1984

Statutory Interpretation in America: Dipping into Legislative History, Part I

Reed Dickerson
Indiana University School of Law - Bloomington

Statutory Interpretation in America: Dipping into Legislative History—I

By Reed Dickerson*

Introduction

It is currently fashionable among American jurisprudents to approve or condone the selective use of legislative history in determining the meaning of statutes. "Legislative history" in this context normally refers to utterances (and some events) that engage the attention of the legislature during the process, from conception to birth, of enacting the statute being interpreted. What, specifically, legislative history consists of will appear later in this article.[1] Its attractions are considerable, largely because it is easier to read legislative history than to pick away at statutory text.

The conscientious judge searches for the "true" meaning of a statute, because the constitutional separation of powers assigns to the legislative branch the central responsibility for the statutory management of social policy in the substantive areas allocated to it under the applicable constitution, subject to such constitutional requirements as "due process," "equal protection," definiteness, and similar guarantees of minimum fairness.

Enthusiasm for legislative history usually assumes that fidelity to legislative supremacy is best served by an unrelenting search for legislative intent, an alleged phantom that Professor Max Radin[2] and his many judicial and academic converts have been unsuccessful in exorcising. The concept of legislative intent is a hardy one and, however fictional,[3] it is basic to maintaining an appropriately deferential judicial attitude. Without it, the legislative process makes no sense.[4]

Many judicial pronouncements seem to imply that the fidelity owed to legislative intent stands higher than any fidelity the court may owe to the

---

* Professor Emeritus of Law, Indiana University (Bloomington); author, *The Interpretation and Application of Statutes* (1975); co-editor, with C. Nutting, *Cases and Materials on Legislation* (1978). This article is a condensed version (published by permission) of an article published as part of a legislation symposium in (1983) 11 Hofstra L. Rev. 1119 *et. seq.* Thanks go to Professors Michael D. Carrico, Maurice J. Holland, Michael B. W. Sinclair, and Laurel A. Wendt for their comments and suggestions.

[1] *See infra*, notes 27–39 and accompanying text.

[2] Radin, "Statutory Interpretation," (1930) 43 Harv. L. Rev. 863. Professor Radin argues that a legislature is incapable of having a realistic intent.

[3] I doubt that the concept of legislative intent is fictional, rather than "real." *See* R. Dickerson, *The Interpretation and Application of Statutes* (1975) 73–74. This does not say that the legislature adverts to every aspect of a statute.

[4] *Ibid.* at 78–79.

statute itself.[5] It is well known that, because of the frailty of language and hectic and compromising nature of the legislative process, what gets said in a statute sometimes differs from what the moving parties intended it to immediately accomplish. To hew to the statute in such a case, it is often said, would be to commit the unpardonable sin of literalness, because everyone knows that words are conditioned by the context in which they are uttered. And who can deny that the legislative history of a statute is part of its context, especially when one finds little in the literature to challenge that assumption? Even so, there are gnawing doubts.

Fidelity to legislative intent is, of course, laudable, but one may ask whether this alone is sufficient fidelity to the applicable constitution. It seems not. Every American constitution provides, in effect, that the only instrument by which the legislature may create law in the usual sense is a statute enacted in the manner prescribed by that constitution.[6] The concomitant is that fidelity to legislative supremacy can be achieved constitutionally only if legislative meaning is pursued through a decent rendering of the statute according to the standards of the system of communication used by the legislative audience.[7]

There is some feeling today that, in view of the legislature's conceded inadequacies, the courts should be able to compensate by treating statute law as if it were case law. Professor Jack Davies recently proposed legislation to that effect, but to apply only after a statute has reached the venerable age of 20 years.[8] Although this interesting proposal is clouded with substantive, practical, and political difficulties, it at least seeks a legislative accommodation, however doubtful,[9] with existing constitutions. More typical have been rationalizations for the judicial amendment of defective statutes that simply ignore or gloss over the constitutional difficulties.[10] For persons of this persuasion, the matters to which this article is directed are academic trivia. But until such persons show a better grasp of the constitutional issues, a more realistic understanding of the legislative process, and at least a rudimentary understanding of the principles of communication, they need not be taken seriously.

---

[5] *See e.g., Schwegmann Bros.* v. *Calvert Distillers Corp.*, (1951) 341 U.S. 384, 390–95. For a discussion of the use of legislative history in the interpretation of the Miller-Tydings Act in *Schwegmann*, *see infra*, notes 44–50 and accompanying text.

[6] R. Dickerson, *supra*, note 3, at 9–10.

[7] For the four main constitutional restrictions, *see ibid.* at Chap. 2. These are (1) legislative supremacy, (2) exclusiveness of statutory vehicle, (3) reliance on accepted means of communication, and (4) reasonable availability.

[8] *See* Davies, "A Response to Statutory Obsolescence: The Nonprimacy of Statutes Act" (1979) 4 Vermont L. Rev. 203.

[9] Davies asserts that, if a legislature can constitutionally include an automatic termination date, it can take the less dramatic action of automatically diluting the force of the statute upon the expiration of a prescribed period. *Ibid.* at 225 n. 67. Isn't this only a euphemism for a deferred power to amend? Delegated legislation provides no precedent, because (1) it authorizes supplementing the enabling statute, not amending it, and (2) it provides at least rudimentary guidelines for that purpose.

[10] *See e.g.* G. Calabresi, *A Common Law for the Age of Statutes* (1982); Note, "Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court" (1982) 95 Harv. L. Rev. 822.

Persons more sensitive to the ramifications of the separation of powers, including legislative supremacy, should take greater pains to delineate the legitimate uses, if any, of legislative history in determining legislative intent. But if we are to take due account of the constitutional exclusiveness of the statutory vehicle, how can we justify the use of legislative history, when it lies beyond the sweep of the one thing that a legislature has constitutional power to enact? To handle this adequately, we need a coherent theory of statutory interpretation.

After 18 years of study, I offered in *The Interpretation and Application of Statutes*[11] a comprehensive approach to statutory interpretation that, while satisfying some cravings,[12] has created much academic disdain, because it fitted no existing orthodoxy and used nontraditional terminology to describe a distinction that has been strongly implied but never before systematically exploited. In the meantime, the profession remains caught in a semantic trap from which it is apparently unable to extricate itself.

Although it is widely recognized that in taking account of statutes courts have not only a law-*finding* function ("interpretation" in its conventional non-legal sense) but, in cases where the law so found is inadequate to dispose of the case before it, a law-*making*[13] function that engrafts on the statute meaning appropriate to resolving the controversy, the implications of this are not generally appreciated. The distinction is fundamental, because the two elements differ widely and are governed by two disparate sets of principles.[14]

The former element, for which I borrowed Professor Alf Ross's term "cognitive,"[15] is controlled for the most part by general, extra-legal principles of communication. The latter, for which I have used the term "creative," is essentially controlled by constitutional principles. The current confusion of doctrine respecting "statutory interpretation" results from legal theoreticians' use of the single term indiscriminately to cover two functions that not only differ radically but should, for constitutional reasons relating to the separation of powers and unfair surprise, be performed, not simultaneously, but serially.[16]

This long recognized distinction and the constitutional exclusiveness of the statutory vehicle must be conscientiously respected if we are to make practical and constitutional sense out of the grab bag of materials that goes under the name "legislative history," irreverently referred to by

---

[11] R. Dickerson, *supra*, note 3.

[12] *See, e.g.*, Donahue, "Limitations on Judicial Review: A Semiotic Interpretation of Statutes", (1978) 7 U.C.L.A.—Alaska L. Rev. 204; Williams, "Statutes as Sources of Law Beyond Their Terms in Common-Law Cases, (1982) 50 Geo. Wash. L. Rev. 554; Re, Book Review, (1977) 22 N.Y.L. Rev. 1092 (reviewing R. Dickerson, *The Interpretation and Application of Statutes* (1975).

[13] For a list of articles discussing this "law-making" function, see R. Dickerson, *supra*, note 3, at 14 n. 5; *see also* W. Statsky, *Legislative Analysis: How to Use Statutes and Regulations* (1975) 23–24.

[14] R. Dickerson, *supra*, note 3, at 13–33 ("Basic Concepts: The Ascertainment of Meaning (Cognition) and Judicial Lawmaking Through the Assignment of Meaning (Creation)").

[15] A. Ross, *On Law and Justice* (1959) 138.

[16] R. Dickerson, *supra*, note 3, at 20, 190.

Charles P. Curtis as "the ashcans of the legislative process."[17] Resistance to the distinction between a court's cognitive and its creative functions is often voiced in terms of the alleged impossibility of intellectually separating from each other notions that are functionally intertwined, a purported handicap that rings oddly in the ears of those who realize that doing just that has long been a main preoccupation of the courts.

My own views can be summarized quickly.[18] While performing its cognitive function of finding statutory meaning, courts should defer to legislative history only to the extent, if any, that it can be considered part of the external context[19] of the statute, it being no part of the statute itself. This is easier said than done, because there are strong doubts that much, if any, legislative history is properly regarded as context.

Where the statutory meaning so found is inadequate to decide the case, courts are free, and indeed are required, to attribute to the statute judge-made meaning appropriate under the legal standards for making law where the statute fails (its creative function). Unfortunately, the indiscriminate lumping of these two judicial functions under the name "statutory interpretation" has stunted the doctrinal growth of both.[20] Indeed, with respect to statutes I perceive no currently accepted body of doctrine for judicial law making.

It is not my purpose here to develop such a body of doctrine, beyond pointing out that there are at least 10 possible guides to supplemental judicial law making in administering statutes[21] and that with respect to them the concept of legislative intent plays a more modest role. For this reason, the need to discover it, with or without resort to legislative history, is likely to be less. Indeed, there should be little or no restriction on what the court may look at for this purpose. The most serious problem here is to determine whether the judicial enhancement of the statute involves the threat of unfairly surprising the legislative audience,[22] a risk that can be avoided by deferring the effectiveness of the new legal meaning.[23] Conversely, unfair surprise is no problem for the cognitive function so long as nothing is attributed to the statute that is not revealed by the text as it is conditioned by its total context.

Although the cognitive-creative dichotomy (and sequence) has not been adopted by the judiciary in those terms, it has been strongly implied by the many courts that resort to legislative history only when significant uncertainty of the statutory meaning emerges. Unfortunately, the implication is blurred by the willingness of some courts to accept legislative history as the sole source of the uncertainty. Rather, notions of fairness would seem to require that factors creating uncertainty should not

---

[17] C. Curtis, *It's Your Law* (1954) 52.

[18] For a more detailed treatment, see R. Dickerson, *supra*, note 3, at 137–97 ("The Uses and Abuses of Legislative History").

[19] *See infra*, text accompanying notes 24–25.

[20] 3 R. Pound, *Jurisprudence* (1959) 483–84.

[21] R. Dickerson, *supra*, note 3, at 240–61.

[22] For a discussion of identifying legislative audiences, see W. Statsky, *supra*, note 13, at 83–98.

[23] R. Dickerson, *supra*, note 3, at 257–61.

be the basis for upsetting otherwise clear language-in-context, unless those factors are part of context and thus available to the legislative audience.

Because some extrinsic evidence lies within the statutory context and some lies outside, it is important to understand the qualifications for external context. I suggest four[24]: Extrinsic material must be (1) relevant; (2) reliable and reliably revealed; (3) reasonably available to the audience (that is, shared by author and audience); (4) taken into account (that is, relied on), as constituting part of the communication, by both author and audience.[25]

In general, little legislative history is helpfully relevant. Much of it is unreliable or unreliably revealed. Most if not all of it is of questionable practical availability to typical members of the legislative audience. Besides, little or none of it is relied on by typical members of the legislative audience as conditioning the language of the statute.

The reader should keep in mind that whether something is part of the external context of a statute is relevant to the court's cognitive function, not its creative function. The reader should also consider what the material is being used to show. On the one hand, material that purports to state what the statute means (which is congruent with immediate purpose) should be rejected out of hand, because it competes with the statute and, if used, undermines the court's role of having the final say on what statutes-in-context mean. On the other hand, material that states what the statute is ulteriorly (more broadly or remotely) attempting to accomplish is not similarly offensive, however objectionable it may be on other grounds.[26] With these general guidelines, let us now see how particular kinds of legislative history measure up.

Kinds of Legislative History

Recommendations of a Study Group

Many statutes are the culmination of studies by official bodies charged with finding legislative solutions to social problems.[27] The resulting reports are the most reliable type of evidence of legislative intent so far as the intent can be inferred from the ulterior purposes of the statute disclosed by the study. These purposes are relevant, however, only so far as it is probable that what the legislature enacted in the particular case was directed at the same purposes as those disclosed by the report. In each case, some deviation is highly probable. How to determine it is the problem.

---

[24] For a more detailed discussion of external context, see R. Dickerson, *supra*, note 3, at 105–25, 142–62.

[25] All but item (4) have received some recognition in England. *See, e.g.* Samuels, "The Interpretation of Statutes", [1980] Stat. L. Rev. 86, 95.

[26] R. Dickerson, *supra*, note 3, at 87–88, 156–57.

[27] For further discussion of the legislative history generated by study groups, *see ibid.* at 161–62, 166–67, 196.

Another problem is practical availability. Unless the statute or its official publication refers to the report, it would be asking too much of typical members of the legislative audience to take into account the purposes stated in the report unless they were independently a part of the background knowledge, however supplied, common to that audience. English courts, which tend to reject all legislative history, cite the reports of Royal Commissions and similar bodies, but only to affirm legislative purposes.[28] If those purposes are independently revealed by knowledge otherwise a part of the legislative context, or if the report is used in making law to resolve an otherwise unresolvable uncertainty, that approach makes sense. Otherwise, such a report should not be relied on for cognitive purposes, unless the statute specifically refers to it.

The same considerations would seem to apply to executive communications recommending legislation.

Committee Hearings

It is highly doubtful that committee hearings can qualify as external context. What is said at such hearings is so unreliable, even when it appears to make good sense, that courts should pay little heed to it,[29] except possibly for confirmatory purposes. It tends to be highly adversarial, but without even the elementary safeguards for balance that our judicial system provides. As for witnesses, the cards are likely to be heavily stacked in favour of the proponents of the bill. There are few guarantees of thoroughness.[30] Nor is such material reasonably available to the legislative audience.[31]

Committee Reports

Committee reports are the second most reliable kind of legislative history.[32] Their main value is in showing (if they do) the ulterior purposes that the respective bills are intended to advance. Here, they tend to emphasise the main thrusts of the legislation, which are usually not too hard to infer from general context.

By long-standing practice, most congressional committee reports include sectional analyses. Unfortunately, these usually consist of mere paraphrases of the statute, and the deviations from statutory text are not likely to be reliably helpful. Although the best person to write the paraphrase is normally the one who drafted the statute, the opportunity to

---

[28] *See* R. Cross, *Statutory Interpretation* (1976) 136–39. For reasons given for rejecting British legislative history, see Samuels, "The Interpretation of Statutes: No Change", (1982) 79 L.S. Gaz. 1252–53.

[29] R. Dickerson, *supra*, note 3, at 155–57. For the most part, unreliability results from bias and from the imbalance inherent in the inevitably incomplete and sporadic nature of what is express, practically available, and otherwise reliable. Many critical legislative developments are off-stage, carefully shielded from the public eye.

[30] *Ibid.* at 148–49.

[31] *Ibid.* at 145–47.

[32] However, even these reports are unreliable so far as they try to state the meaning of what is being recommended for enactment. See *supra*, text accompanying note 26.

get the paraphrase right is likely to be even poorer than the opportunity to get the statute right. Even worse, paraphrases are inevitably competing statements of legislative intent rather than statements of specific ulterior purposes. Nor are there adequate guarantees of objectivity.

Practical availability is also a problem. Even conference reports, each reflecting a consensus following disagreement between two houses, are not free from these defects.[33]

Floor Debates

Among the least reliable kinds of legislative history are floor debates.[34] Not only are they laden with sales talk, but their frequent reference to what a provision means is an unconscious effort to finesse the courts in performing their constitutional function of having the last word on what the statute means. Besides, it would be rare for the authors of a statute to take such references into account.

Even where floor debate is directed to ulterior purposes, the problem of bias persists. Indeed, there are even fewer restraints on insincerity, because the disciplines of the legislative process bear less heavily on the motives for legislative action than they do on the legislative action itself.

Reliability is further undermined by the widespread practice, at least in Congress, of allowing legislators to amend or supplement their remarks in the published version in the *Congressional Record*. "As it goes into the *Record*, House debate is thus a curious melange of the opening lines of many speeches never heard on the floor, coupled with revised, sometimes totally new, remarks. . . . [M]embers in both houses rearrange the facts and rewrite bits and chunks of historical record.[35]

It is thus doubtful that much, if any, floor debate, other than statements by the manager of the bill, is useful even for confirmatory purposes. Besides, even with publication, practical availability remains a problem.

Adoption, Non-Adoption, or Rejection of Interim Amendments

Although often relied on by courts in interpreting or applying statutes, the adoption, non-adoption, or rejection of an amendment proposed during the course of enactment, standing alone, is normally an ambiguous and therefore neutral circumstance.[36] The reason is simple. Any of these actions may result from disparate purposes on which it is hard, if not impossible, to ascertain legislative consensus.

Even if the proposed amendment is adopted, it may have been intended to change substance or it may have been intended merely to clarify the language. If it is rejected, the range of possibilities is much wider. It may be rejected by some legislators because they disagree with its substance

---

[33] R. Dickerson, *supra*, note 3, at 145, 147, 196.

[34] For a general discussion of floor debates, *see ibid.* at 145, 147, 155–57, 185–87, 191, 195, 267.

[35] W. Keefe and M. Ogul, *The American Legislative Process* (5th ed. 1981) 258, (footnote omitted).

[36] R. Dickerson, *supra*, note 3, at 160–61.

(but not necessarily the same substance). On the other hand, those who agree with the substance may nevertheless vote against it as a spurious or unnecessary attempt to clarify. Simple non-action, being consistent with many explanations in circumstances not calling for consensus, has no probative value for any purpose.

Where such ambiguities tend to be resolved by other circumstances, they should not be considered for the purposes of cognition, unless they, too, meet the standards of external context.[37] Otherwise, the court must cope with the risk of unfair surprise.

Miscellaneous

Post-enactment developments should be disregarded for purposes of cognition, simply because at enactment they were taken into account by neither the authors of the statute nor its audience.[38] The problems of relevance, reliability, and availability also persist, often in greater degree, even where they relate only to ulterior purpose.

Official executive pronouncements at the time of signing are rare so far as legislative intent and ulterior purposes are concerned. When made, these cannot be brushed aside as post-enactment commentary, however, because the chief executive officer is himself part of the enactment process. Can the President's views on ulterior purpose be attributed to Congress? The question raises no greater theoretical difficulty than arises for statements made by the second house, which could hardly have been within the contemplation of the first house unless the bill went to conference. The problems in both instances are those of reliability and availability: How probable is it, in the circumstances, that the recited purposes also motivated the earlier legislative participants? Assuming reliability, are such statements sufficiently available and relied on to be part of context? Probably not.

Statements on the witness stand by a legislator or draftsman,[39] even when confined to ulterior legislative purpose, cannot, under any theory, be part of legislative context. Indeed, such statements are not even part of legislative history, however much they deal substantively with the enactment of the statute. So far as they purport to declare the meaning of the statute, they compete with the statute. Also, they are highly unreliable.

Judicial Use of Legislative History

A Partial Concession: Confirmatory Use

While it seems clear that few, if any, aspects of legislative history are part of proper legislative context and that all the rest can, in constitutional principle, be disregarded for purposes of cognition, there is a widespread practice among judges, even in England (where it is usually covert), to

---

[37] See *supra*, text accompanying notes 24–25.
[38] R. Dickerson, *supra*, note 3, at 179–183.
[39] R. Dickerson, *supra*, note 3, at 156 n. 49.

consult materials of legislative history during the cognitive phase.[40] Shortly before his retirement from the bench, Chief Judge Charles D. Breitel of the New York Court of Appeals, wrote me as follows respecting *The Interpretation and Application of Statutes*:

> "I found the chapter on the abuses and uses of legislative history the most valuable just because it is the area most misunderstood by judges, lawyers, and students of the subject. I have small disagreements, of course, but they are only small.
>
> At page 139 you emphasize, as is so often done with the parol evidence rule, that one confine oneself to beginning with textual language. That does not happen, and it is not required to happen that way. One always looks to extrinsic material either to discover meaning, to confirm meaning, or to elaborate on meaning. The parol evidence rule and the statutory rule do come into play only when the extrinsic material tends to contradict or vary the meaning determined literally or in context. I think this examination of extrinsic material is a good practice. But even if it were not, the fact is the practice is about as universal in every instance in which a court says that it is excluding the extrinsic material either in the contractual or statutory interpretation case. It has in fact first looked at the material. At the paragraph that begins at the very bottom of page 146 and concludes at the top of page 147, analytically you ought to be right. The fact of the matter is, however, that if there is any leeway, deference of some kind will be paid to comments that are literally described as "official", albeit not in a constitutional sense. It is not law, as you say, but it surely plays a role as a source if there is any kind of leeway."[41]

Because this analysis is realistic in recognising the widespread psychological need for reassurance in hard cases, it makes sense not to deny the court the opportunity to look for confirmation of an interpretation otherwise made probable by text and context, even if confirmation takes it beyond what is also available to the legislative audience. The crucial constitutional safeguard lies of Judge Breitel's statement that rejection is required "when the extrinsic material tends to contradict or vary the meaning determined literally or in context."[42] In other words, it may be used to support, but not to overturn, meaning-in-context. On the other hand, his requirement of "leeway" implies the guarantee that judicial law making will be deferred until cognition establishes an area of otherwise unresolvable uncertainty. Acceptance of Lord Renton's belief that legislative history should not be cited in court[43] would help prevent confirmatory use from becoming abuse.

A striking example of the use of legislative history for confirmatory purposes appears in Mr. Justice Frankfurter's dissent in *Schwegmann Bros.*

---

[40] *Ibid.* at 163–64, 189, 195–96.

[41] Letter from Chief Judge Charles D. Breitel to F. Reed Dickerson (August 21, 1978).

[42] *Ibid.*

[43] Renton, "Interpretation of Legislation", [1982] Stat. L. Rev. 7, 9; *see also* R. Dickerson, *supra*, note 3, at 196 (court consultation of legislative history should not be mentioned in opinions).

v. *Calvert Distillers Corp.*[44] Here, the court held that the Miller-Tydings Act, which expressly exempted from the Sherman Act vertical agreements setting minimum prices for resale of specified commodities (where such agreements were lawful under local state law), did not result in validating state non-signer provisions that extended the force of minimum price fixing agreements horizontally to keep competing retailers in line.[45]

Selected statements from legislative history provided the majority with apparent support for its belief that, by omitting reference to the horizontal aspects of resale price maintenance, Congress intended to preserve to that extent the prohibitions of the Sherman Act.[46] What it overlooked was that validation of the vertical aspects would not work without validation of the horizontal. It also missed Frankfurter's perception that Congress did not need to affirmatively validate state non-signer provisions but merely needed to nullify the legal force that had indirectly struck them down in the first place—the Sherman Act's invalidation of the vertical consentual arrangements upon which the non-consentual horizontal restraints on competing retailers depended, under state law, for their validity.[47]

Frankfurter's appreciation of the indirect force of the statute kept the statutory remedy coextensive with the statutory need, fulfilled the legislative purpose of providing a workable validation of vertical price fixing, and was fully consistent with the wording of the statute, all this being supportable without going beyond the total statutory scheme. As for legislative history, it happened in this instance to confirm Frankfurter's perception at every point[48] (even the legislative history cited by the majority fell into line). The majority, on the other hand, misread the extent of the statutory need and drew a false inference from Congress's decision to omit non-signer clauses (even though inclusion would have been superfluous). As for confirmation, the majority had to disregard part of the legislative history. It might better have disregarded all of it.

The case seems to support the recommendation of Professor Henry M. Hart, Jr., that a court should hold off looking at legislative history until an examination of the statute in context has generated a problem of meaning.[49] Indeed, the majority's failure in *Schwegmann* to fully grasp what needed legislative attention may have resulted from a premature examination of legislative history.

Because legislative history in this instance consistently confirmed Frankfurter's independently supportable position, it is ironical that Mr. Justice Jackson, long an impassioned enemy of legislative history, selected

---

[44] (1951) 341 U.S. 384, 397–411. *See also* R. Dickerson, *supra*, note 3, at 162 n. 63 (discussing the use of legislative history and the Frankfurter approach to this case).

[45] 341 U.S. at 389.

[46] *Ibid*, at 390–95.

[47] *See ibid.* at 397 (Frankfurter, J., dissenting).

[48] *Ibid.* at 398–401.

[49] H. Hart, Jr., "Tentative Restatement of the Law" (prepared for the 1953 meeting of the Association of American Law Schools, reprinted in F. Newman and S. Surrey, *Legislation—Cases and Materials* (1955) 669, 670; *see also* R. Dickerson, *supra*, note 3, at 141 (discussing the Hart scheme). It is not clear, however, whether this scheme was meant to apply to a court's cognitive function or its creative function.

this as the occasion for one of his strongest diatribes against its use.[50] Despite the cogency of Jackson's general points, Frankfurter cannot be faulted for a reading that was fully supported by the statute-in-context (and therefore adequately accessible to the legislative audience) and for confirming it by looking at the legislative history. It would have been better if Frankfurter had not referred to that legislative history in his opinion.

Current State of Judicial Doctrine

A sampling of the cases suggests that most courts tend to conform to the approach previously outlined by deferring the use of legislative history until significant uncertainty is otherwise established.[51] This might seem to imply that, after shunning legislative history for purposes of cognition, courts are willing to consult it only for purposes of judicial law making.

Unfortunately, the constitutionally implied dividing line between judicial cognition and judicial creation is not the simple line between certainty of meaning and uncertainty of meaning, but rather the line between them as drawn after the court has exhausted the resources of text and context. Mere uncertainty is not enough, because much initial uncertainty is only apparent, disappearing when the resources of meaning, which exclude matters falling outside total context, have been more fully evaluated. Only then has the court discharged its responsibility to total context and thus to legislative supremacy. Unfortunately, it is hard, if not impossible, after the fact to determine in which instances the courts' consultation of legislative history was premature. The implications of judicial support are correspondingly weakened.

On the other hand, it must be clear that this article is not based on the specifics of case law. As the Canadian courts have discovered,[52] case law in this area tends to be relevant only for the meaning of the statutes respectively involved, because the specifics of meaning are usually unique. As for legitimate across-the-board legal principles, few exist. The domain of cognition is for the most part the domain of general principles of meaning and communication, not principles of law.

The vast literature of case doctrine in the field of "statutory interpretation" is fragmentary, chaotic, and unrelatable consistently to either the basics of meaning theory or accepted principles of constitutional law. These complaints include the uses of legislative history, which cannot be reconciled on the basis of any rational theory expressed by existing case law.

[*To be continued*]

---

[50] 341 U.S. at 395 (Jackson, J. concurring).
[51] See J. Hurst, *Dealing With Statutes* (1982) 53, 55–56.
[52] See, *e.g.*, E. Driedger, *The Construction of Statutes* vii–viii (1974).