Brooklyn Law Review

Volume 76
Issue 3
SYMPOSIUM:
Statutory Interpretation: How Much Work Does Language Do?

Article 1

2011

Confirmatory Legislative History

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ARTICLES

Confirmatory Legislative History*

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INTRODUCTION

Textualists and intentionalists regularly lock horns over the proper approach to construing statutory language regarded as inconclusive. The interpretive debate seems less contentious, however, when the words of the law are deemed clear. There may be reasonable disagreement as to whether the text at issue in a particular controversy *has* a plain meaning, but if it does then that meaning arguably preempts further inquiry. Since 1990, Supreme Court majority opinions are replete with declarations such as: "Given [a] straightforward statutory command, there is no reason to resort to legislative history";[1] or "we do not resort to legislative history to cloud a statutory text that is clear";[2] or "[w]hen the words of a statute are unambiguous . . . this first canon is also the last: 'judicial inquiry is complete.'"[3]

Yet despite these ringing statements, the Court in fact often departs from its "first canon" by relying on legislative history to confirm or reinforce what it already has concluded is the plain meaning of statutory text. On numerous occasions

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[1] United States v. Gonzalez, 520 U.S. 1, 6 (1997).

[2] Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994); *see also* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001) (quoting *Ratzlaf* with approval).

[3] Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992) (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)).

since 2006, the Roberts Court has invoked legislative history as a confirmatory asset. Six of these majorities, including four cases decided during the 2009 term, have drawn sharp rebukes from Justice Scalia.[4] Beyond expressing his general hostility toward legislative history, Justice Scalia has criticized the confirmatory use of legislative record evidence as incentivizing wasteful research by lawyers.[5] He discounts such reliance as a misleading makeweight that, although never the real reason for a court's decision, has disturbingly antidemocratic implications with respect to the role of judges.[6]

This essay takes issue with Justice Scalia's view of confirmatory legislative history. It maintains that persistent judicial reliance on such history reflects important shortcomings in the textualist approach. When courts move beyond the presumptively clear meaning of statutory language, they recognize—even if implicitly—that assertions of clarity can too often serve as either a mirage or a refuge. Clarity may be a mirage because apparently precise words or phrases often give rise to conflicting "plain meanings," and also because apparently assured readers of those words or phrases are conditioned to perceive clarity based on their own specialized training, background, and level of self-confidence. Assertions of clarity may serve as a refuge in that they obviate the need for judges to provide more complete explanations for their decisions. This aspiration for completeness, although not embraced by Justice Scalia, is important to many other judges as they seek to explain adjudicative resolutions before the diverse audiences to whom they are responsive and responsible.

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[4] *See, e.g.*, Samantar v. Yousuf, 130 S. Ct. 2278, 2287, 2289 (2010) (Stevens, J.); *id.* at 2293-94 (Scalia, J., concurring); Carr v. United States, 130 S. Ct. 2229, 2241-42 (2010) (Sotomayor, J.); *id.* at 2242 (Scalia, J., concurring); Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA, 130 S. Ct. 1605, 1615-17 (2010) (Sotomayor, J.); *id.* at 1626-28 (Scalia, J., concurring); Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1332 (2010) (Sotomayor, J.); *id.* at 1341-42 (Scalia, J., concurring); United States v. Ressam, 553 U.S. 272, 275-77 (2008) (Stevens, J.); *id.* at 277 (Thomas & Scalia, JJ., concurring); Zedner v. United States, 547 U.S. 489, 500-01 (2006) (Alito, J.); *id.* at 509-11 (Scalia, J., concurring). For additional recent majority opinions relying on legislative history to confirm or reinforce textual plain meaning, see Harbison v. Bell, 129 S. Ct. 1481, 1485-90 (2009); Scheidler v. Nat'l Org. for Women, Inc., 547 U.S. 9, 16-20 (2006); and Small v. United States, 544 U.S. 385, 388-93 (2005).

[5] *See, e.g.*, *Jerman*, 130 S. Ct. at 1629 (Scalia, J., concurring); *Milavetz*, 130 S. Ct. at 1342 (Scalia, J., concurring); *Zedner*, 547 U.S. at 510 (Scalia, J, concurring).

[6] *See, e.g.*, *Samantar*, 130 S. Ct. at 2293 (Scalia, J., concurring); *Carr*, 130 S. Ct. at 2242 (Scalia, J., concurring); *Jerman*, 130 S. Ct. at 1628 (Scalia, J., concurring); *Milavetz*, 130 S. Ct. at 1342 (Scalia, J., concurring); United States v. Taylor, 487 U.S. 326, 344-45 (1988) (Scalia, J., concurring); INS v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring).

Part I reviews the use of confirmatory legislative history and identifies Justice Scalia's objections. Part II explains why judges continue to rely on such history, and how that reliance relates to the inadequacies of an overly language-based approach to statutory interpretation.

I. CRITICIZING CONFIRMATORY HISTORY

The Court's use of legislative history to corroborate that statutory text means what it appears to say is not a recent development. Writing in the early 1980s, Judge Patricia Wald cited numerous decisions from the 1981 term in which the majority analyzed legislative record materials for confirmatory purposes.[7] As far back as the 1920s, Justice Holmes opined that the so-called plain meaning rule was subject to the gloss of congressional intent.[8] In the late 1970s and early 1980s, some judges and legal academics expressed concern that legislative history might be surpassing statutory language as the foundational interpretive asset.[9] The rise of textualism, consistently championed by Justice Scalia during his twenty-five years on the Court, has curtailed that trend and restored the primacy of enacted text.

Primacy, however, need not entail exclusivity. Justice Scalia's initial barrage of separate opinions challenging the Court's reliance on legislative history[10] included an insistence that legislative materials ought to never be invoked to reinforce

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[7] *See* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 197-99 (1983) (discussing nine examples from a single term).

[8] Bos. Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) ("It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law. . . . If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice it would be arbitrary to refuse to consider that fact when we come to interpret a statute.").

[9] *See* Wald, *supra* note 7, at 200-05 (discussing reservations about the reliability, relevance, and thoroughness of various legislative materials); *see also* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 164 (1975) (referring to "the Canadian gibe that in the United States whenever the legislative history is ambiguous it is permissible to refer to the statute").

[10] *See* James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 161 (2008) (discussing twelve Scalia concurrences and dissents written in his first three terms).

the plain meaning of text.[11] Scalia continued to object to confirmatory history during the Rehnquist Court years.[12] His rhetorical intensity—directed at a wide range of colleagues—remains unabated in the Roberts era.[13]

From Justice Scalia's vantage point, reliance on legislative history to confirm plain meaning is unacceptable for a number of reasons. Some of these reasons might fairly be viewed as deriving from his core position that legislative history should be altogether inadmissible as an interpretive resource. Thus, Scalia criticizes confirmatory usage as a form of "intellectual piling-on [that] has addictive consequences" because it acculturates judges to believing that legislative history is intrinsically reliable.[14] Relatedly, he insists that such usage gives rise to a slippery slope: once legislative history is deemed relevant to confirm the clear meaning of text, it may be considered relevant to question or even contradict that clear meaning, "thus rendering what is plain ambiguous."[15] Scalia also condemns reliance on confirmatory references, as he does reliance in general, for more pragmatic reasons: it effectively prescribes "wasteful over-lawyering" at clients' expense "merely for the sake of completeness."[16]

Of particular interest are two other Scalia criticisms that identify potentially distinctive problems with the confirmatory approach. One involves its allegedly superfluous nature. If the text is clear on its face, then confirmatory legislative history is by definition duplicative and hence entirely unnecessary.[17] This redundant role exemplifies how "legislative history is almost never *the real reason* for the

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[11] *See, e.g.*, United States v. Stuart, 489 U.S. 353, 371-77 (1989) (Scalia, J., concurring); *Taylor*, 487 U.S. at 344-45 (Scalia, J., concurring); *Cardoza-Fonseca*, 480 U.S. at 452-53 (Scalia, J., concurring).

[12] *See, e.g.*, Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 267 (2004) (Scalia, J., concurring); Bank One Chi. v. Midwest Bank & Trust Co., 516 U.S. 264, 279-83 (1996) (Scalia, J., concurring).

[13] The six Roberts-era decisions cited *supra* note 4 were authored by Justices Alito, Stevens, and Sotomayor. The five earlier decisions cited *supra* notes 11-12 were authored by Justices Brennan, Blackmun, Stevens, and Ginsburg.

[14] Zedner v. United States, 547 U.S. 489, 510 (2006) (Scalia, J., concurring).

[15] *Id.* at 510-11; *see also Taylor*, 487 U.S. at 344 (Scalia, J., concurring).

[16] Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA, 130 S. Ct. 1605, 1627 (2010) (Scalia, J., concurring); *see also* Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S. Ct. 1324, 1342 (2010) (Scalia, J., concurring).

[17] *See, e.g.*, *Intel Corp.*, 524 U.S. at 267 (Scalia, J., concurring); *Bank One*, 516 U.S. at 282-83 (Scalia, J., concurring).

Court's decision—and make-weights do not deserve a lot of the Court's time."[18]

The second notable criticism involves the allegedly antidemocratic aspects of using confirmatory history. Scalia expressed this concern early in his tenure on the Court. Emphasizing that the role of judges is to "interpret laws rather than reconstruct legislators' intentions," he reasoned that where the language of the laws is clear, courts are not free to consider unenacted intent as a possible supplement or replacement.[19] If courts allow for the possibility that legislative history is capable of altering plain meaning, they foster a lawmaking culture in which members of Congress understand that they can avoid the arduous work of negotiating and enacting a floor amendment for the simpler task of promulgating a floor colloquy.[20] To encourage such efforts by blessing them as potentially probative undermines our constitutional democracy. Judges who denigrate or discount the challenge of securing approval for statutory language from both chambers and the President are effectively promoting a lack of political accountability for our elected officials.[21]

Each of these two criticisms is rooted in Justice Scalia's commitment to a semantic approach when interpreting statutes. His view that ordinary meaning, supplemented by structural and language canons, constitutes "the real reason" for judicial decisions reflects his confidence that there is a single solution to interpretive controversies and that language-based analysis is all conscientious judges need in order to discover it.[22] Likewise, Scalia's objection to the possibility that legislative history is available to confirm ordinary meaning reflects his conviction that judges undermine their neutral, apolitical responsibility as interpreters of Congress's textual

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[18] Samantar v. Yousuf, 130 S. Ct. 2278, 2294 (2010) (Scalia, J., concurring) (emphasis added); *see also Jerman*, 130 S. Ct. at 1628 (Scalia, J., concurring) ("It is almost invariably the case that our opinions benefit not at all from the make-weight use of legislative history.").

[19] INS v. Cardoza-Fonseca, 480 U.S. 452, 452-53 (1987) (Scalia, J., concurring).

[20] *See Taylor*, 487 U.S. at 345 (Scalia, J., concurring); *see generally* Zedner v. United States, 547 U.S. 489, 509-11 (2006) (Scalia, J., concurring).

[21] *See* Hon. Alex Kozinski, *Should Reading Legislative History be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 808 (1998).

[22] *Samantar*, 130 S. Ct. at 2294 (Scalia, J., concurring); *see also* Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting) (describing his approach to construing statutes: "first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies").

work product by consulting the politically generated record of Congress's enactment process.

II. JUSTIFYING CONFIRMATORY HISTORY

A core premise of Justice Scalia's textualist philosophy is that there is almost invariably a single plain meaning for disputed statutory language. He does not expect that this one exact meaning will necessarily be obvious or readily perceived, but he is prepared to work hard to avoid ambiguity. Toward that end, Scalia employs a diverse semantic toolkit for his statutory opinions—dictionary definitions, identical words or phrases as previously applied in other laws, and multiple canons related to the grammar and structure of statutory text. He invokes these tools to identify a reading that is sufficiently clear so as to disqualify other plausible interpretations.[23] An implicit assumption in Justice Scalia's "hard textualist" approach is that when these semantic tools establish lack of ambiguity, the resultant construction is correct—not simply preferred on the basis of shrewd inferences or educated guesses.[24] The correct construction in turn precludes reference to the nonsemantic contextual source of legislative history. There are sound reasons why so many judges and scholars do not share Justice Scalia's semantically based confidence, as discussed in the sections that follow.

A. Concerns Regarding the Conclusiveness of Plain Meaning

Many judges and scholars are not convinced that statutory meaning can be regularly rendered singularly correct based only on language-related considerations.[25] There are, of course, the proverbial easy cases, but the majority of those are not litigated to the circuit court level, much less accorded discretionary review by the Supreme Court. When statutory

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[23] *See, e.g.*, MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 224-34 (1994); Mertens v. Hewitt Assocs., 508 U.S. 248, 251-63 (1993); W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 86-92, 97-99 (1991).

[24] *Cf.* Dewsnup v. Timm, 502 U.S. 410, 435 (1992) (Scalia, J., dissenting) (criticizing the majority for disregarding well-settled principles of statutory construction by pronouncing "a seemingly clear provision . . . 'ambiguous' *sans* textual and structural analysis").

[25] *See generally* JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 111-12, 232-33 (2010) (discussing lack of agreement among judges and scholars regarding what exactly qualifies as unambiguous text and which ambiguity-resolving tools ought to be given priority).

disputes reach the Court, the justices often regard the contested text as allowing for two distinct yet plausible plain meanings. Some justices may insist that the language is so clear it can only be read one way, while others point to a comparably tenable alternative reading of the same language—adding that *their* assertion of plain meaning is supported or confirmed by accompanying legislative history.[26]

The existence of more than one plausible plain meaning for contested text is a function of several factors. On a semantic level, Lawrence Solan has pointed to the tension between a word's ordinary usage, which is what it prototypically signifies, and a word's definitional usage, which includes a broader range of options.[27] Because members of Congress may well have both prototypical and definitional aspects in mind, judges cannot readily "assume that any instance of a statutory word that strays from the prototype is necessarily outside a statute's scope."[28] Prior to 1980, the justices often relied on straightforward introspection to discover ordinary meaning.[29] Since Justice Scalia's arrival, however, the Court tends to identify ordinary meaning by invoking multiple specific resources, including dictionaries as well as similar language from the same or other statutes.[30] This expansion of sources has led to increased divisiveness, particularly when the justices

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[26] *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 111-19, 133-40 (2001) (Justices Kennedy and Souter advance competing semantic readings of "engaged in interstate commerce," and Souter invokes legislative history for additional support); Sutton v. United Air Lines, Inc., 527 U.S. 471, 482-87, 495-501 (1999) (Justices O'Connor and Stevens advance competing semantic readings of "physical or mental impairment," and Stevens invokes legislative history for additional support); *Mertens*, 508 U.S. at 255-59, 263-73 (Justices Scalia and White advance competing semantic readings of "equitable relief," and White invokes legislative history for additional support); FBI v. Abramson, 456 U.S. 615, 623-29, 633-39 (1982) (Justices White and O'Connor advance competing semantic readings of "records compiled for law enforcement purposes," and White invokes legislative history for additional support).

[27] *See* Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027, 2042-46 (2005). Justice Scalia has shown sensitivity to this distinction at times as well. *See, e.g.*, Smith v. United States, 508 U.S. 223, 242 (1993) ("The Court does not appear to grasp the distinction between how a word *can be* used and how it *ordinarily is* used.") (Scalia, J., dissenting).

[28] Solan, *supra* note 27, at 2046. *See, e.g.*, *Smith*, 508 U.S. at 228-33, 241-44 (presenting disagreement over prototypical versus definitional meaning of "use"); Chisom v. Roemer, 501 U.S. 380, 395-402, 410-13 (1991) (presenting disagreement over prototypical versus definitional meaning of "representative").

[29] *See, e.g.*, Greyhound Corp. v. Mount Hood Stages, Inc., 437 U.S. 322, 330-31 (1978); Tenn. Valley Auth. v. Hill, 437 U.S. 153, 172-74 (1978); Burns v. Alcala, 420 U.S. 575, 580-81 (1975).

[30] *See* Solan, *supra* note 27, at 2054-55 (reporting on 122 cases since 1817 that relied on the ordinary meaning rule, including forty-seven decided since 1980).

engage in recurrent dictionary wars over what constitutes ordinary meaning.[31]

Another source of disagreement about plain meaning stems from the indefinite nature of important statutory terms. Congress's use of words like "reasonable," "recognized," "interfere," "restrain," or "modify"[32] reflects its interest in flexibility, anticipating that citizens, agencies, and courts will adapt a statute's application in light of altered or novel circumstances. This in turn raises the possibility that a prototypical or definitional meaning may give rise to plausible conflicting applications when the word is considered in its statutory setting. To take one example, the Federal Communications Commission Act authorizes the Federal Communications Commission (FCC) to "modify" any tariff-filing requirement; the issue in *MCI Telecommunications Corp. v. AT & T Co.*[33] was whether the commission's decision to make tariff filing optional for nondominant long distance carriers was a valid exercise of this authority. Assuming that the plain meaning of "modify" is minor or incremental change, as opposed to change that is more basic or important,[34] a court still must decide whether the FCC's detariffing initiative reflects a minor or major shift in its requirements. This choice in turn implicates two competing readings of the policies underlying Congress's rate-filing requirement.[35]

Apart from divergent understandings as to what constitutes the plain meaning of a statutory term or phrase,

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[31] *See, e.g.*, Muscarello v. United States, 524 U.S. 125 (1998); MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218 (1994). *See generally* Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227 (1999) (demonstrating subjective and highly variable use of dictionaries); *see also* William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171, 234-40 (2000) (contending that reliance on use of same term in other statutes is prone to judicial manipulation).

[32] *See, e.g.*, 42 U.S.C. § 1988 (2006) (authorizing award of reasonable attorney's fees to prevailing plaintiffs in civil rights cases); 29 U.S.C. § 654(a)(1) (2006) (requiring employers to provide a place of employment "free from recognized hazards" that are likely to result in death or serious physical harm); 29 U.S.C. § 158(a)(1) (2006) (prohibiting employers from interfering with or restraining employees in the exercise of rights to engage in concerted activities such as organizing and collective bargaining); 47 U.S.C. § 203(b) (2006) (authorizing Federal Communications Commission to modify tariff-filing requirements for communications common carriers).

[33] 512 U.S. 218 (1994).

[34] *But cf. id.* at 225-28, 240-42 (presenting disagreement between Justices Scalia and Stevens as to whether definition of "modify" covers only minor shift from status quo ante or also applies to more substantial adjustment).

[35] *See id.* at 229-34, 242-45 (presenting disagreement between Justices Scalia and Stevens over whether change in rate-filing requirement should be considered against backdrop of carriers' obligations to file (a major shift) or against backdrop of policies behind rate-filing requirements (a minor shift)).

based on semantic or policy considerations, judges also differ in doctrinal terms about how to construct plain meaning as a predicate for judicial review. These differences—often framed as disagreements over identifying and weighing the factors that contribute to ambiguity—further complicate the task of determining a single plain meaning. Thus, for instance, when the Court considers the correct application of the Rule of Lenity to criminal statutes, some justices contend that a statutory term or phrase is *not* clear unless the government uses "text, structure, and history . . . to establish that [its] position is unambiguously correct."[36] Others maintain that a text *is* clear for Lenity purposes unless it suffers from "grievous ambiguity or uncertainty," meaning that—based on text, structure, and history—the Court can make "no more than a guess as to what Congress intended."[37] Similarly, when deciding whether Congress has directly and clearly addressed an issue for purposes of applying stage one of the *Chevron* test, the justices disagree as to whether legislative history may be considered along with text and structure in order to ascertain clarity.[38]

Finally, those who interpret or apply statutory text bring to the interpretive enterprise both individual specialized backgrounds and distinctive degrees of self-assurance. Government bureaucrats who receive formal training or extensive ad hoc instruction in the intricacies of a complex statutory scheme may believe they have little discretion because the meaning of key terms or phrases seems entirely clear to them, even if ordinary citizens might not perceive the same clarity.[39] Similarly, judges rely on a range of "objective" interpretive assets as part of their effort to avoid charges of subjective decision making; framing judicial decisions as "inevitable" promotes the vision of a coherent and continuous

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[36] *Muscarello*, 524 U.S. at 148 (Ginsburg, J., dissenting); *see also* United States v. Granderson, 511 U.S. 39, 54 (1994) (Ginsburg, J.); United States v. Bass, 404 U.S. 336, 347-49 (1971) (Marshall, J.).

[37] *Muscarello*, 524 U.S. at 138-39 (Breyer, J.) (internal citations omitted); *see also* United States v. Wells, 519 U.S. 482, 499 (1997) (internal citations omitted).

[38] INS v. Cardoza-Fonseca, 480 U.S. 421, 432-37, 441-49 (1987) (Stevens, J.); *id.* at 452-54 (Scalia, J., concurring).

[39] *See* Edward L. Rubin, *Discretion and Its Discontents*, 72 CHI.-KENT L. REV. 1299, 1328-33 (1997) (discussing different mechanisms used by German and American bank regulators and the inclination of many regulators to deny that they are exercising discretion when applying statutory text).

body of law.[40] Although some judges candidly acknowledge that interpreting statutes involves an irreducible element of discretion or even intuition,[41] they express varying degrees of confidence in the inevitable correctness of justifications accompanying their holdings. Thus, Justice Scalia is famously bullish about being able to find the single right answer in text alone.[42] By contrast, Justice Ginsburg looks to legislative history to help complete her interpretive task, albeit with an attitude of "hopeful skepticism."[43] And Justice Breyer, whose background includes experience as a Senate committee counsel, believes courts must never abandon the effort of seeking to identify legislative intent even though that effort can be at times quite arduous.[44]

Underlying these divergent perspectives about statutory language—and the possible impact of policy considerations and interpreter backgrounds with respect to such language—is the reality that statutes are not disembodied textual products but rather are part of a purposive communicative process. Like other forms of purposive communication, their meaning is a function of participants' intentions as well as dictionary definitions and the semantic properties of sentences.[45] Even Justice Scalia has been known to invoke the concept of congressional intent in some judicial opinions, notwithstanding the dismissive approach he adopts in extrajudicial settings.[46]

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[40] *See generally* Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 RUTGERS L.J. 1, 14-17 (1998); William N. Eskridge Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 378-79 (1990).

[41] *See, e.g.*, RICHARD A. POSNER, HOW JUDGES THINK 107-08 (2008); Judith S. Kaye, *The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern*, 73 CORNELL L. REV. 1004, 1006-07 (1988); Patricia Wald, *Thoughts on Decisionmaking*, 87 W. VA. L. REV. 1, 12 (1984).

[42] *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1989) ("One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists. It is thus relatively rare that *Chevron* will require me to accept an interpretation which, though reasonable, I would not personally adopt.").

[43] *See Nomination of Ruth Bader Ginsburg, To Be Associate Justice of the Supreme Court of the United States, Hearings Before the S. Comm. on the Judiciary*, 103d Cong. 224 (1993).

[44] STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 100 (2010).

[45] *See* Cheryl Boudreau et al., *What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957, 961-71 (2007).

[46] *Compare* ANTONIN SCALIA, A MATTER OF INTERPRETATION 16-17 (Amy Gutmann ed., 1997) (rejecting as incompatible with fair or democratic government "to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated"), *with* Sullivan v. Everhart, 494 U.S. 83, 90 (1990) (Scalia, J.) (invoking what "Congress had in mind"), Green v. Bock Laundry Mach. Co.,

In contrast to Justice Scalia, however, judges who instinctively look beyond plain meaning for reassurance or confirmation believe they are engaged in a more complete task as interpreters. The search for completeness reflects a sense of what many if not most judges regard as a properly responsive and responsible role.

B. Concerns Regarding the Responsible Role of Judges

From the early days of the Supreme Court, justices have observed that when "labour[ing] to discover the design of the legislature, [a judge] seizes every thing from which aid can be derived."[47] More recently, the Court has explained that in a confirmatory setting "common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it."[48] This judicial instinct to explore all potentially relevant information is cross-cultural if not universal. In Britain, even when the House of Lords prohibited courts from consulting legislative history at all to aid in construing enacted laws, there were distinguished jurists who confessed—in their opinions and on the floor of Parliament—to peeking at the legislative record evidence in search of further enlightenment.[49]

The quest for completeness when interpreting presumptively clear text is in part a search for reassurance. There is a lingering fear that in exceptional circumstances, "the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters . . . . [or will] thwart the obvious purpose of the statute."[50] Judges are prepared to examine and evaluate all available resources in an effort to avoid error or injustice.

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490 U.S. 504, 528 (1989) (Scalia, J., concurring) (same), *and* Holloway v. United States, 526 U.S. 1, 20 (1999) (Scalia, J., dissenting) (critical of majority decision as promoting a result "so arbitrary that it is difficult to believe Congress intended it"). *See generally* LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION 102-04 (2010) (discussing Justice Scalia's use of intentionalist talk in his opinions).

[47] United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805) (Marshall, C.J.).

[48] Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 611-12 n.4 (1991) (White, J.,), *cited with approval in* Samantar v. Yousuf, 130 S. Ct. 2278, 2287 n.9 (2010).

[49] *See* James J. Brudney, *The Story of* Pepper v. Hart*: Examining Legislative History Across the Pond*, *in* STATUTORY INTERPRETATION STORIES 258, 262-63 (William N. Eskridge Jr. et al., eds., 2011) (reporting remarks by Lord Denning in a 1979 Court of Appeal opinion and by Lord Templeman during a 1989 debate in the House of Lords). The House of Lords overruled its precedent in 1992 and has allowed courts to consult legislative history since that time. *See id.* at 271-77.

[50] Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982) (Rehnquist, J.) (internal citations and quotation marks omitted).

But the judicial pursuit of confirmatory evidence involves more than concern over possible error. Judges are trained and socialized to believe in the value of interpreting the law in a skillful and impartial manner.[51] Bracketing for present purposes whether judges also derive satisfaction as interpreters from promoting their own policy goals, it seems evident that "judges who want the respect of practicing lawyers, legal academics, and other judges have an incentive to be perceived as committed to the law and skilled in its interpretation."[52]

Invoking legislative history in a confirmatory setting is likely to enhance a judge's stature with numerous audiences. To begin with, confirmatory discussion may be viewed as an aspect of judicial accountability. The parties and their attorneys—who may not agree with one another on the clarity of text—present legislative-history arguments in an effort to inform and persuade the court. When courts consider these arguments as part of the written decision-making process, they exhibit respect for attorneys' efforts and in doing so attest to the procedural neutrality of our judicial system. Judges who cite legislative history in confirmatory contexts also express—at least implicitly—that the parties' arguments appropriately contribute to the truth-seeking approach underlying our competitive advocacy process.

In addition, consideration of confirmatory legislative record evidence promotes transparency by making it clear to fellow judges and other attorneys that the court has not ignored or suppressed assertedly relevant interpretive factors. Without a willingness to engage legislative history arguments, even in the face of apparently clear text, judges risk sliding into more conclusory and less deliberative thinking on appropriately contested statutory matters.[53] Justice Scalia belittles this quest for completeness,[54] but others embrace it to signal that judges are acting responsibly by illuminating all plausible arguments as an essential aspect of their reasoned decision making.

Further, the courts' commitment to addressing legislative history as a confirmatory asset provides guidance to repeat litigants, notably the executive branch and interest

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[51] *See* LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES 54 (2006).

[52] *Id.* at 106.

[53] *See generally* Ethan J. Lieb & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47 (2010), http://www.yalelawjournal.org/images/pdfs/900.pdf.

[54] *See supra* text accompanying note 16.

groups that pursue or resist diverse regulatory agendas. It does so by more fully integrating legislative history as a resource in ongoing interpretive conversations between courts and these repeat players. This kind of methodological completeness has special value when one recognizes that legislative history may serve distinct functions with respect to different subject areas addressed by Congress. The executive branch must construe and apply statutes that feature, inter alia, varying degrees of semantic detail, technical complexity, ideological compromise, and potential for constitutional controversy.[55] Courts' review and evaluation of confirmatory history in these settings reflect a willingness to help agencies and other regular litigants navigate the diverse challenges they face when implementing Congress's instructions.

Finally, the courts' use of legislative-record evidence for confirmatory purposes respects the role of Congress in the lawmaking process. Justice Scalia's fear that this practice incentivizes legislators to avoid the hard work of passing clear text rests on a key misunderstanding of why legislative history matters. Reports from permanent standing committees and published verbatim records of floor debates are the result of innovations in legislative design that were authorized under Article I of our Constitution.[56] From the early nineteenth century onward, Congress has expanded its record-keeping requirements as it developed more detailed procedures for keeping itself informed during the lengthy and complex processes by which bills are introduced, discussed, modified, and approved.[57] Members' reliance on legislative history in helping them understand the meaning of the text on which they will vote remains robust today.[58]

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[55] *See* James J. Brudney & Corey Ditslear, *The Warp and Woof of Statutory Interpretation: Comparing Supreme Court Approaches in Tax Law and Workplace Law*, 58 DUKE L.J. 1231, 1260-65, 1276-90 (2009) (differentiating between how legislative history educates and persuades members of Congress in tax legislation versus workplace laws, and how the Supreme Court has grasped and applied the distinctions); Lieb & Serota, *supra* note 53, at 54-55 (discussing more restricted role for imputed intent with respect to criminal law legislative history).

[56] *See* James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CAL. L. REV. 1199, 1217-22 (2010) (discussing early congressional commitment to publication over secrecy, and to organizing legislative production through standing committees rather than select committees).

[57] *See id.* (describing move to daily official publication of full floor proceedings and regular internal distribution of standing committee reports, and explaining that documents were produced for benefit of members themselves as well as broader public).

[58] *See* Brudney & Ditslear, *supra* note 55, at 1292 & n.249 (referring to multiple statements from republican and democratic legislators since the late 1980s).

Given this constitutionally and historically grounded tradition, courts' consultation of legislative history to confirm textual meaning signifies their readiness to invoke the same materials that legislators have long used to inform and persuade one another. Members and their staffs know the difference between enacted text and explanatory colloquies; further, they generally can be expected to know when these colloquies exist primarily to clarify or amplify meaning rather than to paper over disagreements. While there will be anecdotal instances of legislative history being planted in an effort to assuage wavering legislators or to sway gullible judges, such instances *are* anecdotal and also readily detectable.[59] Justice Scalia's belief that invoking confirmatory legislative history will effectively invite members to excuse or conceal failures to reach a textual bargain reflects insufficient appreciation for how Congress operates and has operated for nearly two centuries.[60]

CONCLUSION

This essay has explored the link between judges' use of legislative history for confirmatory purposes and certain limits on how much work language alone can do in statutory interpretation. Over the past quarter century, Justice Scalia has played a formidable role in elevating discourse on the importance of close textual analysis and the related utility of language and structural canons. His contributions and thinking have greatly enriched our understanding of the interpretive enterprise, from a pragmatic and constitutional as well as a semantic standpoint. At the same time, by framing the debate over legislative history in terms of admissibility rather than weight, Scalia and other textualists have shaped

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[59] *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 262-63 (1994); *see also* James J. Brudney, *Congressional Commentary on Judicial Interpretations of Statutes: Idle Chatter or Telling Response?*, 93 MICH. L. REV. 1, 47-56 (1994) (rejecting arguments for systemically discounting legislative history based on asserted manipulation by committee staff or unrepresentative character of standing committees).

[60] Relatedly, this argument also undervalues the role of purposive or intentionalist readings of statutes in allowing voters to understand and respond at the ballot box to the lawmaking results Congress meant to put in place. As Justice Breyer has recently explained, when courts use canons, dictionaries, and grammar arguments alone to determine a statute's scope, meaning, or enforcement impact, it is far more likely that voters will be responding to (and passing judgment on) meanings that Congress never dreamed it was enacting—one result being a more flawed operation of democratic accountability. *See* BREYER, *supra* note 44, at 94-96.

an interpretive conversation that too often has been impoverished in its nature and focus.

During the mid 1980s, then-Judge Scalia invoked the British "exclusionary rule" to help justify his emergent position of rejecting any role for legislative history.[61] The British courts, however, have long abandoned the exclusionary approach; instead, they recognize that legislative history statements are at times useful as an interpretive resource, "perhaps especially as a confirmatory aid."[62] British judges and legal academics now grapple with the extent to which their legislative history may illuminate the meaning of enacted text in particular types of complex statutory settings.[63] Similar challenging questions of retail application rather than wholesale exclusion remain to be explored in the U.S. context as well.[64] Recognizing why judges so often turn to legislative history for reinforcement and assurance may encourage us to move beyond debates over admissibility, and to address these types of interpretive challenges at both judicial and academic levels.

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[61] *See* Judge Antonin Scalia, Speech on Use of Legislative History 1-2 (delivered between fall 1985 and spring 1986 at various law schools) (transcript on file with author).

[62] Harding v. Wealands, [2006] UKHL 32, [2006] 4 All. E.R. 1, 25 (Lord Carswell). For discussion of other recent confirmatory uses by Britain's highest court, see Brudney, *supra* note 49, at 284.

[63] *See, e.g.*, Wilson v. First Cnty. Trust Ltd., [2003] UKHL 40, [2003] 4 All E.R. 97 (discussing consultation of Hansard materials to help determine a statute's compatibility with European Convention of Human Rights); Regina v. Sec'y of State for the Env't *ex parte* Spath Holme Ltd., [2001] 1 All E.R. 195 (discussing relevance of Hansard materials when considering scope of government's discretionary powers conferred by statute).

[64] In addition to the differential role played by legislative history in different subject area settings, discussed *supra* note 55 and accompanying text, courts and scholars might consider (a) whether legislative history accompanying omnibus bills is less suitable for judicial use because congressional deals on such a grand scale are far more likely to be indecipherable; (b) whether legislative history should be presumed to carry less weight where the law is administered primarily by a federal agency rather than private parties; and (c) whether legislative history should be regarded as presumptively more valuable for controversies involving apparent lack of foresight as opposed to those arising from demonstrable failure to reach congressional consensus.