Foreword: Nonjudicial Statutory Interpretation

William D. Popkin
FOREWORD: NONJUDICIAL STATUTORY INTERPRETATION

WILLIAM D. POPKIN*

In the past decade the study of statutory interpretation has gone from benign neglect to intense scrutiny, but the emphasis has remained on interpretation by courts. This symposium takes a different approach. The major theme is that interpretation depends on the interpreter and that we can gain insight into statutory interpretation, even by courts, from analyzing the strengths and weaknesses of nonjudicial interpreters. Part I of this Foreword places the symposium in the broader setting of recent literature on statutory interpretation, briefly reviewing the major schools of thought and explaining the contributors' perspectives. Part II sets forth my own views about judicial reliance on a particularly controversial type of nonjudicial interpretation—statements about specific legislative intent found in legislative history. It supports the dominant theme of the symposium, which is that the interpreter's institutional competence should determine the weight accorded to the interpreter's conclusions.

I. THEMES IN STATUTORY INTERPRETATION

A. Recent Literature

The recent literature on statutory interpretation has encouraged new ways of looking at the two major criteria that courts use to determine statutory meaning—legislative intent and the text itself.

Legislative intent no longer looks the same as it did under the benign Legal Process formulation, which assumed that legislation was the product of reasonable people implementing reasonable purposes, to be reconstructed by courts in the context of the specific case. Under the influence of the Law and Economics movement, we cannot suppress the suspicion that legislation is the undemocratically controlled product of otherwise indeterminate legislative decisionmaking, strongly influenced by private interest logrolling and compromise.1 Despite renewed efforts to describe legislation from a civic virtue or public value perspective,2 it

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* Professor of Law, Indiana University School of Law (Bloomington).
2. The latest are Pildes & Anderson, Slinging Arrows at Democracy: Social Choice Theory,
will be hard to restore the level of optimism about politics that once prevailed. Legislative history, traditionally relied on by courts as a major source of information about legislative intent, has also lost its innocence. Its use to interpret statutes has been both attacked and cautiously rehabilitated.

The idea of the text has also been transformed, both in terms of the conception of the relevant text and the interaction between the text and judicial reader. The conception of the relevant text in Justice Scalia’s “New Textualism” bears little resemblance to the few words on whose plain meaning the judge can rely without much effort. His text is a set of complex statutory provisions, yielding their meaning to a sophisticated but nonetheless deferential grammatical analysis.

A radically different view of the interaction of text and judicial reader is implied by those influenced by the Law and Literature movement. In this view, the judicial reader plays an inevitably creative role in defining and shaping the interpreted text, although there are significant differences of opinion about what perspective the reader does or should adopt. Many of these differences are aired in Robin West’s contribution to this symposium, especially in her discussion of benign and malign interpretive communities. Other differences concern the extent to which historical or contemporary meaning should be openly avowed as the interpreter’s objective.

After this explosion of interest in statutory interpretation, there are signs that we have come full circle to a modified revival of the traditional Legal Process approach. The New Pragmatism, eschewing “foundational” approaches to interpretation and eclectically drawing on every

5. See Eskridge, the new textualism, 37 Ucla L. Rev. 621 (1990).
8. See West, the meaning of equality and the interpretive turn, 66 Chi-Kent L. Rev. 451 (1990).
available insight into statutory meaning, advocates what looks a lot like judicial reconstruction of legislative intent.10

B. Symposium Themes

The emphasis on the judicial reader, so prevalent in the current literature, will continue to dominate writing on statutory interpretation, but there are two reasons why other interpreters are important. First, they often “make” law because their determinations are, as a practical matter, final. Second, judges often decide to rely on other interpreters. Thus, the meanings determined by nonjudicial interpreters have legal as well as practical significance. Every article in this symposium addresses questions of nonjudicial interpretation.

1. Agency Interpretation

Peter Strauss deals with administrative agency interpretation and, more specifically, with the agency’s use of legislative history. He argues that the agency’s reliance on both the historical origins and evolving political history of a statute supports the rule of law by countering the impact of current legislative politics on agency decisions. It also helps agencies operate in the middle ground between law and politics, allowing them to play the dynamic interpretive role some have advocated more generally for courts. Finally, agencies are able to identify and avoid the chaff of politically manipulative and staff-created legislative history. Agency use of legislative history is therefore more defensible than judicial use and, from a judicial perspective, provides one more argument in favor of *Chevron*’s11 mandate that courts defer to agency decisions.

Michael Fitts welcomes this “administrative law” perspective on agency interpretation in his comment on Strauss’s article, but he questions whether it will make the positive contribution to the rule of law that Strauss anticipates. Fitts is especially concerned with the power that agency reliance on legislative history gives to the bureaucracy and legislative committees over the political decisions of the President and Congress. He also observes a tension between the agency’s commitment to legislative history fashioned by the legislature adopting a statute and its reliance on evolving agency interactions with the legislature.


2. Legislative History

William Eskridge is also concerned with nonjudicial interpretation but primarily from a judicial point of view. His concern is with the values that courts should adopt in deciding whether to rely on legislative history. He focuses on the use of legislative history in three contexts: to identify specific legislative intent, general legislative intent, and meta-intent (or truth value). He subjects each use to a constitutional, a political theory, and a jurisprudential critique.

Eskridge is unsympathetic with the constitutional critique and several versions of the jurisprudential critique, all of which privilege the statutory text. He makes several objections: the text, as broadly defined to include the entire body of statute law, often lacks objectively ascertainable meaning; judicial refusal to follow absurd meanings undermines formalist claims for the text's authority; and legitimate concerns about judicial discretion in determining intent are reduced if we posit judges as "relational agents" serving a legislative principal, rather than as willful imposers of their own political values.

Eskridge is more troubled by the political critique. He draws primarily on the public choice and Law and Economics literature to observe that politics is often dominated by selected private interests and that the makers of legislative history may be especially influenced by such interests. Ultimately, his response is to use legislative history cautiously in the practical reasoning process by which judges reconstruct legislative intent. To Eskridge, legislative history is part of the body of evidence which enables judges to learn about the truth value of legislation.

Frank Easterbrook, in his comment, cannot accept Eskridge's enthusiasm for judicial use of legislative history to reconstruct legislative intent. Nonetheless, he would allow legislative history the narrow role of identifying the limits of the statute's domain.

3. Congressional Interpretation

Robin West deals with yet another nonjudicial interpreter—Congress—but from a decidedly nonjudicial point of view. Borrowing the concept of "audience" from literary criticism, she argues that a text's meaning depends on its audience. She claims that we have too readily assumed that the audience for a legal text is the judge. In fact, Congress is another important audience for the constitutional text, with a potentially different perspective on its meaning.

After reviewing the literature about the reader's creative interpretive role, West concludes that judicial interpretation is not fully explained
either by the indeterminacy of the author's intent and the legal text or by the influence of benign or malign community perspectives. She argues that the court's definition of the text as "legal" brings with it a jurisprudential perspective that forces decisions into the "justice" mold, producing results framed in terms of individual rights, wrongs, and remedies.

On the other hand, Congress, as a political body, is not constrained by this "legal" perspective. Congress has the aspirational potential (though not necessarily the inclination) to prefer the "good" to the "just." The elected legislature is a very different audience from the courts, and views its interpretive role differently. As an illustration, she explains how the text of the Equal Protection Clause of the United States Constitution would look different to a Congress concerned with the "good," rather than to a law-oriented court concerned with individual rights, wrongs, and remedies. She is clearly less sanguine about courts avoiding "legalism" than are advocates of dynamic or civic virtue interpretation. West urges us to shift attention away from judges to other audiences, such as legislatures, which do not adopt a jurisprudential point of view.

Larry Marshall, commenting on West's piece, is enthusiastic about her emphasis on a distinctive congressional approach to determining constitutional meaning, but is worried about how Congress can be encouraged to address problems of constitutional meaning. He urges courts to provide Congress with an incentive by restricting the presumption that the statute is constitutional to cases in which Congress deliberated about the constitutional issue.

Although West's discussion deals with congressional interpretation of the constitutional text, the concept of "audience" is also important for understanding judicial interpretation of statutes. Difficult problems of interpretation often boil down to the judge choosing which audience's reading should be preferred on the basis of values which the judge deems important. For example, courts can implement democratic values by choosing the audience intended by the legislature. The court also can protect reliance interests by adopting the meaning that the reading public is likely to infer. In the classic case of defining tomatoes as "vegetables" (and other "easy" cases), both approaches converge to the same result. The legislature intended a nontechnical audience to rely on the statute and the nontechnically trained audience was the public most

12. In addition to protecting reliance interests, judicial preference for the public reader's meaning over legislative intent prevents hidden legislative meanings from undermining straightforward political language.

likely to read and rely on the text. This consideration supported a colloquial definition of tomatoes as vegetables rather than a technically (botanically) correct definition of tomatoes as fruits.

When the intended audience and the public audience likely to rely on the text adopt different readings, however, the court must choose the relevant audience. For example, the choice between historical and contemporary understanding may require choosing between the intended historical audience, thereby implementing legislative intent, or the meaning that the contemporary reader is likely to adopt. In two recent cases, the Supreme Court adopted the historical over contemporary usage in defining "race," but simply assumed without explanation that the perspective of the historical audience was privileged.

Even focussing on the contemporary public reading may still require a judicial choice of the statute's audience if the text is capable of both a relatively obvious colloquial meaning and a meaning apparent only on the basis of a more complex textual analysis. Although the general public rarely relies directly on a statutory text, professionals may disagree about how to read statutory language. The specialized practitioner, for example, may bring a degree of textual sophistication that other lawyers do not share. And some legislative subjects may be expected to invite complex textual analysis, rather than a simpler, more visceral understanding of the text's meaning. The courts usually fail to notice this potential conflict, adopting either a colloquial or more technically sophisticated reading without explaining why the perspective of one or the other audience should be preferred.

Implicit in the discussion of nonjudicial interpreters is the idea that

14. If the historical legislature intended an open-ended meaning, evolving over time, then there is no conflict between legislative intent and a contemporary reading. Inferences about open-ended intent are notoriously difficult to make in many cases.


16. The problem of determining whether the audience is the one with a colloquial or more sophisticated understanding of the text also underlies many cases of ambiguous meaning. For example, in Sullivan v. Stroop, 110 S. Ct. 2499 (1990), the statute helped welfare families by disregarding $50 of "child support" in computing welfare benefits. The question was whether Social Security payments for a child were "child support." There were two choices. A colloquial definition of "child support" included any payments for a child, including Social Security. A more technical definition, however, limited "child support" to parental support. The Court adopted the technical definition, noting that the disregard provision appeared in the same part of the statute that dealt with tracking down parents to obtain child support. Nowhere in the majority opinion was there an explanation for why the technical reader was to be preferred over the more colloquially inclined audience. The scant nontextual evidence revealed a "general" intent favoring the colloquial reading, because the statute was adopted to relieve welfare families of the burden of including a child's income in total family income. Id. at 2510 (Stevens, J., dissenting).

Stroop was typical in not discussing the problem of choice between a colloquial and a more
each might have a competence that justifies deference to his or her view of the text's meaning. One consequence of the search for the most competent interpreter is that we must become empiricists about how nonjudicial interpreters function in order to decide whether to rely on what they say. In the remainder of this Foreword, I will apply that approach by reporting what we know from the political science literature about how legislative history is created. I will use that information to make judgments about whether courts should rely on a particular type of legislative history.

My interest is in the much maligned institution of staff-created and manufactured legislative history. This type of legislative history sets forth statements of specific legislative intent about what the legislature was trying to achieve—what I call specific legislative history. Specific legislative history is, in effect, a rival to the statutory text in dealing with the particular issue being litigated. It contrasts with more general statements about statutory context and purpose—general legislative history. General legislative history is certainly not without its problems, which it shares with all evidence of statutory purpose. It is often imprecise and conflicting, permitting courts to read into the text a wide variety of specific meanings. But general legislative history is usually not as objectionable as specific legislative history, because it is less likely to be used explicitly to manipulate political results and is not a rival text disposing of the litigated issue. Despite serious concerns about specific legislative history, I conclude that considerations of institutional competence sometimes justify its use by courts to determine statutory meaning.

II. Choosing the Most Competent Interpreter—The Problem of Specific Legislative History

A. Models of Politics

There is hardly a more controversial nonjudicial interpreter of statutes than the authors of specific statements about legislative intent ap-

17. The British approach is based on a distinction between general and specific legislative history. British judges will use legislative history to understand legislative context, or general purpose, but will not rely on statements about specific legislative intent. See Black-Clawson Ltd. v. Papierwerke Waldhof-Aschaffenburg A G [1975] 1 All. E.R. 810, 822, 828; The Law Commission and the Scottish Law Commission 13, 32-34 (1969).

The British also claim not to use Parliamentary materials (such as committee reports or debates) for any purpose, but this judicial rule is sometimes breached. When a British judge recently admitted to peeking at forbidden legislative history (Hadmor Productions v. Hamilton [1981] 2 All E.R. 724, 731 (C.A.) (Lord Denning)), he was reprimanded on appeal to the House of Lords by Lord Diplock. Hadmor Productions v. Hamilton [1982] 1 All E.R. 1042, 1050-51.
pearing in legislative history. The problem with these interpreters can be summed up this way. There is a gap between those who create legislative history and the requirements imposed by three normative models of political decisionmaking.18

First, the public choice model is concerned with the impact of private interests on legislative decisions. It faults a political process in which some private interests have the power to override under-represented points of view. Second, the deliberative model requires elected legislators to engage in open-minded and respectful deliberation about political means and ends, fitting statutory detail into a statutory structure. Third, the public value model expects politics to implement public values, and will not settle for either the balanced representation of private interests or meaningful deliberation about statutory structure.

The realities of the legislative process suggest that the creation of specific legislative history may not be able to satisfy the requirements of one or more of these models. As explained in Part IIB, the dominant role of staff and a narrow group of legislators in writing legislative history may undermine deliberative values, skew the content of legislative history towards powerful private interests, and deprive the entire body of legislators of the opportunity to participate in writing statutes.

The fact that the statutory text may be unclear does little to ease concerns about the authors of legislative history. An unclear text simply eliminates the powerful argument that a clear statutory text should not be undermined by hidden meanings found in legislative history.19 The problems posed by the authors persist, however, when deciding whether to rely on specific legislative history, even when the text is unclear.

Part IIB will review the literature about the creation of specific legislative history, laying the groundwork for evaluating its competence as evidence of statutory meaning. Part IIC sets forth a standard for evaluating judicial reliance on such legislative history. Finally, Part IID applies that standard to committee reports and the congressional record.


19. Generally, a clear text will defeat legislative history. The leading case is Commissioner v. Acker, 361 U.S. 87, 92-93 (1959). A recent case is Eagle-Picher Industries v. United States EPA, 759 F.2d 922, 928-30 (D.C. Cir. 1985). The debate in the Supreme Court erupted in INS v. Cardoza-Fonseca, 107 S. Ct. 1207, 1213 n.12 (1987) (a clearly expressed intent in the legislative history might question the strong presumption that intent is expressed through the statutory language); but see id. at 1224 (Scalia, J., concurring) (even strong legislative history should not be used to qualify the plain meaning of the language, except to check up on whether a result is indeed absurd).
B. Information about how Legislative History is Made

1. Staff

Legislative staff play a prominent role in drafting legislative history.\(^{20}\) That much is clear. But why is this a defect in the political process; precluding reliance on legislative history? The most serious complaint about the role of staff concerns the bureaucratization of Congress and the negative implications this has for a deliberative model of politics. In the deliberative model, elected legislators link the details of the law to the broader framework of the statute.\(^{21}\) According to this view, law is not the development of broad principles, leaving others to work out the details, but a process of understanding principles by relating details to the statutory structure. Therefore, when the staff performs detail work, legislators do not engage in meaningful deliberation.

Staff achieve their independence because legislators require large staffs to confront both lobbyists and the Executive Branch on equal terms. As a result, these realities have converted legislators into managers of large bureaucratic offices in which a significant amount of power must be delegated. I am not suggesting, as some do,\(^{22}\) that staff run amok or act in disregard of their employer's wishes.\(^{23}\) The picture that emerges from studies of staff belies the image of excessive independence.


The apparent plausibility of that charge rests on studies emphasizing the growing entrepreneurial role of staff in developing legislative policy options and proposals, in contrast to the more traditional professional role of reacting to whatever task comes along.
Staff/employer relationships are characterized by loyalty, trust, influence, and congruence of views. Nonetheless, the leash restraining legislative staff may still be too long from the perspective of the deliberative model. Through the drafting of legislative history, staff undoubtedly retain considerable discretion to work out legislative details consistent with their employer's wishes. The potential danger this presents to a deliberative model of the political process cannot be disregarded.

The danger can, however, be overstated. A deliberative ideal that forces legislators to work out the relationship of all matters of statutory detail to the general statutory structure is too demanding. Agencies and courts have long been expected to work out statutory detail, precisely because legislatures cannot always do so. The staff's prominent role in negotiating statutory texts may make them sensitive to the overall statutory structure, sometimes more so than legislators. Their careful attention to detail may give them an interpretive competence that justifies judicial reliance on the legislative history.

An example from the Tax Reform Act of 1986 illustrates this point. The definition of a student's earned income became important after 1986 for two reasons—certain deductions could reduce earned income (such as salary), but not unearned income (such as dividends and interest), and the living expense portion of student scholarships became taxable. The statute, however, failed to specify whether taxable scholarships fall within the more favorable category of "earned" income. The Conference Committee Report filled this gap by defining earned income to include


25. See M. Malbin, supra note 21, at 247. See also Manley, supra note 24, at 1066 (the more complex the task, the more staff power).


27. We should also be careful about translating reports in the political science literature concerning independent staff behavior into a specific judgment about how legislative history is made. See Stenger, Congressional Committee Staff Members: Policy Advocates or Process Administrators 20-21 (1978) (noting the lack of studies connecting staff behavior with legislative consequences). For example, Farber and Frickey argue that Justice Scalia's example of staff independence in creating legislative history was misperceived. Farber & Frickey, supra note 22, at 440-42. Staff were attentive to the wishes of legislators, at least to Committee Chairman Dole.

taxable scholarships.\textsuperscript{29} Although the matter was of importance to students, it did not raise a major question of statutory structure and relying on this legislative history posed no threat to a deliberative model.

Opponents of relying on legislative history might respond that writing law through legislative history is usually such a threat to a deliberative model of legislation that courts should disregard it, in the hope of discouraging the kind of legislative carelessness which requires staff to clarify the law.\textsuperscript{30} We should be cautious, however, in advocating statutory interpretation rules to affect legislative behavior. There is no reason to believe that disregarding legislative history will prompt a busy legislature to change its ways. Just as much legislative inattention to detail may result, losing whatever guidance legislative history might provide.

Moreover, it is not clear that greater attention by legislators to the statutory text is always desirable. The proliferation of statutory detail can occupy a great deal of a legislator's time, and the result is often an unintelligible statutory text. On balance, staff attention to detail may sometimes be a useful technique for attending to the detail which legislators overlook.

2. Private Interest Groups

Another reason for a gap between the creators of legislative history and the requirements of normative models of the legislative process is that those creating legislative history may be especially vulnerable to powerful private interest group pressure. Strong private interest groups might undermine all three models of political decisionmaking by giving an undue advantage to one group, discouraging political deliberation, and suppressing consideration of public values. This might occur in two ways. First, those in a position to create legislative history, such as committee members, may be more representative of powerful private interest groups than the legislature as a whole. This occurs whenever committee membership is skewed towards those who can help interest groups in a legislator's constituency.\textsuperscript{31} Second, even if committees mirrored the leg-

\begin{itemize}
\item \textsuperscript{29} H.R. CONF. REP. No. 841, 99th Cong., 2d sess. II-17, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 4105.
\item \textsuperscript{30} See Report to the Attorney General, supra note 3, at 63-64; Wallace v. Christensen, 802 F.2d 1539, 1559 (9th Cir. 1986) (Kozinski, J., concurring).
\item \textsuperscript{31} Such skewing of committee membership is said to occur with some frequency. See Weingast & Marshall, The Individual Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets, 96 J. POL. ECON. 132, 148-55 (1988); Macey, Public Choice: The Theory of the Firm and the Theory of Market Exchange, 74 CORNELL L. REV. 43, 53-56 (1988); Bullock, U.S. Senate Committee Assignments: Preferences, Motivation and Success, 29 AM. J. POL. SCI. 789, 794-95, 801 (1985); Eulau, Committee Selection in HANDBOOK OF LEGISLATIVE RESEARCH, supra note 23, at 191, 208-15 (the reelection hypothesis for explaining committee assignments has been replaced
\end{itemize}
The secretive and staff-dominated process of creating legislative history might be more amenable to private interest group pressure than the process of writing legislation. Judicial rejection of legislative history might therefore reduce the ability of private interest groups to shape the law.

The danger of private interest group manipulation of legislative history, however, can be exaggerated. The distinction between private interest and public values is notoriously difficult to make. Many political claims can plausibly be described as advancing either private interests or public values. Moreover, even assuming that "private interests" can be identified, their impact on legislative history is hard to assess. Political results can be misidentified as the product of private interest group pressure. And committees are not uniformly subject to influence by private interest groups. Some committees are more "national issue" than "clientele-oriented," and the public interest is sometimes well-represented in the committee's deliberations by influential legislative and executive branch officials. Finally, private interests groups cannot be unambiguously associated with defects in the legislative process. Private interests may carry a public value banner, such as farmers arguing for food stamps. Interest groups that care about legislation may be a source of by a "constituency concern" hypothesis. Fiorina, Legislator Uncertainty, Legislative Control and the Delegation of Legislative Power, 2 J.L. ECON. & ORG. 39, 49 n.22 (1986), links these empirical observations to a critique of judicial reliance on committee reports. But see G. Goodwin, The Little Legislatures 78 (1970) (urban representative on agriculture committee).

32. See H. Fox & S. Hammond, supra note 28, at 98, 116 (commenting on the role of staff in communicating with lobbyists); Blanchard v. Bergeron, 109 S. Ct. 939, 947 (1989) (Scalia, J., concurring in part and concurring in the judgment) (disapproving of private interest lobbying through staff); National Small Shipments Traffic Conference, Inc. v. CAB, 618 F.2d 819, 828 (D.C. Cir. 1980) (same). See also Hatch, supra note 20, at 44-45 (speculating that a Senator's speech might be an unreviewed opinion of unelected staff, with the collaboration of union intellectuals).


34. G. Goodwin, supra note 31, at 102-03. National issue orientation (which usually characterizes the Joint Committee on Taxation) is not, however, a guarantee that private interest lobbying will be ineffective. See Manley, supra note 24, at 1066 (complaints about former Chief of Staff of Joint Committee on Taxation).

35. For example, the Tax Reform Act of 1986 stated that the deduction of costs for property, including "books," must be deferred. I.R.C. § 263A(b) (1986) (flush language), as added by Tax Reform Act of 1986, § 803(a), 100 Stat. 2350. The Committee Report added that the property covered by the statute included not only books, but also "similar property embodying words, ideas, concepts, images, or sounds, by the creator thereof." H.R. Rep. No. 99-841 (II), 99th Cong., 2d sess. 308 (1986). This legislative history seemed to require authors as well as publishers to defer costs, a result which favored the government and advanced the public interest in tax equity. Congress has since decided that authors should be more favorably treated than the legislative history provided. I.R.C. § 263A(h) (1986), as added by Pub. L. 100-647, § 6026(a), — Stat. — .
information about statutory defects which are clarified by the legislative history.

3. Participation by Other Legislators

Even if staff creation of legislative history and the influence of private interest groups were not problems, there is something inappropriate about selected legislators making law without the participation of other legislators. Never mind that the creators of legislative history may in fact be agents of the legislature. Courts do not have to accept their status as agents for purposes of determining statutory meaning, whatever may be the internal legislative arrangement.

We do not in fact know a great deal about the opportunity for legislators not on the committee writing legislative history to participate in its creation. The critical empirical question is whether a legislator's personal staff monitors legislation, because only staff have enough time for this task. There is a significant literature on the role of congressional staff, but it focuses more on committee than personal staff.36 In studies which pay significant attention to personal staff, few deal at any length with legislative work. One study dealing with the legislative role of personal staff notes that staff keep track of legislation outside of their employer's committee assignments.37 But some anecdotal evidence indicates that relatively few legislators concern themselves with legislative history,38 and that those in control of the committee process are not always forthcoming about their work.39 No research of which I am aware directly addresses the precise question of personal staff concern with legislative history.


If we focus on committee members, rather than on legislators interested in legislation outside of their committee assignments, there is also doubt about whether they have access to the creation of legislative history. A 1963 study of congressional staff includes complaints by a committee member that he was not informed about the content of his committee's report. Moreover, one committee member observed that his chairman sometimes placed statements in the Congressional Record that did not reflect the Member's views of the committee's action. Insofar as this problem arises from the committee chair's control over committee staff who draft legislative history, the enlargement of staff for minority and other committee members may have reduced the chair's power.

We can, however, confidently assert that legislators who are not on committees in charge of legislation generally do not participate in creating legislative history and that there are obstacles to their opportunity to participate. This reality, however, does not dispose of the question of judicial reliance on specific legislative history. If we were sure that legislative history was always politically manipulative and that staff-created statements should be disregarded, low participation potential might be sufficient to dismiss judicial reliance across-the-board. But the relative advantages of relying on specific legislative history to elaborate on statutory structure in selected situations justifies avoiding such a broad rule.

C. Standards for Relying on Specific Legislative History

The point of this discussion is not that the role of unelected staff and private interests is never cause for concern about relying on specific legislative history. Rather, overreaction by rejecting all such legislative history is unwise. The proper judicial response is to be selective about when to accept or reject specific legislative history.

40. K. KOFMEHL, supra note 20, at 122 (even committee members may not know what is in the committee report). Important legislation, as well as legislative history, may also escape the notice of interested legislators. For example, relevant Members of Congress were not notified that a provision denying the FCC a waiver power was in a continuing resolution. News America Publishing, Inc. v. FCC, 844 F.2d 800, 807 (D.C. Cir. 1988).

41. C. CLAPP, supra note 38, at 136.


43. It is also hard to know how to evaluate particular complaints about inadequate opportunities to participate. Complaints may come from a loser in the political battle, from someone who thinks legislative history is overemphasized vis-à-vis the statutory language, Farber & Frickey, supra note 22, at 439-42 & nn.60-61, or from someone with a nostalgic longing for a Republican age in which committees were subservient to a deliberating Congress. G. GOODWIN, supra note 31, at 6-9 (Republicans near the time of the Founding believed major legislative work should be done by Congress and that committees should take instructions from the Committee of the Whole).
A court should ask two questions. First, is the legislative history an attempt to settle a contentious political debate which accompanied the statute's passage—a "politically sensitive" issue? Legislators should take responsibility for resolving such contentious issues in the statutory text, rather than running the risk that private interest groups will manipulate the result through legislative history. In some cases, such legislative history will be clearly countermajoritarian, in the sense that the gap between legislative history and what the legislature as a whole might want is too great. But even without evidence that the legislative history is countermajoritarian, issues which were the subject of contentious but unresolved political debate should not be resolved through legislative history.

Second, does the legislative history undermine the statutory structure? This criterion focusses on a different problem from countermajoritarian legislative history. A provision is countermajoritarian when it contradicts the results of an explicit political battle. Many issues of statutory interpretation are not explicitly disputed during a statute's passage, but may nonetheless implicate the statute's overall structure. Although legislative deliberation about statutory structure may be too much to expect in all cases, the damage to the deliberative process is excessive when staff and private interest groups undermine that structure through legislative history.

When the issue is not politically sensitive or the statutory structure is not undermined, courts do well to rely on specific statements in the legislative history which elaborate on statutory detail. The attraction of relying on such legislative history is especially strong in very technical

44. This is illustrated by an example from environmental legislation. Ackerman & Hassler, Beyond the New Deal: Coal and the Clean Air Act, 89 YALE L.J. 1466, 1559-61 (1980) give the following account of the history of the Clean Air Act Amendments of 1977. The issue was how to interpret a statutory rule about emission standards in the Clean Air Act. Some House Members of Congress wanted to favor Eastern producers of dirty coal by adopting a standard that would not give clean coal producers an edge. These Members advocated a rule requiring clean (as well as dirty) coal users to reduce emissions by adopting costly pollution control technology. They placed a statement in the legislative history to achieve that result, despite the language of the statute which suggested the absence of such a requirement and in the face of a prior legislative vote suggesting the absence of political sympathy for Eastern dirty coal producers.


45. The assumption that there is a statutory structure would probably be greeted with skepticism by many advocates of the Law and Economics approach. See generally Easterbrook, Statutes' Domains, 50 U. CHI. L. REV. 533 (1983).

46. I am assuming that there is no conflict with a clear statutory text, in which case the text should prevail in any event, absent absurd consequences. See supra text accompanying note 19.
areas of the law. When the choice is between courts becoming embroiled with technically complex interpretive issues or deferring to legislative history drafted by those competent to work out statutory detail, the decision to rely on the legislative history makes good sense.47

Some will observe an irony in the argument that judicial reliance on legislative history permits courts to defer to other decisionmakers. One objection to letting courts use legislative history is the risk of aggrandizing judicial power, by giving courts another string to their interpretive bow and permitting them to hide policy choices behind deference to legislative intent.48 There is no denying that the standards for deciding whether to rely on legislative history require an exercise of judicial discretion. But objections to judicial discretion are more cogently directed to scavenging through legislative history for shreds of evidence about what the statute means and patching those shreds together to construct meaningful legislative history. By contrast, clear statements in the legislative history about matters of statutory detail do not allow the court an excessive opportunity for creative reconstruction of legislative intent. Therefore, such statements can be reliable evidence of statutory meaning, without increasing the court’s opportunity to manipulate or conceal its reasoning.49

47. Tax committee staffs, for example, are often cited for their technical competence. M. MALBIN, supra note 21, at 166-87; Manley, supra note 24, at 1066; Price, supra note 23, at 326-31. Moreover, a sophisticated bar may expect legislative history to be very important in highly technical areas of law, such as tax. See Ferguson, Hickman & Lubick, Reexamining the Nature and Role of Tax Legislative History in Light of the Changing Realities of the Process, 67 TAXES 804 (1989).

Not everyone would agree that tax issues are more appropriately left for resolution by legislative history. Senator Armstrong, for example, objected strongly to relying on committee reports, especially in tax legislation. See Farber & Frickey, supra note 22, at 440, 41 n.61.

After preparing this article, I had the opportunity to read Livingston, Congress, the Courts, and the Code: Legislative History and the Interpretation of Statutes, 69 TEX. L. REV. 819 (1991), dealing with legislative history and tax statutes. I agree with the general point of the article, which is that the “best way to view [...] legislative history may be in institutional terms, as part of the evolving relationship between Congress, the courts, and administrative agencies in the making of tax law and policy.” Id. at 873. I do not, however, share the author’s negative attitude towards specific legislative history, what he calls “writing regulations in the committee report.” Id. at 880. Exactly how much disagreement we have is unclear because, despite his view that such detail lies within the institutional competence of Congress, id. at 882, he ends up giving significant weight to detailed committee reports. Id. at 879 (“deference [to Committee Reports] somewhat less than that provided a Treasury Regulation”).


49. Another criterion for using specific legislative history is suggested by the requirement that legislators have the potential to participate in its creation. At a minimum, legislators should recognize the document as one which embodies political agreement. This rules out judicial use of affidavits prepared by legislators in connection with litigation because they are not recognized vehicles for producing political agreement.

Despite this shortcoming, courts vary in their willingness to consider affidavits. Compare City of Spokane v. State, 198 Wash. 682, 89 P.2d 826 (1939) (affidavits were accorded no probative
D. Application of Standards

These standards for judicial deference to specific legislative history are meant to acknowledge the risks of judicial reliance without disregarding its advantages. In this last section I will test these standards by applying them to some familiar types of legislative history—committee reports and the Congressional Record. These standards provide a somewhat different evaluation of their utility than under the more conventional analysis.

1. Committee Reports

Most legislation today is worked out in committee. Legislators know that this is where political agreements are made. Legislators generally have the resources, if not always the will, to keep track of the process. Committee reports are therefore properly treated as the most reliable type of legislative history.\(^5\)

Some committee reports may not stand up well, however, when measured against the standards outlined above. The conference committee report is traditionally considered the most reliable form of legislative history,\(^5\) presumably because the opinion of both Houses of Congress comes closest to being an expression of legislative intent. But the circumstances under which the conference committee report is issued cast doubt on its reliability. Many conferences resolve politically sensitive disputes at the end of the legislative session, in an environment of frantic activity aimed at winding up the legislative session. This setting is also not conducive to providing other legislators with an adequate opportunity to participate in creating legislative history.\(^5\) It is nonetheless difficult to generalize, even about conference committee reports. Not all issues re-

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solved in conference—even at the end of a session—are politically contentious. And the risk of subsequent exposure in the public press may discourage some efforts to manipulate the law.\textsuperscript{53}

There may also be institutional advantages to using committee reports to make law rather than relying on the statutory text. An opportunity to amend statutory language will often open up the legislative process to the addition of unrelated riders to a popular bill, even though the amendments could not pass on their own, or to the addition of killer amendments to attract opposition that would not otherwise materialize. This possibility is especially serious at the end of the legislative session, when slowing down the bill to fight over controversial provisions may threaten to kill the legislation. Once a committee agrees on statutory language, the committee report may become the preferred vehicle for resolving issues that surface later, without calling back the entire committee to deliberate on the statutory language. And once the House and Senate conferees agree on a version of a bill, the conference committee report may prove similarly convenient.\textsuperscript{54} The rushed process of writing legislative history at the end of a legislative session may even protect the process from private interest lobbying, contrary to the usual assumption, by shortening the time to mobilize private interest group pressure.

2. The Congressional Record and Manufactured Legislative History

The standards discussed earlier for judicial reliance on specific legislative history accord more weight to legislative history found in the Congressional Record than critics of this practice might allow. The charge of planting material in the Congressional Record is usually considered the "most strongly held" objection to legislative history,\textsuperscript{55} on the ground that the Congressional Record often records manufactured conversations staged for a virtually nonexistent audience.\textsuperscript{56} But this reality does not justify automatic rejection of such legislative history.

53. For example, the funding for a school for North African Jews was repealed when Senator Inouye’s sponsorship became a public embarrassment to his ambitions for future political leadership. 1988 CONG. Q. WEEKLY REP. 242. See also Senator Byrd, Launches Crusade Against Influence Peddling, 47 CONG. Q. WEEKLY REP. 2009 (1989) (Senator Byrd was so offended by lobbying for a project that he not only opposed it, even though it benefitted his constituency, but also sponsored legislation to discourage such lobbying practices).

54. 33 TAX NOTES 125 (1986) reports the difficulty in obtaining unanimous consent for making amendments to the Tax Reform Act of 1986 at the end of the legislative session.

55. Report to the Attorney General, supra note 3, at 53-54.

56. Mikva, A Reply to Judge Starr’s Observations, 1987 DUKE L.J., at 384 (referring to the pas de deux in manufacturing legislative history). Congress has responded to these complaints in two ways. Since 1978, if no part of the material was spoken on the floor of Congress, it appears with a black mark (a bullet) in the Congressional Record. 124 CONG. REC. 3676 (1978). And in 1986 the House adopted a one year experiment, H.R. 230, 99th Cong., 1st Sess. (1985), requiring the printing
Manufactured legislative histories are often carefully worked out with other legislators, just like material found in committee reports. If the legislature were a debating society for most legislation, or if the court required legislative history to be part of such a deliberative process to be useful evidence of statutory meaning, manufactured legislative history would be suspect. But if the producers of legislative history are legitimate independent sources of statutory meaning, the fact that legislative history is "manufactured" is not a drawback.

Manufactured legislative history is sometimes unfavorably contrasted with "hot debate," but skepticism should run in the other direction. Hot debate is frequently about politically sensitive issues which should not be resolved through legislative history. Moreover, it often provides inconclusive evidence of conflicting legislative purposes, rather than clarification of matters of statutory detail. Hot debate may therefore be significantly less useful in determining statutory meaning than manufactured legislative history.

III. Conclusion

It is unlikely that judicial interpretation will cease to be the primary focus of attention for those interested in statutory interpretation. But
nonjudicial interpreters may have a different perspective on the meaning of legal texts, which is interesting in its own right and which courts might do well to adopt. This symposium has focussed attention on a variety of nonjudicial interpreters, such as agencies, the makers of legislative history, legislatures, and lawyers. Perhaps there are others—treatise writers, for example—to whom we ought to listen. The symposium contributors have advanced reasons why nonjudicial interpretations deserve deference and, in some cases, the commentators have criticized their conclusions. At the very least, the symposium should force us to be more sophisticated about the relative competence of different interpreters and the claims made to support their view of what a legal text means.