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## WHAT DOES LEGISLATIVE HISTORY TELL US?

FRANK H. EASTERBROOK\*

Legislative history is out of the doldrums. For decades judges pawed through legislative history without much theory about what they were doing or why. Judges were atheoretic, the rest of the bar largely apathetic. How times have changed! Discussions of the role of legislative history, of statutory interpretation in general, have erupted both on the bench and in the academy. For the first time in 50 years there is a sustained, interesting debate about how to understand statutes, the meat of the business in federal courts. Debate ranges over questions of political philosophy, political economy, and epistemology—as it must when the question is “what counts as law in our constitutional republic, and how do we identify that law?”

Professor Eskridge is one of the principal contributors to the new learning about statutes. His contribution to this symposium is part of his effort to reexamine and reconstruct the foundations of statutory interpretation. It is an enterprise well worth doing, and one he has been doing well. Although, as his essay makes clear, his conclusions are not congruent with mine, we have much common ground, especially the rejection of the beliefs that subjective intent of legislators (a) can be found, and (b) represents “the law” if found. Both of us, like most other contemporary students of this subject, have been persuaded by work in public choice that it is misleading to speak of “the legislature” as an entity with a mind or purpose or intent, and wrong to assume that the compromises necessary to enact laws are uniformly public-spirited.

People of good will disagree about where the common weal lies. An assumption that legislation points toward it is not so much a rule of interpretation as it is wishful thinking coupled with a hope that judges can pick up the torch. Realistic understanding of statutes treats them as compromises. Still, it may be possible to nudge the outcome a little in the direction of goodness. Can a gaggle of lawyers with no training in social science and insulation (by tenure) from the pulse of America do this? Are they authorized to do it, if they can?

\* Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, The Law School, The University of Chicago. This essay is a comment on W. Eskridge, *Legislative History Values*, 66 CHI.-KENT L. REV. 365 (1991), and is © 1991 by Frank H. Easterbrook. I thank Abner S. Green and Richard A. Posner for helpful comments on an earlier draft.

Professor Eskridge believes that they can and may, to a limited extent anyway.<sup>1</sup> I have argued elsewhere that they can not and may not.<sup>2</sup> I refrain from rehashing our differences, which are apparent from Professor Eskridge's essay, although I elaborate a little below. One apparent difference is not nearly so great as it seems: the appropriate use of legislative history. Professor Eskridge attributes to the "New Textualists" the view that judges are to legislative history as Catholic priests are to sex. He then uses *Green v. Bock Laundry Machine Co.*<sup>3</sup> to show that abstinence is not the best policy, and that a judge may obtain from the legislative history material on which to base a decision, although not a confident one.

Justice Scalia insisted in *Green* that the legislative history of Rule 609 was neither illuminating nor relevant. Eskridge takes this as the paradigm of "New Textualism." Justice Scalia insists that "law" lies in the enacted texts rather than in the legislators' intents. Yet this does not always lead him to disregard the history of an enactment.<sup>4</sup> Well it should not, as *Green* shows. Rule 609(a)(1) says that a witness's criminal record may be admitted when "the court determines that the probative value of admitting this evidence outweighs its prejudicial value to the defendant" (emphasis added). Why only the effect on "the defendant"? One possibility is that the text is a garble, and that it really means "the litigant" or "the criminal defendant." Another is that the phrase demonstrates a limited domain for Rule 609—that the rule *applies* only to criminal cases (the only kind in which the Rules of Evidence generally give special consideration to "defendants") and is inapplicable to civil cases,

1. Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989). See also Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989). Both Eskridge and Sunstein are a good deal more modest about the court's abilities and authority than are Guido Calabresi and Ronald Dworkin. See CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982); DWORKIN, *LAW'S EMPIRE* 313-54 (1986).

2. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87 (1984); Easterbrook, *The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 14-18 (1984); Easterbrook, *Method, Result, and Authority: A Reply*, 98 HARV. L. REV. 622 (1985); Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59 (1988); Easterbrook, *What's So Special About Judges?*, 61 U. COLO. L. REV. 773 (1990); *Matter of Sinclair*, 870 F.2d 1340 (7th Cir. 1989); *Marozsan v. United States*, 852 F.2d 1469, 1490-1500 (7th Cir. 1988) (in banc) (dissenting opinion); *United States v. Marshall*, 908 F.2d 1312, 1317-19 (7th Cir. 1990) (in banc), *affirmed*, *Chapman v. United States*, 111 S. Ct. 1919 (1991); *Continental Can Co. v. Chicago Truck Drivers Pension Fund*, 916 F.2d 1154 (7th Cir. 1990).

3. 490 U.S. 504 (1989).

4. "I play the game like everybody else . . . I'm in a system which has accepted rules and legislative history is used . . . You read my opinions, I sin with the rest of them." JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 174-75 (R. Katzmann ed. 1988) (Justice Scalia's comments during a panel discussion).

making “the defendant” sensible as it stands but precluding universal application.

Which is it? All of the Justices assumed that Rule 609 has universal application, producing a considerable problem in interpretation and need for triage. The majority of the Justices trudged through the legislative history and concluded that Congress wanted convictions to be automatically admissible to impeach any witness in a civil case; the dissenting Justices used the same methods yet reached a different destination; Justice Scalia got off the bus. Professor Eskridge takes the entire tour, but like the Court on the assumption that the legal archaeologists are looking for missing pieces of pottery, for the best way to complete Rule 609.

Suppose we start in a different place, with the question: “What makes us think that Rule 609 applies to civil cases?” One answer might be that the Rules of Evidence are supposed to apply to all litigation, as Rule 1101(b) says. But the jarring reference to “the defendant” in Rule 609(a)(1) suggests a more restricted domain. Legislative history may be useful in showing the scope of an enactment. If we turn to the debates (as eight Justices did) we find a pitched battle ending in a compromise. Combatants wrangled about the treatment of criminal defendants. The compromise was about their rights, nothing more.

Words do not have natural meanings; language is a social enterprise. Textualists, like other users of language, want to know its context, including assumptions shared by the speakers and the intended audience. Words in legislation may be terms of legal art. Debates and remarks may tell us whether the words in a statute appeal to a lay understanding or to a technical one. Because laws themselves do not have purposes or spirits—only the authors are sentient—it may be essential to mine the context of the utterance out of the debates, just as we learn the limits of a holding from reading the entire opinion. When litigants appeal to a precedent, the judge’s first inquiry is whether the old decision contains a rule of decision for today’s case. Many an opinion concerns the same subject without resolving it. On learning this, the judge takes what is to be learned from the reasoning but seeks “authority” elsewhere. Just as cases have limited domains of authority, so with statutes, and again context matters. What we learn from consulting the debates behind Rule 609 is that the statute is limited to criminal cases. Any particular meaning in civil cases is fanciful—invention, not construction.<sup>5</sup> Why invent a meaning for Rule 609? Every statute has limits; once we discover the

5. See K. Shepsle, Congress is a “They,” not an “It”: *Legislative Intent as Oxymoron*, — INT’L REV. L. & ECON. — (forthcoming 1991).

limit of Rule 609, we may put it down and seek the answer to our problem elsewhere.

As it turns out, "elsewhere" is close at hand. Rule 403 says that evidence, although relevant, may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." If Rule 609 concerns only criminal cases, then Rule 403 supplies the rule for civil cases. Courts should take the "danger of unfair prejudice" into account as Professor Eskridge thinks proper, but without either torturing the language or employing the judges' own systems of values. The majority concluded that the structure of the rules was against this outcome, and Justice Scalia agreed.<sup>6</sup> Yet their argument shows that the wrong question begets an irrelevant answer. The majority asked whether "Rule 403 overrides Rule 609" and answered that it does not because Rule 609 contains its own balancing test: the specific controls the general. Indisputable, *if* Rule 609 applies to civil cases. Asking whether Rule 403 "overrides" Rule 609 begs the answer to that question.

No degree of skepticism concerning the value of legislative history allows us to escape its use. Especially not when we know that laws have no "spirit," that they are complex compromises with limits and often with conflicting provisions, the proponents of which have discordant understandings. Legislative history shows the extent of agreement. It is inconsistent with the approach Professor Eskridge generally accepts to *assume* that a law covers whatever subject comes before the court and is in need of interpretation; proper use of legislative history includes learning whether the agreement reaches so far.<sup>7</sup>

What else ought courts do with legislative history? Doubts about the value of legislative history arise not because the context of a law is unimportant, but because snippets from the debates so often have been used in lieu of the text, or as an excuse to nudge the law closer to the view of the losers in the legislative battle (a class that may include the judge). The text of the statute—and not the intent of those who voted for or signed it—is the law. To discard an intentionalist view of statutory meaning is to limit dramatically the use of legislative history.

We may no longer plumb the history to discover where the sponsors wanted to go; compromises place limits on how far they were able to proceed in that direction.<sup>8</sup> We may no longer assume that anticipated

6. 490 U.S. at 525-26 (majority), 529 (Scalia, J.).

7. *United States v. Fountain*, 840 F.2d 509, 517-23 (7th Cir. 1988), provides an illustration of the method.

8. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative

effects dictate the meaning of rules. Statutes commonly contain means, rules of conduct, while legislative history describes what the drafters intended these rules to achieve. But only the rules are enacted, not all predictions come true, and some unexpected things are bound to happen.<sup>9</sup> Laws therefore have effects not recognized in the committee reports. In the main, shared meaning in the legislative process is limited to the rules to be established; expectations about what these rules will do diverge much more widely. (Sometimes Congress enacts objectives, as in the antitrust laws when instructing the courts to prevent "monopoly"; these laws properly receive interpretation quite distinct from those that prescribe means rather than ends.)

Because the text is the law, we may not properly use colloquy to engage in "imaginative reconstruction."<sup>10</sup> What distinguishes laws from the results of opinion polls conducted among legislators is that the laws survived a difficult set of procedural hurdles and either passed by a two-thirds vote or obtained the President's signature. Even the most astute inductions about what Congress "would have done" if faced with a problem are just paths not taken.

Consider the difference between interpreting a statute and interpreting a contract. Contracts, like laws, may have omissions and ambiguities. It is standard practice to fill in the blanks of a contract, or interpret its ambiguities, by supplying terms that we believe the parties would have reached themselves if costs of bargaining were low. This is imaginative reconstruction in practice. It works because contracting parties generally have a single objective (making money), implying a standard by which to write or disambiguate terms. The institution of contract be-

choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987); *Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. 2668, 2676 (1990). See also *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986); *Matter of Erickson*, 815 F.2d 1090, 1094 (7th Cir. 1987).

9. "It is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history." *Pittston Coal Group v. Sebben*, 488 U.S. 105, 115 (1988); *Eli Lilly & Co. v. Medtronic, Inc.*, 110 S. Ct. 2683, 2688 n.2 (1990). See also *Zabielski v. Montgomery Ward & Co.*, 919 F.2d 1276, 1278 (7th Cir. 1990); *Prussner v. United States*, 896 F.2d 218, 226 (7th Cir. 1990) (in banc); *Premier Elec. Constr. Co. v. Nat'l Elec. Cont. Ass'n, Inc.*, 814 F.2d 358, 364-65 (7th Cir. 1987).

10. "Petitioners . . . insist that if Congress had considered the issue, it would have granted federal courts exclusive jurisdiction over civil RICO cases. The argument . . . is misplaced, for even if we could reliably discern what Congress' intent might have been had it considered the question, we are not at liberty to so speculate". *Tafflin v. Levitt*, 493 U.S. 455, 461-62 (1990). A more recent opinion says that imaginative reconstruction "profoundly mistakes our role" and characterizes the process as "a usurpation." *West Virginia Univ. Hospitals, Inc. v. Casey*, 111 S. Ct. 1138, 1148 (1991). See also *Marozsan v. United States*, 852 F.2d 1469, 1499-1500 (7th Cir. 1988) (in banc) (Easterbrook, J., dissenting); *United States v. Phelps*, 895 F.2d 1281, 1284 (9th Cir. 1990) (Kozinski, J., dissenting from the denial of rehearing in banc).

comes more useful when courts relieve parties of the need to dicker over everything in advance (or receive unexpected jolts if they do not). Everyone gains, at least *ex ante*, when the legal rules allow parties to conserve on bargaining costs. Legislators do not have common objectives, so the basis for imputing agreement to them is weaker than the foundation for this technique in private law. More important, the constitutional rules are designed to increase, not minimize, the “costs” of enacting statutes. The complex of hurdles, in the context of the limited time each legislature has to act, is an essential part of the plan. So a method of interpretation appropriate to contracts is inappropriate to legislation, and with it goes one use of history. Legislative history has become less important because there is less to use it *for*.

Professor Eskridge believes that one appropriate use of history is “to correct apparently erroneous directives from the principal” by imagining what the principal would have wanted.<sup>11</sup> He has good company, including Judge Posner, in this.<sup>12</sup> Both, together with many other thoughtful persons, including Learned Hand,<sup>13</sup> derive this error-correction model from an analogy to private agents. Judge Posner urges us to treat an unclear (or mistaken) law as a garbled command to a secretary (“cancel today’s lunch date with X,” when the calendar shows that the date is with Y), or to a platoon leader (“Go [static].”). Everyone can tell that action is essential, but what action? The secretary or platoon leader had best make a quick choice, and in neither case is literal compliance appropriate. Eskridge analogizes a law to a mother’s instructions to a nanny, who may have to make alterations in order to do the best for the children.

I agree with Eskridge and Posner that a good secretary, nanny, or sergeant avoids empty-headed literalism. We hire agents for their expertise and judgment as well as for their ability to follow orders; good agents know when to deviate from a command in order to achieve more of the principal’s objective. Still, it does not follow that courts ought to treat legislation the way nannies treat recipes for soup. Examples concerning secretaries, soldiers, and the like have several things in common: they posit a *single* living principal, a *single* agent, and a *single* maxim. None of these holds true when the time comes to interpret statutes.

Statutes are drafted by multiple persons, often with conflicting

11. Eskridge, *Legislative History Values*, 66 CHI-KENT L. REV. 365 (1990). See also Eskridge, *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 327-30 (1989).

12. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 267-78 (1990).

13. *How Far is a Judge Free in Rendering a Decision?*, in *The Spirit of Liberty* 106, 108-09 (I. Dilliard 2d ed. 1954). Judge Posner traces the method to Aristotle. *Supra* note 12, at 103-04 n.3.

objectives. There will not be a single objective, and discretionary interpretation favors some members of the winning coalition over others. (Maybe it favors the losers!) An agent's hands are more closely tied when the principal names a means without having a clear objective. Moreover, the parallel to a private agent such as the nanny supposes an ongoing relationship, one in which discretion by the agent best serves the principal's current objectives. With legislation, the "principal" is not the sitting Congress but the enacting one (or perhaps the polity as a whole). This brings into play the many rules that tie the hands of those principals—and perforce of their agents, as it is difficult to give a constitutional theory that endows the judiciary with greater legislative discretion than Congress possesses. Legislators cannot create laws without satisfying constitutional requirements (bicameral approval and the like), plus internal requirements (consideration by committees, and so on). The drafters go out of office and lose the ability to update their decisions; the current legislature may update or be passive (and passivity may stem from still more procedural obstacles rather than agreement with the rules in place).

Still more differences separate the legislature-judge relationship from the common principal-agent one. Laws are designed to control the conduct of strangers to the transactions, not just of the judges. Rules must be publicized to be effective (to be "rules of law" at all). Addressees need predictability so they may plan for compliance, for the rearrangement of the rest of their lives. Usually the addressees (the platoon commanders or nannies) are not judges. They are businesses or the executive branch of government. They may be hostile to the constraints; their purposes diverge from the legislators' objectives. If they do not obey, they are not fired (as private agents may be); instead they are brought to court. If addressees must be able to vary the commands in order to fulfil their objectives, then undermining is likely too. What role is left for judges? To descend from the hills and shoot the wounded? Judges too may be hostile to the commands, or may believe that the supporters did not do "enough." Private agents acting on these views would be discharged; judges have tenure.

My point is simple: an understanding of agency appropriate to one-on-one transactions is not appropriate to the business of writing and implementing statutes. To the extent it is a useful analogy, it shows why the laws' addressees—private persons or the executive branch—should have discretion in interpretation. It may show, for example, why courts defer to administrative agencies' interpretation of the law, and why pub-



lic officials have immunity from liability in damages.<sup>14</sup> So used, however, this analogy *diminishes* the role of the courts in governance, and of legislative history in judging.

So far I have identified only one proper use of legislative history: establishing the domain of the statute. Putting a law in context is not the exclusive use of legislative history. The model of the United Kingdom and many European nations, which disdain legislative history, is not open to courts of the United States because of differences in the way laws are drafted. In England the Office of Parliamentary Counsel drafts the government's bills;<sup>15</sup> in France the Conseil d'État reviews the government's *projet d'loi*. Most other nations have similar institutions, which embody legal society's wisdom about good drafting. They do more than dot i's and cross references. They catch and remove ambiguities; they revise laws so that they will achieve anticipated results after the application of the canons of construction; they comb the books for inconsistent rules to be amended or removed; they add statutes of limitation and specify the extent of private rights of action. Parliamentary systems give the government control over the content of law, the leisure to get things right before introducing bills, and confidence that the proposed text will be enacted as is. Legislative history may be disregarded in these nations (a) because these other mechanisms take care of most of the problems for which we use legislative history, and (b) the parliaments do not draft laws at all, but knuckle under to the cabinet's wishes (or bring down the government). It would overstate the role of a parliament to put much weight on speeches for or about the government's legislation.

Congress, unlike a parliament, really "makes" the law—usually from scratch. Thoughts of the authors matter (and sometimes the legislative history really does speak for the authors). Bills are drafted by junior staffs of legislators, abused by amendments from multiple and conflicting sources, and often hammered into shape at the very end of the session, with little time for review. This process puts great pressure on the ability of words to carry meaning—often a meaning all participants shared, but which a drafter could not make idiot proof. Intelligent, modest use of the background of American laws can do much to bring the execution into line with the plan.

Provided we avoid romanticism about what we read, avoid a belief that all participants were striving for the same goals, avoid a belief that

14. A point Posner recognizes, POSNER, *supra* note 12, at 271 n.14.

15. See Atiyah, *Judicial-Legislative Relations in England*, in JUDGES AND LEGISLATORS, *supra* note 4, at 155-61.

the results must be consistent and in line with "sound" policy (meaning the judge's views of policy). We may not use legislative history to wrench a statute from its moorings, to shift the level of generality. Laws may be precise but expectations (values) about effects nebulous and conflicting. Emphasizing these "values" enables the reader to shift levels of generality, a tactic that lets the interpreter move pretty much at will. A case from last term shows how this works.<sup>16</sup> Maryland allowed children to testify in criminal trials by closed circuit television. That way the child would never need to look the accused child-abuser in the eye. Five Justices concluded that this satisfied the confrontation clause of the sixth amendment. The Court asked: "Why do we have confrontation?", to which it answered, roughly, "So that defendants may receive fair trials." Then it asked: "Did this defendant get a fair trial?", to which it answered "Yes." That was that.

Confrontation vanished in the shuffle. The real Constitution does not say "All trials must be fair." It contains a series of rules, which the drafters anticipated would produce fair trials. Shifting the level of generality—emphasizing the anticipated *effects* of a rule while slighting the rule itself—is a method of liberating judges *from* rules. When rules vanish, so does the claim of judges to have the final word.<sup>17</sup> Yet often the point of employing legislative history is to find something on a plane of generality different from the statute, to facilitate this maneuver. It is a use that must be resisted not only if we wish to carry out the enacted rule, but also if we wish to have laws that produce replicable decisions. A corps of judges allowed to play with the level of generality will move every which way, defeating the objective of justice (equal treatment) under law.<sup>18</sup>

Enough. This is a comment, not a screed. A few notes bring this to a close.

1. The objective of statutory interpretation is to give the text a meaning appropriate to our particular constitutional republic. It is a republic with institutions (federalism, bicameralism, a president with veto power) that distinguish it from the democracies of Europe. A method of interpretation based on hermeneutics slights the differences between law and literature, and between a parliamentary system and our federal republic. Literary interpretation liberates the reader; novelty is rewarding

16. *Maryland v. Craig*, 110 S. Ct. 3157 (1990).

17. *What's So Special About Judges?*, *supra* note 2; Easterbrook, *Approaches to Judicial Review*, in *THE BLESSINGS OF LIBERTY: AN ENDURING CONSTITUTION IN A CHANGING WORLD* 147 (J. David & R. McKay eds. 1989).

18. See Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

and rewarded. Laws do not liberate their addressees, and novelty is penalized. Creative scholars get tenure; creative subjects of legal regulation get fined. No one supposes that the same method of interpretation is right for Shakespeare and laws in the United States, China, Iraq, and Germany.<sup>19</sup>

2. Many scholars disagree with the analysis I have ventured here and elsewhere. Controversy goes with the territory. Justices of the Supreme Court regularly disagree with each other's methods as well as their conclusions. Professor Eskridge occasionally lapses into the fallacy that what is controversial must be wrong. He states a point, remarks that it depends on controversial premises, and moves on, as if the point had been demolished.<sup>20</sup> Not so fast! Hotly disputed statements may be correct. At all events, the proponent of a method of interpretation that depends on Hans-Georg Gadamer's hermeneutics<sup>21</sup> ought not equate controversy with error. What would be the implication of that equivalence for Professor Eskridge's work?

3. Textualism and distrust of legislative history may be confused with conservative politics. Overlap ought to be coincidental, however. If the textualist is interpreting laws written in a more conservative era, the results will appear "conservative" to modern eyes. Sometimes, however, the change goes the other way. The "conservatives" in the confrontation clause case used the Warren Court's usual kit of tools to get 'round an inconvenient text, and the textualist (Justice Scalia) stumped for the result favorable to the criminal defendant. When the text is to the left of today's consensus, textualism produces results that are politically "liberal."

When Congress is to the left of the president, yielding a bench that is "conservative" from Congress' perspective, everyone should support textualism. It allows the legislature to achieve its objectives. In years past a resort to legislative history, and a boost in the level of generality, has been used by a bench to move the law and the Constitution to the left. Conservatives cried out in dismay, objecting to *method* as well as result. Textualism as a method is politically neutral, preserving the compromises of the enacting legislature. Neutrality is an objective any bench ought to strive for—and the more power the interpreter possesses, the more assiduously the interpreter should seek neutrality.

19. See Easterbrook, note 17 *supra*, and, e.g., POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* ch. 5 (1988).

20. See, e.g., Eskridge, *Legislative History Values*, 66 CHI-KENT L. REV. 412-14, 428-29 (1990).

21. See Eskridge, *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990).