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Preface

My aim in this book is to analyze and explain the justification for using legislative history in American statutory interpretation. This book examines the United States Supreme Court's actual use of legislative history in statutory interpretation, distills the theoretical issues presented by the Court's practices, then analyzes those issues in light of several key theoretical arguments. I conclude that legislative history may be used in statutory interpretation. In doing so, I explain why many of the traditional arguments against (and for) using legislative history are erroneous or incomplete.

Frequently when interpreting statutes, the Court looks to legislative history for interpretive guidance, saying nothing more than, "The legislative history indicates that Congress intended...." in order to justify its use of legislative history. This simple statement opens a theoretical thicket of familiar issues about whether a corporate body like a legislature is capable of holding intentions, whether such intentions are actually discoverable, what relation legislative history has to legislative intentions, and what deference must be afforded to either legislative history or legislative intentions.

I argue that the justification for using legislative history should be disaggregated from the notion of legislative intention. Instead, I argue that legislative history conveys a certain degree of expertise and/or provides certain contextual information about the subject-matter of the statute. Once the use of legislative history is justified independently of legislative intentions, many of the theoretical objections to its use simply fall away.

I also consider the possibility that legislative history may be authoritative as a matter of judicial precedent; that is, legislative history may be authoritative because judges have said so in published opinions. This observation comes in two variants: first, that recourse to legislative history is directly, expressly permitted as a matter of precedent; and second, that as a matter of precedent, legislative history is determinative of legislative intention (discovery of which precedent also deems to be the aim of statutory interpretation).

In attempting to disaggregate legislative history and intentions, this book follows Joseph Raz and argues that the only legislative intentions that may be identified and deemed legally authoritative as a matter of general theory are minimal intentions relating to the valid enactment of a particular text as a legally authoritative statute

within a particular legal system. I also analyze arguments for disregarding even these minimal intentions in some cases, as well as arguments for the authoritativeness of some additional kinds of intentions in certain circumstances.

This book is based on a doctoral thesis submitted at the University of Oxford in 2000. My initial interest in issues of language and interpretation was sparked by an undergraduate seminar on J. L. Austin, taught by Peter A. French at Trinity University. At Cornell Law School, my teacher and fellow Oregonian Robert S. Summers encouraged my study of jurisprudence and was instrumental in my pursuit of further study at Oxford. For that, he deserves special thanks.

I would also like to thank the many people who helped me sharpen my thoughts and arguments, in particular Paul Craig and John Finnis, my supervisors; Neil Gorsuch, John Craig, and Philip Marsden, with whom I shared many hours in the Bodleian Law Library; Lisa Feldman, who provided invaluable editorial assistance; Richard Bales, for countless helpful comments on equally countless drafts; and Heller Ehrman White & McAuliffe LLP. Most importantly, I would like to thank my wife, Leigh, for everything she does.

Christian E. Mammen

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CHAPTER ONE

Introduction

This book is about the U.S. Supreme Court's use of legislative history in statutory interpretation.[1] It adopts as its methodology one similar to that recommended by Justice Oliver Wendell Holmes in "The Path of the Law":

> The best way to gain a liberal view of your subject is not to read something else, but to get to the bottom of the subject itself. The means of doing that are, in the first place, to follow the existing body of dogma into its highest generalizations by the help of jurisprudence.[2]

I propose to examine the Court's actual use of legislative history in statutory interpretation, then to compare the Court's practices against the arguments of several leading theorists. In this manner I hope to expose the strengths and shortcomings of both the Court's doctrine and the theoretical arguments. This task will not be an easy one. Professors Henry Hart and Albert Sacks admonished students nearly forty years ago:

> Do not expect anybody's theory of statutory interpretation, whether it is your own or somebody else's, to be an accurate statement of what courts actually do with statutes. The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.[3]

In recent years, controversy has simmered in the United States Supreme Court over whether or not to use legislative history in statutory interpretation. In the context of American federal law, "legislative history" generally refers to any of the materials generated by Congress during the course of enacting statutes. At its broadest, it could be considered to include all materials—other than actual statutes—generated by

[1] At the outset I should note that I maintain the project's significance, notwithstanding the fact that a number of judges with whom I have spoken over the past several years have expressed sentiments best captured in Argentine thinker Jorge Luis Borges' rhetorical question, "Why take five hundred pages to develop an idea whose oral demonstration fits into a few minutes?" *See* Borges, *Labyrinths*, Preface at xiii (1964 ed.). The fact that such judges have been diametrically opposed in their few-minute conclusions suggests the necessity, or at least the justification of a lengthy exposition.

[2] Holmes, "The Path of the Law," 10 *Harvard L.Rev.* 457, 476 (1897).

[3] Hart & Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* at 1201 (tent. ed. 1958).

Congress, its committees, or individual legislators, acting in an official capacity. More narrowly, the term typically denotes the reports of standing committees, as well as transcripts of legislative proceedings (*e.g.*, debates) directly related to the statute being interpreted or applied.

As of 1992–1993, the level of U.S. Supreme Court use of legislative history was roughly in line with twentieth-century average levels of usage. Between 1938 and 1979, the Court cited committee reports and the Congressional Record an average of 115 times per year. In 1992, the Court cited those sources 130 times, and in 1993 it cited them 107 times.[4] This level of citation is down significantly from 1973–1983, when the Court cited legislative history an average of twice that often, 230 times per year. Since 1938, the Court's use of legislative history has followed something of a pendulum-path, hovering at 43 citations per year from 1938–42, 99 per year in 1943–49, 67 per year in 1950–56, 108 per year in 1957–72, and 230 per year on average in 1973–79 and 1983.

For all those citations of legislative history, however, a survey of over a hundred cases from 1990–94 reveals that the Court is largely unreflective about why it thinks legislative history is legitimate, useful, or persuasive in statutory interpretation. In the lion's share of those cases, nothing more was said than some version of, "The legislative history indicates that Congress intended...."

Theorists, on the other hand, have thought long and hard about the role of legislative history in statutory interpretation, particularly the relation of legislative history to legislative intention. On one approach, commentators on the use of legislative history in statutory interpretation could be divided into three groups: those who argue that legislative history *must* be used (*e.g.*, because it is legally binding); those who argue that legislative history *may not* be used (*e.g.*, because its use is somehow illegitimate or it is always, per se, useless); and those who argue that legislative history *may sometimes* be used in interpreting statutes. Although I do not take this tripartite organizational approach in this book, I do attempt to address each of the three groups in the course of my analysis. I conclude that legislative history is neither legally binding in the same way that statutes are, nor is it deserving of a complete prohibition. Rather, legislative history's use in statutory interpretation is sometimes justified and sometimes not justified. The task of this book is to explore *when* legislative history may properly be used, and *how persuasive or authoritative* legislative history is when it is used in statutory interpretation. While I address both of these issues, there is enough of a consensus on the first that I devote less attention to it and focus more deeply on the second issue, particularly the relationship between legislative history and legislative intent.

My overall conclusion can be summed up as follows. Legislative history conveys a certain degree of expertise and/or provides certain contextual information about the subject-matter of the statute. Such contextual information and expertise can be helpful in interpreting statutes (just as contextual information is often helpful in

[4] *See* Carro & Brann, "Use of Legislative Histories by the United States Supreme Court: A Statistical Analysis," 9 *J. Legis.* 282 (1982). Some statistics in that article indicate that Senate Reports, House Reports, and the Congressional Record comprise approximately 2/3 of all citations of legislative history. The figures from 1992 and 1993 were derived from a search of the U.S. Supreme Court Reporter on CD-ROM: "S.Rep." or "H.R.Rep." or "Cong.Rec." and ci("113 S.Ct." or "114 S.Ct.").

understanding the meaning of utterances).[5] I presume that interpretation is best carried out when the interpreter takes maximal advantage of all information reasonably available to her that may be of assistance in the interpretive task within the bounds of the interpreter's discretion.[6] Legislative history may also be authoritative as a matter of judicial precedent; that is, legislative history may be authoritative because judges have said so in published opinions.

But it is not *always* permissible or advisable to delve into legislative history. Often legislative history is unhelpful—it may simply provide no illumination of the interpretive question faced by the court, or the information to be gleaned from it may not be worth the time and expense. Therefore, courts have developed threshold tests for when legislative history may be used. Anglo-American jurisdictions commonly employ thresholds of ambiguity or absurdity. That is, unless the statute is ambiguous or produces absurd results when applied to particular facts, legislative history may not be consulted. But if the statute is ambiguous or produces absurd results, the threshold requirement is met and legislative history may be consulted.[7]

Once we get past the threshold, three main strands of argument support the use of legislative history in statutory interpretation. First, and most obviously, legislative history is used as evidence of legislative intentions. This implicates several subordinate issues: the relevance of legislative intentions to statutory interpretation, and the role of legislative history in revealing legislative intentions. I argue that the use of legislative history is adequately supported by justificatory bases other than legislative intentions, and that there are thorny—and perhaps insoluble—conceptual and evidentiary problems with ascertaining the kinds of legislative intention that would be useful to statutory interpretation.

The second main strand of argument is that legislative history is used because of its value as a secondary source of interpretive arguments and information. Like a treatise, legislative history contains well-considered, or expert, arguments about both the subject-matter of the statute and how the statute should be interpreted, formulated by people with expertise in the area being regulated, and may be said to be "authoritative" in the same way that a treatise is authoritative. At the same time, as part of its function as a secondary source, legislative history provides contextual factual information about the statute and its enactment.

[5]It is my goal to avoid opening the pandora's box of pragmatics, semantics, hermeneutics and other aspects of the philosophy of language. These subjects are difficult enough for philosophers. To attempt to apply their subtleties to the particular context of legally authoritative statutes would be beyond the scope of this book. Nonetheless, it may be impossible in the course of this book to avoid using theory-laden terms of art. For example, by characterizing statutes as "utterances," I do not wish to enter the debate over whether, strictly speaking, legislative enactments are utterances. *See, e.g.*, Hurd, "Sovereignty in Silence" 99 *Yale L.J.* 945 (1990).

[6]*See, e.g., Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 All ER 98, [1998] 1 WLR 896 (Lord Hoffmann) (In a contract interpretation case: "Subject to the requirement that it should have been reasonably available to the parties ... [background knowledge usable in statutory interpretation] includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.").

[7]Justice Scalia, in one of his many arguments against legislative history, argues that legislative history is so often unhelpful and requires so much effort that it should never be consulted no matter what thresholds of ambiguity or absurdity have been met.

Third, the use of legislative history is a practice endorsed by a long line of precedent; precedent alone could provide a sufficient reason for the continued use of legislative history.

But there are also objections to using legislative history. In addition to the practical problems of unhelpfulness and inaccessibility mentioned above as justifications for the thresholds, using legislative history in statutory interpretation also faces more serious theoretical objections. First, and probably most familiar, are arguments surrounding legislative intent and legislative history. The traditional syllogism connecting legislative intent, legislative history, and statutory interpretation runs as follows:

> The aim of statutory interpretation is to give effect to the intent of the legislature. The legislature's intent is accurately represented in legislative history. Therefore, statutory interpretation should follow legislative history.

Detractors reply that the first premise is inaccurate: the aim of statutory interpretation is to give effect to the statute enacted by the legislature. In the United States, this argument often takes on a constitutional dimension: the Constitution delineates Congress' power to enact statutes; only things which have been enacted according to constitutional procedures are legally authoritative, and bare legislative intentions have not been so enacted.

The second premise of the intentionalist argument also has its detractors. They make several arguments about legislative intent and legislative history.[8] First, they argue that legislative intent is not a coherent concept: an institution cannot hold intentions, and even if it could, Congress' intention is impossible to discover because there is no way to aggregate individual legislators' intentions together into a single institutional intention. Second, they argue that there are evidentiary problems with finding legislative intent; even if it is conceivable that Congress can have intentions, there is no way of discovering all of the pertinent intentions which need to be combined. Third, they argue that legislative history is not an acceptable proxy for legislative intent: (1) at best, it represents the views of a few members of a congressional committee; (2) it was probably written by staff members rather than legislators, and therefore is unconstitutional or undemocratic or both; (3) it is subject to abuse via strategic implantation of arguments in the record; and (4) it is not accessible. Thus, the connection between legislative history and legislative intention is both a primary justification for using legislative history and a primary basis for objecting to the use of legislative history.

In addition to the intentionalist objection, opponents of legislative history also offer a constitutional objection, which argues that legislative history may not be used because it has not been subjected to the formal constitutional procedures for statutory enactment. But those who offer this constitutional objection tend to ignore legislative history's utility as a source of expert arguments or contextual information. They neglect the possibility that legislative history may be useful in statutory interpretation without being legally authoritative. They also tend to ignore the possibility that legislative history is legally authoritative by virtue of conventional practices (such as the judicial practice of deferring to it in opinions).

[8] *See, e.g.*, MacCallum, "Legislative Intent," in Summers, ed., *Essays in Legal Philosophy* at 237 (1968).

Conventional practices tend to be such a murky and context-specific area of inquiry that many commentators note their existence, only to set them to one side as something beyond the scope of their arguments. But this book endeavors to connect the Supreme Court's conventional practices with more general theoretical discussions. In the Supreme Court's conventional practices, legislative history tends to be a high profile secondary source of reasoning, and is often discussed in terms of legislative intent. In these conventional practices, legislative history is generally not more authoritative than, or even as authoritative as, the statutory text, but it does tend to be more authoritative than treatises and other comparable secondary sources. This, it seems, must depend on both the content of legislative history's interpretive voice and the discretion of the courts to listen to that interpretive voice. Mere expertise, or the formulation of good arguments, is not quite enough to account for the authoritativeness of legislative history's interpretive voice; many secondary sources depend on expertise-like claims, and legislative history still takes a higher priority. There must be some basis underlying legislative history's superior role in providing guidance. That comes, at least in part, from the *judicial practice* of deferring to external sources for interpretive guidance, as the courts do when they defer to agency interpretations or legislative history. In short, the judicial practice of using legislative history establishes its authoritative place in the hierarchy of aids to statutory interpretation.

To recap: This book argues that legislative history is justifiably useful as a secondary source in statutory interpretation. This is a baseline claim, which provides that legislative history is not illegitimate or off-limits as a tool in interpreting statutes. This book further argues that legislative history is not legally authoritative, in the same way that statutory texts are. This book finally argues that legislative history receives higher prominence in the Supreme Court than is typically given to other secondary sources, and that this higher prominence is adequately explained by legislative history's unique value as a source of contextual and expert information, combined with judicial precedent and institutional conventions of using legislative history in statutory interpretation.

I turn now to the structure of this book. Overall, it starts by discussing the actual practice of statutory interpretation and the use of legislative history in the U.S. Supreme Court, then moves to a theoretical discussion of issues surrounding legislative intention. This progression is loosely organized around eight basic questions:

1. What is a statute/legislation?
2. What is the general approach to interpreting statutes?
3. When may extratextual sources, generally, be consulted?
4. More specifically, when may legislative history be consulted?
5. What materials constitute legislative history?
6. What information is sought in legislative history?
7. How authoritative is legislative history?
8. Are there significant arguments against using legislative history? If so, what are they?

Chapter 2 starts with an overview of statutory interpretation in the Supreme Court. The chapter starts with basic matters, such as defining a statute, and a general description about how the Supreme Court interprets statutes. Chapter 2 then moves

on to a discussion of the Supreme Court's use in statutory interpretation of sources or materials other than the statutory text—for example, treatises, dictionaries or legislative history. I refer to these generally as extratextual sources.

Chapter 3 begins to narrow the book's focus to the Supreme Court's use of legislative history; in particular, *when* legislative history may be used. There are two main circumstances in which the court uses legislative history: when the statutory text is ambiguous as applied to the facts of a particular case and when the text yields a single preferred interpretation, but that interpretation leads to absurd results in the facts of a particular case. Ambiguity and absurdity are themselves vague and malleable concepts. This book does not undertake to articulate bright-line rules about what constitutes an ambiguity or an absurdity.

Chapter 3 also discusses two less important types of threshold conditions for when legislative intention may be used: amendment cases and preemption cases. The first of these exists when Congress amends an existing statute. If the amendments apparently wreak large changes on the statutory scheme, courts may be unwilling to implement those changes absent indications that Congress really intended to make those changes. The latter refers to a category of cases occasioned by the American constitutional scheme in which federal laws are superior to, or preemptive of, state laws. When Congress enacts legislation that interferes with an existing state-law scheme, courts tend to make an additional inquiry whether Congress really intended to displace the state-law scheme.

Finally, Chapter 3 briefly considers the suggestion in several cases that the Court engages in a case-by-case balancing act of all available interpretive materials, rather than imposing a prohibition on extratextual materials absent satisfaction of one of the thresholds (*e.g.*, ambiguity, absurdity, amendment or preemption). In this sort of balancing, the statutory text is still afforded deference.

Chapter 4 discusses a special instance of when courts may or may not use legislative history—namely, when and whether the use of legislative history is appropriate in relation to judicial deference to interpretations proffered by administrative agencies charged with administering the statute at issue. This area of law is commonly known as the *Chevron* doctrine, after the case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.[9] Cases under the *Chevron* doctrine are relatively common, and the interpretive analysis in this sort of cases is rather complex—in fact, the question whether to consult legislative history arises in two separate instances in the analysis. For these reasons, I have given the issue of deference to agency interpretations its own chapter.

Chapter 5 discusses the various kinds of legislative history available to the Supreme Court, and the relative hierarchy regarding when each type of legislative history may be used. In particular, Chapter 5 considers four main kinds of legislative history:

- Committee Reports: Committee Reports are summary descriptions of the legislation nominally authored by a committee of either house of Congress (in reality, they are often drafted by committee members' staff).

[9]467 U.S. 837, 104 S.Ct. 2778 (1984).