

The Secret Decline of Legislative History: Has Someone Heard a Voice Crying in the Wilderness?

Dozens of statutory cases make their way to the Supreme Court each year. Because these cases typically present issues that have confounded the lower courts, they seldom have simple answers. On the contrary, they usually require the Court to determine the meaning of ambiguous, or at least highly confusing, legislation.

The Supreme Court, for this reason, long has searched for ways to make the task of deciding its statutory cases easier. For instance, like other courts, it has adopted a variety of canons of construction and general principles. Well-known examples include the rule of lenity² and the *expressio unius*³ and *eiusdem generis*⁴ maxims.

These interpretive tools, despite occasional academic criticism, surely have helped the Court to some extent.⁵ Yet none of the Justices would claim that they make parsing statutes an effortless task. The Court, accordingly, often has resorted to another simpler, but more controversial, method of determining the answers to statutory questions: peeking at legislative history.

The term "legislative history" typically refers to evidence about what the people who drafted and enacted a law thought the law meant. In the case of federal statutes, legislative history often is found in House and

1. The author wishes to thank Roger Clegg, Steven Feldman, Daniel Troy, and Edward Whelan for their helpful suggestions.

2. See, e.g., *United States v. Bass*, 404 U.S. 336, 347 (1971) (courts will construe ambiguities in criminal statutes against the government).

3. See, e.g., *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (by stating one requirement expressly, a statute excludes others implicitly).

4. See, e.g., *Breinger v. Sheet Metal Workers Int'l Ass'n*, 493 U.S. 67, 91-92 & n.15 (1989) (context may narrow the meaning of a term that otherwise would have a broad meaning).

5. See David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921 (1992) (describing and responding to such criticism).

Senate resolutions, bills, hearings, and reports. It also may come from statements in the House and Senate journals, the *Congressional Record*, various executive branch materials, and even correspondence among Representatives and Senators.⁶ Although the Supreme Court rarely cited legislative history before the 1890s, it has referred to it in thousands of cases since then.⁷

The Supreme Court's 1992-93 Term, however, suggests that something unexpected and, indeed, largely unobserved has been happening in statutory cases. Reversing a trend of many years of increasing reliance on legislative history, the Court now appears to be cutting down on the practice. Although its members occasionally referred to legislative history that Term, they cited it far less frequently than they have in the recent past. Moreover, unlike in previous years, legislative history played a very minor role in determining the outcome of the Court's cases. When push came to shove, the Court made its decisions by focusing on the words of statutes, and not on what members of Congress said about them.

This essay seeks to document and explain the recent decline of legislative history as an interpretative device in the Supreme Court. It introduces the subject by discussing the principal positions that courts and commentators have taken on the use of legislative history. The next part describes how the 1992-93 Term differed from previous Terms. The following section then explores various hypotheses to explain the Court's growing reluctance to stray from statutory text.

The essay considers, but rejects, the suggestion that changes in the membership of the Court brought about the results of the Term. It also discounts the possibility that abnormalities in the docket could account for the difficulties observed. Instead, at the risk of attributing too much power to one member of the Court, the essay argues that credit for the decline of legislative history most likely rests with Justice Antonin Scalia.

Justice Scalia, as described more fully below, has adopted an almost absolute stance against deciding cases on the basis of anything other than the statutory text. Over the past few years, in a series of strongly worded concurrences and dissents, Justice Scalia has challenged a number of decisions that rely on legislative history. His writings appear to have had

6. The "legislative history" of a statute generally encompasses only evidence that came into existence before the statute's passage. In recent years, however, some cases have cited "subsequent legislative history"—statements or actions by Congress after passage of an act. See, e.g., *Atkins v. Rivera*, 477 U.S. 154, 166 n.10 (1986); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *Lowe v. SEC*, 472 U.S. 181, 222 (1985) (White, J., concurring in judgment); *Jefferson Cy. Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 180 (1983) (O'Connor, J., dissenting).

7. See *infra* notes 21-24 & accompanying text.

a substantial effect. Even if the entire Court does not accept his arguments at this point, the force of his assaults has made other Justices hesitant to cite extrastatutory sources in their opinions.

This essay concludes by speculating about what the future holds. It suggests that Justice Scalia's success in campaigning against the use of legislative history will continue and perhaps even grow. It cautions, though, that without Justice Scalia's constant vigilance, the Court risks resuming its old practices.

Differing Approaches To Legislative History

No consensus currently exists, either in the Supreme Court or elsewhere, about when judges may consult legislative history in deciding statutory cases. Courts and commentators, indeed, have expressed a wide range of views on the subject.⁸ The three most common approaches are discussed below.

The "Plain Meaning Rule"

Although the Supreme Court in practice does not treat the subject of legislative history in any consistent manner, the "plain meaning rule" has garnered majority support in a number of cases.⁹ This rule, as currently understood, says that a court may not look at legislative history when interpreting a statute if the meaning of the statute is "plain" on its face. A court, however, may use legislative history to help decipher ambiguous statutory language.

As with many legal doctrines, precedent probably accounts for the plain meaning rule better than anything else. Although the rule may have changed somewhat over time, it has existed in one form or another for several hundred years.¹⁰ As a result, when the Supreme Court invokes the rule, the Court generally finds it sufficient to cite earlier decisions for support. The Court does not attempt to explain the rule as a matter of policy.

8. For an exceptional study canvassing recent thought on legislative history, see OFFICE OF LEGAL POLICY, U.S. DEPT. OF JUSTICE, *USING AND MISUSING LEGISLATIVE HISTORY: A RE-EVALUATION OF THE STATUS OF LEGISLATIVE HISTORY IN STATUTORY INTERPRETATION* (1989) [hereinafter OLP STUDY].

9. See, e.g., *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 455 (1989); *Watt v. Alaska*, 451 U.S. 259, 266 (1982).

10. The original reasons for the rule and the exact course of its development remain a subject of dispute. For two somewhat different views, compare OLP STUDY, *supra* note 8, at 58-65, with 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).

Some aspects of the plain meaning rule have better arguments in their favor than others. If the Supreme Court ever had to justify the rule with reasons other than precedent, it would have little difficulty explaining why interpretation must begin with the statutory language. Even if background and context matter a great deal, the words of a statute still provide the most helpful evidence of its meaning. As Chief Justice Marshall once put it, "a law is the best expositor of itself."¹¹

The plain meaning rule's selective prohibition on using legislative history, however, presents greater difficulty from a policy standpoint. Why should it be acceptable to use legislative history in some instances—namely, when statutes are ambiguous—but not in others? If legislative history lacks legitimacy or reliability, why should courts ever cite it? On the other hand, if courts can trust legislative history, why can't they consult it in all instances? Does the value of legislative history really depend on the clarity of the statutory language?

These questions may have answers, but neither the Court nor anyone else has been articulating them in a persuasive way. For this reason, although the plain meaning rule nominally remains the law of land, it has become subject to criticism from two directions. Some opponents of the rule want to expand the use of legislative history beyond what the plain meaning rule currently permits. At the same time, others advocate scrapping the use of legislative history altogether.

More Permissive Approaches

Advocates of expanding the use of legislative history beyond what the plain meaning rule permits have presented several arguments in support of their position. First and foremost, they have argued that the plain meaning rule rests on the false idea that the words of a statute ever can have a plain meaning by themselves. According to Justice Frankfurter, "The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification."¹²

Proponents of this position stress the importance of context. Everyone has seen examples of statements that, when lifted from a larger passage, appear to take on new meaning. By the same token, advocates of greater use of legislative history assert that reading a statute without looking at the negotiations and understandings prior to its enactment often will distort its meaning.

Second, writers favoring use of legislative history have argued that the plain meaning rule creates a false appearance of objectivity. They assert

11. *Pennington v. Cox*, 6 U.S. (2 Cranch) 33, 52–53 (1804).

12. *United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting).

that, even when attempting to look only at an isolated text, a judge of necessity will consult "extrinsic evidence of the judge's own linguistic education and experience."¹³ In other words, a court cannot interpret a statute or any other text in the absence of context. The only question is whether it will rely on a context secretly supplied from the judge's own intellect, or will use and acknowledge openly the context supplied by congressional documents.

Third, supporters of legislative history have argued that courts have a duty to implement the will of Congress and that Congress expresses this will in large part through legislative history. U.S. Court of Appeals Judge Patricia M. Wald, one of the most ardent adherents of this position, has explained: "[L]egislative history is the authoritative product of the institutional work of the Congress. It records the manner in which Congress enacts its legislation, and it represents the way Congress communicates with the country at large."¹⁴ She even maintains that courts would show improper disdain for a coordinate branch of government by ignoring legislative history.¹⁵

Although agreeing that courts should consult legislative history, proponents of the arguments discussed above disagree about how much weight to give it. For instance, should courts first look to legislative history and only then to statutory language? Justice Thurgood Marshall apparently thought so. He once candidly said in a case:

The legislative history of [the pertinent statutes] is ambiguous.... Because of this ambiguity it is clear that we must look primarily to the statutes themselves to find the legislative intent.¹⁶

Others would not go so far. But this question represents the kind of issue that inevitably faces jurists who have abandoned the plain meaning rule in favor of more permissive stances on the use of legislative history.

Less Permissive Approaches

Not everyone agrees that the plain meaning rule improperly limits legitimate use of legislative history. On the contrary, the rule also has critics who fault it for allowing courts to consider too much legislative history—

13. 3 ARTHUR CORBIN, CORBIN ON CONTRACTS § 579, at 335 n.56 (Supp. 1964) (discussing the plain meaning rule as it applies to the construction of contracts).

14. 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, 306 (1990).

15. See *id.* at 306–07.

16. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 412 n.29 (1971).

Finally, some commentators have asserted that, even if the previous criticisms lack merit, courts should not consult legislative history unless they are willing to use it in a consistent manner. At present, many judges cite excerpts from committee reports and other similar sources when they support their positions, but ignore them when they do not. Justice Antonin Scalia, primarily for this reason, considers all references to legislative history illegitimate. He has stated: "Where we are not prepared to be governed by what the legislative history says—to take, as it were, the bad with the good—we should not look to the legislative history at all."²⁰

Actual Use Of Legislative History

Historical Increase

The Supreme Court began to cite legislative history as we now know it around the close of the nineteenth century.²¹ During the next fifty years, several developments took place. First, the number of citations appearing each Term gradually increased. Second, courts and commentators began to think seriously about the appropriateness of its use.²² Third, the plain meaning rule gained greater support in the Supreme Court's cases.²³

Starting around 1940, the frequency with which the Court resorted to legislative history greatly increased. Professor Jorge L. Carro and Librarian Andrew R. Brann have conducted a massive empirical study of references to legislative history over a forty-one year period.²⁴ In the first year covered by the study, 1938, they found nineteen citations.²⁵ After that date, with only a few exceptions, the volume of citations increased year after year. In the last year of the study, 1979, the number had climbed to 405.²⁶

20. *United States v. Taylor*, 487 U.S. 326, 345 (1988) (Scalia, J., concurring in part). For more on this theme, see also *Thunder Basin Coal Co. v. Reich*, 114 S. Ct. 771, 782 (1994) (Scalia, J., concurring in part and concurring in the judgment).

21. See, e.g., *Church of the Holy Trinity v. United States*, 143 U.S. 457, 464–65 (1892); *American Net & Twine Co. v. Worthington*, 141 U.S. 468, 473–74 (1891).

22. See J.P. Chamberlain, *The Courts and the Committee Reports*, 1 U. Chi. L. Rev. 81 (1933); Kenmore M. McManes, Editorial Note, *Effect of Legislative History on Judicial Decision*, 5 GEO. WASH. L. REV. 235 (1937); Markley Frankham, Note, *Some Comments Concerning the Use of Legislative Debates and Committee Reports in Statutory Interpretation*, 2 BROOK. L. REV. 173 (1933).

23. See, e.g., *United States v. American Trucking Ass'n*, 310 U.S. 534, 543–44 (1940).

24. See Jorge L. Carro & Andrew R. Brann, *The U.S. Supreme Court and the Use of Legislative Histories: A Statistical Analysis*, 22 JURIMETRICS J. 294 (1982).

25. See *id.* at 303.

26. See *id.*

or even for authorizing them to rely on any legislative history at all. Skeptics about the value of legislative history, like their intellectual adversaries on the other side, also have advanced several arguments for their position.

First, opponents of legislative history often challenge the assertion, made by supporters such as Judge Wald, that Congress speaks authoritatively through legislative history. They note that the Constitution grants legal effect only to bills that have won bicameral approval and that have been signed by the President or passed over his veto.¹⁷ Although Senators and Representatives may produce committee reports and make floor statements about the purpose of pending legislation, these items have no official status under the Constitution.

Second, some critics of legislative history have adopted what might be called a "textualist" position on the meaning of statutes. Textualists question whether courts really should view their mission as attempting to discern the intent or will of Congress. They point out that the House and Senate combined have 535 members. When all of these people vote on a statute, they rarely, if ever, will have a single intent. Some may think that a statute means one thing, while others think that it means something entirely different. As a result, textualists assert, courts should not try to discover what "Congress" subjectively intended its legislation to say.¹⁸ Instead, they must decide what the statute actually means by reading its words in the most objective manner possible.

Third, even authors who otherwise have no theoretical objections to using legislative history have questioned its reliability. Everyone on Capitol Hill now knows, of course, that courts occasionally look at legislative history to help them interpret statutes. This knowledge, unsurprisingly, affects behavior. Members of Congress often expend considerable efforts to manipulate the legislative record. What a politician cannot get into the text of a statute, he or she may slip into a report or a statement published in the *Congressional Record*.¹⁹ Courts, as a result, never know what to believe when they stray from the statutory language.

17. See *Premier Elect. Constr. Co. v. National Elect. Contractors Ass'n*, 814 F.2d 358, 364–65 (7th Cir. 1987) (Easterbrook, J.).

18. See OLP STUDY, *supra* note 8, at ii ("No one has yet proposed a satisfactory method of determining the group intent of a body when the individual members of the body may have different intents.")

19. Justice Felix Frankfurter, who generally favored use of legislative history, recognized early on that the Court's use of it was prompting members of Congress to doctor the evidence. See *Shapiro v. United States*, 335 U.S. 1, 48–49 (1948) (Frankfurter, J., dissenting). The practice has continued into more recent times. See Kenneth Starr, *Observations about the Use of Legislative History*, 1987 DUKE L.J. 371, 376.

Ten years ago, Judge Patricia M. Wald wrote an article analyzing the Supreme Court's usage of legislative history during the 1981-82 Term.²⁷ In this article, she made the somewhat startling observation that the Court that year had looked at legislative history in nearly every statutory case, regardless of whether it thought that the statute had a clear meaning on its face. She thus concluded that the plain meaning rule, despite precedent, effectively had died. She stated: "The language of 'plain meaning' lingers on in Court opinions, but its spirit is gone."²⁸ Judge Wald concluded that proponents of the more permissive approaches toward legislative history quietly had won the struggle for the Court.²⁹

The 1992-93 Term

Has anything happened since 1981? The answer is yes. Although the development largely has gone unobserved by Court watchers, the use of legislative history appears to be in decline. In the 1992-93 Term, the Court decided a total of 114 cases with full written opinions.³⁰ About 70 of these cases concerned predominantly statutory issues.³¹ The Court cited legislative history in only about 30 of them.³² These numbers contrast sharply with those Judge Wald observed just ten years ago. At that time, as noted, the Court was citing legislative history in nearly every statutory case. Now, the Court cites it in fewer than half of them.

Two factors make the decline in citation of legislative history even more impressive. First, many of the decisions that did not rely on legislative history touched upon highly controversial personal rights issues. For example, the Court decided several cases requiring it to interpret 42 U.S.C. § 1983, a statute providing damage remedies for constitutional rights violations.³³ In the past, these cases probably would have prompted inquiries

27. See Wald, *supra* note 10.

28. *Id.* at 197-98.

29. See *id.* at 197-99.

30. See *The Supreme Court*, 1992 Term, 107 HARV. L. REV. 27, 372 (1993).

31. The *Harvard Law Review's* annual statistics indicate that 40 cases in the 1992-93 Term concerned primarily constitutional issues. See *id.* at 377-79. That leaves 74 cases focusing on other issues. The author has assumed, on the basis of this information, that most of these remaining 74 cases involved primarily statutory questions. A few cases, however, may have involved neither statutory nor constitutional issues.

32. The author conducted a variety of computer searches to ferret out references to legislative history in the Term's cases. It is possible that the searches may have missed a few of them.

33. See, e.g., *Leatherman v. Tarrant County Narcotics Intel. & Coord. Unit*, 113 S. Ct. 1160 (1993); *Antoine v. Byers & Anderson, Inc.*, 113 S. Ct. 2167 (1993); *Buckley v. Fitzsimmons*, 113 S. Ct. 2606 (1993); *Farrar v. Hobby*, 113 S. Ct. 566 (1992).

into nonstatutory materials documenting the drafting of Section 1983.³⁴ The Court, however, decided the cases without those aids. Second, and even more impressively, legislative history did not even play a very significant role in any of the 31 cases that did cite it.

In two cases, the Court expressly refused to consider anything but the statutory language.³⁵ For example, in *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, the Court, in interpreting the National Bank Act of 1916, stated unequivocally: "Because we conclude that the meaning of the 1916 Act is plain, . . . we need not consider the 1916 Act's legislative history."³⁶ The Court presumably adopted, silently, the same position in the dozens of other statutory cases that it decided without reference to extrastatutory materials.

In another five cases, the Court acknowledged that the legislative documents contained evidence that might contradict its interpretation of a statute, but dismissed them as untrustworthy.³⁷ In *Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs*, for example, the losing side cited a statement by a Senator contradicting the Court's understanding of a particular statute. With little discussion, the Court rejected the argument, saying "[w]e find the text of the statute unambiguous on the point at issue; accordingly, we give no weight to a single Senator during floor debate in the Senate."³⁸

Nine majority opinions and one concurrence actually cited legislative history for its substantive content³⁹ but also made clear that the legislative history merely confirmed a meaning that the Court already had distilled from the language of the statute. *Conroy v. Aniskoff*⁴⁰ presents the

34. For forays into § 1983's legislative history, see, e.g., *Dennis v. Higgins*, 498 U.S. 439, 468-73 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 68-69 (1989).

35. See *United States v. Texas*, 113 S. Ct. 1631, 1635 n.4 (1993); *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 113 S. Ct. 2173, 2186 n.11 (1993).

36. 113 S. Ct. at 2186 n.11.

37. See *Rake v. Wade*, 113 S. Ct. 2187, 2192 (1993); *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2210-12 (1993); *Lincoln v. Vigil*, 113 S. Ct. 2024, 2031 (1993); *Moreau v. Klevenhagen*, 113 S. Ct. 1905, 1910 (1993); *Bath Iron Works Corp. v. Director, Office of Workers' Comp. Programs*, 113 S. Ct. 692, 698-70 (1993).

38. 113 S. Ct. at 790.

39. See *Austin v. United States*, 113 S. Ct. 2801, 2811 (1993); *Sale v. Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2560-62 (1993); *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2210-12 (1993); *Commissioner v. Keystone Consol. Indus., Inc.*, 113 S. Ct. 2006, 2013 (1993); *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1565-66 (1993); *Reves v. Ernst & Young*, 113 S. Ct. 1163, 1170-72 (1993); *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126, 1136 (1993); *Negonsort v. Samuels*, 113 S. Ct. 1119, 1123-25 (1993); *Commissioner v. Soliman*, 113 S. Ct. 701, 712 & n.8 (1993); *Nobelman v. American Sav. Bank*, 113 S. Ct. 2111-12 (1993) (Stevens, J., concurring).

40. 113 S. Ct. 1562 (1993).

attempted to use legislative history to show that the Court had erred.⁵⁰ For instance, in *District of Columbia v. Greater Washington Board of Trade*, Justice Stevens disagreed with the Court about the scope of ERISA based in large part on his understanding of the legislative history of the act.⁵¹ The Court's rejection of this reasoning and its opposition to the other dissents further support the conclusion that the Court as a whole is paying less attention to nontextual arguments.

Possible Reasons For The Decline

What could account for the declining influence of legislative history over the past decade? Four hypotheses come to mind. First, it may reflect changes in the membership of the Court after a dozen years of more conservative appointees. Second, the decline may have come about because the Justices on the Court have become convinced by the arguments against legislative history. Third, abnormalities in the Court's docket may have given the Court fewer occasions to cite legislative history than is customary. Fourth, members of the Court may have decided to avoid legislative history, not because they object to it as a matter of principle, but rather because citing it has become too costly.

The following discussion suggests that the fourth hypothesis seems more plausible than the first three. The "cost" of relying on legislative history has gone up a great deal because one member of the Court, Justice Scalia, ardently and vociferously responds when other members of the Court refer to it. As a result, even if the other members of the Court do not share Justice Scalia's objections to the use of legislative history, they find it easier simply to present other arguments for their views whenever possible.

The Change in Membership Hypothesis

The change in membership of the Court since 1981 possibly might explain the declining use of legislative history. In the decade or so leading up to the 1992-93 Term, Presidents Ronald Reagan and George Bush, both Republicans, appointed a majority of the Court, namely Justices Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy, David L. Souter,

50. See *Mertens v. Hewitt Assocs.*, 113 S. Ct. 2063, 2072 (1993) (White, J., dissenting) (citing a precedent); *Deal v. United States*, 113 S. Ct. 1993, 2002 (1993) (Stevens, J., dissenting); *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 773 (1993) (Souter, J., dissenting in part); *District of Columbia v. Greater Washington Bd. of Trade*, 113 S. Ct. 580, 587 (1992) (Stevens, J., dissenting).

51. 113 S. Ct. at 587.

best example of this category of cases. There the Court confronted the question whether a veteran had to show prejudice before asserting rights under a provision of the Soldiers' and Sailors' Relief Act. Justice Stevens, writing for the Court, concluded that the statute said "no" in terms that he described as "unambiguous, unequivocal, and unlimited."⁴¹ Although he could have quit at that point, Justice Stevens went on to assert that the legislative history supported his position.⁴²

In another nine cases, the Court did no more than briefly note that the legislative history failed to answer the question presented.⁴³ In *Saudi Arabia v. Nelson*,⁴⁴ for instance, the Court had to determine the meaning of the term "commercial activity" in the Foreign Sovereign Immunities Act. The Court noted in the course of its decision that the "sparse legislative history" offered no guidance.⁴⁵ As in other cases in this category, the Court did not state what it would have done if the legislative history had said something relevant.

Only one majority opinion and one concurrence came even close to basing their conclusions on legislative history by citing precedents that earlier had relied on it.⁴⁶ In *Hazen Paper Co. v. Biggins*,⁴⁷ the Court adopted an interpretation of the Fair Labor Standards Act made in a previous case called *Trans World Airlines v. Thurston*.⁴⁸ The Court explained that, in deciding *Thurston*, it had "sifted through the legislative history."⁴⁹ The opinion last Term did not say whether the Court would have used the same reasoning to decide *Thurston* if it had it to do over again.

Although no majority opinion made legislative history a necessary (as opposed to a merely supporting) part of its reasoning, that was not true of some dissents registered last year. At least four dissenting opinions

41. *Id.* at 1564.

42. *See id.* at 1566-67.

43. *See Darby v. Cisneros*, 113 S. Ct. 2539, 2548 (1993); *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2282 (1993); *South Dakota v. Bourland*, 113 S. Ct. 2309, 2319 (1993); *Good Samaritan Hosp. v. Shalala*, 113 S. Ct. 2151, 2158 n.10 (1993); *United States Dep't of Justice v. Landano*, 113 S. Ct. 2014, 2022-23 (1993); *Saudi Arabia v. Nelson*, 113 S. Ct. 1471, 1477 (1993); *Buffed v. Commissioner*, 113 S. Ct. 927, 931 n.10 (1993); *Spectrum Sports, Inc. v. McQuillan*, 113 S. Ct. 884, 889 (1993); *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 113 S. Ct. 716, 719 n.2 (1993).

44. 113 S. Ct. 1471 (1993).

45. *Id.* at 1477.

46. *See Hazen Paper Co. v. Biggins*, 113 S. Ct. 1701, 1708 (1993); *Local 144 Nursing Home Pension Fund v. Demisay*, 113 S. Ct. 2252, 2261 (1993) (concurring opinion).

47. 113 S. Ct. 1701 (1993).

48. *Id.* at 1705 (citing 469 U.S. 111, 126 (1985)).

49. *Id.* at 1708.

and Clarence Thomas.⁵² These new Justices, for the most part, have espoused more traditional views than their predecessors, such as Justices Thurgood Marshall and William J. Brennan.

A close examination of the positions held by the newest members of the Court, however, suggests that something more significant must be at work. Although Justices Scalia and Thomas rarely (if ever) have relied on legislative history to determine the meaning of statutes, the other newcomers to the Court have not taken so strict a view.

Justice O'Connor has relied on legislative history in many cases.⁵³ Indeed, she appears to take a more permissive approach toward legislative history than even the "plain meaning rule" would admit, often putting such history on an even footing with statutory language.⁵⁴ Justice Kennedy has a much more conservative record with respect to legislative history. In referring to it, for example, he generally notes that it has questionable relevance.⁵⁵ Yet, on occasion, Justice Kennedy has made unqualified substantive use of statements by members of Congress.⁵⁶ Justice Souter, meanwhile, has taken a strong stance in favor of using legislative history.⁵⁷ Although he has spent only a short time on the Court, he has relied on legislative history in several instances.⁵⁸ Because of the willingness of most of these new Justices to use legislative history, their joining the Court cannot alone explain the decline in its use.

The Change in Attitude Hypothesis

Critics of legislative history, as noted above,⁵⁹ have identified several weighty theoretical objections to its use. The Supreme Court as a whole, however, never has indicated expressly that it agrees with these objections. On the contrary, it regularly has used legislative history to decide cases

52. Justice Ruth Bader Ginsburg joined the Court at the beginning of the 1993-94 Term.

53. See, e.g., *Mekhtoyan v. Sullivan*, 111 S. Ct. 2157, 2164-65 (1991); *Boos v. Barry*, 485 U.S. 312, 324-29 (1988).

54. See, e.g., *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 842 (1987).

55. See *Department of Revenue of Oregon v. ACF Indus.*, 114 S. Ct. 843, 851 (1994); *Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2595 (1992).

56. See, e.g., *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 116 (1989) (Kennedy, J., dissenting).

57. See *United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102, 2109 n.8 (1992) (adopting the position of Justice Frankfurter that the text of a statute often does not reveal its true meaning).

58. See *id.*; *American Nat'l Red Cross v. S.G.*, 112 S. Ct. 2465, 2474 (1992).

59. See *supra* pp. 61-63.

and, at least in some instances, has endorsed the plain meaning rule.⁶⁰ And even though legislative history did not play a significant role in the cases decided last Term, the Court did not reject its use as a theoretical matter.

Do the recent results at least indicate that more members of the Court have become opposed to using legislative history? That development certainly would please Justice Scalia and others who long have doubted the utility of legislative history. Yet the evidence does not bear out a conclusion that a major change in attitude has occurred.

As discussed above, a number of majority opinions cited legislative history to bolster or confirm conclusions reached on the basis of the statutory language. The references to legislative history, even if not used to contradict the statutory language, nonetheless show that the Court continues to give importance to the subjective intentions of Congress. The Court would otherwise have had no reason to cite their statements at all. Critics of legislative history, as a result, would be celebrating prematurely if they took the 1992-93 Term as evidence of the triumph of their views.

The Abnormalities of Docket Hypothesis

Another possible explanation for the decline of legislative history might be that the Court's docket did not include many cases for which resort to legislative history would have been appropriate. The Court hears a different set of disputes every Term and the issues one year may vary widely from those of the previous year. Nothing guarantees that the Court will consider cases that have ambiguous statutory language or a helpful legislative record. In other words, the diminished use of the legislative history in the 1992-93 Term simply may reflect nothing more significant than the luck of the draw.

The Court certainly considers issues for which the legislative history provides no guidance. The Court even acknowledged this fact in a number of cases during the Term. Yet, again, the evidence suggests that something more must be going on. As noted above, in several cases, the Court rejected legislative history that pointed in the opposite direction from its conclusions.⁶¹ These cases suggest that the Court did consider some statutory issues for which legislative history would have been relevant if the Court had thought it worth consideration. Thus, once more, some other hypothesis probably is needed to explain entirely the decline in the use of evidence from drafting during the 1992-93 Term.

60. See *supra* note 9.

61. See *supra* note 37.

The Costliness Hypothesis

What else might cause a decline in the influence of legislative history? The most likely answer is pressure from Justice Scalia, who now opposes all references to materials documenting the drafting of statutes. Over the past half-decade, Justice Scalia has fired off a series of strongly worded attacks on use of legislative history by the Court.⁶² His separate concurrences and dissents have tried to show how little legislative history proves and how often it is foolish to rely on it. Whether or not his misssives have convinced anyone of his views, they appear to have discouraged reliance on legislative history.

*Sullivan v. Finkelstein*⁶³ provides an excellent example. That 1990 case presented the question whether the Secretary of Health and Human Services could take an immediate appeal from a trial-court order invalidating certain Social Security regulations. To decide this issue, the Court had to construe a statute specifying the circumstances in which appellate courts may hear interlocutory appeals.⁶⁴ The opinion of the Court, written by Justice White, and joined in full by everyone except Justices Scalia and Blackmun, for the most part approached the question in a conventional manner. It considered the text of the statute and a variety of precedents. In the second to last footnote of the opinion, however, the Court took on a task that it probably should not have: It sought to refute "two arguments based on subsequent legislative history" advanced by the losing side.⁶⁵ These arguments concerned statements in two House committee reports that had been printed after passage of the statute at issue. The Court summarized the statements and then rejected them on grounds that they did not prove what the losing party said that they did.

Even this minor acknowledgement of the statements by the congressional committee was too much for Justice Scalia to bear. Although he joined all of the rest of the Court's opinion, he refused to join the foot-

62. See *Thunder Basin Coal Co. v. Reich*, 114 S. Ct. 771, 782 (1994) (concurring in part and in judgment); *Conroy v. Aniskoff*, 113 S. Ct. 1562, 1567 (1993) (concurring in judgment); *United States v. Thompson/Center Arms*, 112 S. Ct. 2102, 2111 (1992) (concurring in judgment); *United States v. R.L.C.*, 112 S. Ct. 1329, 1339 (1992) (concurring in part and in judgment); *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476, 2487 (1991) (concurring in judgment); *Sullivan v. Finkelstein*, 496 U.S. 617, 631 (1990) (concurring in part); *Taylor v. United States*, 495 U.S. 575, 603 (1990) (concurring in part and in judgment); *Begier v. IRS*, 110 S. Ct. 2258, 2267 (1990) (concurring in judgment); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (concurring in judgment); *United States v. Taylor*, 487 U.S. 326, 344 (1988) (concurring in part).

63. 496 U.S. 617 (1990).

64. See 28 U.S.C. § 1291 (1988).

65. 496 U.S. at 628 n.8.

note addressing the statute's "subsequent legislative history."⁶⁶ In a pithy and trenchant separate opinion, Scalia explained that he did not think it relevant "what committees of the 99th and 95th Congress thought the 76th Congress intended." He then concluded with the memorable quip: "Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in footnote."

What result did Justice Scalia's efforts produce? They did not persuade the Court to remove the offending footnote in *Finkelstein*. Yet they also were not forgotten. Since Scalia's concurrence in *Finkelstein* four years ago, the Court has not once relied on subsequent legislative history and does not even take citation to it seriously. For example, when a litigant attempted to rely on such "history" recently in *United States v. Texas*, the Court flatly rebuffed the effort without concern for its content. If Justice Scalia had not made such a fuss in *Finkelstein*, the Court in *Texas* at least might have taken time to decide whether the subsequent legislative history supported or contradicted its conclusion.

*Begier v. IRS*⁶⁷ provides another example of the effect of Justice Scalia's poignant separate opinions. In that 1990 case, the Court had to decide whether payment of trust-fund taxes by a bankruptcy debtor was a voidable preference. The case focused on the meaning of section 7501 of the Internal Revenue Code. Justice Marshall wrote the opinion of the Court. In his reasoning, he relied on a statement in the *Congressional Record* by Representative Edwards, who said that "courts should permit the use of reasonable assumptions" regarding the tracing of trust-fund taxes.⁶⁸ Justice Marshall cited this statement to bolster his conclusion that the payment of taxes was not a preference.

Justice Scalia agreed with the result in the case, but submitted a separate opinion challenging the Court's use of legislative history on two of the grounds stated above. First, he noted that the statement by Representative Edwards had almost no reliability. Justice Scalia pointedly explained:

We do not know that anyone except the presiding officer was present to hear Representative Edwards. Indeed, we do not know for sure that Representative Edwards' words were even uttered on the floor rather than inserted into the Congressional Record afterwards. If Representative Edwards did speak these words, and if there were others present, they must have been surprised to hear him talking about the tracing of 26 U.S.C. § 7501 tax trust funds, inasmuch as the bill under consider-

66. See *id.* at 631 (Scalia, J., concurring in part).

67. 496 U.S. 53 (1990).

68. 124 CONG. REC. 32,417 (1978).

Justice Scalia, in a separate opinion, first reiterated his theoretical objections to the use of legislative history. He then produced an extensive set of excerpts from the legislative history (dug up, Justice Scalia said, by "a hapless law clerk") which tended to cut in the other direction, but which Justice Stevens had neglected to address.⁷³ Justice Scalia's point was not that Justice Stevens had gotten the history wrong. Rather, he sought to show that, by failing to take account of the differing points of view, Justice Stevens in fact did not really make a sufficient effort to understand what Congress intended. Justice Scalia concluded by saying: "We should not pretend to care about legislative intent (as opposed to the meaning of the law), lest we impose upon the practicing bar and their clients obligations that we do not ourselves take seriously."⁷⁴ This kind of response should discourage even more strongly attempts to rest decisions on legislative history.

The Future

The Court has heard Justice Scalia's voice crying in the wilderness and it has had an effect. What does the future hold for legislative history? So long as Justice Scalia remains on the bench and maintains his crusade against legislative history, the Court's use of it should continue to decline. Eventually the bar will take notice of the Court's reluctance to dabble with unenacted statements by politicians and will curtail their citation of it.

What will happen, though, if Justice Scalia tires of the fight and lets down his guard? Or what will happen if he leaves the bench? Whether all of his past efforts will continue to have consequence remains unclear. As noted above, some members of the Court, at least at this point, have not accepted Justice Scalia's theoretical arguments against citing legislative history. If they have curtailed the practice, they appear to have done so largely because they want to avoid confrontation. If citing legislative history is a sin, then the Court is a potential backslider. Should Justice Scalia's vigilance cease, old habits well might resume.

73. See *id.* at 1570-71.

74. *Id.* at 1572.

ation did not relate to the Internal Revenue Code, and contained no provisions even mentioning trust-fund taxes.⁶⁹

Turning then to the argument (espoused by Judge Wald and others) that legislative history is the authoritative product of Congress, Scalia asserted: "Congress conveys its directions in the Statutes at Large, not in excerpts from the Congressional Record that do not clarify the text of any pending legislation."⁷⁰

Did Justice Scalia's words have any effect? Justice Marshall did not remove the quotation of Representative Edwards from his opinion in *Begier*. Yet, in subsequent cases, the Court seems to have heard Scalia's message. Now, even some of the most ardent believers in legislative history have been extremely cautious about placing weight on what a single politician has had to say about the meaning of a law. For example, as noted above, in *Bath Iron Works Corp. v. Director, Office of Workers' Compensation Programs*, Justice Stevens — who joined Marshall in *Begier* — rejected a litigant's citation to the comments of an individual Senator as simply unpersuasive.⁷¹

With Justice Scalia breathing down the necks of anyone who peeks into the *Congressional Record* or Senate reports, the other members of the Court may have concluded that the benefit of citing legislative history does not outweigh its costs. It is likely for this reason that the percentage of cases citing it has decreased dramatically. No one likes an unnecessary fight, especially not one with as formidable an opponent as Justice Scalia. In the 1992-93 Term, Justice Scalia adopted an additional tactic in his crusade to eliminate reliance on legislative history. In the past, Justice Scalia mostly advanced theoretical arguments against using legislative history. He did not examine very carefully statements in congressional documents because he considered them irrelevant. This approach, however, tended to weaken his assaults because members of the Court who did not accept Justice Scalia's theoretical objections often ignored them and dug right into the legislative materials.

Accordingly, Justice Scalia has now escalated his assaults on legislative history by ceasing to give his opponents a free ride to interpret legislative history as they see fit. *Conroy v. Aniskoff*,⁷² discussed above, presents an example. In that case, as noted, the Court had to interpret the *Soldiers' and Sailors' Relief Act*. Justice Stevens, who wrote the opinion of the Court, cited the legislative history to support a conclusion that he already had reached on the basis of the language of the statute.

69. 496 U.S. at 67-68 (Scalia, J., concurring).

70. *Id.* at 68.

71. 113 S. Ct. at 700.

72. 113 S. Ct. 1562 (1993).