Journal of Legislation

Volume 25 | Issue 1 Article 4

1-1-1999

# How Federal Judges Use Legislative History;Essay

Edward Heath

## ESSAY

# How Federal Judges Use Legislative History

"[T]he gravest sins are perpetrated in the name of the intent of the legislature."[1]

### I. Introduction

Ours is a statutory society. More than ever, federal judges are called upon to resolve controversies that turn on the interpretation of statutes. The welfare of each party to such a dispute may sometimes hinge on what meaning a judge reads into a particular statutory word or phrase. The American judge, of course, is not free to reconstruct the statute so as to produce the result he favors. That is lawmaking, and in our federal system lawmaking is the province of the legislature, not the judiciary. The duty of a judge, then, is to apply the statute free of his own amendments.

Federal judges generally agree that when they interpret statutes they must give primary effect to the will of the legislature, so long as it does not transgress constitutional limits. This is not difficult when the statutory language is clear; however, the task becomes complicated when the statute contains linguistic infirmities. Many federal judges disagree about what to do next in such a situation, that is, how a judge should give effect to the will of the legislature when the statutory language is vague or ambiguous.

Federal judges use many tools to interpret vague or ambiguous statutory language, including precedent, custom, tradition, dictionary definitions, and legislative history. In recent years the use of this last tool, legislative history, has come under fire. No rule directs judges to interpret a statute in light of its legislative history, just as no rule prohibits them from doing so. Some judges believe the practice is both imprecise and undemocratic, while others argue it is sensible and indispensable.

This Note examines the different attitudes of the members of the federal judiciary toward the practice. It has five parts. Part II identifies the kinds of materials which are considered part of the legislative history of a statute. It also explains how legislative history gained prominence as a tool of statutory interpretation, and the typical manner in which federal judges use it. Part III identifies the arguments against the use of legislative history, while Part IV examines how advocates of the practice have responded to these arguments. Part V concludes this note by weighing both sides of the debate and reviewing the effect that critics have had on how federal judges use legislative history. Finally, because the subject matter of this note concerns what is basically a judicial activity, much of the discussion focuses on arguments federal judges have made in opinion and article form.

---

1. James M. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 891 (1930).

## II. An Introduction to Legislative History

### A. The Kinds of Legislative History

Generally speaking, legislative history is a written record of the elevation of a bill to a statute. Although many kinds of materials are considered part of legislative history, courts principally look to:

- study group reports
- committee hearings
- committee reports
- floor debates
- the treatment of proposed amendments[2]

The first kind of legislative history is the study group report. When private or public entities call the attention of the legislature to social problems, it may respond by directing an official body to investigate the problem and recommend legislative solutions. This body, called a study group, issues a report which might indirectly influence or directly lead to a statute. A legislative committee may then be formed to hold hearings to determine whether legislation is necessary or, if a bill has already been proposed, to determine the adequacy of such legislation. The testimony of witnesses appearing before the committee constitutes another type of legislative history. If the committee approves the bill, it issues a report which highlights the statute's history and often contains a sectional analysis. The committee report is probably the most commonly cited kind of legislative history.[3] The legislature next debates the bill. These debates are typically prepared speeches or orchestrated debates among legislators. The record of the floor debates can be found in the *Congressional Record.* During the consideration period, legislators frequently propose amendments which alter or add to a pending bill. Such amendments can be adopted, non-adopted or rejected.

### B. The History of Legislative History

Since 1769, English courts have ignored all of the foregoing extratextual resources. In *Millar v. Taylor,* the rule was announced that "[t]he sense and meaning of an Act of Parliament must be collected from what it says when passed into a law; and not from the history of changes it underwent in the house where it took its rise."[4]

Although American courts inherited this rule, it was not long after the founding of the republic that they began to stray. Chief Justice Taney of the United States Supreme Court expressly eschewed the practice of using legislative history in 1845, but he would not speak for the majority for long.[5] In 1860, for example, the Supreme Court construed a land grant act by referring to determinations made in its committee report.[6] A few years later in *Blake v. National City Bank* the Court clarified an ambiguity in a tax statute by reviewing a committee report and the treatment of interim

---

2. For a thorough discussion of the kinds of legislative history see REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES, 145-96 (1975). Statements of non-legislators, such as the President and law professors, are also considered, though not as commonly as the materials listed.

3. William N. Eskridge, *The New Textualism,* 37 UCLA L. REV. 621, 637 n. 60 (1990).

4. 4 Burr. 2303, 2332, 98 Eng. Rep. 201, 217 (K.B. 1769).

5. Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845).

6. Dubuque & Pac. R.R. v. Litchfield, 64 U.S. (23 How.) 66, 87 (1860).

amendments.[7] The *Blake* Court found itself "compelled to ascertain the legislative intention by a recurrence to the mode in which the [contested] words were introduced, as shown by the [legislative] journals and records, and by giving such construction to the statute as we believe will carry out the intentions of Congress."[8] The post-Civil War Supreme Court continued to search for legislative intent with extratextual materials.[9] An unmistakable endorsement of the practice was given in *Holy Trinity Church v. United States*.[10] In that case, a unanimous Court quoted a committee report to clarify an ambiguity in an immigration statute.[11]

In the early Twentieth century, the federal courts were called upon to interpret new socially progressive legislation, which many federal judges opposed.[12] Claiming to be searching for legislative intent, they used what Justice Scalia calls "phonied-up canons" of construction to "impose their own view" on the statutes.[13] Some critics of the judiciary argued that legislative intent was nothing more than a shibboleth for conservative judicial activism.[14] "[T]he gravest sins are perpetuated in the name of the intent of the legislature," Harvard Law School Dean James M. Landis alleged.[15] Rather then excoriate the search for legislative intent, many members of the academic bar offered an alternative way for judges to ascertain it. They suggested that judges ought to refer to legislative history, hoping it would provide tangible evidence of legislative intent to rebut any conclusions judges opposed to the legislation might concoct.[16]

### C. The Modern Courts and the Plain Meaning Rule

The number of statutes has increased tremendously since the New Deal. As a result, issues of statutory interpretation saturate federal court dockets. At least half of the cases argued before the Supreme Court in the 1980's involved such issues.[17] The Supreme Court and the lower federal courts have generally adhered to the plain meaning rule when interpreting statutes. It provides that if a judge identifies the plain meaning of a statute, then that meaning controls. The judge turns to the legislative history only to determine whether his reading accords with the legislative intent. Professor

---

7. Blake v. National City Bank, 90 U.S. (23 Wall.) 307 (1875).

8. *Id.* at 319.

9. *See* Arthur v. Richards, 90 U.S. (23 Wall.) 246, 258 (1875); Jennison v. Kirk, 98 U.S. 453, 459-60 (1879).

10. Holy Trinity Church v. United States, 143 U.S. 457 (1892). Justice Scalia concluded that resorting to legislative history was unnecessary in this case, and that it established a dangerous precedent. This case "is cited whenever counsel wants us to ignore the narrow, deadening text of the statute, and pay attention to the life-giving legislative intent. It is nothing but an invitation to judicial lawmaking." ANTONIN SCALIA, A MATTER OF INTERPRETATION 21 (1997).

11. DREW PEARSON & ROBERT S. ALLEN, THE NINE OLD MEN 464-65 (1936).

12. *See generally Id.* Pearson & Allen discuss the Supreme Court's repeated invalidation of New Deal legislation and the Roosevelt Administration's response.

13. SCALIA, supra note 10, at 30.

14. *See* Landis, *supra* note 1. "[S]trong judges prefer to override the intent of the legislature in order to make law according to their own views," Landis at 890. *See also*, EUGENE C. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 97-121 (1958). "The result of such an attitude toward social legislation on the part of the majority of the Supreme Court was that the process of judicial review ceased to have definitive limits. The constitutionality of a statute was to depend not so much on what the Constitution said as on whether a majority of the Court believed the statute was a wise one." Gerhart at 102-103.

15. Landis, *supra* note 1.

16. *Id.* at 887-93.

17. 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, 286 n.37 (1990).

William N. Eskridge refers to this as the "soft" plain meaning rule because the plain meaning only governs if the legislative history does not strongly contradict it.[18] Such was the typical approach of the Warren and Burger Courts.[19] As Judge Patricia Wald observed, "[i]n virtually every case [in the 1981] Term, the Court checked legislative history to ensure that it did not contradict the Court's reading of the plain meaning of the text."[20]

The practice is just as common in the lower federal courts. Circuit Court Judges Learned Hand and Richard Posner are among those who have advocated the method of interpretation known as "imaginative reconstruction."[21] Posner suggests that ambiguities in a statute are sometimes the product of a drafting error. The judge interpreting such a statute is a Congressional "agent" who "should try to think his way as best he can into the mind of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar."[22] This involves reference to the text as well as the usual extratextual materials, including legislative history.[23]

## III. The Texualist Critique

### A. The Textualist Approach

Several prominent jurists have recently criticized the use of legislative history. One of the most vocal critics is Supreme Court Justice Antonin Scalia. Although Scalia agrees that a judge is supposed to subordinate his will to the will of the legislature when interpreting statutes and give effect to legislative intent, he and his intellectual brethren contend that poring over legislative history is the wrong way to go about this task.

In his first term as a Supreme Court Justice, Scalia wrote a concurring opinion in the case of *Immigration & Naturalization Serv. v. Cardoza-Fonseca* in which he attacked the majority's reference to extratextual materials to affirm the plain meaning of a statute.[24] If a court can identify a plain meaning, Scalia argued, then legislative history is irrelevant. First and foremost, "the language must be given effect — at least in the absence of a patent absurdity."[25] As Scalia later explained:

> 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

18. Eskridge, *supra* note 3, at 626-30.

19. *Id.* at 627 n. 19.

20. Wald, *supra* note 17, at 280.

21. Posner associates the practice with Hand and supports it himself. *See* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 817-22 (1983).

22. *Id.* at 817.

23. Judge Easterbrook, who sits on the same Circuit as Judge Posner, has criticized "imaginative reconstruction." In addition to the general textualist objections to any method of interpretation using legislative history, Easterbrook adds that the common principle-agent relationship is incommensurate with the legislator-judge relationship. *See* Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 446-47 (1991).

24. Immigration & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421 (1987). This is the first Supreme Court opinion in which Scalia advocates textualism. Hirschey v. Fed. Energy Regulatory Comm'n, 777 F.2d 1 (D.C. Cir. 1985) (Scalia, J., concurring), is probably his earliest textualist opinion.

25. *Cardoza-Fonseca*, 480 U.S. at 452.

> 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 compatability which, by a benign fiction, we assume Congress always had in mind.[26]

Under his approach, then, judges wishing to ascertain a statute's meaning should consult the text of the statute, the structure of the statute, and interpretations given to similar statutory provisions, all in light of canons of statutory construction.

The increasing popularity of Scalia's approach, called textualism, has resulted from his dynamic personality and the strength of his arguments.[27] Some of his textualist opinions have become a "standard citation" for lower court judges.[28] Judges Frank H. Easterbrook and Kenneth Starr are among those federal judges who aligned themselves with Scalia and have contributed to the textualist critique.[29]

### B. The Textualist Critique

The textualist critique is two-fold. The first concern is one of practicality. Legislative history, the textualists argue, is unreliable and imprecise. According to Justice Scalia, using it to divine legislative intent "is much more likely to produce a false or contrived legislative intent than a genuine one."[30] The second concern is one of democracy. Treating legislative history as persuasive threatens the separation of powers among the branches of government and may bestow upon unelected persons the lawmaking power constitutionally reserved in the elected representatives of the people. At its worst, legislative history diminishes the integrity of the Congress, the courts and the Executive.

One of the textualists' first practical concerns is that legislative intent is unascertainable because a collective body cannot have an "intent." There are more than five hundred individuals in the Congress, each with his or her own reasons for favoring or disfavoring a particular bill. It is difficult enough to discern the intent of a single person, argues Judge Easterbrook, and it is logically impossible to determine the intent of an institution, such as the Congress.[31] The judge searching for legislative intent labors under the fanciful belief that all of the bill's supporters shared a unitary motive.[32] As Scalia has said, "[i]t is at best dangerous to assume that all the necessary participants in the law-enactment process are acting upon the same unexpressed assumptions."[33] The search, which seems to have judges peering into the minds of legislators, earned the following criticism from Justice Robert Jackson:

> I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress. When we decide from legislative history, including statements of witnesses at hearings, what Congress prob-

---

26. Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring).
27. For a more detailed exposition of Scalia's approach see generally SCALIA, *supra* note 10.
28. Eskridge, *supra* note 3, at 650 n. 114.
29. Judge Easterbrook sits in United States Court of Appeals for the Seventh Circuit. Judge Starr has served on the United States Court of Appeals for the District of Columbia.
30. SCALIA, *supra* note 10, at 32.
31. Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61 (1994).
32. *See* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).
33. Thompson v. Thompson, 484 U.S. 174, 192 (1988).

> ably had in mind, we must put ourselves in the place of a majority of Congressmen and act according to the impression we think this history should have made on them. . . . That process seems to me not interpretation of a statute but creation of a statute.[34]

The textualists also argue that legislative history is unreliable because it does not necessarily reflect the views of any particular legislator who voted on the bill. Committee reports are an example of this. Congressional staffers, not Congressmen, typically draft the reports.[35] Representatives of interest groups often aid staffers in this endeavor with an eye toward judicial interpolation. "It is well known," observes Judge Starr, "that technocrats, lobbyists and attorneys have created a virtual cottage industry in fashioning legislative history so that Congress *will appear to embrace their particular view in a given statute.*"[36] The result can be a thick, dense volume of commentary. Given the heavy workload of Congress, it is perhaps not surprising that legislators usually do not read the committee reports.[37] This lack of legislator contribution and review renders committee reports among the least reliable forms of legislative history. Floor debates are only marginally more useful. Attendance is minimal; many members from both houses are commonly absent, short of quorum calls or voting.[38] Furthermore, speakers edit or supplement their remarks after the remarks have been made on the floor but prior to publication in the *Congressional Record*, sometimes after the bill has been voted upon.[39]

In addition to these and other practical criticisms, textualists contend that use of legislative history is inconsistent with the Constitution. When a judge uses legislative history to vary the plain meaning of a statute, he has given the history the force of law. As stated above, legislative history is almost always prepared by Congressional staff, not Congressmen, and packed with the interest group commentary. Article I of the Constitution vests law-making power in the elected members of Congress, not their unelected staffs or interest groups.

When actual Congressmen contribute to the legislative history, the materials still convey the opinions of only a limb of the entire legislative body. Subgroup reports and half-attended debates cannot be said to reflect the sum of Congressional intent. Even if every Congressman who voted on a bill included his views in a particular legislative history, that history would nevertheless contain nothing more than opinion, and opinion is not law. As Easterbrook contended, opinions and aspirations become binding legal rules "only after clearing procedural hurdles, designed to encourage deliberation and

---

34. United States v. Pub. Util. Comm'n, 345 U.S. 295, 319 (1953) (Jackson, J., concurring).

35. SCALIA, *supra* note 10, at 32. *See also* Hirschey v. Fed. Energy Regulatory Comm'n, 777 F.2d 1, 7-8 (D.C. Cir 1985). Professor Eskridge claims that while Scalia was a judge on the D.C. Circuit his arguments against legislative history were confined to practical concerns; only when he was elevated to the Supreme Court did he begin to advance the constitutional arguments discussed below. Eskridge, *supra* note 3, at 650-57.

36. Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 377 (emphasis added). To this Justice Scalia adds, "affecting the courts rather than informing the Congress has become the primary purpose of the exercise." SCALIA, *supra* note 10, at 34.

37. *Hirschey*, 777 F.2d at 7 n. 1. As an example of this, Scalia cites a Senate floor debate regarding a tax bill in which the Chairman of the Committee on Finance admitted that he neither wrote the accompanying committee report nor read it.

38. SCALIA, *supra* note 10, at 32.

39. Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1132 (1983).

expose proposals (and arguments) to public view and recorded vote."[40] Legislative history never faces the ultimate Constitutional hurdles: Congressional vote and subsequent presidential approval. Although the president may veto legislation, the Constitution does not grant him the power to veto legislative history. The President rarely, if ever, reviews legislative history.[41] "Judicial interpolation of the statute based upon legislative materials thus has the potential to create a statute that the President would not have signed," contends Judge Starr.[42] Justice Scalia made this same point in *Thompson v. Thompson*.[43] In that case one party asked the Court to look to legislative history to imply a private right of action in the Parental Kidnapping Prevention Act. "An enactment by implication," he responded, declining the request, "cannot realistically be regarded as the product of the difficult lawmaking process our Constitution has prescribed."[44] The text of an enacted statute, however, has leaped those hurdles. Furthermore, because the entire Congress has voted on it, it alone can be said to reflect the sum of legislative opinion.

Finally, using legislative history may involve the judiciary in the legislative business, or, as Judge Starr noted, introduce the nonpolitical branch into the political process.[45] Textualists are concerned with the potential for abuse inherent in such an activity. No rule presently restricts how a judge uses extratextual materials. A willful judge, dissatisfied with the outcome the statute patently produces, could plumb the legislative history in search of excerpts of commentary to confirm an alternative reading which produces a result he prefers.[46] Such practice led one judge to note that using legislative history is like "looking over a crowd and picking out your friends."[47] The textualist approach prevents this kind of legislating from the bench.

## IV. Response to the Texualist Critique

Several jurists have responded to the textualists, addressing some of the major points of their critique. Judges who use legislative history disagree with the textualists' conclusion that legislative intent is unascertainable. Justice Breyer argued that the textualists misunderstand the "intent" part of legislative intent.[48] They equate intent with "motive," and say it is nearly impossible for a judge to discover the motives of each member of the Congress — a fairly true observation.[49] Congresswoman A may have voted for a new child tax credit to get reelected, while Congresswoman B may have voted for the credit because she believed it would encourage taxpayers to have more children. These are their motives, and they are as diverse as they are unascertainable by a judge. But intent should not be read as motive. Instead, intent in this context means "purpose," and Breyer contends that it is possible to determine what purpose a legislature had in enacting a particular statute by consulting legislative history.[50] In

40. In re Sinclair, 870 F.2d 1340, 1343 (1989).
41. Starr, *supra* note 36, at 376.
42. *Id.*
43. Thompson v. Thompson, 484 U.S. 174 (1988).
44. *Id.* at 191.
45. Starr, *supra* note 36, at 376.
46. Easterbrook, *supra* note 23, at 444.
47. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 846 (1992) (quoting Judge Leventhal).
48. *Id.* at 864-67.
49. *Id.* at 864.
50. *Id.* at 865-67.

the case of the tax credit, the history would probably reveal that the purpose was to lessen the tax burden on parents.

The textualist argument that legislative history is unreliable because it is not the work of the actual legislators has been criticized by members of the judiciary and the academic bar. According to Professors Daniel A. Farber and Phillip P. Frickey, "Justice Scalia and his followers indulge in some doubtful factual assumptions" when they say that Congressmen pay little attention to committee reports.[51] "To the contrary," they argue, "according to a principal study of congressional policy making procedures, legislators outside the committee and their staffs focus primarily on the report, not the bill itself."[52] Legislative history might be the work of staffers, but this is how Congress necessarily operates.[53] Congress makes legislative history available, contends Judge Wald, so that judges will use it to interpret statutes.[54] "If we are serious about respecting the will of Congress," she asks, "how can we ignore Congress' chosen methods for expressing that will?"[55]

Justice Breyer argues that the textualists "overstate their case" when they complain that legislative history should not be used to alter a statute because it is not enacted law.[56] Breyer believes this practice does not give such things the force of law, as he explained:

> Can the judge, for example, ignore a dictionary or the historical interpretive practice of the agency that customarily applies some words? Is a dictionary or an historic agency interpretive practice "law?" It is "law" only in a weak sense that does not claim the status of a statute, and in a sense that violates neither the letter nor the spirit of the Constitution.[57]

Moreover, the legislative process sometimes produces statutes which contain ambiguities, drafting errors, or are technical beyond a judge's level of expertise.[58] Judges are not free to decline to enforce a statue because of such infirmities; they must somehow interpret it.[59] One of the best ways to cure these infirmities is to consult extrastatutory materials carefully.[60] In sum, these advocates contend that the realities of lawmaking necessitate reasonable reference to legislative history.

---

51. Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 445 (1988).

52. *Id.* Farber & Frickey note that Scalia has offered scant evidence in support of this point besides a floor debate in which a committee chairman admitted he had not yet read the committee report for a bill Congress was debating. *See supra* note 16. The cited study is from W. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 94 (2d ed. 1984).

53. Breyer, *supra* note 47, at 863-64.

54. Wald, *supra* note 17, at 306-07.

55. *Id.* at 306.

56. Breyer, *supra* note 47, at 863.

57. *Id.*

58. Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 380-85 (1987); Starr, *supra* note 36, at 372; Breyer, *supra* note 47, at 848-61.

59. Mikva, *supra* note 58, at 382.

60. The emphasis here is on *careful* consultation. Judge Mikva, for example, agrees with the textualists that certain kinds of legislative history are more reliable than others. He believes floor debates are the least reliable kind. Mikva, *supra* note 58, at 384. Professor Eskridge, also an advocate of the use of legislative history, has organized a hierarchy of reliability. Eskridge, *supra* note 3, at 636-40.

## V. Conclusion

The advocates of the use of legislative history present a strong case. Probably their most persuasive argument is that if Congress did not want judges to use legislative history, it would stop offering it; its continued production seems, however, to direct judges to consult it when faced with ambiguous or vague statutory language.

As persuasive as this argument may be, the practical concerns with legislative history weigh against its use. That judges sometimes misconstrue legislation through intentional or negligent use of extrastatutory materials cannot be ignored. As a tool for some and a trap for others, reference to legislative history can be dangerous. This unsteady practice should therefore be abandoned.

Abandonment would have several practical effects. In addition to reigning in the willful judge, it would lessen the transaction costs of doing business in a statutory society. Gone would be the lawyer's expensive and time-consuming task of poring over legislative history to grasp statutory meaning.[61] As Professor Dickerson observed:

> It is hard enough to search a long, heterogeneous and often conflicting legislative history as it relates to a particular issue in a current controversy. It is vastly harder and impracticable to search all aspects of the legislative history as they relate to the myriad of potentially troublesome problems that the lawyer would like to anticipate.[62]

The onus would then shift to the Congress to enact clearer statutes. Scalia has speculated that dedicated legislators would welcome the change.[63]

The textualist critique has not yet caused the federal judiciary to abandon legislative history, and it is unlikely that it will. It has, however, affected the way many federal judges decide issues of statutory interpretation. Commentators have suggested that Justice Scalia has persuaded a few members of the Supreme Court to join his crusade against legislative history.[64] In the 1990 term, for example, the Court decided 40% of its statutory interpretation cases without consulting legislative history,[65] in contrast to the 1981 term in which it consulted legislative history in "virtually every case" of statutory interpretation.[66] This reflects not abandonment, but a more careful, more critical use of extratextual materials and a greater emphasis on the text.[67] That in itself is a valuable contribution to how federal judges use legislative history.

*Edward Heath**

---

61. Eskridge, *supra* note 3, at 654.
62. DICKERSON, *supra* note 2, at 150-51.
63. Thompson v. Thompson, 484 U.S. 174, 192 (1988). Neither Judge Wald nor Judge Mikva believes this is a realistic possibility. Wald, *supra* note 17, at 309; Mikva, *supra* note 58, at 382.
64. Eskridge, *supra* note 3, at 656-61; Wald, *supra* note 17, at 288.
65. Breyer, *supra* note 47, at 846.
66. Wald, *supra* note 17, at 280.
67. Eskridge, *supra* note 3, at 689-91; Wald, *supra* note 17, at 309-10.

* B.A., Florida Atlantic University, 1996; Juris Doctor Candidate, Notre Dame Law School, 1999. My thanks to Judge Kenneth Ripple of the Seventh Circuit Court of Appeals for his guidance, to the editors of the Notre Dame Journal of Legislation for their assistance, and to Cathy for her editing and encouragement.