

# Avoiding Judicial In-Activism: The Use of Legislative History to Determine Legislative Intent in Statutory Interpretation

Matthew B. Todd\*

*[A] page of history is worth a volume of logic.*<sup>1</sup>

## I. INTRODUCTION

The core function of the judiciary is to determine what the law is, not to determine what the law should be.<sup>2</sup> In determining what the law is, it is empirically necessary that courts determine the legislative intent that went into drafting the law.<sup>3</sup> To argue that the words themselves have meaning beyond, separate from, or in the place of what was intended by the drafter is to forget that the very purpose of language is to convey or communicate ideas to others; the words chosen are merely a means to an end rather than the end itself.<sup>4</sup> One cannot expect to fully understand statutory language unless he or she understands what was intended by the drafter.<sup>5</sup> When the judiciary fails to take every reasonable measure available to discern the legislature's intent, it can be considered an affirmative act of replacing the will of the legislature with that of its own. In essence, when judges refuse to allow their decision-making to be guided by the intent of the legislature, this departure is by its very nature a form of impermissible judicial activism.<sup>6</sup>

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\* B.S. 1999, University of Kansas; J.D. Candidate 2007, Washburn University School of Law. I thank my wife and family for their endless support and encouragement. I owe a debt of gratitude to Professor James Concannon and Dean Bill Rich, whose ability to condense a vast knowledge of constitutional and statutory law into a digestible form provided insight and direction to this note; Professor Myrl Duncan for constantly pushing me to improve my writing and editing; and the *Washburn Law Journal* editorial board, especially Matthew Holcomb and Patrick Turner, for their patience and tireless efforts to ensure that my words conveyed their intended meaning.

1. *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Holmes, J.).

2. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”).

3. Sometimes the legislative intent is clear from the plain language used in a statute, but often it is obscured, whether purposefully or unintentionally, by vague or dense statutory language. See JOSEPH M. WILLIAMS, *STYLE: THE BASICS OF CLARITY AND GRACE* 2 (rev. ed. 2003).

4. Communication is defined as “[t]he exchange of thoughts, messages, or information, as by speech, signals, writing, or behavior.” *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 383 (3d ed. 1992).

5. Understanding is defined as “the fact of perceiving what is *meant*.” *THE RANDOM HOUSE DICTIONARY* 943 (concise ed. 1980) (emphasis added).

6. Judicial activism is defined as “the practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent of or in

Within the structure of the United States' three-branch democracy, each branch carries with it certain responsibilities, obligations, and duties that are necessary for the government to function properly.<sup>7</sup> The Federal Constitution charges the Legislative branch with the responsibility of enacting the law, the Executive branch with the obligation to determine the most effective way to carry out the law, and the Judicial branch with the duty of interpreting the law to ensure that the law or the manner in which it is enforced does not interfere with the rights guaranteed by the Constitution.<sup>8</sup> For the democratic structure to remain successful, the role of each governmental branch must remain separate from and provide appropriate checks and balances on the others.<sup>9</sup>

In addition to the structural checks and balances essential to our form of government, the political process provides an additional inherent check on the activity of the government.<sup>10</sup> This political check is of particular importance in ensuring that laws are enacted and carried out in accordance with the will of the people. By enacting laws in opposition to the will of the people, the legislature subjects itself to the risk of political repercussions.

In stark contrast to the politically-charged legislative process, the

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opposition to supposed constitutional or legislative intent." MERRIAM-WEBSTER'S DICTIONARY OF LAW 270 (1996), available at <http://dictionary.reference.com/browse/judicial%20activism>; cf. BLACK'S LAW DICTIONARY 380 (2d Pocket ed. 2001) (defining judicial activism as "[a] philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions"). "Generally, the definition of an 'activist judge' is one who decides the outcome of a controversy before him or her according to personal conviction, even one sincerely held, as opposed to the dictates of the law as constrained by legal precedent and, ultimately, our Constitution." *Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1271 (11th Cir. 2005) (Birch, J., concurring). "The extent to which the decisions of judges are characterized as activist is [] measured by the degree to which the judiciary has substantially changed the original intent of the law handed down by an elected legislative branch." Search.com, Judicial Activism, [http://www.search.com/reference/Judicial\\_activism](http://www.search.com/reference/Judicial_activism) (last visited Oct. 22, 2006). Judicial activism is much like beauty—in the eye of the beholder. See Editorial, *Activism Is in the Eye of the Ideologist*, N.Y. TIMES, Sept. 11, 2006, at A1. Critics so often invoke the term, which generally reflects nothing more than disagreement with the outcome of a particular case, that "[t]oday, a charge of 'judicial activism' standing alone means little or nothing because the term has acquired so many distinct and even contradictory meanings." Keenan D. Kmiec, Comment, *The Origin and Current Meanings of "Judicial Activism"*, 92 CAL. L. REV. 1441, 1477 (2004) (offering an invitation to a "meaningful conversation about the judicial craft").

7. See *INS v. Chadha*, 462 U.S. 919, 951 (1983) ("The Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility."). "In our constitutional system, the importance of judicial restraint—the idea that judges interpret the law, not make it—cannot be overstated." Alberto R. Gonzales, U.S. Attorney General, Prepared Remarks at George Mason University (Oct. 18, 2005), available at [http://www.usdoj.gov/ag/speeches/2005/ag\\_speech\\_051018.html](http://www.usdoj.gov/ag/speeches/2005/ag_speech_051018.html).

8. See U.S. CONST. art. I-III.

9. *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 91 (1947) ("By these mutual checks and balances by and between the branches of government, democracy undertakes to preserve the liberties of the people from excessive concentrations of authority."). The framers of the U.S. Constitution recognized that "liberty was dependent upon a separation of the government into the three branches of the executive, the legislative and the judiciary." William Howard Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of Government*, 25 YALE L.J. 599, 600 (1916); see also THE FEDERALIST NO. 51 (Alexander Hamilton).

10. David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2509 (1998).

Framers of the Constitution envisioned the court's role of interpreting the law as remaining completely free from political pressure.<sup>11</sup> A fair, free, and independent judiciary is the "cornerstone" to a democratic nation.<sup>12</sup> To provide a just and impartial interpretation of the law, the judiciary is deliberately insulated from the political process.<sup>13</sup>

Existing within this democratic framework is the need for an effective political check on the enactment of laws, yet it also is important that the judiciary be free from political pressure. Thus, it is imperative that the judiciary not enact the law. When the judiciary inadvertently or deliberately exceeds its scope and enacts the law by replacing the will of the legislature with its own, it circumvents the intricate system of checks and balances required for an effective representational democracy.<sup>14</sup> "It is possible that for a time the public would be benefited by the performance of such functions by the court, but the inevitable result in the end would be to lessen its efficiency and prestige as the guardian and conservator of the constitution and laws and the rights of individuals under the law."<sup>15</sup>

As a necessary precaution against inadvertently creating law while interpreting statutes, judges must make every reasonable attempt to fully understand the will of the legislature. Legislative history provides insight into the purpose and meaning of statutory text and, if employed responsibly, can prevent the judiciary from creating laws in conflict with the goals and intent of the elected legislature. It may be appropriate to constrain the application of legislative history to non-binding, persuasive authority; however, a judge's inaction—the outright refusal to consider any extrinsic legislative sources—is an impermissible form of judicial *inactivism*.<sup>16</sup>

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11. GERHARD CASPER, SEPARATING POWER 137-38 (1997); *see also* U.S. CONST. art. III, § 1; *United States v. Will*, 449 U.S. 200, 217-18 (1980); *Evans v. Gore*, 253 U.S. 245, 252-53 (1920). "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support." THE FEDERALIST NO. 79, at 234 (Alexander Hamilton) (Roy P. Fairfield ed., 1981). Life tenure of federal judges is an "excellent barrier to the encroachments and oppressions of the representative body." THE FEDERALIST NO. 78 (Alexander Hamilton), *supra*, at 227.

12. Karen J. Mathis, President, American Bar Association, Remarks at the Tenth Circuit 2006 Bench & Bar Conference (Sept. 7, 2006).

13. *See* *Newdow v. U.S. Congress*, 328 F.3d 466, 471 (9th Cir. 2003); *State ex rel. Young v. Brill*, 111 N.W. 639, 650-51 (Minn. 1907) ("[I]t is apparent that the founders of our system of government intended to confine the courts to their judicial duties, and thus prevent them from becoming involved in the turmoil of political life.")

14. Just as legislators should not interpret the law, judges should not make the law. *See* CASPER, *supra* note 11, at 138.

15. *Brill*, 111 N.W. at 651.

16. Other scholars have referred to "judicial inactivism" in terms of judges' failure to perform the minimum judicial requirements. *See, e.g.*, Chad M. Oldfather, *Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide*, 94 GEO. L.J. 121, 123 (2005); George F. Parker, *The Regulation of Insider Trading in Japan: Introducing a Private Right of Action*, 73 WASH. U. L.Q. 1399, 1423 n.176 (1995) (describing Japanese courts as inactivist agents of the political leaders). This note instead addresses another common practice among jurists, which is more closely related to the common understanding of "activism," yet derives from a judge's inaction—the failure to take advan-

In Part II, this note addresses the historical development of statutory interpretation from the English common law to contemporary American jurisprudence, as well as the background of legislative history and its evolution into an important tool in discerning the intent of legislatures. Part III of this note discusses specific categories of legislative history and contexts in which each has been traditionally implemented, and promotes appropriate and responsible uses of legislative history to interpret the law in accordance with the intent of the enacting legislature.

## II. HISTORICAL DEVELOPMENT AND USE OF LEGISLATIVE HISTORY

In America, the judicial invocation of legislative history to interpret statutory text has occurred in progressing amounts and has been afforded varying degrees of authoritative weight. Throughout much of the nineteenth century, when interpreting acts of the legislature, American courts relied primarily on statutory text and canons of construction, rather than extrinsic legislative sources.<sup>17</sup> However, beginning around the turn of the century, judges and legal commentators developed the notion that “the proceedings of the legislature in reference to the passage of an act may be taken into consideration in construing it.”<sup>18</sup> This belief that legislative materials may be useful during statutory interpretation experienced widespread growth throughout the twentieth century.<sup>19</sup> One commentator, who observed the Supreme Court’s increased reliance on legislative history during the late twentieth century, opined that “[n]o occasion for statutory construction now exists when the Court will *not* look at the legislative history.”<sup>20</sup> Even more recently, however, there has been a backlash against the use of such materials, and there is disagreement among judges and legal scholars regarding the use of legislative history in contemporary courts. Among the most vocal and recognized opponents of reliance on legislative history is Supreme Court Justice Antonin Scalia, who has written “that legislative history should not be used as an authoritative indication of a statute’s meaning.”<sup>21</sup> In

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tage of the available resources necessary to effectively perform the judicial duties. *See also* Randy T. Austin, *Employment Division v. Smith: A Giant Step Backwards in Free Exercise Jurisprudence*, 1991 B.Y.U. L. REV. 1331, 1347 n.88 (1991).

17. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 207 (1994); *see also* Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 210 (1996).

18. ESKRIDGE, *supra* note 17, at 207.

19. *Id.*; *see also* Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1297 (2002).

20. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 195 (1983).

21. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 29-30 (Amy Gutmann ed., 1997). “However, Justice Scalia accepts the use of legislative history to con-

addition to the authoritative value, another question at issue is whether legislative history should be relied on at all. The debate over implementation, extent of reliance, and authoritative value of extrinsic legislative sources in statutory interpretation continues to be “the hottest one in recent statutory studies.”<sup>22</sup>

Legislative history and legislative intent are often analyzed separately, but if extrinsic legislative sources have any value in ascertaining the legislative intent, that value rests on the presumption that the purpose of statutory interpretation involves determining the intent of the legislature.<sup>23</sup> According to logic, if words are the symbolic representation of an attempt to communicate a subjective meaning, the meaning intended by the author must be “the ultimate object of search” when seeking to interpret a statute.<sup>24</sup> Stated differently, to understand the letter of the law, one must also understand the spirit of the law.<sup>25</sup>

The concept of legislative intent as the ultimate goal of statutory interpretation did not develop overnight. Instead, it is commonly viewed as the product of an evolutionary process.<sup>26</sup> Discovering the subjective intent of a group of legislators was once thought of as an unattainable ideal, but with increased public awareness regarding the context of the legislative process and the availability of extrinsic legislative sources, ascertainment of legislative intent has emerged as a legitimate goal of statutory interpretation and has been used in many contemporary cases to provide more just results.<sup>27</sup>

The current role of American judges in interpreting statutes was shaped largely by the methods used in pre-colonial England.<sup>28</sup> As one commentator put it, American “thinking about statutory interpretation is the product of a long period of evolution from the earliest English practice to the modern period.”<sup>29</sup> Instilled with English traditions, the

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firm that an absurd disposition was not intended.” KENT GREENAWALT, *LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS* 172 n.202 (1999) (citing *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring)). Additionally, Justice Scalia appears willing to place reliance on something more susceptible to subjective interpretation—the “public history of the times in which [legislation] was passed”—than on purely legislative sources. Scalia, *supra*, at 30 (quoting *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845)).

22. ESKRIDGE, *supra* note 17, at 207.

23. *But see* Scalia, *supra* note 21, at 31 (objecting to reliance on legislative history on the grounds that the legislative intent is not “the proper criterion of the law”).

24. REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 36 (2d prt. 1975) (“[W]e are interested in the intended meaning of the author in the sense that the process of communication makes no sense unless some intention can be attributed to him.”).

25. In the words of the author: My faith resides not in the words of man; my faith resides in that which moved the man to write.

26. *See, e.g.*, WILLIAM D. POPKIN, *STATUTES IN COURT: THE HISTORY OF STATUTORY INTERPRETATION* 7 (1999) (“Our thinking about statutory interpretation is the product of a long period of evolution from the earliest English practice to the modern period.”).

27. *See infra* Part II.A.

28. *See, e.g.*, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 142-43 & nn.21-22 (1984); *Gannett Co. v. DePasquale*, 443 U.S. 368, 424 (1979); *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 63 n.8 (1964); *Brown v. Walker*, 161 U.S. 591, 608 (1896).

29. POPKIN, *supra* note 26, at 7.

uniquely American concept of a representative government, a “government of the people, by the people, for the people,”<sup>30</sup> resulted in a fusion of early methods of statutory interpretation with a more pragmatic approach to resolving questions of statutory meaning. Statutory interpretation developed from an era of distrust of the legislature, when legislative intent was used to expand or contract the statutory language only when necessary to achieve justice,<sup>31</sup> into an era of “cautious deference to the legislature,” when legislative history was more heavily relied on in order to achieve equity and avoid absurd results.<sup>32</sup> Ultimately, many contemporary American courts view the judicial role of statutory interpretation as an opportunity to support the democratic process by applying statutes in accordance with the legislative intent and purpose.<sup>33</sup>

#### A. *The English Tradition of Equitable Interpretation*

Much of early American legal theory and practice was derived from preexisting English traditions; therefore, an examination of the judicial role regarding statutory interpretation advanced by English courts and legal commentators is useful to provide context for the modern practice.<sup>34</sup> Long before American courts and legal scholars even contemplated the role of the judiciary, English courts had well-established traditions of statutory interpretation.<sup>35</sup> The extent to which the English traditions permeated into American courts is unclear, “but there is no doubt that previous English approaches influenced legal thought in this country.”<sup>36</sup> Much can be learned not only from the state of English law at the time America was founded, but also from how English law developed up to that point.

In England, between the thirteenth and seventeenth centuries, a gradual separation of the legislative and judicial functions occurred, but a “sense of a common enterprise between Parliament and the courts” remained throughout that period.<sup>37</sup> Although it was viewed as a joint effort, much of the legislative role was limited to codifying the common law, and “judges continued to view themselves as the senior partners in

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30. President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), *available at* <http://www.ushistory.org/documents/gettysburg.htm>.

31. *See* POPKIN, *supra* note 26, at 112-13 (concluding that late nineteenth-century statutory interpretation was tempered by judicial efforts to protect the common law from being discarded by legislative reform).

32. *Id.* at 131-33.

33. *See infra* notes 122-125 and accompanying text.

34. POPKIN, *supra* note 26, at 9.

35. *Id.*; *see also* William N. Eskridge, Jr., *Textualism, the Unknown Ideal?*, 96 MICH. L. REV. 1509, 1523-24 (1998).

36. POPKIN, *supra* note 26, at 9; *see, e.g.*, Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned from King Henry III*, 49 ST. LOUIS U. L.J. 393, 395, 429, 479-80 (2005).

37. POPKIN, *supra* note 26, at 9.

the collaborative effort to identify what that law was.”<sup>38</sup> Accordingly, it was common for English courts to develop theories of statutory interpretation that preserved the courts’ dominant role in the lawmaking process.<sup>39</sup>

The most notable theory of statutory interpretation that developed in English courts is referred to as “equitable interpretation.”<sup>40</sup> Under this theory, judges interpreted statutes in the context of both the “letter” and the “spirit” of the law, “and the ‘spirit’ was referred to as the ‘equity of the statute.’”<sup>41</sup> This spirit, or equity, evoked two separate connotations. Equity, within the scope of equitable interpretation, referred both to “the statute’s *objective*” as well as “substantive background considerations, [which were] usually derived from the common law.”<sup>42</sup> Using the theory of equitable interpretation, English courts would surmise an expansive or restrictive meaning from the letter of the law to achieve the equity of the law, in accordance with legislative objectives or in light of other pragmatic considerations.<sup>43</sup>

“[T]he best-known explanation of equitable interpretation in the late sixteenth century” can be found in Plowden’s *Commentaries*.<sup>44</sup> Edmund Plowden, widely recognized as a prominent English lawyer and legal scholar,<sup>45</sup> published reports of decided cases supplemented with commentary on legal theory.<sup>46</sup> The case of *Eyston v. Studd*<sup>47</sup> was accompanied by one of Plowden’s most extensive commentaries on equity’s role in statutory interpretation, which made clear “that something underlying the text is the ‘real’ law.”<sup>48</sup> Plowden recognized that English law, like all law, is composed of two elements, namely the body and the soul.<sup>49</sup> “[T]he letter of the law is the body of the law, and the sense and

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38. *Id.* at 11 (noting that judges often claimed to possess “privileged knowledge of what the statute meant because they drafted the legislation”).

39. *Id.*

40. *Id.*; see also Darien Shanske, Note, *Four Theses: Preliminary to an Appeal to Equity*, 57 STAN. L. REV. 2053, 2075 (2005).

41. POPKIN, *supra* note 26, at 11.

42. *Id.* (emphasis added). “The idea of equitable interpretation builds upon the Aristotelian premise that equity should mitigate the defects of generally worded laws.” John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 29 (2001).

43. POPKIN, *supra* note 26, at 11; see also HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 57-59 (2d ed. 1911). Although equitable interpretation gave courts authority to expand or contract the law, “judges were more likely to limit than extend statutes” to protect the common law from legislative encroachment. POPKIN, *supra* note 26, at 11.

44. POPKIN, *supra* note 26, at 11.

45. See, e.g., Wikipedia, Edmund Plowden, [http://en.wikipedia.org/wiki/Edmund\\_Plowden](http://en.wikipedia.org/wiki/Edmund_Plowden) (last visited Oct. 2, 2006); see also Paul M. Shupack, *Natural Justice and King Lear*, 9 CARDOZO STUD. L. & LITERATURE 67, 83 (1997); A.W.B. Simpson, *Legal Iconoclasts and Legal Ideals*, 58 U. CIN. L. REV. 819, 823 n.17 (1990).

46. POPKIN, *supra* note 26, at 11.

47. 2 Plowden 459, 75 Eng. Rep. 688 (K.B. 1574).

48. POPKIN, *supra* note 26, at 11; see also BLACK, *supra* note 43, at 60.

49. See *Eyston*, 2 Plowden at 465, 75 Eng. Rep. at 695.

reason of the law is the soul of the law.”<sup>50</sup> Moreover, “it is not the words of the law, but the internal sense of it that makes the law.”<sup>51</sup> As a result, according to Plowden, understanding the letter of the law does not automatically give way to understanding the sense and reason of the law, “for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive.”<sup>52</sup> Rather than judges limiting interpretation to the letter of the law, “the soul of the law is what the judge *should* seek when interpreting a statute.”<sup>53</sup> During this time period, equitable interpretation, which “enlarge[d] or diminishe[d] the letter according to [equity’s] discretion,” was widely used in England to “correct” any defects in the plain meaning of the statutory language.<sup>54</sup>

Another example of the English tradition of equitable interpretation comes from *Heydon’s Case*,<sup>55</sup> arguably “the most famous statutory interpretation case from the sixteenth century.”<sup>56</sup> In *Heydon’s Case*, the court applied a statute that voided an enumerated list of certain types of property transfers by religious establishments, which were being used to avoid seizure by King Henry VIII.<sup>57</sup> In the judicial opinion extending the statute to cover the transfer of copyhold interests, a growing practice that was “being used to evade the law,” the court included a statement on the proper method of interpreting statutes.<sup>58</sup>

After listing three interpretive criteria—the prior common law, the mischief for which it failed to provide, and the legislative remedy—the court invoked the “true reason of the remedy,” arguing that “the office of all the judges is always to make such construction as shall suppress the mis-

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50. *Id.* Plowden further explains this bifurcation in the law by analogizing the sense of the law to the kernel of a nut:

[T]he law may be resembled to a nut, which has a shell and a kernel within, the letter of the law represents the shell, and the sense of it the kernel, and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law, if you rely only upon the letter, and as the fruit and profit of the nut lies in the kernel, and not in the shell, so the fruit and profit of the law consists in the sense more than in the letter.

*Id.*

51. *Id.*

52. *Id.*

53. POPKIN, *supra* note 26, at 11-12.

54. *Eyston*, 2 Plowden at 465, 75 Eng. Rep. at 695-96; *see also* BLACK, *supra* note 43, at 60; POPKIN, *supra* note 26, at 12. Many of Plowden’s legal theories have survived into modern times. For example, “Judge Learned Hand’s twentieth-century writings about statutory interpretation” revive one of Plowden’s analogies that statutory interpretation should be like having “a conversation with [a] hypothetical lawmaker.” POPKIN, *supra* note 26, at 12. As stated by Plowden,

in order to form a right judgment when the letter of a statute is restrained, and when enlarged, by equity, it is a good way, when you peruse a statute, to suppose that the law-maker is present, and that you have asked him the question you want to know touching the equity, then you must give yourself such an answer as you imagine he would have done, if he had been present.

*Eyston*, 2 Plowden at 465, 75 Eng. Rep. at 695-96.

55. 3 Co. Rep. 7 a, 76 Eng. Rep. 637 (Ex. 1584).

56. POPKIN, *supra* note 26, at 14.

57. *Heydon’s Case*, 3 Co. Rep. at 7 a-b, 76 Eng. Rep. at 638; *see also* POPKIN, *supra* note 26, at 14.

58. POPKIN, *supra* note 26, at 14.

chief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief."<sup>59</sup>

In essence, the court equitably applied the statute by relying on objective and substantive background considerations, such as the gap in the common law that Parliament attempted to fill with the statute.<sup>60</sup> Although Parliament did not specifically proscribe this particular attempt to evade the law when it enumerated the list of illegal property transfers, the court suppressed the "mischief" that the legislative body intended to remedy with the statute to achieve the purpose and objective of the statute.<sup>61</sup> An argument can be made that, through such an extension of a statute, the English courts engaged in a form of judicial activism; however, English courts' authority to equitably interpret a statute in a restrictive manner, particularly to prevent interference with fundamental rights, remains unchallenged.<sup>62</sup>

The eighteenth century saw a shift in the courts' approach to statutory interpretation, as the parliamentary lawmaking process gained authority and effect.<sup>63</sup> With an increase in the quantity of legislation by the middle of the century, courts gave greater deference to the legislature and tempered their own efforts to seek out the spirit of the law.<sup>64</sup> The opinion from *Colehan v. Cooke*<sup>65</sup> summarizes the sentiment toward the practice of statutory interpretation in eighteenth-century England:

When the words of an Act are doubtful and uncertain, it is proper to inquire what was the intent of the Legislature: but it is very dangerous for Judges to launch out too far in searching into the intent of the Legislature, when they have expressed themselves in plain and clear words.<sup>66</sup>

The concept of seeking the intent of the legislature as the ultimate goal was not lost, but greater weight was given to the words themselves, particularly when the jurists felt confident that the words clearly expressed the legislature's intent.

Sir William Blackstone, the preeminent English theorist and commentator regarding eighteenth century English law, echoed the call for a decline in equitable interpretation, and advocated supplementing equitable interpretation with "a sequential interpretive process."<sup>67</sup> According to Blackstone, "[t]he fairest and most rational method to interpret

59. *Id.* (quoting *Heydon's Case*, 3 Co. Rep. at 7 b, 76 Eng. Rep. at 638).

60. *See supra* notes 41-42 and accompanying text.

61. *Heydon's Case*, 3 Co. Rep. at 7 b, 76 Eng. Rep. at 638.

62. *See* POPKIN, *supra* note 26, at 17. *See generally* Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 240-41 & n.84 (2003) (noting that there are numerous examples of courts in England and the United States that used equity to extend statutes; this practice was not considered an abuse of discretion or a form of "illicit lawmaking").

63. POPKIN, *supra* note 26, at 19.

64. *See* Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 23-24, 33 (2001) (referencing "[t]he doctrine of legislative supremacy").

65. Willes 393, 125 Eng. Rep. 1231 (C.P. 1742).

66. *Id.* at 397, 125 Eng. Rep. at 1233.

67. POPKIN, *supra* note 26, at 19-20.

the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable.”<sup>68</sup> Blackstone promoted the view that courts should look first to the words in their ordinary meaning, and “then move[] beyond the words *only* when they ‘happen to still be dubious.’”<sup>69</sup> Only after a review of the context, or surrounding text, and subject matter of the legislation has failed to clarify the intent would it be appropriate to consider “other interpretive criteria,” such as the potential absurd consequences that might result from a literal interpretation.<sup>70</sup> Lastly, Blackstone argued that “the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it.”<sup>71</sup> Blackstone insisted that statutes be interpreted equitably, but he favored formalized canons and rules to govern the courts’ equitable constructions to ensure that the resulting law was proper and consistent with the legislative intent.<sup>72</sup> By 1785, any “power to engage in extensive equitable interpretation, such as extending the list of property in *Heydon’s Case* to include copyholds,” was no longer recognized in England.<sup>73</sup> To the extent that judicial action claimed authority to reshape the law into something more palatable to the jurist’s own conception of equity and, in effect, attempt to usurp power from the legislature, the principle of equitable interpretation “finds no place in modern law.”<sup>74</sup>

*B. Reworking Inherited Traditions of Statutory Interpretation in American Courts*

During the Revolutionary Era, American judicial methods of statutory interpretation represented a distinct continuation from the English practices;<sup>75</sup> however, American legal thought “differed from its English antecedents” by viewing legislative lawmaking “as an expression of popular will” that recognized a connection between the people and the

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68. WILLIAM BLACKSTONE, 1 COMMENTARIES \*59. Blackstone lists the most natural and probable signs of legislative intent as “the words, the context, the subject matter, the effects and consequence, or the *spirit and reason* of the law.” *Id.* (emphasis added).

69. POPKIN, *supra* note 26, at 20 (quoting BLACKSTONE, *supra* note 68, at \*60).

70. *Id.* The presumption against absurdity operates to avoid results that are physically or morally impossible, “which is contrary to reason and common sense, or, in other words, which could not be attributed to a man in his right senses and gifted with ordinary judgment.” BLACK, *supra* note 43, at 130 (citing *State v. Hayes*, 81 Mo. 574, 585 (1884)).

71. BLACKSTONE, *supra* note 68, at \*61; *see also* BLACK, *supra* note 43, at 69; POPKIN, *supra* note 26, at 21.

72. William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 1038-39 (2001).

73. POPKIN, *supra* note 26, at 19.

74. BLACK, *supra* note 43, at 63. Nevertheless, there is modern evidence that an underlying principle of equitable interpretation has survived: “This idea [is] that a given case should not be taken to be within a statute, though apparently covered by its comprehensive terms, unless it is within the spirit and reason of the law.” *Id.* at 65.

75. Eskridge, *supra* note 72, at 1013.

government which represented them.<sup>76</sup> This representative form of government gave a certain amount of credibility to Congress and state legislatures that Parliament lacked.<sup>77</sup> “In the politics of 1776, legislatures . . . were the voice of the people.”<sup>78</sup> Early in the Revolutionary Era, such confidence in the legislature led to concerns about allowing judges to have too much discretion.<sup>79</sup> However, with fears of “legislative encroachment on individual rights” and deliberate legislative attempts “to usurp the judicial function,” the pendulum swung away from confidence in the legislatures to an acrimonious suspicion of legislative enactments.<sup>80</sup> At the height of the Revolutionary Era, people commonly perceived legislatures to be a much greater threat than the judiciary.<sup>81</sup>

“This partial and cautious rehabilitation of judging relied on a readily available English tradition,” which involved courts utilizing the common law to protect individual rights.<sup>82</sup> This notion of courts protecting the rights of individuals from the acts of the legislature was reflected by the leaders of the Revolutionary Era. “Even [Thomas] Jefferson, an early proponent of expansive legislative power and always a critic of judicial lawmaking, came to fear legislative encroachment on individual rights.”<sup>83</sup> Likewise, Alexander Hamilton argued in *The Federalist Papers* that statutory interpretation by an independent judiciary “provided a check on the legislature.”<sup>84</sup>

[I]t is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws.<sup>85</sup>

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76. POPKIN, *supra* note 26, at 31.

77. *Id.*

78. *Id.*

79. *Id.* at 32.

80. *Id.* at 33.

81. *Id.*

82. *Id.* According to one commentator:

The Continental Congress in 1774 had emphasized that the “colonies [were] entitled to the common law of England,” and common law principles were embodied in many early state constitutions adopting declarations of rights and in the federal Constitution’s incorporation of a Bill of Rights (whose first eight articles included traditional common law rights enjoyed by Englishmen).

*Id.* (quoting *Declaration and Resolves of the First Continental Congress* (Oct. 1774), in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. NO. 69-398, at 3 (Charles C. Tansill, ed., 1927)) (alteration in original).

83. *Id.*

84. *Id.* at 42; see THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 11, at 231-32.

85. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 11, at 231. “It is the highest calling of federal judges to invoke the Constitution to repudiate unlawful majoritarian actions and, when necessary, to strike down statutes that would infringe on fundamental rights, whether such statutes are adopted by legislatures or by popular vote.” *Newdow v. U.S. Congress*, 328 F.3d 466, 471 (9th Cir. 2003).

According to Hamilton, the role of the judiciary was not only to interpret the law, but also to protect certain classes of citizens who became victims of lawmakers' unjust majoritarian politics.<sup>86</sup> Although there was significant growth of faith in the legislative process during the Revolutionary Era, statutory interpretation empowered the judiciary to provide adequate protection of individual rights by placing a much needed check on the legislature.

### 1. The Evolution of Statutory Interpretation in American Courts During the Nineteenth Century

During the nineteenth century, the evolution of statutory interpretation was most significantly impacted by the skepticism of both the courts and the practicing bar regarding the increasing reliance on legislation.<sup>87</sup> The prevailing view held by legal professionals during the first half of the century "was that legislation primarily patched up the common law, which continued to dominate the law."<sup>88</sup> Moreover, what had initially been a collaborative effort between judges and legislatures, the effort required to accommodate the common law with statutory supplements ultimately resulted in conflict between courts and lawmakers.<sup>89</sup>

Through the first half of the century, lawyers' reluctance to acknowledge legislation as a reputable source of law "took the form more of benign neglect than active hostility."<sup>90</sup> However, as the lawmaking partnership between legislatures and judges began to dissipate near the middle of the nineteenth century, both courts and attorneys "set themselves actively against legal change, whether judicial or legislative."<sup>91</sup> This increased opposition toward legislation, which began proximate to the Civil War, resulted from "[a] shift in the legal culture [that] occurred during this period, separating law from the people."<sup>92</sup> In reaction to this perceived legislative shift away from the will of the people, courts' methods of statutory interpretation often reflected an antagonistic view of legislation.<sup>93</sup> This hostility frequently resulted in judges applying

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86. See THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 11, at 231 (arguing judicial independence also serves as an obstacle that deters legislators from attempting to pass iniquitous legislation); see also POPKIN, *supra* note 26, at 42. Legal scholars have argued that such "strict judicial scrutiny" should be applied in only those situations where the political branches intrude on constitutionally protected fundamental rights. Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1738 (1992).

87. POPKIN, *supra* note 26, at 59. "The dominant reality, with important implications for statutory interpretation, was an increasing reliance on statutes; at the same time, the practicing bar was reluctant to accept legislation as a significant source of law." *Id.*

88. *Id.* at 61.

89. *Id.* at 8. "Initially, the task of creating the law was shared by courts and legislatures . . . ." *Id.* at 59.

90. *Id.* at 59.

91. *Id.*

92. *Id.* at 60.

93. *Id.*; Richard E. Levy & Robert Mead, *Using Legislative History as a Tool of Statutory Construction in Kansas*, J. KAN. B. ASS'N., May 2002, at 35, 38.

canons of construction, such as the derogation canon, by which courts would narrowly construe statutes that deviated from the common law.<sup>94</sup> Relying more heavily on the common law not only bolstered support from the general public, but it also allowed courts to reassert a dominant role in the lawmaking process toward the end of the nineteenth century.

A “review of nineteenth-century decisions preserving the common law against statutory change suggests that judges were clearly suspicious of the policies underlying legislation.”<sup>95</sup> During this time, courts often implemented methods of statutory interpretation that were based “on the assumption that there was a ‘right’ answer regarding legislative intent in statutory interpretation—just as there was a ‘right’ answer in common law . . . matters.”<sup>96</sup> Thus, even when legislation did not threaten the common law, “the dominant judicial perspective” was to limit the reach of the statute.<sup>97</sup> This perspective is exemplified in the influential Supreme Court case of *Holy Trinity Church v. United States*.<sup>98</sup> In *Holy Trinity*, a church was charged with violating a federal statute that made it unlawful for any person to bring “any foreigner or foreigners, into the United States . . . to perform labor or service *of any kind*.”<sup>99</sup> In delivering the opinion of the Court, Justice Brewer conceded that the letter of the law seemed to clearly prohibit Holy Trinity’s act, which was hiring a pastor from England to come to its church in New York.<sup>100</sup> To avoid an absurd result, however, the Court relied on “the spirit of the law” and refused to apply the hiring ban to members of the clergy.<sup>101</sup> Relying on a House committee report, the Court determined that the purpose of the legislation was to prevent the influx of “cheap, unskilled labor,” which would compete with domestic labor, so the statute did not apply to “brain toilers” or Christian ministers.<sup>102</sup> Essentially, the Court found it implausible to believe that “a religious nation like ours could . .

94. Nathan Oman, *Statutory Interpretation in Econotopia*, 25 PACE L. REV. 49, 53 (2004); see also POPKIN, *supra* note 26, at 60 (discussing the “derogation” canon). This hostility has also been widely recognized as taking “the form of courts declaring statutes unconstitutional.” POPKIN, *supra* note 26, at 60.

95. POPKIN, *supra* note 26, at 112. This suspicion led to controversial assertions of judicial power and aggressive methods of statutory interpretation that appeared to threaten the legislative lawmaking authority. See Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 14 (2006).

96. Molot, *supra* note 95, at 16 (citing *Gelpcke v. Dubuque*, 68 U.S. (1 Wall.) 175, 206 (1863)).

97. POPKIN, *supra* note 26, at 292 n.311; see also Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 386 (1908) (noting that even when statutes were not determined to be “in derogation of the common law, courts refuse[d] to treat the rules established by legislation as parts of the law”).

98. 143 U.S. 457 (1892); see also POPKIN, *supra* note 26, at 292 n.311; Molot, *supra* note 95, at 14-15.

99. *Holy Trinity Church*, 143 U.S. at 458 (emphasis added).

100. See *id.*

101. POPKIN, *supra* note 26, at 112, 292 n.311 (citing *Holy Trinity Church*, 143 U.S. at 460); see also *id.* at 121-22.

102. *Holy Trinity Church*, 143 U.S. at 464-65 (citing to committee reports from both the House and Senate). “[R]esorting to legislative materials . . . was a natural evolution in response to changing realities in the judicial and legislative process.” POPKIN, *supra* note 26, at 122.

. possibly criminalize the importation of a religious cleric.”<sup>103</sup> Opinions such as *Holy Trinity* have led commentators to conclude that nineteenth-century courts used statutory interpretation as a means of resisting statutes and the policies they embodied from being “enthusiastically incorporated into the law.”<sup>104</sup>

This view existed not only at the federal level, but was also present in state cases involving statutory interpretation; however, the state and federal approaches differed slightly.<sup>105</sup> While federal judges relied on statutory interpretation primarily for protection of fundamental rights, “[s]tate judges . . . appeared willing to incorporate the English legal tradition of trying to help the legislature reach a sensible result in *all* types of cases.”<sup>106</sup> Since the majority of legislation passed during the nineteenth century occurred within the state legislatures, state courts’ methods of statutory interpretation offer the greatest insight into “the evolution of interpretive theory and practice” during this time period.<sup>107</sup>

Most state court judges took a common sense approach similar to that of Massachusetts Chief Justice Lemuel Shaw, who served during the middle third of the century.<sup>108</sup> Shaw’s approach was to “help[] out the legislature in the common venture of making sensible law.”<sup>109</sup> Shaw consistently sought out the intent of the legislature, but did not always stray from the text when the intent was evident from the plain meaning of the words that were specifically chosen by the legislature.<sup>110</sup> Shaw once remarked that “[a] statute is no doubt to be construed according to the intent of the legislature; but it . . . cannot be carried beyond the plain intent of the legislature, as thus expressed.”<sup>111</sup> Although this statement

103. POPKIN, *supra* note 26, at 292 n.311; see *Holy Trinity Church*, 143 U.S. at 465.

104. POPKIN, *supra* note 26, at 112. “[T]hat history does not mean that the results violated legitimate norms of judicial practice.” *Id.* at 113.

105. *Id.* at 60. This difference has been attributed to “institutional reasons related to the role of the federal government in the first half of the nineteenth century.” *Id.*

Chief Justice Marshall, [taken] as the example of federal statutory interpretation, reacted against the traditional judicial dominance over legislation but staked out a special judicial interpretive role in protecting fundamental values. At the state level—especially for Chief Justice Lemuel Shaw in Massachusetts—statutory interpretation did not clearly differentiate between fundamental values and matters of mere inconvenience.

*Id.* at 64.

106. *Id.* (emphasis added); *e.g.*, *State v. Comptoir Nat’l D’Escompte de Paris*, 26 So. 91, 95 (La. 1899) (promoting an equitable construction of a corporation licensure statute where two constructions are possible); *Perry v. Strawbridge*, 108 S.W. 641, 645-46 (Mo. 1908) (applying a statute according to its “spirit and reason” in a case to partition property); *State v. Baltimore & Ohio R.R. Co.*, 56 S.E. 518, 519 (W. Va. 1907) (considering the “spirit and reason” in a criminal case). State courts, however, were noted for accomplishing sensible results “without the judicial arrogance or priority of judge-made law which was part of [the English] tradition.” POPKIN, *supra* note 26, at 64.

107. POPKIN, *supra* note 26, at 80.

108. *Id.* at 85.

109. *Id.*; *e.g.*, *Howard v. Merriam*, 59 Mass. (5 Cush.) 563, 571-72 (1850).

110. *E.g.*, *Britton v. Commonwealth*, 55 Mass. (1 Cush.) 302, 304 (1848).

111. *Barnicoat v. Folling*, 69 Mass. (3 Gray) 134, 136 (1854). “We should be suspicious of claims that a court was *merely* insisting on the letter of the law. Modern textualism implies that such an approach is passive, but in a period when extensive equitable interpretation was still plausible, sticking to the letter of the law was an affirmative judicial act.” POPKIN, *supra* note 26, at 103.

may appeal to modern textualists, it is important to note that it was made when construing a penal statute,<sup>112</sup> and “the dominant pattern in his statutory interpretation opinions is a pragmatic ‘every thing from which aid can be derived’ approach to the text, purpose, and equity of the law.”<sup>113</sup> Like Shaw, most nineteenth-century state courts offered a practical, common sense model of statutory interpretation, which prioritized the text, but maintained the ultimate goal of collaborating with the legislatures by interpreting and applying the true intent of the law.<sup>114</sup>

## 2. Overcoming the Conflict Between Judges and Legislatures Through Purposive Interpretation

By the end of the nineteenth century, America had experienced tremendous growth in the impact of legislation at state and federal levels resulting from the increased legislative output, budding perception of legislative competence, and the significance of the enacted legislation.<sup>115</sup> Like nineteenth-century statutory interpretation, twentieth-century purposivism recognized that “[t]he growing impact of statutes on legal change meant that statutory interpretation had to be taken seriously.”<sup>116</sup> However, where courts in the nineteenth century tended to limit the scope of legislation for purposes of protecting fundamental rights and the common law, twentieth-century courts were more likely “to extend statutes to achieve *their* purpose.”<sup>117</sup>

112. Penal statutes have traditionally been restrictively applied to protect the substantive due process rights of individuals, as required by the Constitution. *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964); *see also, e.g.*, *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820).

113. POPKIN, *supra* note 26, at 88. Shaw’s determination to seek out the legislative intent, which led to reliance on drafting history as well as commissioners’ reports, made him a forerunner in the use of legislative history. *Id.*

114. *See, e.g.*, *Farmers’ Bank v. Hale*, 59 N.Y. 53, 57 (1874) (“The cardinal rule for the construction of legislative acts is to ascertain the intent of the legislature. When that is determined, the language must yield to that intent.”); *Sherwood v. Atl. & Danville Ry. Co.*, 26 S.E. 943, 946-47 (Va. 1897).

115. POPKIN, *supra* note 26, at 64; *see also* Pound, *supra* note 97, at 383.

After the Civil War, federal legislation became important. Civil rights laws were passed to implement the Civil War amendments to the Constitution in 1866, 1871, and 1875. The first modern regulatory agency—the Interstate Commerce Commission—was created in 1877; the Sherman Antitrust Law was adopted in 1890, and the first peacetime income tax . . . was adopted in 1894 . . . .

Perhaps a more fundamental sign of the growing importance of federal legislation was . . . Congress’s replacement of the informal process of recording legislative debates . . . with direct supervision of the *Congressional Record* through the Government Printing Office in 1873.

POPKIN, *supra* note 26, at 61 (citing Elizabeth Gregory McPherson, *The History of Reporting the Debates and Proceedings of Congress 210* (1940) (unpublished Ph.D. thesis, University of North Carolina) (on file with Davis Library, University of North Carolina)).

116. POPKIN, *supra* note 26, at 64.

117. *Id.* at 115 (emphasis added). In contrast to his statutory interpretation decisions, Chief Justice John Marshall’s nineteenth-century constitutional interpretation opinions took “an equitable interpretation approach that *expanded* the constitutional text” to protect fundamental values and inalienable rights, an approach which actually “anticipates twentieth-century purposivism.” *Id.* at 76. Although twentieth-century purposive jurisprudence is better known for extending legislative enactments to achieve their purpose, the Court frequently restricted government action that placed an un-

Purposivism offered yet another advancement beyond the traditional English statutory interpretation. Twentieth-century purposive interpretation differed from the English tradition of equitable interpretation, which judges applied to extend or limit statutory coverage merely “to help out a careless legislature,” by “reconceiv[ing] the text as embodying vital legislative purposes.”<sup>118</sup> Many notable legal scholars have commented on the importance of the context legislative purpose provides to statutory interpretation and in ascertaining statutory meaning.<sup>119</sup> “If a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense.”<sup>120</sup> Since the legislative purpose was viewed as superior to the text itself, purposive interpretation justified the actions of courts that would “tilt the text when necessary to give it a possible meaning” to achieve the legislative purpose, even if the ascertained meaning was “not necessarily the most probable one.”<sup>121</sup>

Purposive interpretation developed from an amalgamation of sources. One prerequisite to purposivism was the increasingly positive image of democracy and the amplified role legislation played in supporting it.<sup>122</sup> Throughout twentieth-century America, “[d]emocratic principles were widely embraced,”<sup>123</sup> and legislation was viewed as an important part of the democratic process because it was enacted by an elected body that represented the will of the people.<sup>124</sup> “[W]ith law affirmatively associated with popular will, the judicial role in statutory interpretation could not be justified as an appeal to custom or legal science, but only as a way of implementing popular will, embodied in legislative purpose.”<sup>125</sup> Purposive interpretation was a method for the courts to take part in and support the democratic process by applying the law in accordance with its legislative purpose.<sup>126</sup>

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due burden on fundamental rights. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 876-77 (1992).

118. POPKIN, *supra* note 26, at 118.

119. DICKERSON, *supra* note 24, at 88, 95. Legal scholars have also differentiated “legislative intent,” which “coincides with the particular *immediate* purpose” of the statute, from “legislative purpose,” which “refers primarily to an *ulterior* purpose that the legislature intends the statute to accomplish.” *Id.* at 88 (emphasis added); see also *id.* at 87, 92.

120. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395, 400 (1950).

121. POPKIN, *supra* note 26, at 118. “Although no one said it in quite this way—it was statutes that twentieth-century judges were expounding.” *Id.* at 119 (alluding to the landmark Supreme Court case of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (“[W]e must never forget, that it is a *constitution* we are expounding.”)).

122. *Id.* at 118 (“The changing image of democracy and legislation had significant implications for statutory interpretation.”).

123. *Id.* at 117 (noting such examples as “the amendments to the U.S. Constitution which provided that the U.S. Senate should be popularly elected (1913) and that women could vote (1920)”).

124. See Pound, *supra* note 97, at 406. A perceived increase in quality of legislation revived this concept that had existed since the Revolutionary Era. See POPKIN, *supra* note 26, at 31.

125. POPKIN, *supra* note 26, at 117.

126. See ESKRIDGE, *supra* note 17, at 214-15.

Another prerequisite to the development of modern purposivism was “the growing faith in a science of legislation and in the reliability of legislative history as a source of information about what legislatures were doing.”<sup>127</sup> Twentieth-century legislation, to a much greater extent than ever before, “created whole new bodies of statute law” that offered detailed and extensive solutions to problems in the law and rendered portions of the less intricate common law obsolete in the process.<sup>128</sup> “The vitality and scope of modern reform legislation invited the view that statutes embodied a purpose that was the guide to their interpretation.”<sup>129</sup> In addition to the statutory text, “legislative history, in the form of statements in legislative materials about the statute’s purpose, provided evidence of what the legislature was trying to achieve.”<sup>130</sup> Using legislative history to unlock the legislative purpose became an important function of effective statutory interpretation.

Bolstering the importance of determining the legislative purpose was the popular view of legislation as a means to address problems that the judiciary’s common law could not remedy.<sup>131</sup> “In the early twentieth century, commentators . . . explained that legislation was good because it was becoming a science, capable of dealing with the kinds of change to which the slow-moving common law could not adjust.”<sup>132</sup> Not only did the legislative process offer a more scientific method, “the ‘science’ of the common law was revealed to be riddled with political choices, giving legislation a comparative advantage as a source of law.”<sup>133</sup> Rather than trying to accommodate the common law, courts engaging in purposive interpretation applied the law strictly in accordance to its legislative purpose.

This purposive theory of statutory interpretation was well established in the courts by the middle of the twentieth century and is overtly illustrated by the Supreme Court case of *United States v. American Trucking Ass’ns*.<sup>134</sup> The Court’s opinion is not only well known for averring the link between courts and legislatures, but it also establishes a quasi-linear approach to determining a statute’s purpose.<sup>135</sup> It emphasizes the priority of the text as evidence of the legislative purpose, but the Court provides limitations on the text when the words alone are no

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127. POPKIN, *supra* note 26, at 115; *see also* ESKRIDGE, *supra* note 17, at 209.

128. POPKIN, *supra* note 26, at 116.

129. *Id.* at 118.

130. *Id.*

131. Pound, *supra* note 97, at 384-85 (noting the early twentieth-century belief by scholars that narrow or illiberal statutory interpretation impeded social and industrial development).

132. POPKIN, *supra* note 26, at 117; *e.g.*, Pound, *supra* note 97, at 384 (discussing the imminent effects the science of legislation will have on the deficient judge-made law).

133. POPKIN, *supra* note 26, at 117.

134. 310 U.S. 534 (1940).

135. POPKIN, *supra* note 26, at 132. This approach resembles one promoted by Blackstone during the period of legislative supremacy in England. *See supra* text accompanying notes 67-72; *see also* Kramer, *supra* note 64, at 23-24 (mentioning the “doctrine of legislative supremacy”).

longer useful in determining the statute's purpose.

There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act.<sup>136</sup>

The concept of looking beyond the plain meaning of the text in order to avoid an absurd or futile result is not new, but the Court used it to reiterate the importance of identifying the statute's purpose.<sup>137</sup> The Court suggested that it is appropriate to look beyond the plain language for the legislative purpose not only when it will yield an absurd result, but also in less extreme situations where strict application of the plain meaning will contradict the purpose of the legislation.<sup>138</sup> In *American Trucking*, the Court noted that "[f]requently, . . . even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words."<sup>139</sup> As was typical of twentieth-century purposive interpretation, the Court placed less significance on determining the plain meaning of the statutory text and a far greater emphasis on discerning the underlying legislative purpose.<sup>140</sup>

From equitable interpretation to purposive interpretation, courts have traditionally sought out the legislative intent when interpreting statutes.<sup>141</sup> While the evolution of courts' use of legislative history to discern legislative intent and purpose is helpful in framing the current debate over the use of extrinsic legislative sources, another crucial element in the debate is an analysis of where the legislative sources come from and how reliably they can be applied by a court.

### III. APPROPRIATE AND EFFECTIVE USE OF LEGISLATIVE HISTORY

Extrinsic legislative sources have provided insight into the meaning and purpose of statutory language, but reliable sources of legislative history were not readily available to the public until the publication of the

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136. *Am. Trucking*, 310 U.S. at 543.

137. *Id.* This "golden rule" of avoiding absurd results is a remnant of the English tradition and has survived as one of the long-standing rules of statutory interpretation. See *supra* text accompanying notes 69 & 101; see also POPKIN, *supra* note 26, at 132 ("[The Supreme Court] also underlined the influence of the Golden Rule."). Although the golden rule allows deviations from a strict textualist approach, it does not provide guidance regarding what evidence judges should use to supplant the absurd meaning. See CHRISTIAN E. MAMMEN, USING LEGISLATIVE HISTORY IN AMERICAN STATUTORY INTERPRETATION 101 (2002).

138. *Am. Trucking*, 310 U.S. at 533-34; see also POPKIN, *supra* note 26, at 132.

139. *Am. Trucking*, 310 U.S. at 543 (quoting *Ozawa v. United States*, 260 U.S. 178, 194 (1922)).

140. See *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (citing to a list of Supreme Court decisions in which the Court "refused to be bound by the letter, when it frustrate[d] the patent purpose of the whole statute").

141. See, e.g., *supra* text accompanying note 55-61; *supra* text accompanying notes 134-139.

*Congressional Record* at the end of the nineteenth century.<sup>142</sup> With the onslaught of purposive interpretation during the twentieth century, legislative history played a prominent role in determining the purpose of the often dense and vague statutory language.<sup>143</sup> Because legislative history, which consists of statements made by legislators and documents produced and used in the course of enacting a bill, “might reflect what the legislature intended,” courts rely on these materials when interpreting the meaning of statutory text.<sup>144</sup> Legislative history is a useful source of information regarding the legislative intent and purpose of American law, but it is susceptible to abuse. For legislative history to have an effective and appropriate result, it must be applied cautiously and responsibly.

#### A. *Categories and Appropriate Use of Legislative History*

Before addressing the arguments for or against the use of legislative history, let alone assessing its authoritative value, it is crucial to understand what constitutes legislative history and from where it can be derived. Just as statutory language is contextual, the benefits and challenges associated with reliance on legislative history are based largely upon how and where it was recorded.<sup>145</sup> Legislative history is a broad term which generically refers to “the internal workings of the legislative process, including hearings, committee reports, statements on the floor of the legislature, and messages accompanying presidential signatures.”<sup>146</sup> It is essentially anything created or considered by legislators contemporaneous to the enactment of a bill, which may have shaped or expressed the collective intent of the legislature.<sup>147</sup>

##### 1. Committee Reports

Committee reports are widely regarded by courts as “[t]he most

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142. POPKIN, *supra* note 26, at 61; *see also supra* note 115.

143. POPKIN, *supra* note 26, at 121.

144. RONALD BENTON BROWN & SHARON JACOBS BROWN, STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT 117-18 (2002) (“[C]ourts often consider whatever is found in the legislative history as evidence of the legislative intent.”); *e.g.*, *Bank One Chi. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 273 (1996); *Marvin v. Hous. Auth.*, 183 So. 145, 148 (Fla. 1938); *see also* GWENDOLYN B. FOLSOM, LEGISLATIVE HISTORY: RESEARCH FOR THE INTERPRETATION OF LAWS 1 (1972); Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992).

145. *See Garcia v. United States*, 469 U.S. 70, 78 (1984) (rejecting the applicability of certain legislative history because it was used out of context).

146. GREENAWALT, *supra* note 21, at 171. “The legislative history also includes comparisons of the final language of an act with the language of previous drafts.” *Id.*

147. The term “bill” may be used to refer to, or include, other forms of proposed legislation. “Proposed legislation is sometimes introduced in Congress as a joint resolution instead of a bill. The legislative process by which such resolutions may become law does not differ from that applicable to bills.” FOLSOM, *supra* note 144, at 44.

important and reliable component of a legislative history.”<sup>148</sup> In both state and federal systems, when a bill is under consideration, it is common for the legislature to refer it to a committee that studies the proposed legislation and produces a report that informs other members of the legislature “what the committee thinks about the bill, and . . . about [its] well-considered opinion regarding the statute’s scope and meaning.”<sup>149</sup> Courts are less hesitant to rely on committee reports as compared to other forms of legislative history because they provide the committee’s collective opinion regarding “the salient aspects of the statute,” as well as recommendations for the other legislators to review when determining how to vote.<sup>150</sup> Individual legislators are often too busy to read the full text of each bill, so they rely on committee reports as “the authoritative explication of a statute’s text and purposes.”<sup>151</sup> Moreover, committee reports are accessible to every legislator,<sup>152</sup> so “the committee report explaining the bill was what the legislators *should* have had in mind at the time of the vote, so the report reflects their *probable* state of mind at that time.”<sup>153</sup> By providing a concrete illustration of how legislators most likely viewed a particular bill, committee reports present courts with the probable purpose and meaning of the statutory language.

Notwithstanding the level of legislative reliance on committee reports, textualists commonly criticize judicial reliance on committee reports because the language contained in them is not voted on by the legislature or enacted into law.<sup>154</sup> Since committee reports seemingly reflect the opinion of only a minority of the legislators, some textualists believe that courts should refrain from not only giving any authoritative value to committee reports, but also from using them at all as authoritative interpretive aids.<sup>155</sup> After all, the language in the statute is the only clear “majoritarian expression of legislative intent,” so heavy reliance on a committee report may have the effect of enacting a law in a manner which either violates the separation of powers or bypasses the process of bicameralism and presentment required by federal and state constitutions.<sup>156</sup> However, “[t]o the extent that committee reports and other

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148. BROWN & BROWN, *supra* note 144, at 121; *e.g.*, *Garcia*, 469 U.S. at 76; *Gore v. Harris*, 772 So. 2d 1243, 1251 (Fla. 2000); *see also* ESKRIDGE, *supra* note 17, at 220; MAMMEN, *supra* note 137, at 26, 62-63.

149. MAMMEN, *supra* note 137, at 62; *see also* BROWN & BROWN, *supra* note 144, at 121.

150. MAMMEN, *supra* note 137, at 63; *see also* BROWN & BROWN, *supra* note 144, at 122.

151. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2630 (2005) (Stevens, J., dissenting).

152. ESKRIDGE, *supra* note 17, at 212. In fact, “House and Senate rules require that members must receive committee reports before they vote.” *Id.*

153. BROWN & BROWN, *supra* note 144, at 122.

154. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 817 (1995).

155. MAMMEN, *supra* note 137, at 64; *see also* ESKRIDGE, *supra* note 17, at 230.

156. MAMMEN, *supra* note 137, at 64; *see also* *Thompson v. Thompson*, 484 U.S. 174, 191-92 (1988); BROWN & BROWN, *supra* note 144, at 123. The bicameralism and presentment requirements

legislative history shed light on the ‘study and debate’ that Congress is supposed to engage in, the constitutional procedures of legislation would seem to support some consultation of legislative history.”<sup>157</sup> A persuasive argument can be made, at least at the federal level, that the bicameralism and presentment requirements found in Article I of the Constitution are merely a condition on which the legislative branch may enact laws and have no effect on the judicial *interpretation* of laws.<sup>158</sup> Essentially, any bicameralism and presentment argument “support[s] nothing more than the truism that legislative history does not have the same authority as statutory text.”<sup>159</sup> Thus, judicial reliance on committee reports as interpretive aids, taken not as the law itself, but used solely to ascertain the intended meaning of the statutory text, is clearly an appropriate use of legislative history.

Although committee reports generally provide a recommendation based on a detailed analysis of the bill, many textualists view them as an unreliable source of legislative intent because they are typically written by staff and not the legislators themselves.<sup>160</sup> “However, other judges consider these reports important on the theory that the committee members have read (or at least should have read) these reports and probably relied [on] them (or at least summaries of their contents) when voting the bill out of committee.”<sup>161</sup> Although the committee report merely presents a reflection of the probable legislative intent at the time the bill was voted on, it is a useful aid that should not be wholly ignored. After all, there is no way to accurately determine what each individual legislator knew at the time of voting, but the collective intent of the legislature may be inferred from what a reasonable legislator would have known.<sup>162</sup> When engaging in an *ex post* analysis in an attempt to interpret the purpose and intent of any written document that is superficially ambiguous, evidence regarding the meaning a reasonable person would have known and intended with the document can be particularly useful.

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appear in Article I, Section 7 of the United States Constitution.

157. ESKRIDGE, *supra* note 17, at 230 (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983) (“The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings.”)).

158. ESKRIDGE, *supra* note 17, at 230. The executive branch, acting within the confines of congressionally delegated authority, can make quasi-legislative determinations about how to apply the law that “is not subject to the approval of both Houses of Congress and the President.” *Chadha*, 462 U.S. at 954 n.16 (1983).

159. ESKRIDGE, *supra* note 17, at 230.

160. BROWN & BROWN, *supra* note 144, at 121.

161. *Id.* at 121-22; *see, e.g.*, *Bush v. Gore*, 531 U.S. 98, 154 (2000) (Breyer, J., dissenting) (relying in part on a report from the Select Committee on the Election of President and Vice-President). Familiarizing oneself with the committee report before voting the bill out of committee “is what a responsible legislator would do.” BROWN & BROWN, *supra* note 144, at 122. “However, the reality is that not all legislators read reports. Probably, they rely heavily on their staff to digest the reports for them.” *Id.*

162. *See* James M. Landis, *A Note on “Statutory Interpretation”*, 43 HARV. L. REV. 886, 888-89 (1930).

Textualists in opposition to the use of legislative history are also quick to point out that “committee reports are subject to manipulation by committee staff who may try to sneak things into the report that they could never get into the bill because the report will not be read carefully or debated.”<sup>163</sup> Not only is there something inherently wrong with a political system where judges must presume that the legislative process is tainted because legislative staff consistently engage in improper tampering with committee reports, it is also rather unlikely that this type of activity would even be successful. For this dishonest practice to succeed, the legislative staff would first have to conceal the desired “intent” in the committee report, where it would have to go undiscovered by any of the opposing legislators throughout the enactment process.<sup>164</sup> Additionally, for this type of scheme to succeed, the enacted statute must ultimately come before a court, which would determine that the statutory language is ambiguous and then somehow stumble across the minor changes in the committee report. Finally, regardless of its inconsistency with the remaining portion of the committee report and other legislative history, the court would still somehow need to be convinced that this unsupported portion of purported legislative intent carries so much weight as to necessitate rejecting the overriding actual purpose of the legislation. The proposition that this intent-tampering will succeed also presupposes that the legislative staff engaged in an *ex ante* analysis that determined that the legislation would indeed pass, would be deemed ambiguous, and that this clandestine portion of “counter-intent” added to the legislative history would be discovered and successfully implemented to support the desired outcome of overthrowing the actual purpose of the statute.<sup>165</sup> Arguably, the textualists who are unwilling to credit the legislative staff with the ability to draft competent committee reports are willing to credit the same legislative staff with the foresight and ability to devise and conduct such a comprehensive and devious plan.<sup>166</sup> Furthermore, any such risk can easily be mitigated by an informed court, which could simply “limit its degree of reliance by keeping in mind the possibility that the history might have been salted to influence the court’s decision.”<sup>167</sup>

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163. BROWN & BROWN, *supra* note 144, at 122-23.

164. This requirement alone shows the unreasonableness of a fear of this type of behavior. It would be virtually impossible for legislative staff that is opposed to the actual purpose of the bill to have sufficient control over the committee report to include any vital information that would go undetected.

165. To ultimately achieve this misinterpretation of the law, the perpetrators would also have to arrange for a special interest group or plaintiff that could be injured by the statute and challenge its validity. See U.S. CONST. art III, § 2, cl. 1; see also *Allen v. Wright*, 468 U.S. 737, 750-51 (1984) (discussing requirements to meet the standing doctrine).

166. See *supra* text accompanying note 160.

167. BROWN & BROWN, *supra* note 144, at 120. This fear of misuse of legislative history reflects a lack of faith in judges and their awareness of potential evidentiary abuse.

Fears of misuse do not merit abandoning the aid of committee reports, but it is also clear that committee reports are *not* the law, and courts should be cautious when using them to identify the legislative intent.<sup>168</sup> The most appropriate authoritative value courts should assign to committee reports is to use them as persuasive evidence of a potential meaning or purpose of the statutory language.<sup>169</sup> It is rational to expect that “[t]he legislative intent may be revealed by what motivated the legislature to act and what information the legislature had when it acted,”<sup>170</sup> but this information should be used with caution. Committee reports that legislators rely on when voting on bills surely have some reasonable grounds of authority, but it is important that courts not rely solely on one aspect of legislative history, whether a committee report or another extrinsic legislative source. The more sources of evidence in support of a proposed meaning, the more persuasive the authority becomes; nonetheless, courts should always attempt to harmonize the intent stated in the legislative source with the actual language of the statute, which *is* the law.

## 2. Floor Statements, Legislative Remarks, and Debates

Like committee reports, which indicate what legislators relied on to understand a bill, what the legislators said and heard during the enactment process can also provide insight into what the legislature knew and intended with that particular legislation.<sup>171</sup> In this way, the statements made by legislators during committee meetings or debates on the floor are often used as persuasive support for a particular interpretation of legislative intent.<sup>172</sup> The authoritative weight of these remarks depends on the fact that they were made to enlighten or sway other legislators *before* the legislature voted, so “they could be considered a force in the creation of the legislature’s state of mind.”<sup>173</sup> For this reason, courts have widely rejected the use of any such statements that are made *after*

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168. See *United States v. R.L.C.*, 503 U.S. 291, 312 (1992) (Thomas, J., concurring in part); *Am. Hosp. Ass’n v. NLRB*, 499 U.S. 606, 616 (1991); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 191 (1978).

169. See *MAMMEN*, *supra* note 137, at 64. The purpose of this note is to assess the role of legislative history in relation to the legislative intent; therefore, it is beyond its scope to identify all of the other potential uses or values of committee reports.

170. *BROWN & BROWN*, *supra* note 144, at 117.

171. At the federal level, “[t]hese materials are typically published in the Congressional Record, which is the official transcript of proceedings in Congress.” *MAMMEN*, *supra* note 137, at 67. Most states, however, do not have such extensive documentation of floor statements and debates, but “[t]o the extent that such materials exist, . . . there is a growing tendency in state courts to resort to them.” *FOLSOM*, *supra* note 144, at 5-6.

172. See, e.g., *Begier v. IRS*, 496 U.S. 53, 64 & n.5 (1990); *Bd. of County Comm’rs v. Nielander*, 62 P.3d 247, 253-54 (Kan. 2003). In addition to intent, statements made by legislators may also provide persuasive authority regarding what they did *not* intend. See, e.g., *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 350 (1985); *Hand v. State Farm Mut. Auto. Ins. Co.*, 577 P.2d 1202, 1205 (Kan. Ct. App. 1978).

173. *BROWN & BROWN*, *supra* note 144, at 123; see also *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 524, 526-27 (1982); *United Steel Workers of Am. v. Weber*, 443 U.S. 193, 202-04 (1979).

the relevant legislation has been enacted.<sup>174</sup> Likewise, the persuasive authority of statements made by individual legislators also heavily depends on whether they were made in the presence of other legislators.<sup>175</sup>

In addition to the usual textualist challenge that reliance on statements not part of the enacted statutory language is “illegitimate law-making that avoids the procedural requirements,”<sup>176</sup> critics point out that “[t]hese remarks urging passage, defeat, or amendment may be presented by a party solely to illuminate that legislator’s view of what the statute means.”<sup>177</sup> One “balancing factor,” however, is that legislators are well aware of the possibility that such statements may be used in court, and each legislator has the same opportunity to add his or her own view to the record.<sup>178</sup> Moreover, courts at all levels have recognized that the “[r]emarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.”<sup>179</sup> When ascertaining the legislative intent, one particular legislator’s opinion can be especially enlightening, but is not nearly as important as “the collective intent of the legislature.”<sup>180</sup>

In order for legislative statements to provide any reasonable amount of persuasive authority regarding the collective intent of the legislature, they should be consistent with the statutory text, other legislative history, or the overriding theme of the statute. The Supreme Court has recognized that “[s]uch statements by individual legislators should not be given controlling effect, but when they are consistent with the statutory language and other legislative history, they provide evidence of Congress’ intent.”<sup>181</sup> The Court has even relied on congressional statements regarding “the feeling of Congress” to bolster its own interpretation of intent derived from the statutory language.<sup>182</sup> Legislative remarks are of the greatest contribution to a court’s interpretation of the statutory text when they are combined with, and supported by, addi-

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174. See, e.g., *United States v. Monsanto*, 491 U.S. 600, 610 (1989); *Davis v. City of Leawood*, 893 P.2d 233, 244 (Kan. 1995); *Mitchell v. Rayl*, 665 P.2d 1117, 1119 (Kan. Ct. App. 1983); *Hand*, 577 P.2d at 1205.

175. “Remarks might exist only on paper, never having actually taken place in the legislative chamber.” BROWN & BROWN, *supra* note 144, at 124.

176. *Id.* at 125.

177. *Id.* at 124. “For that reason, traditional doctrine prohibited relying on them in the interpretation process.” *Id.* (citing *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 318 (1897)).

178. *Id.* at 125. Additionally, these remarks are recorded as part of the public record so they are easily accessible to both lawyers and the general public. *Id.* at 123 (“The remarks of a federal legislator in a committee or on the floor may be reported in the Federal Register.”).

179. *Kansas v. Colorado*, No. 105, 1994 WL 16189353, at \*151 (U.S. Oct. 3, 1994); *accord Chrysler v. Brown*, 441 U.S. 281, 311 (1979); *Sierra Club v. Costle*, 657 F.2d 298, 320 n.55 (D.C. Cir. 1981).

180. BROWN & BROWN, *supra* note 144, at 124. “Statements by individual legislators should generally be given little weight when searching for the intent of the entire legislative body.” *Kansas*, No. 105, 1994 WL 16189353, at \*151 (citing *Castaneda-Gonzalez v. INS*, 564 F.2d 417, 424 (D.C. Cir. 1977); *Nat’l Welfare Rights Org. v. Mathews*, 533 F.2d 637, 642-43 (D.C. Cir. 1976)).

181. *Brock v. Pierce County*, 476 U.S. 253, 263 (1986) (citing *Grove City Coll. v. Bell*, 465 U.S. 555, 567 (1984)).

182. *Andrus v. Shell Oil Co.*, 446 U.S. 657, 670-71 (1980).

tional extrinsic legislative sources.

Not only should legislative remarks be consistent with other sources, but to have a more reliable persuasive effect, they should be supported by evidence that the statements were heard by other legislators.<sup>183</sup> Courts can take two different approaches to determine the sufficiency of this type of evidence: an empirical approach or a normative approach. Following an empirical model, the issue for the court is whether the remarks *actually* contributed to the collective intent of the legislature.<sup>184</sup> “For example, remarks made to an empty house would not be heard when made and would probably not be brought to the attention of any legislator before the vote was cast.”<sup>185</sup> However, under a normative, “reasonable legislator” model, a showing that other legislators were present and *should have* heard the remarks during the course of deciding how to vote may be sufficient.<sup>186</sup> In effect, “the persuasive value of such remarks depends on a showing of what effect they probably had.”<sup>187</sup> Therefore, if a party wishes to introduce a legislator’s remarks, for the court to responsibly rely on that evidence, the remarks should be accompanied by other legislative sources indicating the same proposed interpretation, as well as additional evidence that other legislators were present and actually, or at a minimum should have, heard the remarks.

### 3. Comments of the Drafters and Amendments

Statements made by individuals other than legislators are generally among the most controversial and least persuasive forms of pre-enactment legislative history;<sup>188</sup> however, an exception is carved out from this category for comments made by the drafters of the legislation.<sup>189</sup> It is not uncommon for bills to be drafted by individuals other than legislators or even their legislative staff.<sup>190</sup> Quite often, bills are “produced by a panel of experts, by a law reform organization, or by an interest group pushing its own agenda.”<sup>191</sup> When such is the case, these proposed drafts consistently include the “comments or interpretations

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183. BROWN & BROWN, *supra* note 144, at 124 (“Whether a legislator’s remarks actually had any effect on the collective state of mind is subject to question.”).

184. *Id.* at 126.

185. *Id.*

186. *See id.* at 125-26.

187. *Id.* at 126.

188. *See* ESKRIDGE, *supra* note 17, at 222 (figure 7.1).

189. *See id.* at 220; *e.g.*, *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 221-22 (1979) (relying on a National Association of Insurance Commissioners report); *Trbovich v. United Mine Workers*, 404 U.S. 528, 535 (1972) (relying on comments made by law professor who consulted the drafters).

190. BROWN & BROWN, *supra* note 144, at 126; *see also* ESKRIDGE, *supra* note 17, at 220.

191. BROWN & BROWN, *supra* note 144, at 126. Common organizations include “the American Bar Association, the American Law Institute, [and] the National Conference of Commissioners on Uniform State Laws (NCCUSL).” *Id.* at 127.

of the drafters.”<sup>192</sup>

The most persuasive characteristic the drafters’ comments possess is that the third-party drafters are generally people who have specialized knowledge regarding the subject matter of the bill.<sup>193</sup> Moreover, before being attached to the proposed legislation, “the comments have been the subject of deliberation in committee and by the respective organizations,” and are designed to help explain and interpret the provisions of the act itself.<sup>194</sup> Because these comments are nestled in with the proposal and provide information crucial to the legislators’ understanding of the proposed legislation, it is appropriate and rational to expect that they provide some aid to the legislature’s own collective comprehension of the bill.<sup>195</sup> If the drafters’ comments helped the legislature understand the bill—like the statements of legislators themselves—the commentary may have “formed the basis for the legislative intent.”<sup>196</sup> Thus, depending on whether a court decides to take a normative or empirical approach,<sup>197</sup> evidence showing that the majority of legislators read or should have read the drafters’ commentary “would be a legitimate basis for courts to consider it in the statutory interpretation process.”<sup>198</sup>

Perhaps the best-received example of proposed legislation that includes drafters’ comments is the Uniform Commercial Code (UCC), which was the result of a joint effort by the American Bar Association, the American Law Institute, and the National Conference of Commissioners on Uniform State Laws.<sup>199</sup> Since its initial adoption by New York in 1962, some variation of the Model UCC has been adopted into law by every other state.<sup>200</sup> The drafters’ commentary is not like typical legislative history; “[i]n practice, however, courts often put weight even

192. *Id.* at 126.

193. *Id.* at 126-27. This expertise provides insight that most legislators or judges themselves cannot reasonably be expected to possess. See Pound, *supra* note 97, at 405 (discussing the comprehensive investigation and deliberate adjustments applied to proposals of uniform law).

194. BROWN & BROWN, *supra* note 144, at 128.

195. *Id.*; see, e.g., *B & W Glass, Inc. v. Weather Shield Mfg., Inc.*, 829 P.2d 809, 816 (Wyo. 1992).

196. BROWN & BROWN, *supra* note 144, at 127. “Therefore, the legislature probably intended the statute to be interpreted as the comments suggest, so the comments may be relied upon to determine legislative intent.” *Id.* at 128; see, e.g., *Dunn v. Hindman*, 855 P.2d 994, 997-98 (Kan. 1993) (relying on the Commissioner’s Note to interpret the legislative intent of a section of the Uniform Criminal Extradition Act); see also *B & W Glass*, 829 P.2d at 816.

197. “The *normative view* is that the legislature should have known, so that knowledge will be presumed; while the *empirical view* would be to consider whether it did or was really likely to have known of the decision.” BROWN & BROWN, *supra* note 144, at 129; see also *supra* notes 184-187 and accompanying text.

198. BROWN & BROWN, *supra* note 144, at 127; see *Kosak v. United States*, 465 U.S. 848, 863-64 (1984) (Stevens, J., dissenting). “However, it is important to remember that the critical question is the intent of the legislature, not the intent of the drafters.” BROWN & BROWN, *supra* note 144, at 127.

199. BROWN & BROWN, *supra* note 144, at 127-28.

200. STEVEN J. BURTON & MELVIN A. EISENBERG, *CONTRACT LAW: SELECTED SOURCE MATERIALS*, at VIII (2004); BROWN & BROWN, *supra* note 144, at 128. Although drafting actually began in 1942, it took the Commissioners and ALI twenty years and two different versions “to meet the objections of [New York] in commercial matters.” BURTON & EISENBERG, *supra*, at VIII.

on comments that go beyond or are even in tension with the text.”<sup>201</sup> In complex areas of the law, such as commercial transactions where “the common law has difficulty setting forth a comprehensive framework of legal rules to govern,” this commentary, as evidence of the drafter’s intentions, can provide insight into what the legislature itself intended when it adopted and enacted the law.<sup>202</sup>

In addition to the drafters’ commentary, the widespread acceptance of uniform acts has made available the judicial interpretations of other state’s parallel acts, which might function as a helpful aid in discerning the legislative intent.<sup>203</sup> Courts rely on the opinions of other state courts as merely persuasive authority, but these decisions can be useful in two ways.<sup>204</sup> Like other third-party commentary, “[d]ecisions made in another state before the adoption of this act might have been brought to the attention of this legislature when it was considering adoption.”<sup>205</sup> If a state legislature adopts a uniform act with constructive knowledge of another state’s previous decision, and it does not change the statutory language, the necessary implication is that “the legislature acquiesced in the court’s interpretation” and intended the act to have the same effect.<sup>206</sup> For court decisions from other states to be reliable sources of legislative intent, the critical issue is whether an interpreting judge can reasonably infer that the adopting legislature had constructive knowledge of the judicial interpretation *prior* to enactment.<sup>207</sup>

Similar to the legislative acquiescence to another state’s interpretation of a model act, legislative intent may be inferred from the acceptance or rejection of amendments prior to a bill’s enactment.<sup>208</sup> Although this type of legislative history is less authoritative, “these sources might be viewed as earlier expressions of congressional intent which remained in effect through the time of enactment of the statute.”<sup>209</sup> If the legislative body chooses to adopt or reject a particular amendment,

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201. BURTON & EISENBERG, *supra* note 200, at IX.

202. *Id.* at VII.

203. BROWN & BROWN, *supra* note 144, at 129.

204. *Id.* (noting that knowing about other state’s interpretations “could be critical when faced with a case of first impression”).

205. *Id.* Depending on whether a particular court takes a normative or empirical approach, it may require additional evidence that the knowledge is actual or inferred from reasonable legislative practices. See *supra* notes 184-187 and accompanying text.

206. *Id.* at 129-30; see, e.g., *Henrietta Mining & Milling Co. v. Gardner*, 173 U.S. 123, 130 (1899); see also BLACK, *supra* note 43, at 597. In circumstances where a state legislature adopts express amendments to the proposed legislation in direct response to another state court’s prior disagreeable interpretations, this affirmative act provides an even greater implication regarding the legislature’s desired intent. *In re Henderson’s Tobacco*, 78 U.S. (11 Wall.) 652, 657 (1870) (“The enactment of provisions inconsistent with those previously existing, manifests a clear intent to abolish the old law.”); see also BLACK, *supra* note 43, at 601.

207. BLACK, *supra* note 43, at 598-99.

208. See ESKRIDGE, *supra* note 17, at 220-21; MAMMEN, *supra* note 137, at 64-65. This type of legislative history might “includ[e] previous legislation, previous attempts to legislate, and amendments that were introduced and accepted or rejected.” MAMMEN, *supra* note 137, at 64.

209. MAMMEN, *supra* note 137, at 65.

especially where the amendment would replace “a specific provision to a contrary effect,” it is presumed to have done so for a reason.<sup>210</sup> In general and particularly in state legislatures, where materials recording legislative explanations of action are not always readily available, the adoption of an amendment is more reliable indicia of legislative intent than a rejected amendment.<sup>211</sup> At the federal level, however, the Supreme Court has relied in part on the intent implied from the Senate’s rejection of an amendment.<sup>212</sup> To provide reliable indication of legislative intent, evidence of the adoption or rejection of an amendment should be accompanied by the legislative reasons for the adoption or rejection along with other sources of supporting legislative history.<sup>213</sup>

Although all of the various extrinsic legislative sources often get lumped into the broad category of legislative history, a basic understanding of three primary types of legislative history attests to the fact that not all legislative sources are equal. It is clear that the authoritative value of an individual legislative source can vary greatly depending on how, when, and to whom it was presented, and, ultimately, whether the legislative material in question can reasonably reveal the collective intent of the legislature at the time it voted on the bill.

### *B. The Importance of Relying on Legislative History to Discern Legislative Intent*

Determining statutory purpose and meaning is a question of law, and “[t]he function of the court is to interpret the statutes, giving the statutes the effect intended by the legislature.”<sup>214</sup> Applying a statute in accordance with the ascertainable legislative intent is “[t]he fundamental rule of statutory construction, to which all other rules are subordinate.”<sup>215</sup> Legislative intent may be divined from various sources, but the statutory text is the most reliable and should always be the first point of inquiry.<sup>216</sup> Many courts agree that “[w]hen a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not

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210. FOLSOM, *supra* note 144, at 38; *e.g.*, *Alaska v. Am. Can Co.*, 358 U.S. 224, 226-27 (1959).

211. FOLSOM, *supra* note 144, at 38-39. *Compare* *State ex rel. Peters v. McCollister*, 11 Ohio 46, 55 (1841) (relying on the “evident intention” of the amended statutory language), *and* *Banner Milling Co. v. State*, 191 N.Y.S. 143, 152-53 (1921) (considering an amendment that eliminated a specific phrase as clear evidence of legislative intent to exclude certain damages), *with* *Bd. of Educ. v. N.J. Educ. Ass’n*, 247 A.2d 867, 877-78 (N.J. 1968) (refusing to impute any legislative intent from the rejection of a proposed amendment by the Governor).

212. FOLSOM, *supra* note 144, at 38; *e.g.*, *Fox v. Standard Oil Co.*, 294 U.S. 87, 96 (1935) (considering the rejected amendment along with other “[e]xtrinsic tokens of intention”).

213. *See* *Fox*, 294 U.S. at 96.

214. *Todd v. Kelly*, 837 P.2d 381, 384 (Kan. 1992); *see also* *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 542-43 (1940).

215. *Brinkmeyer v. City of Wichita*, 573 P.2d 1044, 1047 (Kan. 1978).

216. *See* *Hawley v. Kan. Dep’t of Agric.*, 132 P.3d 870, 876 (Kan. 2006).

be.”<sup>217</sup> The threat that legislative history might be used to impeach the statutory meaning has led some legal scholars to argue that extrinsic legislative sources should be used only when the intent is unclear from the plain language of the statute.<sup>218</sup> There is no rational justification, however, to prevent the use of legislative history, especially if it can be used to confirm the plain meaning of the statutory text.<sup>219</sup> The Supreme Court has previously recognized that “[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on ‘superficial examination.’”<sup>220</sup> Even detractors of legislative history admit that it is particularly useful when the literal meaning of the statute may yield an absurd result.<sup>221</sup> Legal commentators have also historically pointed out that “[t]he records of legislative assemblies once opened and read with a knowledge of legislative procedure often reveal the richest kind of evidence” of the meaning attached to statutory language.<sup>222</sup> Legislative history offers insight not only into the broader intent of the legislature, but also into the meaning of statutory text regardless of whether the language is clear or ambiguous.

Without the aid of extrinsic legislative sources, the true legislative intent can easily be overlooked. Although words may seem clear at first glance, the English language is finite, and words cannot always accurately convey their intended meaning.<sup>223</sup> Particularly because the language in proposed legislation is often drafted, amended, and approved by different groups of individuals, the final statutory language may not

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217. *West v. Collins*, 840 P.2d 435, 439 (Kan. 1992) (quoting *Martindale v. Tenny*, 829 P.2d 561, Syl. ¶ 2 (Kan. 1992)); *see also, e.g., Berry v. Sale*, 43 S.W.2d 225, 226 (Ark. 1931). *But cf.* *Boston 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 and does not preclude consideration of persuasive evidence if it exists.”). Courts have also long recognized that the ultimate object of statutory interpretation is to ascertain the legislative intent, which prevails over the literal meaning of the statutory text. *E.g., In re Marriage of Ross*, 783 P.2d 331, 334 (Kan. 1989) (“[T]he court must give effect to the legislature’s intent even though words, phrases or clauses at some place in the statute must be omitted or inserted.”); *Cain v. State*, 20 Tex. 355, 361-62 (1857) (“That intention, where it can be discovered, will prevail over the literal import of words.”).

218. *See* Bradley C. Karkkainen, Article, “*Plain Meaning*”: *Justice Scalia’s Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL’Y 401, 438 (1994) (noting Justice Scalia’s resistance to using legislative history even to resolve an inherent ambiguity in the statutory text).

219. *See* Karkkainen, *supra* note 218, at 437-38; MAMMEN, *supra* note 137, at 2-3. “[I]nterpretation is best carried out when the interpreter takes maximal advantage of all information reasonably available to her that may be of assistance in the interpretive task within the bounds of the interpreter’s discretion.” MAMMEN, *supra* note 137, at 3.

220. *United States v. Am. Trucking Ass’ns*, 310 U.S. 534, 543-44 (1940) (quoting *Boston Sand & Gravel*, 278 U.S. at 48; *Helvering v. N.Y. Trust Co.*, 292 U.S. 455, 465 (1934)) (footnote omitted).

221. *See, e.g., Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (finding “it entirely appropriate to consult . . . legislative history” to confirm that Congress did not intend an “unthinkable disposition”).

222. Landis, *supra* note 162, at 888.

223. *See* Arnett v. Kennedy, 416 U.S. 134, 159 (1974); *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 578-79 (1973).

succinctly or effectively represent the legislatures' intended effect.<sup>224</sup> Accordingly, it is important to remember that words are merely the physical manifestation of a subjective intent.<sup>225</sup>

For words, which are no other than the verberation of the air, do not constitute the statute, but are only the image of it, and the life of the statute rests in the minds of the expositors of the words, that is, the makers of the statutes. And if they are dispersed, so that their minds cannot be known, then those who may approach nearest to their minds shall construe the words, and these are the sages of the law whose talents are exercised in the study of such matters.<sup>226</sup>

Judges, as "the sages of the law," are called upon to apply their specialized interpretive skills to the statutory language in order to administer the law in a manner consistent with the intent of the legislature.<sup>227</sup> To be effective, this collaborative effort between courts and legislatures often involves relying on legislative resources beyond the statutory text. So long as legislatures do not enact specific statements of purpose and intent as part of the statutory text, legislative history provides the greatest insight into the intent and purpose of legislation.

### C. Responding to Critics

Some academics and judges have argued that jurists' use of legislative history encroaches on the lawmaking function of the legislative branch and should qualify as an impeachable offense.<sup>228</sup> Other critics point out that searching for legislative intent may conflict with other "generally accepted concrete rules of statutory construction."<sup>229</sup> In support of a purely textualist approach, such critics of legislative history provide reasons sufficient to justify limiting its weight of authority, but fail to demonstrate any real need to eliminate its use entirely.<sup>230</sup>

[L]ike previous schools of thought, the new textualism can best be understood as a cultural and political phenomenon, one that is most successful in reviving realist arguments against legislative history's "authority value" but reveals a lack of sophistication in ignoring other legislative history values, such as figuring out statutory policy and exploring the normative issues involved in applying the statute.<sup>231</sup>

A more complete analysis would indicate that it is not the mere use of

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224. See *supra* notes 190-191 and accompanying text.

225. See *supra* note 24 and accompanying text.

226. *Partridge v. Strange & Croker*, 1 Plowden 77, 82, 75 Eng. Rep. 123, 130 (K.B. 1553).

227. *Id.*; accord *Eyston v. Studd*, 2 Plowden 459, 466, 75 Eng. Rep. 688, 697-98 (K.B. 1574); see also POPKIN, *supra* note 26, at 12.

228. E.g., Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 813-14 (1998).

229. Scalia, *supra* note 21, at 16. *But cf.* *Cain v. State*, 20 Tex. 355, 361 (1857) ("All the rules of construction must give way . . . to the fundamental principle that the intention of the Legislature is to govern.").

230. See ESKRIDGE, *supra* note 17, at 207.

231. *Id.*

legislative history, but rather its misuse that leads to problems.<sup>232</sup> Justice Breyer has suggested due care as a more pragmatic alternative to eliminating the use of legislative history:

[V]iewed in light of the judiciary's important objective of helping to maintain coherent, workable statutory law, the case for abandoning the use of legislative history has not yet been made. Present practice has proved useful; the alternatives are not promising; radical change is too problematic. The "problem" of legislative history is its "abuse," not its "use." Care, not drastic change, is all that is warranted.<sup>233</sup>

If an individual judge uses select portions of legislative history simply to support his or her own pre-determined conclusion, this may qualify as an ethical violation of his or her judicial duty.<sup>234</sup> Although a common criticism of purposive interpretation is that it allows judges too much discretion, judges can just as easily manipulate a textualist approach to achieve their own desired outcome.<sup>235</sup> Indeed, judicial invocation of any extrinsic evidence—even a particular dictionary that includes a favorable definition—merely to support the judge's pre-determined conclusion is arguably unethical.<sup>236</sup> However, it is highly unlikely that any jurist would promote a ban on references to dictionary definitions, even though these definitions, which have no tangible relation to what the legislature actually intended, are much less reliable than legislative history in discerning legislative intent.<sup>237</sup> Instead, a more scholarly approach would promote reliance on the actual experiences and informa-

232. See Breyer, *supra* note 144, at 874.

233. *Id.*

234. See generally CODE OF CONDUCT FOR U.S. JUDGES Canon 2 (1973) (requiring judges to avoid "the appearance of impropriety in all activities" and refrain from advancing "private interests").

235. See GREENAWALT, *supra* note 21, at 180-81; see also Molot, *supra* note 95, at 49-50. Purposive and textualist approaches are both inherently susceptible to manipulation. See Molot, *supra* note 95, at 49-50.

236. See, e.g., *Rapanos v. United States*, 126 S. Ct. 2208, 2220-21 (2006) (Scalia, J., plurality opinion) (relying on a 1954 edition of Webster's New International Dictionary to define "the waters" as used in the Clean Water Act of 1970). *But cf. id.* at 2242 (Kennedy, J., concurring in the judgment) (pointing out that the definition selected by the plurality is "without support in the language and purposes of the Act or in our cases interpreting it"). Judge Learned Hand has pointed out the importance of intellectual honesty when interpreting a statute's meaning:

Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing . . . . But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.

*Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945).

237. Statutory terms are not "commonly understood" merely because they are defined in a dictionary. *State v. Adams*, 866 P.2d 1017, 1023 (Kan. 1994). A dictionary definition provides only one possible meaning that a reasonable legislator may have intended, and is generally used without indication that any legislator actually considered that particular definition, let alone shared that view with the rest of the legislators. See, e.g., *Dolan v. U.S. Postal Serv.*, 126 S. Ct. 1252, 1257 (2006); *Gonzales v. Oregon*, 126 S. Ct. 904, 927-28 (2006) (Scalia, J., dissenting); see also *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655, 2679 (2005) (Thomas, J., dissenting) (interpreting the U.S. Constitution with a dictionary from 1773).

tion that contributed to the enactment of the law.<sup>238</sup>

The fact that there is a potential for misuse of legislative history by no means supports a conclusion that any and all use of legislative history is per se unethical. To propose such a conclusion mistakenly presupposes that every judge, if given the opportunity, will use legislative history only to support his or her own agenda. Not only is this accusation unfounded, but if true it would indicate that our judicial system has much greater problems that need to be resolved before addressing the issue of legislative history.

Textualism, quite plainly, is an oversimplified attempt at statutory interpretation that fails to sufficiently account for the purpose and intent for which legislation is enacted. Superficially, it may seem easier to simply look at a statute and apply it according to its apparent plain meaning, but this is by no means a short-cut to the true legislative intent. Granted, it requires effort to review the relevant legislative materials and discern their meaning with respect to a particular section of a statute, but that is the most effective means of ascertaining the meaning intended by the legislature. For that reason, *inter alia*, aggressive textualism is losing support.<sup>239</sup> The pendulum that once swung out in the direction of a strong purposivist approach to statutory interpretation recently swung in the opposite direction to an aggressive textualist approach.<sup>240</sup> It is time for the pendulum to return back to a moderate and more reliable approach that emphasizes the text, yet incorporates an appropriate dependence on extrinsic legislative sources to adequately account for legislative intent. The most effective way to avoid manipulation and intellectual dishonesty is for courts to recognize the importance of legislative supremacy but maintain a cooperative approach that accommodates a reasonable amount of judicial leeway to carry out the essential judicial function of providing a check on the legislature.<sup>241</sup>

#### IV. CONCLUSION

The contemporary American legislative process and methods of statutory interpretation implemented by the courts are the direct result of an evolutionary development into a collaborative system of creating just laws in accordance with the will of the people. It is the duty of judges to apply statutes in harmony with the intent and purpose ascribed by the legislature that enacted the law. To maintain the checks and bal-

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238. As one great scholar said, "Life is our dictionary." Ralph Waldo Emerson, *The American Scholar, An Oration Delivered Before the Phi Beta Kappa Society, Cambridge University* (Aug. 31, 1837), available at <http://www.emersoncentral.com/amscholar.htm>.

239. See Molot, *supra* note 95, at 48.

240. See *id.* at 16.

241. See *id.* at 56-57; see also Eskridge, *supra* note 35, at 1548-49 (promoting a more cooperative, agency-type role for the judiciary on behalf of the legislature).

ances that are essential to the structure and effectiveness of a three-branch democracy, the judiciary, when interpreting and applying the law, must make all necessary efforts and use all reasonable resources to discern the legislative intent. If achieving justice is the goal of our courts, history has demonstrated that judges, at times, need to look beyond the mere language of a statute to fully understand its purpose, because equity is not in the words, but in the spirit of the law. Until a more collaborative process evolves between courts and legislatures and the intent of each statute is readily available to the courts, legislative history, when applied in an ethical and responsible manner, offers the greatest insight into the collective intent of the legislature at the time a particular statute was enacted. A complete failure or outright refusal to consider any extrinsic legislative sources to determine the legislative intent is nothing less than judicial in-activism.

The democratic process is best served when the legislature provides its intent in clear, unambiguous language, allowing courts to simply apply the plain meaning; however, it may be unrealistic to expect legislators to craft such precise legislation.<sup>242</sup> There are far too many unforeseeable considerations for a legislature to provide a comprehensive law that addresses every remote possibility.<sup>243</sup> There are bound to be circumstances that fall outside the letter of the law. When the statutory language is unclear or fails to specifically address an issue, it is entirely reasonable for a court to refer to something other than the plain text of the law to glean what the lawmakers would have intended in the particular situation before the court.<sup>244</sup>

The American judicial system works best when it reinforces people's faith in the democratic process.<sup>245</sup> Jurists' manipulation of extrinsic sources for the sake of judicial advocacy flies in the face of the democratic process and significantly weakens the credibility of the entire justice system. Conversely, faith in the democratic process is also lost when unjust laws are passed and courts blindly apply them.<sup>246</sup> It is the province of the judiciary, as the independent branch of government, to provide a fair and impartial balance by stepping in and interpreting seemingly unjust laws in a manner that promotes faith in both the judi-

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242. Molot, *supra* note 95, at 53-54.

243. GREENAWALT, *supra* note 21, at 183-84.

244. If the legislation is unclear and meaning cannot be derived from extrinsic legislative sources, the court is left with the contingent option of declaring the statute inoperative and void. See *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1925); *State ex rel. Crow v. W. Side St. Ry. Co.*, 47 S.W. 959, 961 (Mo. 1898).

245. Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View From Century's End*, 49 AM. U. L. REV. 1, 29-30 (1999) ("Courts ought not impose substantive solutions for which there is no general social consensus, both because such impositions are illegitimate and because they may undermine people's faith in the courts and in the rule of law.").

246. Molot, *supra* note 95, at 58; *see also id.* at 53-54 (pointing out the exclusion of statutory purposes interferes with the democratic process).

cial system and the democratic process.<sup>247</sup> The Court created a guide as to when democratic advocacy is required to avoid results that fly in the face of the principles and values on which this country was founded.<sup>248</sup> It is simply untenable to believe that a democratic nation like ours could produce laws that blatantly favor one class of citizens over another, and the judiciary must provide this important check on the legislature to ensure that our laws do not have that effect.<sup>249</sup> It is at those times when the independence of the judiciary is of the utmost importance, and jurists must rely on “the principle of Puritan statesmanship [that] ‘[t]he magistrate is the servant not of his own desires, not even of the people, but of his God.’”<sup>250</sup>

Attorneys are taught to make bold assertions and support them with the most persuasive authority available. That is zealous advocacy. Although judges are expected to take and apply the law as they find it, and because most judges are lawyers, it is reasonable to expect some judicial advocacy.

Action is with the scholar subordinate, but it is essential. Without it, he is not yet man. Without it, thought can never ripen into truth. Whilst the world hangs before the eye as a cloud of beauty, we cannot even see its beauty. Inaction is cowardice, but there can be no scholar without the heroic mind.<sup>251</sup>

This action does not, however, equate to a judicial license to engage in intellectual dishonesty, and judicial opinions are not a platform to advocate on behalf of what the individual judge thinks the law *should* be. The purpose of this note is certainly not to encourage judicial activism in the sense of judges replacing their will for that of the legislature, but instead is to encourage judicial advocacy in the sense of judges actively pursuing the purpose and objective of the legislation. When that purpose or objective is unclear, and the text offers only limited insight into the will of the legislature, failure to look beyond the text for the true legislative intent is inexcusable judicial in-activism.

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247. Interpreting the law is only one of the necessary roles of the judiciary. *See id.* at 56-57 (noting the importance of the constitutionally prescribed judicial role in the separation of powers).

248. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938) (promoting a “narrower scope for operation” when legislation appears to be specifically prohibited by the Constitution, restricts access to the political process, or prejudices “discrete and insular minorities”).

249. *Cf. supra* note 103, and accompanying text. Certainly, unjust laws have emerged from Congress and state legislatures; however, the threat of a strong judicial check can deter and minimize the negative effects of such laws. *See THE FEDERALIST NO. 78* (Alexander Hamilton), *supra* note 11, at 231.

250. JOHN F. KENNEDY, *PROFILES IN COURAGE* 64 (memorial ed. 1964) (quoting John Adams).

251. Emerson, *supra* note 238.