitimacy of legislative history. This could include a list of what constitutes official legislative history:

The resolution might make clear, for example, Congress' view of the relative value of remarks made during floor debates. . . . Congress should clearly state that it expects judges to consult legislative history when the statutory language is ambiguous.\(^{62}\)

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59 Frankfurter, supra note 2, at 546.
60 Starr, supra note 8, at 377.
61 Note, supra note 10, at 1020–21.
62 Spence, supra note 13, at 616.
In short, there are steps which Congress could take to increase the efficacy of legislative history to indicate its intent, and ways it could reduce specific textualist objections to its use.

D. Legislative and Judicial Interaction and Education

While a perfectly "pure" legislative history may be an unattainable ideal, are there any other ways to improve its accuracy in rendering the intent of the legislature? Some commentators have argued that the problem is not legislative history itself, but a lack of judicial interaction with Congress and an inadequate understanding by each branch of the other's work: "The problem is that judges don't know as much as they ought about the legislative process." Judges should understand the role of committees in drafting statutes, the congressional bureaucracy, and the compromises reflected in legislation. If "[l]egislative products mirror Congress's scattered and decentralized structure," it follows that an accurate understanding of Congress would facilitate an accurate understanding of the results of its deliberations.

There are so many elements of "legislative history" that without knowledge of the weight and significance of each in statutory formation, a judge could easily be led astray. For example, all the following have a different role and impact in the process of a bill becoming law:

The use of committee reports and floor debate (and the lack of it), the difference between floor amendments and committee amendments, the trade-offs between statutory language and committee report language, the impact of conference committee changes in a bill, the effect of conflicting interpretations given by members during floor debate . . .

For a judge to accurately ascertain a reasonable measure of legislative intent, he or she must understand the difference in legitimacy, merit, and use of the markings which would reveal it.

Congressional education is also a necessity. Mikva suggests sending Congress a copy of decisions in which the judiciary interpreted an ambiguous statute. Committee staff members could be required to read the decisions which interpret the statutes that they themselves drafted. This would alert the legislature to uncertainties in its work.

63 Mikva, supra note 16, at 384.
product and provide the opportunity to clarify the statute so as to more accurately reflect its intent. As he articulates, "most of the time Congress does not read judicial opinions and does not know whether courts properly interpreted the statute." Preservation of the primacy of the legislature is not only a judicial responsibility, but the burden also lies on Congress to assert its superiority by understanding how it may be derogated. If, in fact, "the law-related articles in Congressional Quarterly, the National Journal, and Time Magazine are often as close to legal reading as legislators get," the judiciary cannot be excessively faulted if it occasionally misinterprets and subrogates the intent of the legislature.

Such interaction could, and should, lead to agreed-upon methods of interpretation. Mikva posits that "Congress and the judges should also agree on some canons of interpretation." Congress should be aware of the tools used by the judiciary to shape its statutes, and genuine agreement on the appropriate tools would facilitate the enactment of legislative intent.

A significant by-product of such mutual understanding could be a partial "uncorruption" of legislative history, accomplished without specific reforms thereto. One author has argued that judicial resort to legislative history necessarily corrupts it because such consultation introduces an incentive to shape legislative history "to indicate support for results that could not have won majority support in Congress." Perhaps if Congress knew that the judiciary possessed a developed understanding of the legislative process, and it demonstrated an ability to pick its way through floor statements to uncover "legitimate" legislative intent, less incentive would exist for this manufactured "history."

Such interaction could also facilitate mutual respect between the branches, banishing the sometimes-held judicial attitude that the legislature does its work "capriciously, superficially, on the basis of the limited subjective impressions of a few members of a legislative committee." It is essential to establish judicial respect for the legislative branch and its processes, or at least an understanding thereof, because without such an attitude, the will of the "first branch" of the government could be subverted by the "third branch" on the basis that it better understands the best means to attain public policy goals.

67 Mikva, supra note 65, at 630.
68 Mikva, supra note 16, at 384.
69 Note, supra note 10, at 1016.
70 JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICA 292 (1950), quoted in Mikva, supra note 65, at 627.
V. Conclusion

The mountain of literature produced on judicial use of legislative history has isolated and articulated the flaws with both its use and its abandonment. And, no doubt, dangers exist in determining intent from background history. However, to reject wholesale this product of the legislative process on the belief that judges can more accurately discern the meaning of a statute in its absence, presupposes a judiciary which does not exist. Legislative history is a helpful tool that can constrain judicial policy implementation, ensure judicial dispassionateness and neutrality, and maintain the rightful role of Congress. We cannot change human nature, and a judge may ardently espouse a particular policy position, but we can minimize the opportunity to enforce it. Rather than abandon legislative records on the basis that they can sometimes lead us astray, it may be more prudent to recognize the potential pitfalls and exert efforts to erect bridges which span the minefield.

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