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Statutory Interpretation in Econotopia

Nathan Oman¹

Much of the debate in the recent revival of interest in statutory interpretation centers on whether or not courts should use legislative history in construing statutes. The consensus in favor of this practice has come under sharp attack from public choice critics who argue that traditional models of legislative intent are positively and normatively incoherent. This paper argues that in actual practice, courts look at a fairly narrow subset of legislative history. By thinking about the power to write that legislative history as a property right and legislatures as markets, it is possible to use Coase's Theorem and the concept of Pareto optimality to justify current judicial practice. However, such a justification suggests that certain aspects of current practice should be changed.

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Introduction

The last two decades have seen an upsurge in interest in statutory interpretation. Since the mid-1980s,² the law reviews³ and the case reporters⁴ have played host to a lively debate on the proper treatment of statutes. The roots of the revival lie in a multipronged attack on the traditional model of interpretation that was launched by a group of conservative law professors and judges – most notably Antonin Scalia and Frank

2. William Eskridge dates the revival of interest in statutory interpretation to 1982. William N. Eskridge, Jr., *Interpretation of Statutes, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 200 (Dennis Patterson, ed. 1996). One commentator, writing in 1983, summed up the then orthodox opinion by noting that "[t]he general contemporary American view of statutory interpretation is that there is not a great deal to say about the subject." Robert Weisberg, *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 213 (1983). Eskridge's date seems to be based on the publication of Guido Calabresi's influential book, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

3. See Phillip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 204 (1999) (summarizing the academic debate).

4. See, e.g., *Broad v. Sealaska Corp.*, 85 F.3d 422, 431 (9th Cir. 1996) (Kleinfeld, J. dissenting); *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989) (Easterbrook, J.); *Wallace v. Christensen*, 802 F.2d 1539, 1559 (9th Cir. 1986) (Kozinski, J., concurring); *Hirschey v. Fed. Energy Regulatory Comm'n*, 777 F.2d 1, 7 (D.C. Cir. 1985) (Scalia, J., concurring). Judge Posner summarized the debate in one dissenting opinion, arguing that it represented:

a jurisprudential disagreement that is not less important by virtue of being unavowed by most judges. It is the disagreement between the severely positivistic view that the content of law is exhausted in clear, explicit, and definite enactments by or under express delegation from legislatures, and the natural lawyer's or legal pragmatist's view that the practice of interpretation . . . authorize[s] judges to enrich positive law with the moral values and practical concerns of civilized society. Judges who in other respects have seemed quite similar, such as Holmes and Cardozo, have taken opposite sides of this issue. Neither approach is entirely satisfactory. The first buys political neutrality and a type of objectivity at the price of substantive injustice, while the second buys justice in the individual case at the price of considerable uncertainty and, not infrequently, judicial willfulness.

United States v. Marshall, 908 F.2d 1312, 1334-35 (1990) (Posner, J., dissenting).

Easterbrook.⁵ Their attack and the responses that it spawned – critical and appreciative⁶ – have led to a widespread reevaluation of long unquestioned assumptions about how to interpret statutes.

One of the key issues in the debate is the usefulness of legislative history.⁷ Legislative history is a capacious term that can refer to everything from judicial notice of the historical background giving rise to a particular statute, to a minute analysis of amendments considered and rejected by the legislature.⁸ However, most of the debate has centered on a particular subset of legislative history: committee reports, sponsor statements, and floor debate. For purposes of this paper, I will use the term “legislative history” to refer to only these sources. Traditionally, these sources have been consulted as evidence of legislative intent. Critics, however, have questioned this assumption.

Much of this criticism has centered on a public choice based attack on the concept of legislative intent. Inspired by economic style analysis of political institutions, Easterbrook and others have argued that legislative intent is normatively and positively incoherent and that statutes should be understood as the result of either bargains between politicians and interest

5. The most complete statement of Scalia's position can be found in 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: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997). Easterbrook launched his critique in Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983).

6. See, e.g., William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (giving an appreciative but critical account of Justice Scalia's textualism); Abner J. Mikva & Eric Lane, *The Muzak of Justice Scalia's Revolutionary Call to Read Unclear Statutes Narrowly*, 53 SMU L. REV. 121 (2000) (arguing that the textualist attack on legislative history represents a subversive and revolutionary plot).

7. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 860 (1992); Alex Kozinski, *Should Reading Legislative History be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807 (1998); Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380 (1987); Kenneth Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371 (1987).

8. One study of the use of authorities by the Supreme Court in construing statutes found that the Court consulted no less than thirty-nine different kinds of sources produced by the legislature. Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1092 (1992).

groups or an irreducibly arbitrary legislative process that has been manipulated by congressional agenda setters.⁹ Proponents of legislative history have responded by offering more sophisticated defenses of legislative intent, arguing that the public choice attacks need not be fatal to the concept or, alternatively, that the entire enterprise of public choice is misguided.¹⁰

This paper offers an alternative justification for the judicial use of legislative history, one that does not rely on the concept of legislative intent. Rather, I will argue that much of the traditional practice of using legislative history can be justified in terms of promoting legislative efficiency and judicial legitimacy. Essentially, my claim is that the judicial use of legislative history can be understood in terms of creating an efficient political market in Congress. Such a market provides courts with useful interpretive material, while at the same time maximizing legislative satisfaction in ways that do not threaten judicial legitimacy. Far from abandoning legislative history, I argue that judges should actually formalize their current practice more rigorously.

In Part I, I offer a summary of the current debate over legislative history with particular attention to the role of public choice theory. In Part II, I offer some background on how legislatures actually create statutory text and legislative history, as well as background on the way in which courts use it. In Part III, I offer my theory of political markets and legislative intent. Finally, in Part IV, I offer some suggestions for how courts should alter their current practice in light of my theory.

I. Background to the Debate

A. *Early Background and the Legal Process Consensus*

The common law that the United States inherited from Great Britain contained an absolute prohibition on the judicial use of legislative history in construing statutes. According to eighteenth century English precedent, for judges to inquire into what members of Parliament said during the course of their deliberations would violate the special immunity of parliamentary

9. See *infra* Part II.B.

10. See *infra* Part II.B.

debate guaranteed by the Glorious Revolution of 1688.¹¹ However, as the United States developed its own legal traditions, American courts departed from English precedents.¹² Beginning in the nineteenth century, American courts began to consult the records of congressional debates as part of their effort to interpret statutes.¹³

During the late nineteenth and early twentieth centuries, courts used canons of construction to narrow the reach of legislation. For example, courts invoked the canon that "statutes in derogation of common law are to be narrowly construed" to limit the reach of new laws.¹⁴ Not surprisingly, progressives who supported new legislation vigorously attacked such methods, accusing judges of substituting their own policy preferences for the will of the legislature.¹⁵ By the 1950s, a consensus on the theory of interpreting statutes emerged. This consensus received its most forceful articulation in Hart and Sack's mimeo-

11. See *Millar v. Taylor*, 98 Eng. Rep. 201, 217 (K.B. 1769) (holding that English Courts could not consult legislative history in construing statutes). This rule was relaxed in the United Kingdom in *Pepper v. Hart*, 1 All E.R. 42 (H.L. 1993).

12. For an overview of statutory interpretation in American courts during this period see chapters 2 ("The United States: From the Revolution to the Founding") and 3 ("The United States: Nineteenth Century"), in WILLIAM D. POPKIN, *STATUTES IN COURT* (1999).

13. The seminal case on this issue is *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

14. See, e.g., *Shaw v. R.R. Co.*, 101 U.S. 557, 565 (1879) (limiting the reach of a statute purporting to make bills of lading negotiable). Recently, some legal historians have begun to question the traditional story of aggressive use of canons by anti-legislation judges. Thus William Popkin argues:

If we take this judicial rhetoric and the commentators' reaction at face value, we would get an unbalanced picture of statutory interpretation. To be sure, judges were favorably inclined toward preserving the common law, but it is misleading to generalize to the conclusion that what they did was judicial usurpation of legitimate lawmaking power – a violation of the separation of powers. In many instances their decisions were well within legitimate interpretive boundaries, even if we would consider them wrongheaded, looking back on the nineteenth century from a twentieth-century, drenched-in-statutes, legislative-reform-minded perspective.

WILLIAM D. POPKIN, *STATUTES IN COURT* 99-100 (1999).

15. See Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379 (1908); Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

graphed materials on *The Legal Process*.¹⁶ According to *The Legal Process*, statutory interpretation was a matter of courts imputing a reasonable intent to the legislature and then using it to fill in any ambiguities in the law.¹⁷ Judges should assume that legislators are essentially reasonable people pursuing reasonable goals, and the role of the courts is to act as good agents in discovering and advancing those goals.¹⁸ In practice, judges frequently equated reasonable intent with actual intent. As a result, consulting legislative history became an important part of statutory interpretation. By the beginning of the 1980s, the use of legislative history had become ubiquitous. In 1983, Judge Patricia Wald wrote, "Not once last Term was the Supreme Court sufficiently confident of the clarity of statutory language not to double check its meaning with the legislative history. The language of the 'plain meaning' lingers on in the Court in opinions, but its spirit is gone."¹⁹

B. *The Public Choice Attack*

This consensus rested on the coherence of the concept of legislative intent. However, in the 1980s this concept came under attack from legal scholars inspired in part by public choice theory.²⁰ Public choice is a somewhat amorphous body of scholarship, but it can be summed up as the application of microeconomic methods of analysis to the practice of politics.²¹

16. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

17. *Id.* at 1232.

18. *Id.*

19. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 197-98 (1983).

20. See William Dubinsky, Book Note, 90 MICH. L. REV. 1512, 1517 (1992) (reviewing DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991)) ("Traditionally, legislative history has been viewed as reflecting the intent of the enacting legislature. Public choice rejects the existence of such coherent intent.").

21. For a summary of the public choice debate in legal scholarship, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991). Most of the foundational texts of the public choice movement were published by economists in the 1960s. See generally KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963); JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962); MANGUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* (1965).

The attack on legislative intent – and by extension legislative history – employs two different lines of argument. One rests on the idea of interest group politics. The other rests on voting theory and the paradoxes of the concept of “majority will.” These two lines of attack, in turn, mirror a debate within public choice scholarship generally.²² On one hand, there is the so-called “Chicago School” of public choice, associated most often with the work of James Buchanan, which focuses on the incentives that political institutions create for the mobilization of interest groups.²³ On the other hand, there is the so-called “Rochester School,” associated most often with the work of Kenneth Arrow and William Riker, which focuses instead on the arbitrary – if not pathological – nature of majority decision-making procedures.²⁴

Interest group theorists think of politics as a market in which politicians sell legislation to interest groups in return for support at election time and in which competing politicians constantly hammer out deals with each other in the form of legislation. On their face, such claims seem at least plausible to any observer of American politics. They also do not seem especially new. Since at least the time of John Locke, political theorists have often thought about legislation in terms of contracts between the governors and the governed.²⁵ More recently, in a 1975 article, Richard Posner and William Landes suggested that legislation should be thought of as a contract between political interests and that courts should approach statutory interpretation in essentially the same way they approach contract interpretation.²⁶

22. See Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992) (discussing the Chicago School – Rochester School divide in the context of law and economics scholarship).

23. See BUCHANAN & TULLOCK, *supra* note 21.

24. See ARROW, *supra* note 21; WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM* (1982).

25. Cf. JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* § 95 (1690), in *THE ENGLISH PHILOSOPHERS FROM BACON TO MILL* 403, 441 (Edwin A. Burt ed. 1939) (“Men being . . . by nature all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent, which is done by agreement with other men . . .”).

26. William Landes & Richard Posner, *The Independent Judiciary in Interest Group Perspective*, 18 J.L. & ECON. 875 (1975).

Because legislation represents a deal between competing interests, Easterbrook reasons, it does not make sense to conceive of it as the product of a single legislative mind.²⁷ For Easterbrook, one of the fundamental mistakes made by the intentionalist approach to interpretation is that it tends to assume that statutes always apply to the cases brought to court and then uses the concept of "intent" to stretch the statutory text to cover ambiguous cases.²⁸ Rather, he argues, judges should realize that the text of the statute itself represents the limit of the legislative deal struck and that any attempt to expand or contract the text would do violence to that underlying political compromise.²⁹ Easterbrook also suggests that advancing "legislative" intent may be far less benign than the intentionalists assume, writing "like most other contemporary students of this subject, [I] have been persuaded by the work in public choice that . . . it is wrong to assume that the compromises necessary to enact laws are uniformly public-spirited."³⁰ The public choice theorists come to this conclusion by focusing specifically on the demand side of the political market. On the basis of a traditional-rational-actor model, they conclude that interest groups lobby the government for specific benefits. Politicians respond to these pressures by diffusing the costs of those benefits over the population at large. Because the share of any one individual in bearing those costs is so small, citizens do not have a sufficient incentive to invest in becoming informed and active to counter the interest group influence. The result is that legislatures will produce legislation that responds to special interest pleading rather than some conception of the public interest. The academic literature labels this behavior by interest groups as "rent seeking," referring to the effort to get government to confer some benefit that would be unavailable in

27. See Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 443 (1990).

28. See Frank H. Easterbrook, *Statutes' Domain*, 50 U. CHI. L. REV. 533 (1983).

29. See Easterbrook, *supra* note 27, at 447 ("There will not be a single objective, and discretionary interpretation favors some members of the winning coalition over others.").

30. See *id.* at 441.

an otherwise unregulated market.³¹ In this pessimistic world the concept of legislative intent is drained of the normative significance that it had for *The Legal Process* consensus; there are no reasonable people pursuing reasonable, public-spirited goals in the public choice universe.³² Indeed, if legislation represents cynical rent seeking by interest groups and their politician-facilitators, rather than advancing the goal of the legislation (fleecing the broader public) courts should minimize the damage by confining the force of statutes to the plain meaning of their text.³³

A more radical critique has been leveled against the positive – rather than normative – coherence of legislative intent. The argument here builds on the work of economist Kenneth Arrow³⁴ and looks at the supply side of the political market envisioned by the public choice theorists. The traditional account of legislative intent assumes that majority-voting procedures produce outcomes that reflect the preferences of the majority of legislators. Building on a problem first posed in the nineteenth century by the French theorist Condorcet, Arrow and his followers argue that this optimistic model of majority voting and majority will is based on a fiction.³⁵ The fiction is that there actually is some majority will. Imagine a situation in which there are three legislators (A, B, C) voting on three policy options (X, Y, Z). Provided that they have different ordinal rankings of preferences (e.g. A prefers X to Y and Y to Z, B prefers Y to Z and Z to X, etc.), no stable majority can be formed. If X is paired with Y in a vote, then Y will win; if Y is paired with Z,

31. A.O. Krueger first coined this term in 1974. See A.O. Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AM. ECON. REV. 291 (1974). For an extensive discussion of the term and the theories associated with it see TOWARD A THEORY OF THE RENT SEEKING SOCIETY (James Buchanan et al. eds., 1980). For a lucid introduction see Gordon Tullock, *Rent Seeking*, in 4 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 147 (John Eatwell et al. eds., 1987).

32. Cf. *supra* Part I.A.

33. Cf. Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 42 (1984) (“Those who see market failure and conceive statutes as means to correct these defects, will read the statutes broadly and extend them to cover new cases. Those who conclude that statutes generally displace markets in order to transfer rents to political opportunists will take a more beady-eyed view.”).

34. See ARROW, *supra* note 21.

35. See, e.g., Shepsle, *supra* note 22, at 239.

then Z will win; but, if Z is paired with X, then X will win.³⁶ In other words, there is no policy option that cannot be defeated by one of the other alternatives. Without some arbitrary rule structuring the voting, legislatures will simply cycle endlessly through the options. In such a system there is literally no majority will, and the legislative outcome will hinge entirely on the order in which the votes are taken. Thus, leaders and agenda setters will be able to manipulate the procedures to get whatever outcome they prefer.

The public choice theorists demonstrate that this result, known as Arrow's Impossibility Theorem, can be generalized far beyond the simple hypothetical above to include large bodies like Congress.³⁷ On the basis of this argument, Kenneth Shepsle has reasoned in a much-cited article that the traditional concept of legislative intent is an oxymoron and that courts cannot posit some majority will that lurks behind statutes.³⁸ "If legislative intent must go, as I urge," Shepsle argued, "then so, too, must deference to it. The courts cannot defer to something that is nonsense."³⁹ In the absence of intent, however, there is no reason to consult legislative history. If committee reports and floor debates are supposed to be evidence of something that is a self-contradictory fiction, then they cannot help but mislead.

C. *The Response*

While there is no doubt that the public choice attack has been influential, legal scholars continue to defend the concept of legislative intent and the use of legislative history. The defense has taken one of two forms. First, there are those who either reject public choice out of hand and/or simply ignore it. Second, there are those who argue that even given the force of public choice arguments, there are reasons to doubt that they have completely undermined the concept of legislative intent.

Sometime politician and former federal appellate judge Abner Mikva provides a good example of the first kind of re-

36. See also JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 12-15 (1997) (discussing Condorcet's Paradox and the Arrow Impossibility Theorem).

37. See Shepsle, *supra* note 22.

38. *Id.*

39. *Id.* at 254.

sponse.⁴⁰ Mikva argues that public choice is essentially worthless and offers nothing to our understanding of the political process.⁴¹ First, he denies that the account of politicians and interest groups as cynical brokers of rent seeking legislative deals fits actual reality.⁴² The model simplifies too much. Some politicians are “crooks,” Mikva admits, but even the “crooks” are sometimes (often) motivated by sincere concern for the public interest.⁴³ As for Arrow’s Theorem, Mikva argues that social scientists have been seduced into thinking that mathematics provide a level of determinacy and certainty about a messy social reality that it cannot possibly deliver.⁴⁴ Accordingly, he would give little deference to the results of mathematically based social science.⁴⁵ Others have made even more extreme criticisms, arguing that the practice of public choice itself is immoral.⁴⁶ Here, the argument is that public choice’s cynical and pessimistic view of the political process is self-fulfilling, since the scholarship itself encourages political actors to behave immorally.⁴⁷

There have also been more sophisticated – and sympathetic – responses to the public choice critique. These scholars argue that despite the theoretical elegance of the public choice models, actual political practice evidences a more complex design.⁴⁸ First, they argue that while the rent-seeking model may be useful as a worst-case scenario for institutional design, there are clear examples of public regarding legislation.⁴⁹ In any case,

40. See Abner J. Mikva, *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988). Mikva’s response to public choice in this Forward is – not surprisingly given the format – neither comprehensive nor rigorously worked out. However, it is a revealing and approachable summary of the reactions of many to public choice.

41. *Id.* at 176-77.

42. *Id.* at 167.

43. *Id.* at 169. Strictly speaking, public choice does not posit politicians as “crooks.” Rather, it simply assumes that they are rational vote maximizers. Mikva simply ignores this distinction.

44. *Id.* at 174, 177.

45. *Id.*

46. See Steven Kelman, *‘Public Choice’ and Public Spirit*, 87 PUB. INTEREST 80 (1987).

47. Mikva, *supra* note 40, at 174-77.

48. See Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988).

49. *Id.* at 425-37.

they argue, the criteria of what counts as public regarding is fluid enough that it is much more difficult to verify the public choice hypothesis than its advocates assume.⁵⁰ Second, they argue that notwithstanding the truth of Arrow's Theorem, legislatures do not in fact exhibit the random cycling that it predicts.⁵¹ They argue that this is because the preferences of legislators are not in fact distributed so as to produce the unstable majorities predicted by Arrow's Theorem and that institutional mechanisms in Congress can generate coherent legislative agendas.⁵²

II. The Reality of Legislative History

At this point, it would be useful to step back from this highly theoretical debate and take a look at the way in which Congress actually produces bills and legislative history, and at how courts actually use it. Against this background, I will then suggest an alternative way of understanding and defending the use of legislative history.

A. *How a Bill Becomes a Law (and Gets a History)*

According to a well-worn maxim, those who like laws and sausages should not look at the way in which either are made. Certainly, one need not scratch very far below the civics-book veneer of the legislative process to be confronted with a bewildering array of arcane procedures and complex political gyrations. The study of Congress is an entire sub-discipline within political science, and at least since the publication of Woodrow Wilson's classic *Congressional Government* in 1885 has been the subject of intense academic interest.⁵³ Given the sheer volume of such literature, it would be naive to attempt even a summary of it in this paper. However, it is important to have a basic sense of the procedures involved in creating laws (and their legislative histories), as well as understanding some of the common political practices in which these procedures are embedded.

50. *Id.* at 425-27.

51. *Id.* at 426-35.

52. *Id.* at 436-37.

53. See WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* (The Johns Hopkins Univ. Press 1981).

The “traditional” path⁵⁴ for a bill to take in becoming a law is for a member to “drop” the bill, which is then assigned to the standing committee with jurisdiction. Oftentimes, complex bills are referred to several committees. The committees will often conduct hearings on the bill or on the policy area with which it is concerned. The committee will then hold a “mark-up” in which members make amendments. At the completion of this ritual, the majority and minority committee staffs – under the direction of the chairperson and ranking member respectively – will author a committee report explaining the background of the bill and offering an extended commentary on it. The bill will then be reported out of committee to the floor of the chamber, where it will be subject to debate and amendment. A final version will be adopted, which will then be sent to the other house where the process will be repeated. Once both houses have passed a version of the bill, a conference committee consisting of members from both houses will then reconcile the two versions of the bill through its own mark-up process. The conference committee will then produce a report on the bill similar to the standing committees’ reports. Both houses then vote on the conference version and the bill is sent to the President for his signature.

This stylized account misses much of the complexity of real legislation and comparatively few bills follow this route through the legislature.⁵⁵ First, there is the basic question of who writes statutory language. Actual members almost *never* do this. It is often not even their staffs. Rather, bill language is generally written by either outside interest groups,⁵⁶ or by non-partisan staff attorneys within Congress. Both houses of Congress have offices of Legislative Counsel.⁵⁷ These are essentially non-parti-

54. For a sophisticated “civics book” style account of legislation written by a knowledgeable insider see CHARLES JOHNSON, *HOW OUR LAWS ARE MADE* (22d ed. 2000).

55. Much of what follows is based on my personal observations as a Senate staffer prior to law school.

56. For accounts of lobbyist-written legislation see JEFFREY H. BIRNBAUM & ALAN S. MURRAY, *SHOWDOWN AT GUCCI GULCH: LAWMAKERS, LOBBYISTS AND THE UNLIKELY TRIUMPH OF TAX REFORM* (1987) (describing the legislative battles over tax reform in the 1980s); RICHARD E. COHEN, *WASHINGTON AT WORK: BACK ROOMS AND CLEAN AIR* (1995) (discussing the 1990 amendments to the Clean Air Act).

57. See 2 U.S.C. § 271 *et seq.* (2002) (establishing the Senate Office of the Legislative Counsel); 2 U.S.C. § 281 *et seq.* (2002) (establishing the House Office of the

san, in-house law firms whose duty is to "aid in drafting public bills and resolutions."⁵⁸ They take policy proposals from members and their staffs and transform them into statutory language.

The authorship of committee reports is similarly complex. Frequently these reports contain detailed legal commentary on provisions within the statute. Interest groups, who retain attorneys to foresee and resolve possible future ambiguities in the bill, write much of this commentary.⁵⁹ However, sophisticated, partisan staff members tightly control the inclusion of such material.⁶⁰ These staff members, in turn, are hired on the basis of their ideological fit with the members for whom they work and tend to faithfully execute their principal's agenda. In addition to ideology, staff members have incentives to follow members' preferences because they have traditionally had fewer procedural protections than other federal employees and can be dismissed relatively easily.⁶¹

The account of floor procedure is likewise very stylized. Virtually all bills come to the floor of Congress subject to rules governing the length of debate and the number (and often scope) of the amendments that can be offered. In the House, such rules are promulgated for each bill by the Rules Commit-

Legislative Counsel). For background, see KENNETH KOFMEHL, *PROFESSIONAL STAFFS OF CONGRESS* 183-200 (1962); Frederic P. Lee, *The Office of the Legislative Counsel*, 29 COLUM. L. REV. 381 (1929).

58. 2 U.S.C. § 275 (2002) (setting forth the duties of the Senate Office of the Legislative Counsel).

59. See Scalia, *supra* note 5, at 3.

60. See Bernard W. Bell, *R-E-S-P-E-C-T: Respecting Legislative Judgments in Interpretive Theory*, 78 N.C. L. REV. 1253, 1318 (2000) (noting the involvement of staff and lobbyists in preparing committee reports).

61. For example, until the recent passage of the Congressional Accountability Act of 1995, congressional staff were exempt from The Fair Labor Standards Act of 1938 (29 U.S.C. § 201 *et seq.*), Title VII of the Civil Rights Act of 1964, The Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 *et seq.*), The Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 *et seq.*), The Family and Medical Leave Act of 1993 (29 U.S.C. § 2611 *et seq.*), The Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 *et seq.*), Chapter 71 (relating to federal service labor-management relations) of title 5, United States Code, The Employee Polygraph Protection Act of 1988 (29 U.S.C. § 2001 *et seq.*), The Worker Adjustment and Retraining Notification Act (29 U.S.C. § 2101 *et seq.*), The Rehabilitation Act of 1973 (29 U.S.C. § 701 *et seq.*), Chapter 43 (relating to veterans' employment and reemployment) of title 38, United States Code. See Pub. L. No. 104-1, 109 Stat. 3 (1995) (The Congressional Accountability Act of 1995).

tee, which is tightly controlled by the majority party's leadership.⁶² In the Senate, the terms of debate are generally controlled by a unanimous consent agreement negotiated by the majority and minority leadership. Such agreements, however, can be vitiated by the dissent of a single senator. Accordingly, they are much more difficult to fashion than the special rules promulgated by the House Rules Committee. This does not, however, mean that bills routinely come before the Senate for wide-open debate and amendment. Since the majority leader has control over the Senate's calendar, he can simply refuse to bring up bills until there is some sort of a unanimous consent agreement.

Debate itself is often highly stylized. In addition to the expected political partisanship, there are sophisticated attempts to influence the later interpretation of the bill. Members will insert complex interpretive memos in the form of speeches into the record.⁶³ These speeches are frequently authored by either staff attorneys or interest group attorneys and often discuss fairly arcane interpretive issues. In addition, the bill sponsor, who manages the bill on the floor, will frequently field questions from other members on specific provisions of the proposed statute.⁶⁴ Such "colloquies" are usually carefully scripted, the words being negotiated and committed to writing in advance. Indeed many colloquies never actually occur on the floor. Rather, scripted dialogue is simply inserted into the record.⁶⁵

Voting itself is somewhat more complex. In reality, members frequently vote on two bills. First, they vote on whether to vote on the "perfected" bill or the original committee version. The "perfected" bill is the version produced by all of the floor amendments. The house then votes on whether to pass or fail

62. See STEVEN S. SMITH, *CALL TO ORDER: FLOOR POLITICS IN THE HOUSE AND SENATE* (1989) 241 (discussing the use of the Rules Committee to limit the scope of amendments on the floor).

63. See R. SHEP MELNICK, *BETWEEN THE LINES* (1994) (discussing the rules regarding the insertion of statements into the *Congressional Record*); Scalia, *supra* note 5, at 3 (noting that the production of such material is one of the major tasks of D.C. based lawyers).

64. See William S. Moorhead, *A Congressman Looks at the Planned Colloquy and Its Effect in the Interpretation of Statutes*, 45 A.B.A. J. 1314, 1314 (1959) (describing how "friendly colloquies" are used).

65. When I worked on Capitol Hill, one of my routine tasks was inserting such negotiated colloquies into the record.

whichever of these two versions they have chosen. In practice, this means that bills can be subject to a wide variety of *successful* floor amendments, but nevertheless pass in their original form. Indeed, the ability to offer the unperfected bill at the end of debate encourages strategic use of "killer amendments" because such amendments need not be fatal to the committee version of the bill.⁶⁶ In addition, often non-strategic amendments passed by different coalitions will, in combination, produce a bill that is less preferable to those coalitions than the unperfected version.⁶⁷

In addition to these complexities of procedure and legislative history generation, it is also important to note that frequently one or more of the stages described above are absent. Entire bills are frequently offered as amendments to other bills.⁶⁸ This is an especially popular tactic when the other bill is an appropriations bill. This is because, unlike run-of-the-mill legislation, some kind of an appropriations bill must be passed each session or else, pursuant to the Constitution, the government must shut down.⁶⁹ During periods of intense budget controversy, such as the mid-1980s, the vast bulk of *all* legislation will be passed in the form of appropriations riders.⁷⁰ This is because given a limited number of days and a contentious, time-consuming budget cycle, it is logistically impossible to consider a large number of other bills independently. Bills passed in the form of riders can take many forms. Some of them have gone all the way through the conference committee process and are simply attached as an amendment as a time saving device. Some riders may have never even been considered by a standing committee. Others may have been reported out of committee (with or without a report) but never considered independently by the full house. Finally, the reconciliation process is often truncated.

66. See Shepsle, *supra* note 22, at 245 (discussing the voting procedure). Shepsle argues that this "first proposed/last disposed" quality of the committee bill . . . confers on it some decided advantages and thus confers on the agenda setters disproportionate influence over final legislative results." *Id.*

67. *Id.*

68. See SMITH, *supra* note 62, at 29.

69. See U.S. CONST. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

70. SMITH, *supra* note 62, at 59 (discussing the dominance of appropriations bills as vehicles for legislation in the 1980s).

Conference committees may produce no report. Sometimes there is no conference committee. In such circumstances, rather than producing a reconciled version of the bill, one house will simply adopt the other house's version of the bill in place of its own.⁷¹

The vision of the legislative process that emerges from this description has two important characteristics. First, production of both the text of the bill and its legislative history are controlled by procedures that are subject to political maneuvering and neither of them is likely to be the product of any single author. It is even less likely that the author of either the text or the legislative history is going to be an actual member of Congress, although this does *not* seem to mean that members do not control final products. Rather, both bill text and legislative history are likely to be written by legally sophisticated parties and are subject to intense negotiation. Second, the process can be haphazard and there is no one process by which a bill becomes a law. Rather, there are many paths that a bill can take and differing paths will produce differing kinds and quantities of legislative history.

B. *What Courts Do With Legislative History*

Defenders of the judicial use of legislative history frequently paint the picture of a wise, pragmatic judge sifting through the record looking for useful information. The claim is that judges are relatively unconstrained in the kinds of materials that they consult and can effectively distinguish the probative from the purely political. Thus, Patricia Wald suggests that judges have the ability to sort out "illuminating . . . context" from "irrelevant diversion," and, provided that what members say on the floor is probative, it will be considered.⁷²

However, in actual practice, American judges take a somewhat less holistic approach. Rather, they privilege a small subset of legislative materials, namely committee reports and sponsor statements. Certainly, there is no clear rule, and the underlying consistency of the practice is often obscured by lan-

71. Shepsle, *supra* note 22, at 247.

72. See Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 309 (1990).

guage implying a canvassing of the whole record.⁷³ However, the underlying reality does reflect a kind of rule. Generally speaking, courts look first to the committee reports (if they exist).⁷⁴ For example, the Supreme Court is twice as likely to refer to committee reports as floor debate.⁷⁵ In practice American judges – despite the holistic language of apologists like Judge Wald – generally treat floor debates in the same way that English courts are required to treat them by the holding in *Pepper v. Hart*.⁷⁶ Unlike American courts, which have no formal rules as to what sorts of legislative materials they may or may not consult,⁷⁷ the House of Lords promulgated a rule governing what sorts of legislative history may be consulted.⁷⁸ In relaxing the rule forbidding resort to *Hansards*, the official record of parliamentary debates, the House of Lords gave specific guidance to lower courts. They held:

. . .that the exclusionary rule [against consulting legislative history] should be relaxed so as to permit reference to Parliamentary materials where:

- (a) legislation is ambiguous or obscure, or leads to an absurdity;
- (b) the material relied on consists of one or more statements by a minister or other promoter of the Bill together if nec-

73. See, e.g., *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 491 (2001) (“Indeed, this Court, after reviewing the entire legislative history . . .”); *Patterson v. McLean Credit Union*, 491 U.S. 164, 191 (1989) (“The Court’s interpretation of § 1981 has been based upon a full and considered review of the statute’s . . . legislative history.”).

74. See, e.g., *Pittston Coal Group v. Sebben*, 488 U.S. 105, 134-44 (1988) (discussing the legislative history of Black Lung Benefits Reform Act beginning with committee reports and then consulting managers’ statements, and finally turning to statements made during debate).

75. Congressional reports were cited in 32% of the cases, while congressional floor debates were cited in only 16.9% of the cases. Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1093 (1992).

76. 1 All E.R. 42.

77. Courts generally regard the so-called “plain meaning rule,” under which courts consult legislative history only when the statute is ambiguous on its face, as “rather an axiom of experience than a rule of law, [which] does not preclude consideration of persuasive evidence if it exists.” *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) (Holmes, J.). On the general demise of the plain meaning rule in practice prior to the academic revival of statutory interpretation see Wald, *supra* note 19, at 197-98.

78. *Pepper*, 1 All E.R. 42.

- essary with such other Parliamentary material as is necessary to understand such statements and their effect;
 (c) the statements relied on are clear.⁷⁹

The rule of *Pepper*, therefore, creates a clear hierarchy of sources. Courts are to look first to the statements of ministers and then to the statements of bill promoters. They are not given license to freely comb through the reports of parliamentary debates looking for probative materials.

American discussions of legislative history reveal similar limiting principles with regard to floor debates. Most commentators and judges are leery of floor debates. One scholar has suggested that "[a]mong the least reliable kinds of legislative history are floor debates. Not only are they laden with sales talk, but . . . it would be rare for the authors of a statute to take such references into account."⁸⁰ However, the "qualms of courts and commentators about relying on statements made during floor debates . . . often disappear when the speaker is the sponsor of the bill or amendment that includes the statutory provision being interpreted."⁸¹ As a result, in practice, American judges generally privilege the sponsor's statement.⁸²

Sometimes, however, as a result of floor debate judges will disregard the interpretive gloss offered by the sponsor or the committee report. This happens when other members vigorously challenge those interpretations during debate. The Supreme Court's interpretation of the legislative history of the Civil Rights Act of 1991⁸³ provides an example of this approach.⁸⁴ In 1991, Congress amended the civil rights laws to overturn a Supreme Court decision that made it more difficult for plaintiffs to prevail in anti-discrimination suits.⁸⁵ As part of the deal struck between congressional leaders and the White

79. *Id.* at 69.

80. Reed Dickerson, *Statutory Interpretation: Dipping Into Legislative History*, 11 HOFSTRA L. REV. 1125, 1132 (1983).

81. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *LEGISLATION AND STATUTORY INTERPRETATION* 791 (2d ed. 1995).

82. *See, e.g.,* *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528 (1972) (relying almost entirely on statements by the sponsor of the bill, Sen. Edward Kennedy, in construing the statute).

83. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified in scattered sections of 42 U.S.C.).

84. *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

85. *See Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989).

House, a two-page sponsor's memo inserted into the *Congressional Record* by Senator John Danforth was to constitute the sole legislative history of the Act.⁸⁶ However, Senators and Representatives on both sides of the aisle offered lengthy commentaries on various provisions of the Act in an attempt to influence its later interpretation.⁸⁷ The result was a recorded debate reflecting a patchwork of possible interpretive approaches. Writing shortly after the Act was passed, one scholar noted that in the face of such polyphony, "[w]hat the federal courts will eventually make of all this is anybody's guess."⁸⁸ In the fullness of time, the ambiguities of the Act came before the Supreme Court in *Landgraf v. USI Film Products*.⁸⁹ The Court was asked to interpret the Act in light of the legislative history.⁹⁰ Writing for the majority, Justice Stevens took a very conventional approach. Canvassing the floor debate, he concluded that "the legislative history discloses some frankly partisan statements about the [point at issue], but those statements cannot be read as reflecting any general agreement."⁹¹ Foreswearing legislative history, the Court went on to decide the question without reference to congressional statements.⁹²

Sometimes courts will simply ignore relevant legislative history. One of the most notable examples of this is the case of *United Steelworkers of America v. Weber*.⁹³ The case involved the question of whether or not Title VII of the 1964 Civil Rights Act forbade voluntary affirmative action programs by private employers.⁹⁴ The relevant provision of the Act provided that:

86. MELNICK, *supra* note 63, at 4-5.

87. *See Landgraf*, 511 U.S. at 262-63 (discussing floor debate on the bill); MELNICK, *supra* note 63, at 4-6 (discussing the debates).

88. MELNICK, *supra* note 63, at 6.

89. 511 U.S. at 244.

90. *Id.*

91. *Id.* at 262.

92. *Id.* at 265 (arguing that the "presumption against retroactive legislation is deeply rooted in our jurisprudence").

93. *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979).

94. There was some dispute as to whether or not the program at issue in *Weber* was truly voluntary. *See id.* at 222-23 (Rehnquist, J., dissenting) (noting that the affirmative action program at issue was created "under pressure from the Office of Federal Contract Compliance"). The majority opinion, however, chose to "emphasize at the outset the narrowness of [their decision]" noting that the "plan [at issue] does not involve state action." *Id.* at 200 (Brennan, J.).

It shall be an unlawful employment practice . . . to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program to provide apprenticeship of other training.⁹⁵

Weber was excluded from a training program that had a quota of 50% black and 50% white participation because he was white.⁹⁶ Writing for the majority, Justice Brennan argued that “[i]t is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”⁹⁷ He then argued on the basis of the context in which the Act had been introduced and the statements of some of its supporters, that the primary purpose of Title VII was to address “the plight of the Negro in our economy.”⁹⁸ Since affirmative action programs served to advance this purpose, they could not be forbidden by the Act.⁹⁹ In a lengthy dissent, Justice Rehnquist excoriated the majority for ignoring statements by key supporters that directly conflicted with the Court’s holding.¹⁰⁰ During the course of the debate over the bill, Southern Democrats opposed to the measure repeatedly made the argument that it would require employers to implement affirmative action programs. In responding to these arguments, the Senate floor managers of the bill,¹⁰¹ as well as key supporters, repeatedly denied that it would create any such requirement, arguing that rather it would forbid such programs by private parties.¹⁰² An interpretive memorandum placed in the record by the Senate managers stated:

[An employer] would not be obliged – *or indeed permitted* – to fire whites in order to hire Negroes, *or to prefer Negroes for future va-*

95. *Weber*, 443 U.S. at 200 n.3 (construing 42 U.S.C. § 2000e-2(d) (2000)).

96. *Id.* at 199.

97. *Id.* at 201 (internal quotations and citations omitted).

98. *Id.* at 202-08 (discussing the context and purposes of the Act) (internal quotations and citations omitted).

99. *Id.* at 208 (“The purposes of the plan mirror those of the statute.”).

100. *Weber*, 443 U.S. at 219-20 (Rehnquist, J., dissenting) (comparing the majority opinion to totalitarian propaganda in George Orwell’s novel 1984).

101. Because the bill originated in the House there was no formal Senate sponsor. *See id.* at 239.

102. *Id.* at 235-52 (discussing the Senate debates).

*cancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier.*¹⁰³

Yet, despite this language, Justice Rehnquist could garner only one other vote for his position.¹⁰⁴

Of late, it seems that courts – especially the Supreme Court – have been less likely to consult or discuss legislative history.¹⁰⁵ It is difficult to access the precise import of this shift. It may be that the textualist critiques of legislative history have been persuading judges of the error of their ways. The presence of vocal textualists such as Scalia, Easterbrook, and Kozinski may mean that opinion writers are disciplining their use of legislative history.

Justice Scalia has made the theoretical aspects of statutory interpretation vivid and relevant to everyone. A practitioner writing a Supreme Court brief who ignore[s] Justice Scalia's attacks upon the conventional wisdom about statutory interpretation [does] so at her own peril. The practitioner in the lower federal courts [is] likely to encounter a fair number of judges who found Scalia's arguments persuasive, and a greater number who [pay] heed to them, if only to avoid being reversed.¹⁰⁶

Perhaps that vividness has led some users of legislative history to "see the light."¹⁰⁷ However, there continue to be judges who have few qualms about consulting legislative history, and a majority of Supreme Court Justices have taken the position that there is nothing wrong per se with judicial resort to such sources. Likewise, appellate advocates continue to cite and discuss legislative history in their briefs. For example, a search of

103. *Id.* at 240 (emphasis added). One of Weber's arguments was that black employees with less seniority had been preferred to white employees with more seniority. *Id.* at 199.

104. The other vote came from Chief Justice Burger. *Id.* at 219. For an insightful discussion of this case, as well as the dynamics of the judicial, congressional, and presidential responses that it provoked see William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991).

105. See Frickey, *supra* note 3, at 203.

106. *Id.*

107. See Note, *Looking it Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994) (One possible evidence of increased textualist influence is a surge in the use of dictionaries by the Supreme Court); *Cf.* MCI Telecomms. Corp. v. ATT Corp., 512 U.S. 218 (1994) (Scalia, J.) (discussing at some length the relative merits of various dictionaries).

Westlaw revealed that in the last year at least 281 briefs discussing legislative history were submitted to the Supreme Court.¹⁰⁸ It may be the case that judges continue to consult legislative history but simply omit its discussion from their opinions while reaching the same result. Indeed, one empirical study has suggested that the interpretive methodologies of judges have little – if any – influence on the outcome of cases.¹⁰⁹ Finally, it may simply be that judges who are basically comfortable with using legislative history have nevertheless been persuaded to pay closer attention to the statutory text. Thus, judges may be adopting the stance of one academic critic of Scalia and Easterbrook who opined that nevertheless,

the new textualists remind us that statutory interpretation is, most of all, textual analysis. We start with the text, and most practitioners end with the text when rendering ‘quick and dirty’ advice to their clients. The Court’s longstanding tendency to ignore the text and go straight to legislative history in many cases is a tradition in need of correction, and I applaud the new textualists for turning us back to the text.¹¹⁰

Regardless of how one explains this phenomena, it seems clear that the critics of legislative history have been far from completely victorious in court.

III. Statutory Interpretation in Econotopia

With this background it is possible to offer an alternative justification for the use of legislative history. The public choice critique reveals that, at the very least, the concept of legislative intent is problematic. However, one need not justify legislative history with reference to such a concept. Regardless of how one assesses the public choice debate, courts will always have to interpret statutes. The nineteenth-century legal theorist Francis Leiber demonstrated the inevitability of legal interpretation.

108. A search of Westlaw’s SCT-BRIEF database on April 29, 2002 using the search term “DA (AFT 04/29/2001 & BEF 04/29/2002) & “LEGISLATIVE HISTORY”” produced 281 documents.

109. Daniel A. Farber, *Do Theories of Statutory Interpretation Matter?: A Case Study*, 94 Nw. U. L. REV. 1409 (2000) (presenting an empirical study of decisions involving both Judge Posner – a vocal pragmatist – and Judge Easterbrook – a vocal textualist – finding negligible differences in how they decided cases involving statutory construction).

110. Eskridge Jr., *supra* note 6, at 690.

He noted that the only way to make a legal specification clearer was to add another specification, which in turn would give rise to the need to create a specification for the specification, and so on ad infinitum.

Where would be the end? We are constrained then, always, to leave a considerable part of our meaning to be found out by interpretation, which, in many cases must necessarily cause greater or less obscurity with regard to the exact meaning, which our words were intended to convey.¹¹¹

In light of this predicament, courts will inevitably look for tools in construing statutes. Those who attack the use of legislative history fully realize this and often argue for various canons of construction as an alternative to legislative history.¹¹² Yet even if one accepts the public choice critique of legislative intent, a question about legislative history still remains: Does it provide a useful aid in resolving statutory ambiguity?

At one level the answer to this question is clearly "yes." Statutes frequently contain gaps and ambiguities that courts must resolve. There are a variety of ways of filling these gaps. Traditionally, courts turned to canons of construction to provide background assumptions.¹¹³ Recently, background rules have enjoyed something of a renaissance, with courts¹¹⁴ and scholars arguing that gaps in laws should be filled in with background norms.¹¹⁵ At a more prosaic level, uniform laws are enacted

111. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1114 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994), *quoting* FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS* 17 (1880).

112. Scalia, *supra* note 5, at 8.

113. See Karl 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 (1950). For a modern reassessment of Llewellyn's attack see John F. Manning, *Legal Realism & The Canons' Revival*, 5 GREEN BAG 2d 283 (2002).

114. See, e.g., *Landgraf*, 511 U.S. at 244 (answering the unspecified issue of retroactive application of a statute with reference to a background norm against ex post facto laws).

115. According to one scholar, "the real news . . . is that that a large and growing number of academics (and academics turned judges) now believe in the utility of canons of construction . . . and, second, that the newly faithful cover a broad philosophical spectrum." Manning, *supra* note 113, at 284. Compare Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989) (a liberal arguing for the use of background rules of interpretation) with Scalia, *supra* note 5, at 8 (a conservative making similar arguments).

with a set of comments that give guidance on the purposes and possible interpretation of various provisions.¹¹⁶ Committee reports and sponsor statements frequently contain detailed commentary anticipating interpretive questions that are likely to arise. This commentary is generally prepared by legally sophisticated parties and often provides concrete solutions to specific problems.¹¹⁷ To the extent that judicial interpretation is a matter of finding determinate answers to questions about ambiguous language and resolving disputes that such ambiguities create, legislative history is useful.

There is, of course, another part of the question: Why pick views enshrined in committee reports and sponsor statements, rather than some other set of views? This question is essentially distributive. The current practice privileges the views of committee members and bill sponsors. The question inevitably arises as to why courts should choose those members, rather than others. Why not simply give equal weight to the statements of all members? It turns out that the kind of economic analysis of political processes that underlies public choice may provide a possible answer to this question.

A. *Legislative History in Econotopia*

Consider the following thought experiment. Imagine a country called Econotopia that has legislative and judicial institutions that closely parallel those of the United States. In Econotopia, statutes are inevitably drafted using language that must later be interpreted. This task falls to the courts of Econotopia, but they wish to give legislators some influence as to how the laws they pass will later be interpreted. However, unlike in the United States, in Econotopia politicians and interest groups can bargain costlessly with one another, exchanging political favors for interpretive influence. Senator Smith may have influence over the later interpretation of the Mothers and Apple Pie Bill but will use that influence on behalf of Senator Jones or the National Association of Maternal Pastry Chefs in return for support on some other issue. There are lots of mediums in which such a trade might take place: votes on future

116. See, e.g., U.C.C.A.

117. See *supra* Part II.B.

issues ("I'll vote for your pet bill."), influence with other members ("I will twist Senator Doe's arm for you. He owes me."), electoral support ("I can promise that the Maternal Pastry Chefs will turn out for you come election day."), or simply future gratitude ("Give this to me, and I'll help you out in the future."). Only legislators' creativity and the ethics laws of Econotopia, which like the United States forbid simple bribery,¹¹⁸ limit the form that such transactions can take.¹¹⁹ Finally, the political actors in Econotopia are unusually savvy operators, making all deals on the basis of a steely-eyed cost-benefit analysis.¹²⁰

Now suppose that the Supreme Court of Econotopia is trying to formulate a rule as to which legislators should have interpretive influence over the later construction of a statute. The Supreme Court is composed entirely of red-headed justices, and the justices decide on that basis that red-headed legislators are likely to be the best interpreters of statutes. Under such a rule, legislators and interest groups would bargain with the red-headed legislators in order to get their particular view of a given bill enshrined as the legislative interpretation that will later influence judicial construction. If it turned out that the red-headed legislators had particularly strong views about the bill in question they might simply refuse to deal, forgoing the benefits of any deals, and opting instead to enshrine their own views in the record.

We would expect the same view to prevail if the Court adopted a different rule, say one that gave interpretive influence only to the sole bald legislator in Econotopia. The same legislators and interest groups would now try to make deals with the bald legislator. If the red-headed legislators had been so attached to a particular interpretation that they would refuse to deal, we would expect to see them making offers to the

118. See 18 U.S.C. § 201 (2000) (forbidding bribery of a "person who has been selected to be a public official").

119. Although because transacting in Econotopia is costless, there are no costs associated with imagining or choosing among the various forms.

120. This is not to suggest that the politicians of Econotopia are without principle. Senator Smith may have such strong convictions about the way in which the Mothers and Apple Pie Act should be interpreted that he will refuse to "make a deal" no matter what Senator Jones or the Maternal Pastry Chefs offer. However, in Econotopia politicians are perfectly willing to make deals with even their most strident critic if they think that the deal, on balance, will make them better off, advance their agenda, or what not.

bald legislator in return for influence. In the end, the Court would have the same legislative interpretation of the statute, because the same players will be bargaining over meaning regardless of how the initial “right to influence interpretation” is allocated.¹²¹ This will hold true even if the Court, motivated by a strong egalitarian ethic, adopted a rule giving all members of the legislature equal influence. Since political bargaining is costless in Econotopia, the player with the strongest interpretive preference would “purchase” influence from all of the legislators, like a speculator amassing a debtors’ small and widely dispersed negotiable notes into a single, large claim.

Generalizing from these examples, we can see that from the perspective of interpretation the rule adopted by the Supreme Court of Econotopia is irrelevant. As long as legislators can bargain costlessly with one another over the content of the legislative history, the same views will *always* be enshrined in the legislative record. In Econotopia, the Court need not worry about fashioning a rule that captures the “correct” or “true” legislative history. This is not to imply that the rule adopted by the Court will not have important consequences. Any rule that it adopts will have effects on the distribution of power within the legislature. Certainly, a rule that looks only to the views of red-headed legislators is going to give them more power vis-à-vis bald legislators. However, such distributional questions concern issues of political power. If legislators are constantly trading votes, future support, influence with others, and other forms of political power in return for authoritative legislative history, the legislators who control that history will be in a position to politically profit at the expense of those who must purchase such history. However, provided that legislators can bargain costlessly, the rule chosen does not necessarily implicate the content of the interpretation-influencing legislative record.

B. *Coase’s Theorem and Interpretive Influence*

By now Econotopia should be familiar to any student of law and economics. It is a political instantiation of Coase’s Theo-

121. Of course the bald legislator might refuse to deal, but if this is the case, then we would expect that he would be the victorious bargainer under a rule giving interpretive power to the red-headed legislator.

rem.¹²² "The theorem, slightly oversimplified . . . is that if transactions are costless, the initial assignment of a property right will not affect the ultimate uses of the property."¹²³ The term property is slightly misleading, since Coase's Theorem can be applied to a wide variety of legal rights. Thus, in one classic example a factory emits pollution that causes \$375 in damages to neighboring homeowners' drying laundry. It would cost \$150 to install a smokescreen on the factory or \$250 to purchase dryers for all of the homeowners. Provided that the parties can bargain costlessly, it does not matter whether courts give the factory the right to pollute or the homeowners the right to clean laundry. If the right is given to the homeowners, then the factory will purchase a smokescreen in order to avoid the \$375 of damages. If the right is given to the factory, the homeowners will pay the factory \$150 to install the smokescreen rather than pay \$250 to purchase dryers. Regardless of the rule adopted, you get the same final outcome: \$150 spent on pollution control.¹²⁴

Legislative history is much like an option contract. In a standard option contract, purchasers buy the right to purchase some commodity or security at a fixed price in the future.¹²⁵ If the market price in the future is above the option price, then the option becomes valuable to its holder. If the market price is below the option price, then it is not. Essentially, an option is a right that you purchase now that might or might not become a valuable opportunity at some point in the future. Favorable legislative history is similar. An interpretation inserted into the legislative record now might or might not become valuable depending on whether or not the issue to which it is addressed arises and whether or not the court is influenced by the interpretation offered. The value of any given interpretation offered in a committee report or a sponsor statement is uncertain and contingent. But like an option, such uncertainty can be dis-

122. See Ronald Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960) (first articulating what came to be known as Coase's Theorem).

123. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 8 (5th ed. 1998).

124. This example is taken from A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 11-12 (2d ed. 1989).

125. BLACK'S LAW DICTIONARY 1094 (6th ed. 1990).

counted to yield a current value, and political players can bargain on the basis of that discounted value.

Coase's Theorem teaches us that regardless of how we assign this right *ex ante*, in a world of costless bargaining, players in the political market will trade to an efficient *ex post* outcome. More precisely, the parties will bargain to a Pareto optimal outcome. Pareto optimality means simply that it is not possible to reassign the right in such a way that at least one person will be made better off and no one will be made worse off.¹²⁶ Put another way, the kind of perfectly operating market assumed by Coase's Theorem will always assign the right to the same player, the player willing to pay the most for the right.

C. *Politics and Pareto Optimality*

In other contexts, many legal theorists have drawn normative implications from Coase's Theorem. In the real world, they point out, bargaining is not costless. There are search costs, information costs, and the like. This means that the *ex ante* distribution of any right will have serious consequences. In the presence of such transaction costs, we cannot assume that players will bargain to efficient outcomes. It is thus possible to assign a right in such a way that one would have an *ex post* non-Pareto optimal distribution. This in turn would imply a dead-weight loss: there will be some losers without any off-setting winners. Accordingly, they argue that we should assign rights *ex ante* to the person who would hold them *ex post* in a world of zero transaction costs. Put another way, legal rules should mimic the results of perfectly functioning markets.¹²⁷

In certain contexts the appeal of this argument is fairly clear. Inefficient allocation of economic resources makes society as a whole poorer. By constructing a legal regime that mimics a perfectly functioning market, we can increase the size of society's collective pie. Adopting inefficient rules means that even if we make A better off, we are making B worse off by more than the increase in A's welfare. Of course, there are those who dispute whether or not this is a sufficient – or even relevant – nor-

126. JEFFRIE G. MURPHY & JULES L. COLEMAN, *PHILOSOPHY OF LAW* 182-83 (2d ed. 1990).

127. *Id.* at 194-96.

mative criteria.¹²⁸ Still, the appeal of the rule, even if it is not universal, is at least intuitively obvious.

However, it is less clear whether or not Pareto optimal outcomes in the kind of political market described above are desirable. In a commercial market, it is easy to see how an efficient outcome maximizes wealth. In a market for interpretive influence, political satisfaction is what an efficient outcome would maximize. However, it is not political satisfaction in some absolute sense. Rather, it is political satisfaction in the face of the judicial decision to grant legislators influence over the later interpretation of statutes. If one takes the choice of collectively giving legislators some form of influence over the later interpretation of statutes as given, one could argue a Pareto optimal rule is normatively desirable because it makes legislators as a group better off. Of course, there is no reason per se that we should care about legislators' satisfaction. Certainly, institutions like frequent elections and a free press can make the lives of congresspersons unpleasant.

There is another reason, however, to favor an efficient allocation of interpretive influence. In the context of a judicially created rule, maximizing legislators' satisfaction with a Pareto optimal rule is likely to protect judicial legitimacy. Consider two analogies. The first is Alexander Bickel's famous discussion of "the passive virtues" in *The Least Dangerous Branch*.¹²⁹ Bickel's argument is that the Supreme Court frequently uses doctrines such as standing to avoid deciding controversial cases that could compromise the Court's political legitimacy.¹³⁰ Such a husbanding of judicial legitimacy allows the judiciary to exercise counter-majoritarian review within the context of a democratic polity. The second analogy is the courts' treatment of questions involving parliamentary procedures promulgated by

128. For example, John Rawls seems to argue that any action which makes the worst off members of society better off is desirable even if it makes better off members worse off in a dramatically disproportionate way. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971); see also Ronald Dworkin, *Why Efficiency?: A Response to Professors Calabresi and Posner*, 8 HOFSTRA L. REV. 563 (1980) (arguing that the concept of efficiency tells us nothing about the justice or injustice of any rule of law).

129. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 111-98 (2d ed. 1986) (discussing the "passive virtues").

130. *Id.*

Congress to "determine the Rules of its Proceedings."¹³¹ Courts have been extremely leery of requests that they review such rules.¹³² Thus, the D.C. Circuit (where virtually all of these suits occur) has held that courts should exercise their equitable power to deny a remedy even in cases where internal legislative rules present constitutional violations.¹³³ This odd holding is justified by the need to avoid judicial entanglement in internal legislative politics.¹³⁴ Academic commentary suggests that courts should refuse to adjudicate such disputes not because of any legal impediment, but simply because involvement could be too politically dangerous for the courts.¹³⁵

The basic logic of both of these arguments can be applied to the question of which bits of legislative history the courts should consult when construing statutes. Long ago, Aristotle realized that the boundary between the generality of legal rules and the resolution of particular "hard cases" marked a frontier of power. Indeed, Aristotle designated the boundary as the border between the rule of law and the rule of men:

Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, *owing to the difficulty of framing general rules for all contingencies*, to make an exact pronouncement.¹³⁶

His remarks serve as a reminder that "the interpretation of statutes is not an abstract exercise, it is about the exercise of power in our political system."¹³⁷ Put more philosophically, "the important question concerning statutory interpretation . . . is political rather than epistemic . . ."¹³⁸ Picking one source of

131. U.S. CONST. art. I, § 5, cl. 2.

132. See, e.g., *United States v. Ballin*, 144 U.S. 1 (1892) (rejecting a challenge to the House of Representatives method of determining the presence of a quorum). *Ballin* was the first case in which the Court was asked to rule on an internal legislative rule. Since then, courts have generally followed its deferential approach. See Michael B. Miller, *The Justiciability of Legislative Rules and the "Political" Political Question Doctrine*, 78 CAL. L. REV. 1341, 1348–53 (1990) (discussing *Ballin* and its progeny).

133. *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1983).

134. *Id.* at 1174.

135. Miller, *supra* note 132, at 1364–74.

136. ARISTOTLE, *POLITICS* 148 (Ernest Barker trans., 1948) (emphasis added).

137. Mikva & Lane, *supra* note 6, at 136.

138. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 271 (1990).

legislative history rather than another has the potential to transfer power from one legislator to another, because it can give the legislator controlling the history the opportunity to sell it to some other legislator with stronger preferences in return for some of that legislator's political power.¹³⁹ To regularly force Senator Smith to pay off Senator Jones could "cut very deep into the very being of Congress. Courts ought not[, one might argue,] . . . enter this political thicket."¹⁴⁰ Legislators and their constituents are likely to view such interference as political meddling. This in turn would undermine the courts' claim to be neutrally applying the law, a claim on which their legitimacy – and power – rests. One judge encapsulated this concern by writing that "[w]hen the public comes to understand that judges are simply unelected, life-tenured bureaucrats dressed in black, making policy decisions just like other government officials, the moral authority of the courts will be seriously undermined and popular obeisance to the courts' constitutional judgments will be jeopardized."¹⁴¹

From this point of view, an efficient rule for distributing interpretive influence will have two positive effects. First, it will reduce the number of political transactions over the legislative record. A world in which legislators must routinely make deals with the red-headed senator in order to influence later interpretation would repeatedly remind legislators of the way in which courts are giving the red-headed senator power.¹⁴² However, a world in which few such deals occur because the distribution is efficient is less likely to emphasize judicial interference. Second, deviation from an efficient rule will, by definition, make at least one legislator worse off such that the legislator's loss will be greater than any gain realized by another legislator. Accordingly, if we assume that animus towards the courts is a function of the intensity of disappointed

139. By "power" I mean things like votes on future legislation, influence with other legislators, and the myriad of other mediums in which political deals are made. See *supra* Part III.A.

140. Cf. *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (arguing that courts ought not to be involved in congressional redistricting).

141. Alex Kozinski, *Should Reading Legislative History be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 814 (1998).

142. See *supra* Part III.A.

preferences,¹⁴³ then the animus felt by the losing legislator in such a scenario is likely to be greater than any gratitude felt by the winning legislator.¹⁴⁴ It is not difficult to see how after several rounds of interpretation involving different pieces of legislation about which different legislators have strong interpretive preferences that the overall intensity of anti-court animus within the legislature would increase faster than any pro-court gratitude. Thus, while there may be no value per se in efficiently maximizing legislators' satisfaction, maximizing it can serve to shield the courts and husband judicial legitimacy.

D. *Rejustifying the Judicial Use of Legislative History*

Granting the conceptualization of legislative history as a property right and the arguments made in favor of efficiency, we can answer the normative question of what approach courts should take in using legislative history. Theoretically, the answer to this question is simple: courts should rely on the legislative history created by those actors who would bargain to control the "authoritative" legislative history in Econotopia. In practice, it turns out that this means that courts should look to committee reports and sponsor statements.

The sponsor of a bill is likely to be the legislator who is most interested in the final shape of the bill. Her choice to sponsor the bill represents a strongly expressed interest in the issue addressed by the legislation. Likewise, the committee members who control committee report language are likely to have particular interest in – and strong preferences about – the policy areas within the committee's jurisdiction. Not surprisingly, such members often have strong preferences about the way in which legislation is interpreted. They are thus likely to be the members who would bargain to control authoritative history in Econotopia. Of course, bill sponsorship and committee membership are at best imperfect signals of strong interpretive

143. Where intensity is defined in terms of willingness to pay to satisfy the preferences.

144. Assuming, of course, that because of real-world transaction costs, the two parties cannot make a deal. In a costless world, the two could simply make a deal. This presumably would reduce the level of animus felt toward the courts, because at least the legislators' preferences would be satisfied. However, there still might be animus coming from the necessity of entering into the transaction in the first place.

preferences. Thus, it is not difficult to imagine situations in which bill sponsors and committee chairpersons are not the political actors who would bargain to control the history.

However, their positions provide a second reason why courts would want to assign the rights to them *ex ante*. Remember that in Econotopia it did not matter how the courts allocated rights; political actors would always bargain to efficient outcomes. The reason that we worry about the allocation of rights in the real world is because transaction costs exist, and parties will have difficulty bargaining to efficient outcomes. Obviously, courts have imperfect information at best about who those particular parties are actually going to be. However, one thing that we can assume is that if we assign the right to a party that can bargain at low cost with the group of players who are most likely to have the strongest preferences, we are much more likely to get efficient outcomes. As I pointed out in Part II, statutory text is almost always a product of negotiation among various interested parties. These parties are likely to have the strongest preferences about the later interpretation of the statute both because they have strong interests in the underlying policy issues and because they are likely to have the legal sophistication to foresee and form preferences about future interpretive issues. Furthermore, the fact that they already have access to sponsors and committee members from the negotiations over statutory text – which is largely controlled by these legislators¹⁴⁵ – means that these same players are likely to be able to negotiate over legislative history inexpensively. Thus, by linking control over statutory text with control over interpretive influence, we can closely mimic the conditions of Econotopia (lots of information and low transaction costs) in those cases where we are not mimicking the actual outcomes of Econotopia. Either way, we are likely to get efficient outcomes.¹⁴⁶

145. *See supra* Part II.A.

146. Note, this argument will not apply to the text of the statute itself. This is because no political actor has a property right in the actual text, which can only be changed by a majority vote (of either the committee considering it or the whole house considering it). One might be tempted to argue that there *is* a property right in the actual votes of legislators and that in Econotopia, at least, one could bargain over the votes on various textual amendments to reach a Pareto optimal outcome. However, such a rosy view ignores the insights of Kenneth Arrow and the Roches-

Consider the example of the Year 2000 Liability Act.¹⁴⁷ In anticipation of computer problems expected by the change of the year 2000, Congress passed legislation designed to limit the liability of companies that tried to fix the problem before end of 1999.¹⁴⁸ The Senate created the Special Committee on the Year 2000 Technology Problem to study the problem, and produce legislation on the subject. At the time, creating some sort of limited liability shield for firms trying to fix Y2K problems was a fairly high-profile issue with certain segments of the business community, and Senator John McCain, who was gearing up for his presidential bid, decided that he wanted to claim sponsorship of the issue. He had a staffer contact senior staff in other offices that had been working on the issue. On the basis of that short conversation, McCain's staff produced a bill, and McCain proposed and immediately reported it out of his own powerful Commerce Committee to the floor of the Senate.¹⁴⁹ The Senate's Republican leadership, eager to pass a bill before the end of the session, agreed to let McCain sponsor the bill, but only on the condition that he substitute a new text for his own hastily constructed bill, which mishandled many of the issues considered by the Special Committee on the Year 2000.¹⁵⁰ McCain agreed to the compromise and the bill passed.¹⁵¹

None of this maneuvering appears in the *Congressional Record*. However, it does illustrate two points. First, the judicial

ter School. Because of the intransitivity of collective preferences, even in a world of costless bargaining—in fact more so—we would expect cycling. See *supra* Part I.B.

147. My narrative of events is based on discussions with many of the staffers who participated in events but who have asked that they not be formally cited.

148. Y2K Act, Pub. L. No. 106-37, 113 Stat. 185 (1999). Computers were supposed to malfunction because their two-digit year record in their internal calendar would read "2000" as "1900" causing all sorts of technological problems. Fortunately, whether through the millions of dollars spent on retrofitting or overblown predictions of global catastrophe, 2000 came and went with relatively few calendar induced computer glitches. For a discussion of the bill's specific provisions see *Year 2000 Liability Provisions*, in CONGRESSIONAL QUARTERLY ALMANAC 1999, at 22-20, 22-21 (David Rapp ed., 2000).

149. See *Law Enacted to Limit Firms' Liability From Y2K-Related Computer Glitches*, in CONGRESSIONAL QUARTERLY ALMANAC 1999, at 22-9 (David Rapp ed., 2000) (stating the McCain bill became S. 96) [hereinafter *Y2K-Related Computer Glitches*].

150. See S. Amend. 608 (June 9, 1999).

151. *Y2K-Related Computer Glitches*, *supra* note 149, at 22-9.

decision to privilege statements made by the sponsor of a bill is largely arbitrary, resting on what is often, at best, a benign fiction of legislative expertise. Second, in large part because of that judicial fiction, sponsorship decreases the cost of bargaining. McCain had little or no knowledge of the issues involved in the anticipated Y2K litigation. However, he knew that businesses, eager to influence the later judicial interpretation of the bill, would feed him statements which he could then read into the record, and that he could parlay his position as a privileged mouthpiece into political support for his upcoming battles in the presidential primaries. Indeed, during debate on the measure, he was eager to trumpet the access that sponsorship had given him to top CEOs in the high technology industry.¹⁵² In the end, the “quality” of the legislative record may well have been unaffected by Senator McCain’s insertion of himself into the process. As Justice Breyer has suggested, legislative history is an institutional product and much of its value for judges lies in the way in which it channels the diverse expertise of effected interests, staff, and legislators to courts.¹⁵³

Of course, giving preference to committee reports and sponsor statements is still an imperfect way of mimicking a perfectly functioning market. It is possible to imagine plausible situations in which, because of collective action problems, we would expect non-Pareto optimal outcomes. To simplify the example, imagine that we can measure the “price” that legislators are willing to pay for interpretive influence in fungible units called “political pennies.” Suppose that there is one representative who is willing to pay 100 political pennies to get his favored interpretation in the record, and there are 100 representatives willing to pay two political pennies to get a single, differing interpretation in the record. In Econotopia, the two-penny representatives could costlessly aggregate and outbid the 100-penny legislator. However, in the real world there will invariably be situations in which – even given a rule that allocates power of the legislative history to the person who can bargain at least cost – it will not be possible to aggregate all of the two-penny representatives. The result is that the 100-penny member will

152. *Id.* at 22-9, 22-13, 22-14 (discussing McCain’s floor statements about his discussions with Andrew S. Grove, CEO of Intel Corp.).

153. Breyer, *supra* note 7, at 856.

be able to purchase the legislative history even though it would not be optimal for him to do so. All that can be said against such a criticism, it seems to me, is that assigning control over the legislative history to sponsors and committees will mitigate the problem somewhat by making it less costly to bargain. It does not seem that there is any rule that is likely to eliminate this problem. Accordingly, the logic of the second-best solution counsels in favor of allocating control over legislative history to those who currently have control: committees and sponsors.

All of this suggests that the current judicial use of legislative history can be justified as an efficient political market in interpretive influence. Whatever the weaknesses such an account might have – most notably the underlying normative ambiguity of Pareto optimality – it does have significant advantages over the traditional defenses of legislative history. This argument does not rest on any questionable assumptions about the coherency of legislative intent. Rather, it relies on assumptions much closer to those of the public choice theorists. It too views legislators as engaged in political bargaining. However, unlike legislative intent, its coherence is not tied to majority voting procedures. It is thus immune from criticisms based on Arrow's Theorem. It is still open to the basic thrust of the rent-seeking analysis offered by Easterbrook. However, it seems no more open to these challenges than the text of statutes themselves. If anything, it is less open to such critiques. Statutory text gains force on the basis of a majority vote. It can be imposed on unwilling losers. In contrast, the particular interpretation enshrined in the legislative history is much more likely to result from voluntary transactions. Any force it acquires comes from the underlying vote on the statute itself, a vote which even vociferous critics like Easterbrook are reluctant to question.

IV. Implications

The justification for legislative history offered above, however, is not entirely apologetic for current practice. It also has some critical bite, suggesting ways in which courts might want to reformulate their current practice. In particular, courts should take a "harder," more formalistic approach to legislative history and should stop trying to holistically interpret the re-

cord on the basis of some underlying intent. In particular, the current practice may frequently lead to inefficient outcomes and de-incentivize the production of useful legislative history.

A. *Making Blowhards Bargain*

Currently, courts will frequently abandon the interpretation offered in committee reports and sponsor statements if it appears that this interpretation is controversial among other members.¹⁵⁴ However, conceptualizing legislative history as a political option market suggests that this approach is mistaken.

There are two intuitions driving the current practice. The first is that legislative history should be consulted as evidence of legislative intent.¹⁵⁵ Generally, courts seem to be willing to believe that committee reports and sponsor statements reflect this intent.¹⁵⁶ However, when the floor debate indicates that a particular interpretation is controversial, courts lose their faith in the probative value of the normally privileged sources.¹⁵⁷ After all, a particular interpretation cannot reflect the actual intent of the legislature when so many individual legislators reject it. The second intuition is political. Faced with a legislative record of controversy on the floor, courts are eager not to appear to be taking sides. Picking a winner or a loser is likely to offend political actors and undermine the judiciary. In such situations, "reliance on legislative history is often the 'equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends.'" ¹⁵⁸

Both of these intuitions, however, are misguided. As the public choice critique demonstrates, the concept of legislative intent is deeply problematic.¹⁵⁹ Accepting legislative history because it creates an efficient market in interpretive influence, however, means that the concept of legislative intent is beside the point. The question is not whether the legislative history reflects some imagined intent. Rather, it is whether the materi-

154. See *supra* Part II.B.

155. See *supra* Part I.A.

156. See *supra* Part II.B.

157. See, e.g., *Landgraf*, 511 U.S. at 263-72.

158. Cf. *Broad*, 85 F.3d at 435 (Kleinfeld, J., dissenting) (quoting *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993)).

159. See *supra* Part I.B.

als used by the courts reflect an efficient distribution of interpretive influence. Floor debate does not provide any incentive for members to consider the strength of their commitment to their particular interpretation. Offering such an interpretation is virtually costless, since it takes a member very little in terms of time or resources to insert a statement into the record. Furthermore, because normally their interpretation is not given great weight and is therefore not particularly valuable to other political actors, they have few opportunity costs.

Abner Mikva, a former congressman, tells the following story that illustrates this dynamic. He writes:

When the Racketeer Influenced Corrupt Organizations (RICO) provisions of the Organized Crime Act of 1970 came up for floor debate, I expressed my opposition in hyperbolic terms, parading one horrible example after another before the House. Since the managers had the number of votes needed for passage, and I was speaking mostly to an empty House, they did not even bother to answer me. My remarks have been used ever since as legislative history to prove the broad scope of RICO. If I knew then what I know now (that was my first term in Congress) I would have gone to the Committee Chairman and said that I had 36 members who were going to raise a lot of sand unless he agreed to engage in some floor dialogue with me to limit future interpretations of the RICO language. At the point he might well have agreed and I could have made the opposite — and less mischievous — legislative history.¹⁶⁰

Notice the differing incentives that the value of the legislative history created. The freshman congressman spouted off without considering the consequences of his remarks. Dialogue with the committee chairman, however, had to be negotiated over.

Sponsors and committee chairs also face few direct costs to promulgating a particular interpretation. However, all things being equal, under current judicial practice, their interpretation is much more valuable. Accordingly, they *do* face opportunity costs in offering an interpretation, namely the cost of forgoing the “sale” of the interpretation to another actor. Thus, there is little reason to suppose that statements made by ordinary legislators in the course of debate reflect anything more than politi-

160. Abner J. Mikva, *Reading and Writing Statutes*, 48 U. PITT. L. REV. 627, 632 (1987).

cal hot air.¹⁶¹ In contrast, statements made by committees and sponsors are much more likely to reflect the strong preferences of some committed political actor.

This dynamic also shows that the intuition about getting involved in political fights is wrong. First, the fact that courts are interpreting a statute means that they will inevitably have to offer *some* construction of the language. If the proper interpretation was in fact controversial in the legislature, it is an illusion for courts to suppose that they can decide the case without offending at least some of the legislators. However, by retreating completely from the legislative history in the face of controversy, the courts make the mistake of treating all legislative statements as reflecting equal political intensity. Perhaps Senator Blowhard will be offended if the courts accept the interpretation offered by the bill's sponsor rather than his. However, refusing to accept the interpretation offered by the sponsor is nevertheless a choice, and there is no reason to suppose that she – or the interests that she speaks for – will not be as offended as Senator Blowhard. In fact, given the differing incentives that members face, there is good reason to believe the interpretation she offered reflects more intense preferences. In the end, to consistently allow the loud and the loquacious to negate the views of sponsors and committees is more likely to create anti-court political animus, since such statements will reflect less intensely held views than those contained in reports and sponsor statements.

In contrast, a relatively formal and rigid rule – “the interpretation of sponsors and committees will always be preferred to rival interpretations offered during debate” – creates incentives that are *less* likely to result in animus against the courts. First, it will encourage those with genuinely strong preferences about the interpretation of statutory language to bargain for their preferred outcome. Second, consistently applying such a rule is less likely to look like political favoritism. Under the current practice, there is no clear understanding of how much

161. Cf. *Landgraf*, 511 U.S. at 262 (“[T]he legislative history discloses some frankly partisan statements about the meaning of the final effective date language, but those statements cannot plausibly be read as reflecting any general agreement.”); Wald, *supra* note 72, at 309 (suggesting that legislative history is a mix of “illuminating . . . context” and “irrelevant diversion”).

controversy there must be before courts reject a sponsor or committee's interpretation. Sometimes they accept it, sometimes they do not. Such imprecision leaves judges open to the accusation that in consulting legislative history they are "looking over the heads at a party for their friends"¹⁶² far more than a rigid rule would.

B. *Increasing the Incentive to Produce*

Taking it as given that legislative history provides courts with useful material in construing statutes,¹⁶³ one problem they face is that many bills have no useable legislative history at all.¹⁶⁴ Adopting a more rigid approach, however, could help to mitigate this problem. This is because such an approach would increase the incentive to produce such history.

The more valuable legislative history is to political actors, the more likely they are to produce it. In terms of interpretive influence, the current value of any piece of legislative history is a function of three factors: First, the importance of the interpretive issue; second, the probability that the particular issue will arise; third, the probability that the courts will consider the legislative history. Essentially, the present value of the legislative history is the first factor discounted by the second two.¹⁶⁵ If players think that a particular issue is important, then they are likely to try to create legislative history influencing that issue. However, if they think that the issue is unlikely to arise or that when it does arise, that courts are unlikely to defer to legislative history, then creating such history is less valuable.

Of these three factors, courts have no control over the first two. However, they have exclusive control over the third factor. The greater the certainty that they can provide *ex ante* that particular legislative history will be consulted *ex post*, then the greater the incentive to create such history. However, when courts abandon sponsor statements and committee reports in

162. See *supra* Part III.

163. See *supra* Part II.B.

164. See *id.*

165. It will also be discounted by the period of time between the creation of the legislative history and the case in which the interpretive issue is expected to arise. Issues far in the future are less valuable than issues in the immediate future.

the face of controversy on the floor, they diminish the incentive to create such history. Likewise, when they engage in holistic searches for legislative intent, they reduce the certainty that political actors have about their ability to influence later interpretation. In contrast, rigidly following a fairly formal rule would dramatically increase the probability that particular pieces of legislative history will be consulted. This, in turn, means that when the history is being created there will be less discounting by political actors. The result would be more useful material for courts faced with tricky issues of construction.

Conclusion

Public choice critics have severely – perhaps fatally – undermined the traditional justification for legislative history. However, attention to the way in which legislative history is actually used suggests that it can be thought of as a kind of property right. Reconceptualizing the issue in terms of a political market seems to avoid at least some of the criticisms of the public choice theorists. Certainly, it is methodologically similar to their approach. However, far from undermining the traditional practice, thinking of legislative history as a property right suggests that current judicial practice is actually efficient and desirable. Far from abandoning their current practice, judges should tighten it up. This new theory suggests that judges should give up searches for legislative intent and platitudes about holistic reconstruction of the whole record. A focus on the actual incentives that judicial practice creates suggests that what is needed is not a retreat into a fog of pragmatic rhetoric¹⁶⁶ but a steely-eyed formalization of current judicial practice.

166. William Eskridge, Jr. was an avowed pragmatist. See William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Eskridge, *supra* note 2, at 207 (stating “[t]hese thinkers emphasize the eclectic and instrumental features of the process tradition Law involves a balance between form and substance, tradition and innovation, text and context. Pragmatism probably best captures the actual practice of courts and agencies, but provides little normative direction for that practice.”).